

State of Minnesota
In Supreme Court

Amanda Tatro,

Appellant,

vs.

University of Minnesota,

Respondent.

**JOINT BRIEF OF AMICI CURIAE AMERICAN COUNCIL ON EDUCATION
AND THE ASSOCIATION OF AMERICAN MEDICAL COLLEGES,
JOINED BY
THE ASSOCIATION OF AMERICAN UNIVERSITIES, THE ASSOCIATION OF
PUBLIC AND LAND-GRANT UNIVERSITIES, AND THE AMERICAN
ASSOCIATION OF STATE COLLEGES AND UNIVERSITIES**

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TABLE OF CONTENTS

STATEMENT OF AMICI CURIAE 1

INTRODUCTION 2

ARGUMENT 4

 I. Factual Context..... 4

 A. Ms. Tatro was a Professional Student..... 4

 B. Ms. Tatro Complains of Academic Decisions by the
 University 6

 C. Campuses Must Take Threats of Violence Seriously 6

 II. Legal Context 7

 III. Institutions of Higher Education Have a Right to Evaluate All
 Professional Students in Accordance with the Ethical Standards of
 Their Profession 11

 IV. Willed-Body Programs Provide Critical Value to Medical Schools
 and Mortuary Science Programs and Colleges and Universities Must
 be Allowed to Set and Enforce Reasonable Rules to Protect the
 Integrity of Those Programs..... 14

 A. Willed-Body Donation Programs are Essential to the
 Educational Mission of Medical Schools and Programs in
 Mortuary Science 14

 B. The Role of the University in Protecting the Integrity of
 Willed Body Programs 15

 V. In Order to Prevent Violence, Institutions of Higher Education Must
 Be Allowed to Respond to Concerning Behavior By Students,
 Including Statements Made On-Line 21

CONCLUSION 27

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Bailey v. University of Minnesota</i> , 290 Minn. 359; 187 N.W.2d 702, 703 (1971)	7
<i>Board. of Curators, Univ. of Missouri v. Horowitz</i> , 435 U.S. 78 (1978)	7, 8, 11
<i>Board of Regents of Univ. of Wis. Sys. v. Southworth</i> , 529 U.S. 217 (2000)	8
<i>Brown v. Li</i> , 308 F.3d 939 (9th Cir. 2002)	10
<i>Florida Bar v. Went For It, Inc.</i> , 515 U.S. 618 (1995)	12
<i>Grutter v. Bollinger</i> , 539 U.S. 306 (2003)	4
<i>Healy v. James</i> , 408 U.S. 169 (1972)	9
<i>Keeton v. Anderson-Wiley</i> , 733 F. Supp.2d 1368 (S.D. Ga. 2010)	10
<i>Nova Se. Univ. v. Gross</i> , 758 So. 2d 86 (Fla. 2000)	24
<i>Parate v. Isibor</i> , 868 F.2d 821 (6th Cir. 1989)	8, 13
<i>Pugel v. Board of Trustees of the Univ. of Illinois</i> , 378 F.3d 659 (7th Cir. 2004)	10
<i>Regents of Univ. of Michigan v. Ewing</i> , 474 U.S. 214 (1985)	7, 8, 11
<i>Schieszler v. Ferrum Coll.</i> , 236 F.Supp.2d 602 (W.D. Va. 2002)	23

<i>Settle v. Dickson County School Bd.</i> , 53 F.3d 152 (6th Cir. 1995)	9
<i>Sweezy v. New Hampshire</i> , 354 U.S. 234 (1957).....	8
<i>Tatro v. University of Minnesota</i> , 800 N.W.2d 811 (Minn.Ct. App. 2011).....	6, 18, 20, 23
<i>Theard v. United States</i> , 354 U.S. 278 (1957).....	12
<i>Tinker v. Des Moines Independent Sch. Dist.</i> 393 U.S. 503 (1969).....	9, 11, 13, 19
<i>Widmar v. Vincent</i> , 454 U.S. 263 (1981).....	9, 13
STATUTES	
110 Ill. Comp. Stat. 12/1 (2011).....	25
20 USC § 1092(f) (2011).....	25
Minn. Stat. § 149.20, subd. 4 (2011).....	4, 5
Minn. Stat. § 149A.70, subd. 1 (2011).....	4
Minn. Stat. § 149A.70, subd. 7 (2011).....	5, 6, 7
Minnesota Rule of Civil Appellate Procedure 129.03	1
Va. Code Ann. § 23-9.2:10 (2011).....	25
OTHER AUTHORITIES	
33 Ill. Reg. 8175 (2009).....	25
A.G. Sulzberger & Trip Gabriel, <i>College’s Policy on Troubled Students Raises Questions</i> , N.Y. TIMES, Jan. 13, 2011	24
ABSFE Accreditation Standards, available at http://www.abfse.org/docs/standards.pdf	5

