MINNESOTA STATE LAW LIBRARY

NO. A10-1440

State of Minnesota
In Supreme Court

Amanda Tatro,

Appellant,

vs.

University of Minnesota,

Respondent.

RESPONDENT'S BRIEF

JORDAN S. KUSHNER (#219307)
431 South Seventh Street, Suite 2446
Minneapolis, MN 55415
(612) 228-0545

Attorney for Appellant

KEVIN FINNERTY (#3259945)
Assistant Attorney General
Office of the Attorney General
445 Minnesota Street, Suite 900
St. Paul, MN 55101
(651) 757-1058

Attorney for Amicus Curiae
Minnesota State Colleges and Universities by and through its Chancellor, Steven J. Rosenstone

MARK B. ROTENBERG (#126263)
General Counsel
TRACY M. SMITH (#19718X)
Associate General Counsel
University of Minnesota
Office of the General Counsel
360 McNamara Alumni Center
200 Oak Street SE
Minneapolis, MN 55455
(612) 624-4100

Attorneys for Respondent

(Counsel for Additional Parties Identified on Inside Cover)

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STATEMENT OF THE LEGAL ISSUES

1. **Does the First Amendment permit a public university to enforce reasonable academic requirements requiring respectful treatment of human donors in a mortuary science program, when a student violates those requirements by making broadly disseminated disrespectful statements about a human donor?**

   The Court of Appeals held in the affirmative.

   Apposite authorities:

   Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 (1978)
   Bethel School District No. 403 v. Fraser, 478 U.S. 675 (1986)
   Brown v. Li, 308 F.3d 939 (9th Cir. 2002)

2. **Does the First Amendment permit a public university to enforce a student conduct regulation against threatening conduct, when the student's threat on a social-networking website explicitly referred to stabbing someone with a University laboratory instrument and substantially disrupted the order and discipline of the Mortuary Science program?**

   The Court of Appeals held in the affirmative.

   Apposite authorities:

   Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)
   DeJohn v. Temple University, 537 F.3d 301 (3d Cir. 2008)
   Wisniewski v. Board of Education, 494 F.3d 34 (2d Cir. 2007)
   D.J.M. ex rel. D.M. v. Hannibal Public School District No. 60, 647 F.3d 754 (8th Cir. 2011)

3. **Did the University of Minnesota Provost act within his discretion in affirming a hearing board's finding of violations of University academic and student conduct rules?**

   The Court of Appeals held in the affirmative.

   Apposite authorities:

   Bailey v. University of Minnesota, 187 N.W.2d 702 (Minn. 1971)
   Chronopoulos v. University of Minnesota, 520 N.W.2d 437 (Minn. Ct. App. 1994), *rev. denied* (Minn. Oct. 27, 1994)

4. Did the University of Minnesota act within its discretion in assigning a failing course grade to a student who violated course rules?

The Court of Appeals held in the affirmative.

Apposite authorities:

Board of Curators of University of Missouri v. Horowitz, 435 U.S. 78 (1978)
Zellman ex rel. M.Z. v. Independent School District No. 2758, 594 N.W.2d 216 (Minn. Ct. App. 1999), *rev. denied* (Minn. July 28, 1999)

STATEMENT OF THE CASE

Appellant Amanda Tatro, a student in the University of Minnesota's Mortuary Science program, was subject to academic sanctions for unprofessional and disrespectful treatment of human donors, and for making threats of violence. (Appellant's Addendum ("App. Add.") 6A-8A.). Tatro asked the University's student conduct board—the Campus Committee on Student Behavior ("CCSB")—to hold an evidentiary hearing. (App. Add. 26A.) The board found that Tatro violated both academic rules and the University's Student Conduct Code. The board's academic sanctions were a directed study in clinical ethics; writing a letter to a faculty member about respect within the department and the funeral service profession; a psychiatric evaluation at the student health center; academic probation; and, as directed by her course instructor, an "F" in the course in which Tatro had violated the course rules. (App. Add. 26A-31A.) Tatro was neither suspended nor expelled from her program or the University, and she continued as a student. On administrative appeal, Provost E. Thomas Sullivan affirmed the CCSB's academic sanctions in a written decision. (App. Add. 42A-44A.)

Appellant sought review by writ of certiorari. The Court of Appeals affirmed the Provost's decision. *Tatro v. Univ. of Minn.,* 800 N.W.2d 811 (Minn. Ct. App. 2011) (App. Add. 45A-64A.) The Supreme Court granted Appellant's Petition for Review.

STATEMENT OF THE FACTS

Amanda Tatro is a student in the University of Minnesota Mortuary Science program, a Bachelor of Science program that trains upperclass undergraduate students to become licensed funeral directors. (CCSB Transcript ("Tr.") 43-44.) More than eighty percent of licensed morticians in Minnesota are trained by the University. (*Id.* at 44.)

Anatomy Bequest Program

The Anatomy Bequest Program is a program within the Medical School through which persons donate their bodies for use in education and research. (*Id.* at 112.) Through that Program, human donors[1] are made available to students and researchers for educational and research purposes, including internal University and external research, medical education, law enforcement education, and education in Mortuary Science. (*Id.*) Preservation of the Program and the missions it serves depends on the trust of the individuals and families who donate their bodies. (*Id.* at 119, 126.) Respectful treatment of donors is imperative to maintaining that trust. (*Id.* at 119, 127.)

The Anatomy Bequest Program is highly regulated and managed. (*Id.* at 116.) A panel reviews every request for use of a donor to ensure scientific and medical merit. (*Id.* at 117.) Every group approved for access to a donor must undergo an orientation by the

[1] The Program uses the term "human donors" for cadavers.

Program. (*Id.*) The orientation includes a video, an in-person orientation by Program personnel, and written affirmation stating one's understanding of the rules. (*Id.*)

Program Rules Regarding Human Donors

Donors are used in three laboratory courses within the Mortuary Science academic program. (*Id.* at 47.) Tatro was enrolled in all three during Fall Semester 2009: Human Anatomy Laboratory; Embalming Theory and Laboratory; and Restorative Art Theory and Laboratory. (*Id.* at 105.)

Tatro received extensive orientation regarding appropriate treatment of donors in those courses. Relator's Human Anatomy Laboratory was taught by Angela McArthur, who both teaches the lab course and is the Assistant Director for the Anatomy Bequest Program. (*Id.* at 112.) The first 3-hour session of McArthur's course was devoted almost entirely to orientation. (*Id.* at 129.) Students watched the Anatomy Bequest Program video, which emphasizes the responsibilities of students in appreciating the gift of access to donors in their education and the requirement to communicate respectfully about donors and lab practices. (*Id.* at 126-127.) The video gives examples of disrespectful discussion of donors and laboratory practices, including a real-life example at the University involving two medical students who were overheard by a potential donor on a bus disrespectfully discussing dissection of a donor. (*Id.* at. 128.)

During the orientation, McArthur also reviewed the course syllabus. (*Id.* at 129; Record ("R") 0067-0074.) She spent approximately one hour discussing the Anatomy Laboratory Rules, which were part of the syllabus. (CCSB Tr. 129; App. Add. 17A-18A.) Those rules are minimum components for any course or research program providing access to human donors. (CCSB Tr. 132.) They state, in part:

> The opportunity to review and dissect the human body is a privilege afforded to students in Mortuary Science and only a couple of other health sciences. It carries with it an important responsibility for treating the person who has given his/her own body to advance our education with utmost respect and dignity.
>
> It is important that each student appreciate the opportunity afforded and observe the following rules which have been set up to promote respect for the cadaver and success for you in the laboratory. Failure to adhere to these rules may result in your eviction from the cadaver lab and the course.
>
> . . . .
>
> 6. Human material should always be handled with the greatest respect. The body should be appropriately draped whenever possible.
>
> 7. Conversational language of cadaver dissection outside the laboratory should be respectful and discreet. Blogging about the anatomy lab or the cadaver dissection is not allowable.

(App. Add. 17A.)

McArthur reviewed each of the rules. She specifically addressed the prohibition against "blogging" and informed students that the prohibition applied to all Internet postings including Facebook, Twitter, and MySpace. (CCSB Tr. 136; 349-350.)

Tatro also received orientation regarding donors in her Embalming Lab. Course instructor Jody LaCourt testified that the first session of her lab was devoted to orientation to lab practices and expectations for student behavior. (*Id.* at 199.) LaCourt talked about professionalism; the fact that donors are not just bodies, they are somebody's mother, father, or child; the respect expected in the lab; and the requirement that what happens in the lab is not to be discussed outside of the lab. (*Id.* at 200-202.)

