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## I. INTRODUCTION AND SUMMARY[1]

This case, while ostensibly about the postings of one college student on a social networking website, raises significant questions about how much control colleges and schools may assert over what is said about them. If affirmed by this Court, the legal standard adopted by the court below assures that student journalists, editorial commentators, citizen activists and whistleblowers will face retaliation without recourse for speech addressing matters of public concern. Whatever this Court may think about

[redacted]

Amanda Tatro's sense of humor, unleashing colleges and schools to punish their

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

*Amici* fully agree with, and adopt, the constitutional arguments made by counsel for Appellant Tatro in her brief. *Amici* write separately to emphasize two primary and fundamental errors in the Court of Appeals' opinion below that make reversal essential if

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

## II. *TINKER* STRIKES THE WRONG BALANCE WHEN SPEECH TAKES

At the outset, *Amici* fully agree with Appellant's counsel that the *Tinker* standard—uniquely and deliberated fashioned for the context of grade and high schools—is inapplicable in the adult world of a college campus at which attendance is

*recognition* of First Amendment rights—struck its balance based on the "special characteristics of the school environment." *Tinker*, 303 U.S. at 506. These are, principally: (1) that K-12 schools are populated by impressionable minors, and (2) that

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

*Tinker*'s reduced level of First Amendment protection for on-campus K-12 student speech is justified in part by the fact that a student who has speech unwittingly thrust upon him in the confines of the school predictably may act upon that speech while at school. Returning to the Confederate flag T-shirt example, a student who finds the

school and to otherwise "disrupt" routine operations—the student absolutely must be able to do so with certainty that he is within the protection of the First Amendment. Under the

rule coined by the Court of Appeals below, the student cannot have that confidence. If not reversed by this Court, the result inevitably will chill the dissemination of information and opinions much more substantive than jokes on a Facebook page.

It further bears emphasis that *Tinker* does not require a school to actually wait to see whether a disruption materializes; rather, speech may be penalized in the reasonable

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

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

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

adjacent to school grounds. In so doing, the Court distinguished the case of *Bethel Area Sch. Dist. v. Fraser*, 478 U.S. 675 (1987) by observing that, even though the Court found high school student Matthew Fraser's sex-themed speech punishable in the context of a

mandatory on-campus assembly, "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected." *Id.* at 2626. In other

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

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

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

First, as a theoretical matter, it is not appropriate to countenance reputational harm to the school as a *Tinker* disruption. Even if student speech inflames potential donors, allowing schools to punish speech on the basis of reputational harm invites impermissible [redacted]

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

In 1988, *The Minnesota Daily*, the student newspaper at the University of Minnesota, was instrumental in bringing to light questionable spending by the University's then-president, Kenneth Keller, which ultimately led to the president's resignation.[13] That series of events undoubtedly was more "disruptive" to the University's [redacted]

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

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

In demarcating the boundaries of constitutionally protected student speech, *Tinker*

did more than just adopt a standard of "material and substantial disruption." *Tinker* also

Just as the University here argues that

show that "its action was caused by something more than a mere desire to avoid the

discomfort and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 504.

Soon after *Tinker*, the Court further crystallized this principle in *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667 (1973) (per curiam). *Papish* involved attempted discipline of a college student for distributing a newspaper issue that included a headline containing a profanity and a raunchy political cartoon. The Eighth Circuit had held that even if the paper was not obscene, the student could be disciplined pursuant to a university regulation barring "indecent speech or conduct," an obligation that the student

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

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

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

To affirm the Court of Appeals' "disruptiveness" finding on the grounds of donor

them that talking about their schools off campus—even if attempting to engage public

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

Respectfully submitted,

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