Tatro also received orientation to the Mortuary Science Program generally, which emphasized confidentiality and respect for human donors. (*Id.* at 227-229.) The orientation included review of the Mortuary Science Student Code of Professional

Conduct, which is included in the Mortuary Science student manual. (App. Add. 21A-24A.) The Mortuary Science Student Code of Professional Conduct is based on the Professional Code that students will have to abide by as funeral directors. (App. Add. 21A.)[2] As Program Director LuBrant testified, the Mortuary Science Program stresses respect for the donor: "These are people's loved ones, and what I always say to students, and what everybody else would say in our program, our faculty, this—this was a life lived. People loved these individuals." (CCSB Tr. 77-78.) Tatro acknowledged in writing that she had received the Mortuary Science student manual, that the contents of the manual were reviewed by the Program Director during orientation, and that she would comply with the policies in the manual. (R 0113.) Tatro also certified that she understood that if she had questions on the policies, she was to contact the Program Director. (*Id.*)

Following McArthur's orientation in the Anatomy Lab, Tatro also signed the Anatomy Bequest Program orientation disclosure form. (App. Add. 25A.) By signing that form, Tatro acknowledged that she understood that her "access to the human anatomical materials is a privilege," that it was her "responsibility to adhere to the policies of the Anatomy Bequest Program and additional laboratory policies outlined in the course syllabus," and that failure to adhere to the rules regarding human anatomical materials may result in "eviction from the anatomy lab." (*Id.*)

---

[2] Appellant notes that the student manual produced at the CCSB hearing was for academic year 2008-2009. *See* Appellant's Brief ("App. Br.") at 4 n.1. There is no evidence that the relevant provisions of the Student Code of Professional Conduct, which were discussed at the CCSB hearing, changed between 2008-2009 and 2009-2010; indeed, they did not.

Tatro admitted at the hearing that, despite her written acknowledgement to the contrary, she never read the Mortuary Science Student Code of Professional Conduct, neither at orientation nor any time thereafter. (CCSB Tr. 297-298.) As for the lab rules, Tatro professed confusion regarding the meaning of "blogging," but admitted she asked no questions about it at her lab orientation. (*Id.* at. 299; 332-333.) Nevertheless, Tatro acknowledged that she understood that she was restricted from writing about the details of what she did in the lab, and that those restrictions applied as well to Facebook. (*Id.* at 275-277.) Tatro specifically acknowledged that the "no blogging rule" did not contain an exception for family or friends. (*Id.* at 294.)

Tatro's Postings and the Response

Near the end of the semester in 2009, University administrators were informed of postings that Tatro had made on her Facebook page. According to Tatro, a Mortuary Science student who was also an employee in the Anatomy Bequest Program reported concerns about the posts to the Anatomy Bequest Program. (*Id.* at 260.) These concerns were reported to the Program's director on Friday, December 11 (*id.* at 144), and then to Assistant Director McArthur (also Tatro's Anatomy Lab instructor) on Monday, December 14. (*Id.* at 53, 145.)

The Facebook postings, which dated from mid-November into December, stated:

- **Amanda Beth Tatro** Gets to play, I mean dissect, Bernie today. Let's see if I can have a lab void of reprimanding and having my scalpel taken away. Perhaps if I just hide it in my sleeve…

- **Amanda Beth Tatro** Is looking forward to Monday's embalming therapy as well as a rumored opportunity to aspirate. Give me room, lots of aggression to be taken out with a trocar.

- **Amanda Beth Tatro** Who knew embalming lab was so cathartic! I still want to stab a certain someone in the neck with a trocar though. Hmm..perhaps I will spend the evening updating my "Death List #5" and making friends with the crematory guy. I do know the code…

- **Amanda Beth Tatro** Realized with great sadness that my best friend, Bernie, will no longer be with me as of Friday next week. I wish to accompany him to the retort. Now where will I go or who will I hang with when I need to gather my sanity? Bye, bye Bernie. Lock of hair in my pocket.

(R 0075.)

McArthur raised concerns about the postings to Mortuary Science Program Director Michael LuBrant that same Monday. (CCSB Tr. 53.) Director LuBrant met with his program faculty members. (*Id.* at 67.) Jody LaCourt, the Embalming Lab instructor in whose class a "trocar" is used, was "very upset" by the postings. (*Id.* at 66.) According to LuBrant, LaCourt was "visibly shaking." (*Id.*) A trocar is a long, hollow needle made of stainless steel inserted in the body to aspirate gas and fluids. (*Id.* at 202-203.) Trocars are not tools that students own or keep; rather, they are kept in LaCourt's laboratory. (*Id.* at 66.) As LaCourt testified at the CCSB hearing, she was concerned about Tatro's violent references and feared for her students' and her own safety because Tatro was to be in class, with access to a trocar, that very Monday afternoon. (*Id.* at 208.) Tatro's reference to hiding a scalpel up her sleeve also concerned the program faculty. (*Id.* at 66.)

LuBrant testified regarding his concerns for personal safety. Just prior to Tatro's post regarding stabbing a "certain someone" in the neck with a trocar, he had negative interactions with Tatro concerning a rude note she had left on another University employee's car windshield. (*Id.* at 56-62.) Tatro had parked in a handicapped parking

spot reserved for a particular disabled employee. (R 0081.) When that employee came to work and her spot was occupied, she contacted the police, who ticketed Tatro's car. (*Id.*) Tatro left a handwritten note on the employee's car: "You must be very special to have your own designated spot. . . . Again, thank you for being the handicapped parking Nazi. Without you, things would never be the same or function properly." (R 0082.) The employee contacted the Medical School, asking the School to have a discussion with its student regarding the note. (*Id.*) When LuBrant met with Tatro, she became upset with him. (CCSB Tr. 62-63.) This incident, in addition to information from other people that Tatro was referring to LuBrant in her posting about stabbing a "certain someone," caused him concern that he was the subject of Tatro's post. (*Id.* at 56, 64.)

Based on these faculty concerns for safety, LuBrant that same day called the University Police. (*Id.* at 67.) An officer came to the building, spoke with LuBrant, and went with him to find Tatro. (*Id.* at 68-69.) LuBrant directed Tatro to stay away from Mortuary Science while the matter was looked into. (*Id.* at 69.) The officer then met with Tatro. (*Id.* at 70.) The police did not take further action. (*Id.* at 71.)

The matter then was referred to the University's Office for Student Conduct and Academic Integrity, and a meeting was held with Tatro and University administrators on Wednesday, December 16. (*Id.* at 71.) Tatro was informed she could return to school the following day and complete her classes. (*Id.* at 71-72.)

Tatro's Facebook posts were open to literally hundreds of people. Tatro testified that she had "hundreds" of Facebook "friends" (*id.* at 278), and that she had set her Facebook settings so that not only her "friends," but also all the "friends of friends" (including persons unknown to her), could see her posts. (*Id.* at 289.) She testified that

she "knew all the Mort Sci kids would see it." (*Id.* at 266.) Tatro also publicized her posts to the general public through local media. (*Id.* at 280.) Her posts were aired on television. (*Id.* at 156.)

The University and the Anatomy Bequest Program received negative feedback concerning Tatro's posts. Director LuBrant testified that a funeral director with a clinical affiliation agreement with the University called concerned about whether Tatro had been at his funeral home or had the code for access to its crematory. (*Id.* at 80-81.) Students came to LuBrant "very upset, more than one was actually crying." (*Id.* at 80.) LuBrant received calls, including from the past president of the Minnesota Funeral Directors Association. (*Id.* at 82.)

Assistant Director of the Anatomy Bequest Program McArthur testified that the Anatomy Bequest Program received letters and calls from donor families and the public regarding the student's lack of professionalism, poor judgment, and immaturity. (*Id.* at 152-56.) Donor families wanted to ensure that Tatro did not handle their loved ones' bodies, and notes had to be placed in particular donor files to ensure that would not happen. *Id.* Families also communicated that they did not find Tatro's comments to be funny and that they were dismayed by Tatro's media statements that people in the industry needed to have a sense of humor. *Id.* One family member whose parents had donated their bodies to the Anatomy Bequest Program wrote that she was "horrified by the total disregard and callousness of Miss Tatro." (R 0080.) Assistant Director McArthur, who does outreach on behalf of the Program to solicit the necessary donors, testified that she still has people asking about the Tatro matter. (CCSB Tr. 154.)

Sanctions

The Human Anatomy Laboratory syllabus and rules call for eviction from the course for students who violate lab rules. (*Id.* at 156-157.) Eviction from the course prior to its completion necessarily results in an "F" grade. (*Id.* at 157.) Because the violations did not come to light until the end of the semester, the instructor, McArthur, let Tatro take the final examination but informed her that if the violations were sustained through the disciplinary process, she would receive an "F" in the course. (R 0115.) Tatro took the final and was assigned a C+ pending disciplinary review. (*Id.*)

The Office for Student Conduct and Academic Integrity sent Tatro written notice of Student Conduct Code violations. (App. Add. 6A-8A.) Described in detail, the charges were for (1) violation of University rules, specifically the Anatomy Laboratory Rules, the Mortuary Science Student Code of Professional Conduct, and the Anatomy Bequest Program disclosure form, and (2) threatening conduct under subdivision 6 of the Student Conduct Code. (*Id.*)

Tatro requested and was given a hearing before the CCSB, where she was represented by counsel. The seven-person panel found Tatro responsible for threatening conduct by a vote of 6-1, and found her responsible for violating University rules by a vote of 7-0. (App. Add. 26A-31A.) The CCSB imposed these sanctions:

> 1. An "F" in the Human Anatomy Lab.
>
> 2. Completion of a directed study course in Clinical Ethics in the Center for Bioethics.
>
> 3. A letter to one of the faculty members in the Mortuary Science department addressing the issue of respect within the department and the profession.

4. A psychiatric evaluation at the student health services clinic and completion of any recommendations made by their evaluation.

5. Probation for the student's remaining undergraduate career.

On appeal, Provost E. Thomas Sullivan affirmed. (App. Add. 42A-44A.) The Provost wrote, "The clear intent of the anatomy lab rules and mortuary science student conduct code is that all matters related to the lab, both inside and outside the lab, must be taken seriously, done respectfully, and communicated about in a respectful and professional manner. . . . The student's Facebook posts at issue here were disrespectful, unprofessional, and reasonably interpreted as threatening." (App. Add. 44A.) Provost Sullivan rejected the argument that the language was not threatening: "I find the language used to be sufficiently disturbing as to constitute a violation of subdivision 6 of the University's student conduct code." *Id.* Provost Sullivan observed that Tatro stated she intended her statement about stabbing someone to be directed at someone in particular outside the University, but that the Student Conduct Code is not limited to threats against members of the University community. *Id.* Moreover, Provost Sullivan wrote, "the language used by the student reasonably could be interpreted as pertaining to conduct that may take place on University property." *Id.*

Review and Decision by Court of Appeals

The Court of Appeals affirmed the Provost's decision. *Tatro,* 800 N.W.2d at 814. The Court found that three specific rules (Rule 6 of the Anatomy Lab Rules and two cited provisions of the Mortuary Science Student Code of Professional Conduct) were not violated because of their narrow scope. *Id.* at 818-19 The Court, however, affirmed findings of violation of Rule 7 of the Anatomy Lab Rules (requiring respectful language

of cadaver dissection outside the lab); violation of the Anatomy Bequest Program's rules and policies requiring treating donors with respect and dignity, as explained in the orientations Tatro received and as reflected in the Anatomy Bequest form; and violation of the Student Conduct Code prohibition against threatening conduct. *Id.* 817-18.

The Court of Appeals rejected Appellant's First Amendment challenge, holding that, under the standard articulated by the United States Supreme Court in *Tinker v. Des Moines Independent Community School District,* 393 U.S. 503 (1969), the University's action was justified because Appellant's conduct "materially and substantially disrupt[ed]" the work and discipline of the University. *Id.* at 821-22 (citing *Tinker,* 393 U.S. at 513) .

SUMMARY OF ARGUMENT

The University's enforcement of reasonable academic program rules that specifically relate to the privilege of access to human donors, as well as its rule against threatening conduct, was constitutional, nonarbitrary, and supported by the record. Appellant Tatro violated those rules by posting thoroughly unprofessional and disrespectful comments about a human donor on her Facebook page, and also by posting comments overtly suggesting physical violence, including stabbing someone in the neck with a University laboratory instrument.

The threatening comments are properly evaluated under the substantial disruption standard articulated in *Tinker,* 393 U.S. 503. The University's academic rules violations, however, also can be demonstrated without any substantial disruption. The First Amendment permits reasonable regulation of student expression based on academic

professional program rules that are directly related to legitimate pedagogical interests. Both constitutional standards were met.

In addition, the University's substantive findings of academic rules violations and its assignment of sanctions were nonarbitrary and supported by the evidence.

ARGUMENT

I. Standard of Review

This is an appeal from a decision by the Minnesota Court of Appeals taken on writ of certiorari from a final decision of the University imposing academic sanctions upon a student under the University's Student Conduct Code. The University's decisions are entitled to "very substantial deference" by the appellate courts. *Bailey v. Univ. of Minn.,* 187 N.W.2d 702, 704 (Minn. 1971); *see also State ex rel. Sholes v. Univ. of Minn.,* 54 N.W.2d 122, 126 (Minn. 1952) ("[T]he board of regents . . . is a body corporate, created by our constitution and endowed by it with the power to govern the institution which it controls, free from interference by either legislature or the courts so long as it stays within the scope of its constitutional powers."). Certiorari review of a University student discipline decision is limited to an inspection of the record of the administrative tribunal, and the court is confined to questions affecting the regularity of the proceedings and, as to the merits of the controversy, whether the determination was arbitrary, oppressive, unreasonable, fraudulent, made under an erroneous theory of law, or without any evidence to support it. *Chronopoulos v. Univ. of Minn.,* 520 N.W.2d 437, 441 (Minn. Ct. App. 1994), *rev. denied* (Minn. Oct. 27, 1994)).

Challenges to the constitutionality of government actions are questions of law reviewed *de novo* by this Court. *See, e.g. State v. Machholz*, 574 N.W.2d 415, 419

(Minn. 1998). When reviewing a claim that a governmental action "violates the First Amendment, we view the evidence in the light most favorable to the state, but independently determine whether the conduct falls outside constitutional protection." *In re Welfare of W.A.H.*, 642 N.W.2d 41, 47 (Minn. Ct. App. 2002) (citing *In re Welfare of M.A.H.*, 572 N.W.2d 752, 757 (Minn. Ct. App. 1997)). However, even in constitutional challenges, judicial deference is accorded to a university's academic judgments about appropriate student discipline. *Bd. of Curators of Univ. of Mo. v. Horowitz,* 435 U.S. 78, 90 (1978). Public schools and universities have "comprehensive authority" to prescribe and control student conduct, *Tinker,* 393 U.S. at 507, and it is not the role of the courts "to set aside decisions of school administrators which the court may view as lacking a basis in wisdom or compassion." *Wood v. Strickland,* 420 U.S. 308, 326 (1975).

II. The University's sanctions for violating specific Mortuary Science and Anatomy Bequest Program rules requiring respectful treatment of human donors were constitutional, nonarbitrary, and supported by the evidence.

The Court of Appeals properly affirmed the University's actions in imposing sanctions on Tatro for violating its particular academic program rules requiring respectful treatment of human donors. The University's actions did not violate the First Amendment, and abundant evidence established that Tatro was informed of the Mortuary Science and Anatomy Bequest Program rules requiring professionalism and respect for human donors, that she agreed to follow those rules, and that her disrespectful and unprofessional Facebook posts violated the rules.

Resolution of this case requires application of constitutional norms in the special context of a university academic program that trains students for a particular profession that, like other professions, emphasizes specific norms, *e.g.,* respectfulness for human

cadavers, discretion, sensitivity, and dignity. The University has no quarrel with—indeed it endorses—broad statements regarding the importance of free speech and a marketplace of ideas on campus.[3] Nowhere in Minnesota are such principles more often celebrated and realized. But these general principles in no way preclude the University from also seeking to inculcate in its academic programs those standards of professional behavior that are expected in particular academic disciplines. The measured and reasonable academic tools that the University employed in this case are not inconsistent with the free speech standards that the University rigorously maintains. Nothing in our First Amendment law mandates that reasonable standards and rules for particular academic disciplines cannot be maintained and enforced consistent with the Constitution.

A. The appropriate constitutional standard is whether the University was enforcing reasonable rules related to legitimate pedagogical objectives.

Tatro's four Facebook posts contained two legally significant elements. One element was her unprofessional, disrespectful public discussion of a human donor in violation of specific academic program rules. The second was Tatro's threatening language in violation of the University's Student Conduct Code. The University's measured response to both violations was constitutional. The Court of Appeals held that the University's action was constitutional because under *Tinker* the University was justified in responding to Tatro's substantially disruptive behavior. While that is true, the University could also constitutionally enforce reasonable Mortuary Science and Anatomy Bequest Program rules even without proof of substantial disruption to order and

[3] Tatro and her *amici* cited numerous First Amendment cases articulating these broad principles. But they do not cite a single case that holds that a university cannot enforce reasonable academic program rules.

discipline, where such programmatic rules serve legitimate pedagogical interests. *See, e.g., Morse v. Frederick,* 551 U.S. 393, 405-06 (2007) (observing that "the mode of analysis set forth in *Tinker* is not absolute" and that "the rule of *Tinker* is not the only basis for restricting student speech").

1. Appellant sets forth no defined constitutional standard.

While Tatro argues that her threatening language must be evaluated under a "true threat" standard, *see* Appellant's Br. at 25, she is less clear about the constitutional standard applicable to her violation of the Mortuary Science and Anatomy Bequest Program rules. Tatro appears to acknowledge that the First Amendment permits some programmatic limits on her human donor-related speech, even absent any "true threat"—for example, she apparently acknowledges that the University constitutionally could restrict her from disclosing the identity of a human donor or from describing autopsy procedures on a human donor. *See* Appellant's Br. at 33. But Tatro fails to articulate any specific constitutional standard for determining those limits.

Tatro cites to a public forum case, which has its own distinctive First Amendment analysis not applicable here. *Rosenberger v. Rector and Visitors of Univ. of Va.,* 515 U.S. 819 (1995). Tatro also cites to two cases that stand for the proposition that public universities cannot sanction otherwise protected student expression merely because it is "offensive to good taste" or violates "conventions of decency." *Papish v. Bd. of Curators of Univ. of Mo.,* 410 U.S. 667, 670 (1973) (discussing *Healy v. James,* 408 U.S. 169, 180 (1972)). None of these cases addresses the constitutionality of public university

enforcement of reasonable rules specifically related to a professional academic training program.[4]

2. Academic enforcement of reasonable rules related to legitimate pedagogical objectives does not violate the First Amendment.

This Court should find the University's actions constitutional because its academic program rules requiring professional, respectful treatment of human donors were reasonably related to the legitimate pedagogical objective of training Mortuary Science students to enter the funeral director profession. This standard recognizes "a state university's undoubted prerogative to enforce reasonable rules governing student conduct." *See Papish,* 410 U.S. at 669-70. The standard also appropriately defers to university educators to reasonably determine academic standards and rules for professional education.

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[4] Appellant's *Amicus* ACLU of Minnesota argues for rejection of *Tinker* at the university level and suggests that the standard for evaluating the constitutionality of the University's enforcement of its academic rules should be the compelling governmental interest test applied by the Supreme Court to a California statute regulating the sale of video games to minors in *Brown v. Entertainment Merchants Association,* 131 S. Ct. 2729, 2738 (2011). *See* ACLU's Br. at 2. State regulation of commercial speech, however, is far afield from the professional educational context here, *see D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60*, 647 F.3d 754, 766 (8th Cir. 2011) (distinguishing *Brown* from school cases); and while neither ACLU nor Appellant actually applies the compelling governmental interest standard to the present case, the standard would be met.

Appellant's other *Amici* Student Press Law Center ("SPLC") and Foundation for Individual Rights in Education ("FIRE") likewise argue for the rejection of *Tinker* and advocate for application of strict scrutiny. Those *amici* further argue that the University could not constitutionally regulate any expression that Appellant posted on-line. Interestingly, though, those *amici* suggest, without further explanation, that a school *could* require "professional assessment, and, if necessary, counseling" for speech that "is worrisome." Joint Brief of *Amici* SPLC and FIRE at 11. The University did exactly that when it directed Appellant to have an evaluation at the student health service and comply with any recommendations. (App. Add. 30A.)

Judicial deference to reasonable academic judgments runs throughout our constitutional jurisprudence. The United States Supreme Court's decision in *Board of Curators of University of Missouri v. Horowitz* defined the constitutional context for judicial review of academic decisions. 435 U.S. 78 (1978) . Rejecting a student's Due Process challenge to her dismissal from a medical school program, the Court explained that it would not "enlarge the judicial presence in the academic community," *id.* at 90, and observed that "Courts are particularly ill-equipped to evaluate academic performance." *Id.* at 92

Similarly, in *Grutter v. Bollinger,* the Supreme Court granted deference to academic judgments in another constitutional context— an Equal Protection challenge to race-conscious admissions in public higher education. 539 U.S. 306 (2003). Emphasizing that "[c]ontext matters" in cases challenging government action on constitutional grounds, *id.* at 327, the Court found the University of Michigan's race-conscious admission policy to be a permissible means of promoting the university's stated academic objective of achieving student diversity. The Court wrote that even in a case involving strict scrutiny, it takes into account the "complex educational judgments in an area that lies primarily within the expertise of the university" and, citing *Horowitz,* affirmed that its holding "is in keeping with our tradition of giving a degree of deference to a university's academic decisions, within constitutionally prescribed limits." *Id.* at 328

Deference to reasonable academic rules and their enforcement in public universities was also affirmed in the college case of *Healy v. James,* where the Supreme recognized that "First Amendment rights must always be applied 'in light of the special characteristics of the . . . environment' in the particular case." 408 U.S. at 180 (1972)

(quoting *Tinker,* 393 U.S. at 507) (ellipsis in *Healy*). "[W]here state-operated educational institutions are involved, this Court has long recognized 'the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.'" *Id.* at 180 (quoting *Tinker,* 393 U.S. at 507).

3. Public universities have legitimate pedagogical interests in their academic programs.

Public universities unquestionably have legitimate and important pedagogical interests in their academic programs, and the First Amendment allows enforcement of reasonable academic rules that facilitate those interests.[5] *See Widmar v. Vincent,* 454 U.S. 263, 268 n.5 (1981) ("A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied a university's authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities."). For example, pedagogical interests without question justify a university's sanctioning of, or grading down of, expression that is plagiarized, ungrammatical, or unrelated to a particular assignment. A student can be sanctioned or graded down for repeatedly distracting classmates with irrelevant comments, personal insults, or jokes.

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[5] Elementary schools, secondary schools, and universities obviously differ. Younger students, who are mandated to attend school, are more appropriately shielded from certain content inappropriate for their maturity level. *See Bethel Sch. Dist. No. 403 v. Fraser,* 478 U.S. 675, 683 (1986). University students, who voluntarily pursue higher education and study particular disciplines, are expected to have the maturity to handle more controversial expression. All levels of academic training, however, have legitimate pedagogical objectives that are determined by the "special characteristics" of the particular educational environment. *See Healy,* 408 U.S. at 180.

Other legitimate pedagogical interests are particularly present in higher education programs that focus on professional and interpersonal training. The University educates students for entry into many professions that carry with them obligations of discretion, confidentiality, and professionalism. To prepare students for those professions, the University must train them in the ethical and professional standards to which they will be held. The University does this not just through didactic classroom lectures, but also through the establishment and inculcation of reasonable programmatic norms that train students to excel in their chosen fields of academic study. *Cf. Fraser,* 478 U.S. at 683 (observing that education "is not confined to books").

For example, programmatic rules in the University's College of Education constitutionally may require that student teachers speak respectfully and courteously to children, parents, and other school professionals, and that they maintain student confidentiality. Law students enrolled in the Law School's clinic programs must respect the attorney-client privilege and client confidentiality, and are trained in and evaluated on demonstrating professionalism in the questioning and counseling of clients. Medical students not only must respect patient confidentiality, but must speak respectfully to patients and exercise discretion and professionalism in public discussion of medical procedures. Similar expectations apply to students in Pharmacy, Social Work, Psychology, Dentistry, and numerous other academic programs, including Mortuary Science.

4. The pedagogical interests standard in higher education is widely recognized by the courts.

Other courts have applied the pedagogical interests standard in higher education cases, without requiring proof of substantial disruption as was required in the context of restricting political speech in *Tinker.* In *Brown v. Li,* the United States Court of Appeals for the Ninth Circuit held that a public university can require a student to comply with the requirements of an academic degree program without violating the First Amendment. 308 F.3d 939, 943-45 (9th Cir. 2002). There, a graduate student's thesis committee refused to approve a dissertation that contained an offensive "Disacknowledgements" section. *Id.* at 943. The Ninth Circuit drew guidance from the Supreme Court's decision in *Hazelwood School District v. Kuhlmeier,* 484 U.S. 260 (1988), and explained that the proper First Amendment analysis "appropriately defers to the university's expertise in defining academic standards and teaching students to meet them." *Id.* at 952. The court held that the graduate student "was given reasonable standards for [his thesis], including a pedagogically appropriate requirement that the thesis comply with professional standards governing his discipline." *Id.* The university's action in rejecting the student's thesis "was reasonably related to a legitimate pedagogical objective: teaching Plaintiff the proper format for a scientific paper." *Id* The court rejected the idea that pedagogical interests diminish from secondary to post-secondary school. "The Supreme Court's jurisprudence does not hold that an institution's interest in mandating its curriculum and in limiting a student's speech to that which is germane to a particular *academic* assignment diminishes as students age. Indeed, arguably the need for academic discipline and editorial rigor increases as a student's learning progresses." *Id.* at 951.

Similarly, in *Axson-Flynn v. Johnson,* the Tenth Circuit held that the First Amendment did not give a Mormon undergraduate college student in an actor training program the Free Speech right not to perform monologues she found offensive. 356 F.3d 1277, 1293 (10th Cir. 2004). The court stated that "schools must be empowered at times to restrict the speech of their students for pedagogical purposes," and observed that *Hazelwood* "does not require that the [restrictions] be the most reasonable or the only reasonable limitations, only that they be reasonable." *Id.* at 1290, 1292. Recognizing that *Hazelwood* was a secondary school case, the court explained that "[a]ge, maturity, and sophistication level of the students will be factored in determining whether the restriction is 'reasonably related to legitimate pedagogical concerns.'" *Id.* at 1289 (quoting *Ward v. Hickey,* 996 F.2d 448, 453 (1st Cir. 1993)).

Two unpublished federal court decisions likewise support the authority of public universities to enforce reasonable academic program rules. In *Marinello v. Bushby,* the Fifth Circuit found that Mississippi State University did not infringe on the First Amendment rights of a veterinary medicine student by requiring him to complete an essay on veterinary medicine ethics as a punishment for violating the professional guidelines applicable to veterinary students and practicing veterinarians. 163 F.3d 1356, 1998 WL 857879, at *1-2 (5th Cir. Nov. 17, 1998). The court observed that the college of veterinary medicine "trains students to become doctors of veterinary medicine. Part of that education includes the inculcation of the professional standards veterinarians must follow." *Id.* at *3. In *Ward v. Wilbanks,* a Michigan federal district court upheld Eastern Michigan University's disciplinary proceedings against a student for violating the American Counseling Association Code of Ethics by refusing to counsel a homosexual

client as part of her practicum. No. 09-CV-11237, 2010 WL 3026428, at *1-2 (E.D. Mich. July 26, 2010). The court rejected the student's Free Speech argument, concluding that the university's inclusion of professional ethics standards in its academic curriculum was reasonably related to legitimate pedagogical concerns and therefore constitutional. *Id.* at *15.

B. The Mortuary Science and Anatomy Bequest Program rules reasonably relate to legitimate pedagogical interests.

Because the "special characteristics" of each case matter, *Healy,* 408 U.S. at 180 (citing *Tinker,* 393 U.S. at 506), it is critical to note that this case does not involve political expression as in *Tinker,* or the dissemination of an offensive newspaper as in *Papish.* In this case, Tatro was found to have violated clear academic norms governing professionalism and respect related to a human donor, and to have ignored clearly communicated academic rules that she agreed to abide by as a condition of having the privilege to train on a human donor in her Mortuary Science program.

The rules Tatro violated serve several legitimate, important pedagogical interests. They promote and develop in Mortuary Science students the respect for human dignity with which they are expected to treat deceased persons in their funeral home clinical practicums while in school, and in their profession when they graduate from the University. The rules also promote and develop in students the sensitivity, discretion, and maturity in their interactions with family members and loved ones of deceased persons that students are expected to display in their practicums and professionally. Finally, the rules serve the vital academic interest of maintaining public confidence in the University's Anatomy Bequest Program so that persons will continue to donate their

bodies to serve the University's important research and educational missions. Erosion of public confidence in that Program—because the public becomes aware that the University tolerates its students publicly mocking a cadaver, or publicly talking about taking out their aggression on a cadaver—will harm the educational interests of all students and researchers at the University who depend on access to willed bodies for their research and education. Because these rules reasonably serve legitimate, important academic interests, their enforcement does not offend the First Amendment.

C. The enforcement of programmatic rules requiring respectful treatment of human donors was not arbitrary and was supported by the evidence.

The Court of Appeals, applying the deferential standard of review owed to University decisions, *see Chronopoulos v. Univ. of Minn.,* 520 N.W.2d at 441, especially academic decisions, rightly concluded that the University did not act arbitrarily in deciding that it had jurisdiction to enforce violations of programmatic rules that were displayed online, or that the programmatic rules violated by Appellant were "University rules" under the Student Conduct Code.[6] The Court also found sufficient evidence to support the University's factual findings. Its decision should be affirmed.

Tatro argues that the University lacked authority to enforce the Mortuary Science and Anatomy Bequest Program rules because her expression took place online and therefore, in her view, "off campus." That argument is without merit. Academic violations may be addressed by the University whether they occur in a campus residence

[6] While the hearing panel and the Provost found that all the rules cited in the student conduct complaint were violated, the University does not challenge here the Court of Appeals' decision rejecting some of those violations. The rules violations affirmed by the Court of Appeals went to the heart of the issue of respect for human dignity required in the Mortuary Science program and in the Anatomy Bequest Program and, as the Court of Appeals found, themselves justified the University's actions.

hall or an off-campus apartment, on a University computer or a student's laptop. A student who plagiarizes in violation of academic rules may be sanctioned whether or not the student plagiarizes material in the school library, the city library, or via the Internet. Likewise, violations of the Anatomy Laboratory Rules and the rules reflected in the Anatomy Bequest Form may be sanctioned wherever they occur, including online. That principle is implicit in the rules themselves. The Anatomy Laboratory Rules explicitly prohibit blogging, which necessarily takes place online. Moreover, the testimony at the hearing established that the requirements of professionalism and respect for human donors applied to all Internet postings, including Facebook. The principle also is implicit in Tatro's own understanding of the rules. Tatro acknowledged that she understood that there were limitations on what she could write on Facebook about donors (CCSB Tr. 275-77); thus, she must have understood that the program's academic obligations followed her online. In any event, the record established that Tatro's online posts certainly did reach campus, as Tatro included all her fellow Mortuary Science students as "friends," and the posts were read by University students and faculty alike. (*Id.* at 266.)

Tatro also argues that the programmatic rules could not be addressed as violations of subdivision 16 the Student Conduct Code because, in her view, they do not constitute "University Rules." The Court of Appeals correctly rejected this argument. The Anatomy Lab Rules were mandatory elements of the course syllabus. The rules and policies of the Anatomy Bequest Program were recognized in the form that Appellant signed, confirming her "responsibility to adhere to the policies of the Anatomy Bequest Program." (App. Add. 25A.) It was not arbitrary for the University to consider these regulations "University rules." As the Court of Appeals wrote, "Tatro cites no legal or

commonsense support for her narrow construction of subdivision 16, and such a construction would frustrate the very purpose of course-specific rules, which must necessarily address the unique considerations presented by a particular course or field of student." *Tatro,* 800 N.W.2d at 817.

Tatro also argues that the evidence did not support the findings of violation of programmatic rules. As for Rule 7 of the Anatomy Lab Rules, Tatro argues that Facebook posting is different from "blogging," and she therefore could not be held responsible for her expression on Facebook. (Appellant's Br. at 38-39.) The Court of Appeals refused to address that narrow question, observing that the requirements of Rule 7 were broader. The rule in full states, "Conversational language of cadaver dissection outside the laboratory should be respectful and discreet. Blogging about the anatomy lab or the cadaver dissection is not allowable." (App. Add. 17A.) The Court of Appeals agreed with the University that "public comments about 'playing' with or taking 'aggression' out on a cadaver are inconsistent with notions of respect and dignity whether they occur in person, on Facebook, in a blog, or via other media." *Tatro,* 800 N.W.2d at 818 The record established that Tatro received extensive orientation that specifically included discussion of Facebook, and that she understood that there were limitations on what she could post on Facebook.

The Court of Appeals also correctly concluded that Tatro violated "policies and rules regarding treating donors with respect and dignity [that] were explained during orientation." *Tatro,* 800 N.W.2d at 819. These rules and policies were reflected in the Anatomy Bequest Program disclosure form, signed by Tatro, in which she acknowledged that she "understood the policies and the overall responsibilities that the privilege of a

dissecting a human body 'carries with it.'" *Id.* As Provost Sullivan observed, "The clear intent of the anatomy lab rules and the mortuary science student conduct code is that all matters related to the lab, both in and outside the lab, must be taken seriously, done respectfully, and communicated about in a respectful and professional manner." (App. Add. 44A.) The Anatomy Bequest Program form, together with the testimony of Tatro's instructors and the director of the Mortuary Science program describing the extensive orientation Tatro received about the requirement of respectful and professional behavior, supported the University's action.

D. Even if a showing of substantial disruption were necessary, that standard was met.

Even if the *Tinker* substantial disruption standard applied to academic rules, that standard was met. Under *Tinker,* speech may be regulated if it materially and substantially disrupts school operation and discipline or invades other students' rights, or if it can be reasonably forecast to do so. *Tinker*, 393 U.S. at 513-14. School officials must be able to concretely show that a student's speech will interfere with the rights of others or with school discipline and operation, because "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression." *Id.* at 508.

Appellant's disrespectful Facebook posts stating that she "Gets to play, I mean dissect, Bernie [her donor cadaver] today," her suggestion that she would take out her aggression on the human donor she was embalming, her flippant comment the liked to "hang out" with the human donor, and her suggestion that she was keeping a "lock of [the donor's] hair in my pocket" disrupted the educational and research missions of the

University facilitated by the University's Anatomy Bequest Program. The University's willed body program—the Anatomy Bequest Program—plays an essential role is the University's education of Mortuary Science students. It is also essential to other elements of the University's mission including medical education and research. By undermining public trust in the Anatomy Bequest Program, Tatro endangered a key component of the University's research and educational programs.

The existence of the Anatomy Bequest Program depends on the continued willingness of many members of the public to donate their bodies for use in the University's education and research activities. Due to the intensely personal and emotional nature of these donations at the time of death, respectful treatment of donors by University students afforded the special privilege to work with them is imperative to maintaining public trust and the viability of the Program. "Indeed," as the Court of Appeals wrote, "the rules requiring respect and professionalism in the sensitive area of mortuary science appear designed to ensure ongoing trust in this relationship, and Tatro agreed to be bound by these rules as a condition of her access to a human donor." *Tatro,* 800 N.W.2d at 822.

Appellant's overt, public display of unprofessionalism undermined public trust in the Anatomy Bequest Program, as evidenced by the numerous letters and calls of concern and dismay received by the Program. (CCSB Tr. 152-56.) Some donor families made particular requests that Tatro never handle their loved ones' bodies, requiring notes to be placed in each donor file to ensure that would not happen. Another donor family member whose parents had donated their bodies to the program wrote that she was "horrified by the total disregard and callousness of Miss Tatro." (R 0080). The damage caused by

Appellant's posts to public confidence in the Anatomy Bequest Program posed a substantial and material disruption to the University's ability to secure the donor cadavers necessary to carry out its educational and research missions.

Appellant and her *amici* attempt to minimize this harm by denigrating it as a mere concern with "the school's image," *see* Appellant's Br. at 33, or fear of losing financial donors. *See* Brief of *Amici* SPLC and FIRE at 2-3. Obviously from the record, however, the University's concern was with the loss of public confidence in its willed body program, not financial donors. If the University could not constitutionally take reasonable, measured steps to assure compliance with its professionalism requirements, prospective donors would be discouraged from willing their bodies to the University for educational and scientific purposes, doing substantial harm to the University's educational and research mission.

III. The University's enforcement of the prohibition of threatening conduct was constitutional, nonarbitrary, and supported by the evidence.

Apart from curricular rules within academic programs, the University also maintains a general Student Conduct Code governing student behavior. Tatro's posts about human donors and lab practices also included a specific reference to hiding a scalpel up her sleeve; a declaration that she wanted to "stab a certain someone in the neck with a trocar;" and a reference to updating her "death list," to making friends with a "crematory guy," and to knowing the crematory code. These comments caused significant fear and concern for campus safety, especially since they referenced tools used in lab classes on campus. Provost Sullivan properly found that these posts constituted threatening conduct under the Student Conduct Code, and affirmed the

assignment of sanctions. His decision was constitutional, nonarbitrary, and supported by the evidence.

A. The Court of Appeals properly applied the *Tinker* standard to the threatening speech in this case.

In *Tinker*, the Supreme Court ruled that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." 393 U.S. at 506. At the same time, however, the Court "emphasized the need for affirming the comprehensive authority of the State and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools." *Id.* at 507. The Court declared that school officials may constitutionally regulate student speech within the "schoolhouse gate" that "materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school" or "collid[es] with the rights of others." *Id.* at 506, 513. The *Tinker* standard is appropriately applied to threatening speech at a public university, including disruptive speech that is conveyed on the Internet.

1. "True threat" is not the appropriate standard.

Tatro argues that a public university is powerless to address any threatening statements made by its students, except for "true threats." Petitioner misunderstands the significance of a "true threat" under the First Amendment. Like defamation, a "true threat" falls entirely outside the ambit of the First Amendment, and therefore a student who issued a "true threat" cannot state a civil rights claim under 42 U.S.C. § 1983. *See Riehm v. Engelking,* 538 F.3d 952, 965 (8th Cir. 2008). But even speech within the ambit

of the First Amendment can be regulated by schools and universities when it causes substantial disruption. *See Tinker, supra.*

In a case relied on by Tatro, *Doe v. Pulaksi County Special School District,* the *en banc* majority of the Eighth Circuit found that a student's "true threat" fell outside First Amendment protection and rejected the student's civil rights claim. 306 F.3d 616, 626-27 (8th Cir. 2002). Because the expression was entirely unprotected, the majority did not reach the question whether the speech was disruptive under *Tinker.* Importantly, however, even the dissenters recognized that speech that did not constitute a "true threat" could be regulated under *Tinker.* Judge Heaney wrote for the dissenters: "I believe the proper inquiry before us is 1) whether J.M.'s written expression is protected speech or a true threat; and 2) if it is protected speech, as I believe it is, whether it is subject to regulation because it may cause substantial disruption or interfere with the rights of other students." *Id.* at 627 (Heaney, J., dissenting). Judge Heaney concluded that, while the expression was not a "true threat" in his view, the student's "conduct required disciplinary action" (but not, in his view, expulsion). *Id.* at 635.

Similarly, in *Porter v. Ascension Parish School Board,* the Fifth Circuit found that a drawing was not a "true threat," but recognized that the disruptive speech nevertheless could be regulated under *Tinker.* 393 F.3d 608, 615 & n.17 (5th Cir. 2004). In *Wisniewski v. Board of Education,* the Second Circuit applied *Tinker*, observing that "school officials have significantly broader authority to sanction student speech" than a true-threat standard would allow. 494 F.3d 34, 38-39 (2d Cir. 2007) . Finally, the Fourth Circuit applied *Tinker* to a MySpace page that harassed another student. *Kowalski v. Berkeley Cty. Sch.,* 652 F.3d 565, 571-72 (4th Cir. 2011). Consistent with these cases, the

Court of Appeals here properly applied the standard for student speech articulated in *Tinker* and its progeny.

2. Courts routinely and properly apply the *Tinker* standard to college and university student speech.

Although *Tinker* was decided in the context of secondary education, courts have repeatedly applied the *Tinker* standard to student speech in colleges and universities. *See, e.g., DeJohn v. Temple Univ.*, 537 F.3d 301, 317 (3d Cir. 2008); *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1293-94 (11th Cir. 2007); *Salehpour v. Univ. of Tenn.*, 159 F.3d 199, 208 (6th Cir. 1998); *Williams v. Eaton*, 468 F.2d 1079, 1083 (10th Cir. 1972); *Pickings v. Bruce*, 430 F.2d 595, 598-99 (8th Cir. 1970); *Saunders v. Va. Polytechnic Institute*, 417 F.2d 1127, 1130 (4th Cir. 1969). In the college case of *Healy v. James* the Supreme Court stated that colleges and universities are the "marketplace of ideas," but the Court also quoted *Tinker* in recognizing the need of public universities to prescribe and control conduct. *Healy*, 408 U.S. at 180 (quoting *Tinker*, 393 U.S. at 507).

Soon after *Tinker* was decided in 1969, the Fourth Circuit stated that the holding in *Tinker* was "the premise upon which our decision rests" in determining that Virginia Polytechnic Institute could not restrict a nonmatriculated student from participating in a campus demonstration. *Saunders*, 417 F.2d at 1130-31. Less than one year later, the Eighth Circuit applied *Tinker* to find that Southern State College administrators could circumscribe speech that "would substantially interfere with the work of school, the rights of students and the maintenance of appropriate discipline." *Pickings,* 430 F.2d at 599.

The Eleventh Circuit also directly applied the *Tinker* standard, as well as the Supreme Court's other student speech cases, *Hazelwood* and *Fraser*, to uphold the University of Alabama's right to impose reasonable regulations on student groups. *Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala.*, 867 F.2d 1344, 1346 (11th Cir. 1989). The court noted that in accordance with *Tinker* and its progeny, "University judgment on [matters of student regulation] should be given great deference by federal courts." *Id.* at 1347. The Eleventh Circuit also ruled that Florida International University could apply the *Tinker* standard to a graduate student in a practicum. *Watts v. Florida Int'l Univ.,* 495 F.3d at 1294. The Third Circuit, while recognizing it "must proceed with greater caution before imposing speech restrictions on adult students at a college campus," maintained that under *Tinker* colleges and universities may prohibit that speech that poses a "tenable threat of disruption" to "school operations or interfere[s] with the rights of others." *DeJohn*, 537 F.3d at 317 n.17, 318.

The principles underlying *Tinker*—prevention of disruption that interferes with the operation of the school and protection of the rights of all students—apply with equal force in higher education as they do in secondary schools. *See Williams*, 468 F.2d at 1084; *Watts*, 495 F.3d at 1294. As the court recognized in *Salehpour*, "the compelling interest of the academicians to educate in an environment that is free of purposeless distractions and is conducive to teaching" is present at every level of public education, including university undergraduate and professional degree programs. 159 F.3d at 208.

The *Tinker* test requires evaluation of disruptive speech in the context of the particular environment in which it occurs. The maturity of college students and the desire for the exchange of ideas in the context of higher education is properly considered

as part of the *Tinker* analysis. Because of this, the Court of Appeals below recognized that "what constitutes a substantial disruption in a primary school may look very different in a university." *Tatro,* 800 N.W.2d at 821 (citing *DeJohn v. Temple Univ.,* 537 F.3d at 318). Nevertheless, student expression that materially and substantially disrupts or threatens to disrupt the work and discipline of a public university constitutionally may be the basis for discipline under *Tinker.*

B. Appellant's speech materially and substantially disrupted the Mortuary Science Program.

Tatro's threatening language created a substantial disruption that justified the University's measured and proportionate response. Reports of the posts were made within the Mortuary Science Program and the Anatomy Bequest Program on the Friday they came to light, and on the following Monday. The program faculty met immediately upon learning of the posts. LaCourt, the instructor in the lab course in which trocars are provided for student use, testified that reading the post about stabbing someone in the neck with a trocar made her "very upset," it made her "heart race," and it caused her to get "sweaty" and "feel really uncomfortable." (CCSB Tr. 208.) According to Director LuBrant, LaCourt was "visibly shaking, she was very upset" when she saw the posts. (*Id.* at 66.) LuBrant and LaCourt were concerned for their own safety and the safety of Tatro's fellow students in the Mortuary Science Program. (*Id.* at 56, 64, 208.) LaCourt was concerned for the safety of herself and her students because Appellant used a scalpel and had access to a trocar, a long hollow stainless steel needle inserted into the body to aspirate gas and fluids, in McCourt's laboratory class. (*Id.* at 208.) LuBrant reasonably feared that he was the "certain someone" targeted in Appellant's post because he had

reprimanded Appellant just prior to the posting. Testimony also established that other students were fearful of physical violence. (*Id.* at 246.) The tools referenced by Tatro were particularly found in a campus laboratory.

As a result of these specific fears for campus safety, LuBrant called the University police, who investigated the matter. As LuBrant testified, "Our biggest concern was what was the potential for threat, you know? There have been lots of instances of violence on campuses, and we're all acutely aware of that. . . . [A]nd calling the police we agreed was the appropriate action." (CCSB Tr. 68.)[7] After the police met with Tatro, school administrators met with her. Given the impact of Appellant's post on University faculty and students, the meetings and actions required to evaluate the threat and assure the safety of the campus community, the distraction of the faculty from their educational responsibilities to having to evaluate a threat to campus safety, Appellant's posts constituted a substantial disruption to the work and discipline of the University.

The fact that University police did not pursue criminal charges against Tatro does not mean that the expression was not disruptive under *Tinker* or did not merit a measured University response. As the Court of Appeals wrote:

> The fact that the university's concerns were later assuaged does not diminish the substantial nature of the disruption that Tatro's conduct caused or the university's need to respond to the disruptive expression. A school need not wait for actual

[7] The reasonableness of the University's response must be evaluated in the context of recent, nationally heightened awareness of violence on college campuses, or by college students, and the duty of college officials to take prompt, effective measures to ensure campus and public safety. *See, e.g.,* Lucinda Roy, *After Tucson: a Personal Assessment of Higher Education's Response to Threats,* The Chronicle of Higher Education, Feb. 12, 2011, http://chronicle.com/article/After-Tucson-a-Personal/126274 (discussing role of higher education in addressing disturbing student behavior following mass killings at Virginia Tech and attack by expelled college student on Representative Gabrielle Giffords and others in Tucson).

> violence to occur before taking appropriate steps to ensure the safety of its community.

Tatro, 800 N.W.2d at 822.

The University's response to Tatro's conduct was clearly reasonably and proportionate, under the circumstances. Importantly, Tatro was not expelled from the University, nor was she was even suspended from her academic program. She was assigned a number of academic sanctions and directed to the student health service for evaluation and possible followup. These sanctions responded to Tatro's failure to meet academic and behavioral standards closely tied to the Mortuary Science program, were intended to assist Tatro's personal and professional development and success in the program, and were directed at assuring campus safety. Public universities must have the flexibility to apply a reasonable range of sanctions to different levels of threatening behavior, so they can effectively address problems before dangerous behavior occurs and the only reasonable response is arrest and expulsion.

Courts grant school officials broad discretion in responding to potentially disruptive student speech. *See, e.g., D.J.M. ex rel. D.M. v. Hannibal Pub. Sch. Dist. No. 60,* 647 F.3d at 766 ; *Doninger v. Niehoff,* 527 F.3d 41, 51 (2d Cir. 2008); *Wisniewski,* 494 F.3d at 38-39, *Lowery v. Euverard,* 497 F.3d 584, 596 (6th Cir. 2007); *Boim v. Fulton Cty. Sch. Dist.*, 494 F.3d 978, 984 (11th Cir. 2007); *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981, 989 (9th Cir. 2001). "*Tinker* does not require school officials to wait until the horse has left the barn before closing the door. Nor does *Tinker* 'require certainty that disruption will occur.'" *Lowery*, 497 F.3d at 591-92 (quoting *Pinard v. Clatskanie Sch. Dist. 6J*, 467 F.3d 755, 767 (9th Cir. 2006)). In exercising their discretion, it is

appropriate for school officials to consider all of the circumstances confronting them at the time the decision is made. *Pinard*, 467 F.3d at 768.

The Eighth Circuit held that that where a student's threat of violence required school officials to "spend considerable time dealing with . . . concerns and ensuring that appropriate safety measures were in place," that threat constituted a substantial disruption. *D.J.M.*, 647 F.3d at 766. Likewise, the Eleventh Circuit commended school officials for acting quickly upon discovery of a student writing contemplating violence against one of the student's teachers. *Boim*, 494 F.3d at 984. Notably, the court stressed that "[w]e can only imagine what would have happened if the school officials . . . did nothing about it and the next day [the student] did in fact come to school with a gun and shoot and kill her math teacher." *Id.* The court therefore concluded "it is imperative that school officials have the discretion and authority to deal with incidents." *Id.*

Based on the threatening nature of Tatro's posts, their direct relation to her University laboratory class and tools, and the size and makeup of the audience to which they were directed, it was reasonably foreseeable that the postings would, and in fact did, materially and substantially disrupt operations of the University.

C. The First Amendment does not immunize disruptive speech simply because it is online and widely accessible.

Appellant and her *amici* argue that her Facebook posts could not be grounds for discipline because they were online and therefore, in their view, constituted "off-campus" speech not reachable under the First Amendment. Ample precedent establishes, however, that even off-campus speech, including online speech, constitutionally may be grounds for student discipline when it causes substantial disruption to the school or university.

As an initial matter, the Supreme Court has recognized that the reference in *Tinker* to the "schoolhouse gates" does not limit disciplinary reach to the physical property of a school. In *Morse v. Frederick*, the Court found that a student "standing among other . . . students across the street from the school, [who] directed his banner toward the school, making it plainly visible to most students" was within the school's authority to punish. *Morse*, 551 U.S. at 401.

Online speech has been found to be within school's authority to regulate. In *Doninger*, the Second Circuit elaborated on the disciplinary discretion given to school officials after *Morse*. 527 F.3d at 48. Noting that "territoriality is not necessarily a useful concept in determining the limit of [school] authority," the Second Circuit ruled that a "student may be disciplined for expressive conduct, even conduct occurring off school grounds" where it is "foreseeable that the off-campus expression might also reach campus" and "foreseeably create a risk of substantial disruption within the school environment." *Id.* at 48 (quotation omitted). The Fourth Circuit similarly found that off-campus online speech "directed at persons in school and received by and acted on by them was in fact in-school speech." *Kowalski*, 652 F.3d at 573. This non-territorial interpretation of what qualifies as punishable student speech is necessary because "students both on and off campus routinely participate in school affairs, as well as in other expressive activity unrelated to the school community, via blog postings, instant messaging, and other forms of electronic communication." *Doninger*, 527 F.3d at 49.

In *Doninger*, the court found that a student who posted an online blog entry criticizing the school administration regarding the scheduling of a co-curricular school event was properly disciplined by school officials for causing a substantial and material

disruption. *Id.* at 45, 54. The court found that the student's blog post "was purposely designed . . . to come onto the campus" and "directly pertained to [school] events." *Id.* at 50 (quotation omitted). Additionally, the student admitted that her intent "was specifically to encourage her fellow students to read and respond." *Id.* (quotation omitted). Similarly, in *Kowalski*, the student "indeed pushed her computer's keys in her home, but she knew that the electronic response would be, as it in fact was, published beyond her home and could reasonably be expected to reach the school or impact the school environment." 652 F.3d at 573. Likewise, in *Wisniewski*, the Second Circuit found that it was reasonably foreseeable that an instant messaging icon depicting violence against a teacher that was seen by only fifteen recipients would enter the school environment and "come to the attention of school authorities." 494 F.3d at 39.

As in *Doninger*, *Kowalski*, and *Wisniewski*, it was reasonably foreseeable that Tatro's Facebook postings would, and in fact did, travel beyond the location where she happened to transmit her message, and directly affect the campus, her fellow students, and faculty. Like the student in *Doninger*, Tatro published her threatening statements on a forum open to at least hundreds of people, including her fellow Mortuary Science students. One of these fellow students, who was also an employee of the Anatomy Bequest Program, reported concerns about Tatro's posts to the Director of the Mortuary Science Program. After Tatro was confronted by University officials regarding her posts, she contacted and shared her Facebook posts with local media, resulting in their being featured on local television news programs available to the public at large. Tatro's speech reached far beyond the fifteen recipients found to be sufficient in *Wisniewski*. Based on Tatro's dissemination of her speech to hundreds of recipients, including fellow

students, she could not reasonably have believed her speech would not enter the University campus. Appellant's speech is properly regarded as within the disciplinary authority of the University.

Cases cited by Appellant found school discipline improper under the First Amendment *not* because the online speech was "off-campus," but because it did not substantially disrupt school in the particular circumstances in those cases. For example, in *J.S. ex rel. Snyder v. Blue Mountain Sch. Dist.,* a case involving a vulgar, prank MySpace profile created by a student about the school principal, the Third Circuit observed that "there was no dispute" that the expression did not cause a substantial disruption at school, and found no reasonable expectation of disruption since the profile was so juvenile it could not be taken seriously, school computers blocked access to the profile, and the student took steps to limit access to the student and her friends. 650 F.3d 915, 929 (3d Cir. 2011). *See also Layshock v. Hermitage Sch. Dist.,* 650 F.3d 205, 214 (3d Cir. 2011) (school did not challenge finding of no substantial disruption); *J.C. and R.C. v. Beverly Hills Unified Sch. Dist.,* 711 F. Supp. 2d 1094 (C.D. Cal. 2010) (no substantial disruption found); *Murakowski v. Univ. of Del.,* 575 F. Supp. 2d 571, 592 (D. Del. 2008) (same). These cases—with their different facts—in no way indicate that no disruption occurred here, where the plain facts show otherwise.

D. The finding of threatening conduct was supported by the evidence.

The Student Conduct Code prohibits "conduct that endangers or threatens to endanger the health, safety, or welfare of another person, including, but not limited to, threatening, harassing, or assaultive conduct." (Appellant's Add. 7A.) Tatro's language

and the impact of the language on others amply supported the conclusion that the comments were threatening.

Tatro argues her comment was not directed at a specific person, but in the hearing she acknowledged that she was indeed directing the comment at a specific person—a former boyfriend—whom she expected to read her Facebook posts. (CCSB Tr. 265-66.) The fact that she did not identify the "certain someone" she wanted to stab in the neck did not allay faculty or student concern that she had physical violence in mind with respect to a specific person. Indeed, not knowing who that person was only heightens concerns for others on campus.

Tatro's argument that her posts "could not reasonably be construed as threats," Appellant's Br. at 37, also is without merit. While Tatro complains that University members who read the posts as threatening "lack understanding and appreciation of literary and satirical expression," on their face the posts reveal no evidence of satire or literary worth, and the testimony more than established that the posts were not so understood and that the safety concerns raised by the posts were not unreasonable. A panel of faculty, students, and staff found the comments threatening. (Appellant's Add. 29A.) Also meritless is the argument that the posts were "intended to be shared with Tatro's family and friends." Appellant's Br. at 37. Appellant set her own Facebook settings to permit broad access to her posts—including by all of her fellow students. (CCSB Tr. 259, 266.)

IV. The University acted within its discretion in assigning a failing grade.

The University did not act arbitrarily or beyond its discretion in assigning Tatro a failing grade in her Human Anatomy Laboratory course. The University has wide

authority to assign academic sanctions for violation of course rules, and Tatro's argument that eviction from a course would not have resulted in a failing grade is factually groundless.

In *Zellman ex rel. M.Z. v. Independent School District No. 2758,* the Court of Appeals upheld a failing grade for student who plagiarized in violation of course guidelines. 594 N.W.2d 216, 219 (Minn. Ct. App. 1999), *rev. denied* (Minn. July 28, 1999). In evaluating the sanction on certiorari review, the Court warned, "Judicial intervention in the public school system requires restraint. The judiciary should exercise even greater restraint in cases involving academic discipline in contrast to expulsions or suspensions." *Id.* at 220 (citing *Horowitz,* 435 U.S. 78 at 87-91 (1978)) (additional citation omitted). The Court stated that a school's decision satisfies substantive due process unless it is "arbitrary, capricious, or unreasonable," meaning it is "willful and unreasoning, without consideration of the facts and circumstances." *Id.* at 221 (citations omitted).

Here, the syllabus for Human Anatomy Laboratory course expressly included students' compliance with the Anatomy Laboratory Rules. (R 0067-0074.) The rules stated that failure to adhere to them could result in eviction from the course. (App. Add. 17A.) Tatro violated the rules before the end of the course. As the instructor, Angela McArthur testified, immediate eviction would have resulted in an "F" on the final and an "F" in the course. (CCSB Tr. 284.) Although Tatro could have been immediately evicted from the course, McArthur chose instead to let her take the final, but advised her that a finding that she violated lab rules would result in an "F." (R 0115.) The "F"

sanction thus accorded with the faculty member's notification to Tatro and was consistent with the syllabus.

Tatro's failing grade was consistent with clearly expressed course expectations, it followed a full evidentiary hearing, and it was a reasonable sanction to address the misconduct.

CONCLUSION

For the foregoing reasons, the University of Minnesota respectfully requests that the Court affirm the decision of the Court of Appeals.

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Respectfully submitted,

MARK B. ROTENBERG
General Counsel
University of Minnesota

By_____
Tracy M. Smith (19718X)
Associate General Counsel
360 McNamara Alumni Center
200 Oak Street S.E.
Minneapolis, MN 55455-2006
(612) 624-4100

Attorneys for Respondent