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Daryll Bullen, M.S. & Darrell Crase, Ph.D., <i>The Ultimate Gift: Body Donation</i> , 37 OMEGA 75 (1998)	14, 15
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Steven Labrash & Scott Lozanoff Ph.D., <i>Standards and Guidelines for Willed Body Donations at the John A. Burns School of Medicine, 2007</i> , 66 HAWAII MEDICAL JOURNAL 72 (2007).....	20
Helen Hickey de Haven, <i>The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability</i> , 35 J.C. & U.L. 503, 589 (2009).....	23
Johnny Lee, <i>Why Campus Security Teams Should Investigate Social Media in Threat Assessments</i> , http://epanicbutton.com/media/9441/social_media_article.pdf (last visited Nov. 23, 2011)	24
K. Kraco, <i>Body Bequest Programs in Minnesota</i> , 6 MINNESOTA MEDICINE 8 (2004).....	16, 18, 19
Marlsa R. Randazzo & Ellen Plummer, <i>Implementing Behavioral Threat Assessment on Campus: A Virginia Tech Demonstration Project</i> (Nov. 2009).....	26
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Rong-Gong Lin II et al., <i>School Releases YouTube Post from Loughner</i> , L.A. TIMES, Jan. 15, 2011, http://articles.latimes.com/2011/jan/15/nation/la-na-arizona-shooting-20110115	24
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STATEMENT OF AMICI CURIAE¹

The American Council on Education (“ACE”) is a non-profit association whose members include more than 1,800 public and private colleges, universities, and educational organizations throughout the United States. ACE strives to enhance the vitality and well-being of the nation's higher education institutions through advocacy, research, leadership, and program initiatives. ACE regularly submits *amicus* briefs in cases that raise legal issues important to higher education.

The Association of American Medical Colleges (“AAMC”) is a non-profit association representing all 136 accredited U.S. medical schools and nearly 300 major teaching hospitals and health systems. Founded in 1876, the AAMC provides national leadership in medical education, research, and health care. Its activities are focused on supporting the education of students and residents, developing faculty and institutional leaders, establishing and maintaining the highest standards for scientific research and discovery, and advancing the health of all.

The Association of American Universities (“AAU”), the Association of Public and Land-grant Universities (“A·P·L·U”), and the American Association of State Colleges

¹ Pursuant to Minnesota Rule of Civil Appellate Procedure 129.03, Counsel certifies that this brief was authored in whole by listed counsel for *amici curiae* American Council on Education and the Association of American Medical Colleges with the assistance of American Council on Education’s law student intern, Tessa Somers. No person or entity other than ACE or AAMC made any monetary contribution to the preparation or submission of the brief.

and Universities, (“AASCU”) join in the amicus brief of ACE and AAMC.² The Association of American Universities (AAU) is a nonprofit organization of 61 leading public and private research universities in the United States and Canada. AAU focuses on issues that are important to research-intensive universities. A·P·L·U is an association of public research universities, land-grant institutions, and state public university systems. A·P·L·U is dedicated to excellence in learning, discovery and engagement. AASCU represents more than 400 public colleges, universities, and systems of higher education throughout the United States and its Territories.

The listed *amici* submit this brief in support of the position of the University of Minnesota and urge this Court to affirm the decision of the Minnesota Court of Appeals. The Minnesota Court of Appeals correctly determined that the University did not violate Ms. Tatro’s First Amendment rights.

INTRODUCTION

This is a case about the academic freedom of a university to set and enforce reasonable course standards and reasonable campus rules. The course standards at issue were designed to teach ethics and professional norms to students enrolled in a professional program. The course rules were also designed to ensure the continued

² The Rule 129.01 Request by ACE and AAMC for Leave to File an *Amicus Curiae* Brief requested leave from this Court to file an *amicus curiae* brief and to add later other interested educational organizations as amici to their brief. This Court granted the request of ACE and AAMC. As such, AAU, A·P·L·U, and AASCU have joined on this brief.

success of willed-body donation programs, which programs are critical to medical students and mortuary science students. The campus rules at issue, which prohibit threatening conduct, were designed to promote a safe and effective learning environment for all students. A public college has a right and a compelling need to implement and enforce standards and rules like those at issue here.

The Appellant, Amanda Tatro, is a professional student who was disciplined for violating course and campus rules. She contends that the First Amendment prohibits the University of Minnesota from enforcing course rules and from enforcing campus regulations that prohibit threatening conduct. The First Amendment certainly protects Ms. Tatro from criminal sanctions for protected speech and it imposes certain limits on the university's ability to regulate speech. The First Amendment does not, however, provide Ms. Tatro a right to violate reasonable course and campus rules and to engage in unprofessional and unethical conduct without any academic repercussions.

ACE, AAMC, AAU, AASCU, and A·P·L·U fully agree with and support the arguments made by the University of Minnesota. This brief will focus on providing further information to the Court with respect to an institution's right and compelling need to: (1) enforce professional standards, including ethical standards, in professional programs; (2) protect the integrity of willed-body programs; and (3) take thoughtful and reasonable action in response to threats of violence.

ARGUMENT

I. **Factual Context.**

In reviewing a constitutional challenge to a public university's policies or decisions, "context matters." *Grutter v. Bollinger*, 539 U.S. 306, 309 (2003). In reviewing Ms. Tatro's claims, there are three particularly important factual contexts to remember.

A. **Ms. Tatro was a Professional Student.**

In order to become a mortician or funeral director in Minnesota, an individual must obtain a license to practice mortuary science. Minn. Stat. § 149A.70, subd. 1 (2011). In order to obtain such a license, an individual must graduate from an accredited mortuary science educational program. Minn. Stat. § 149.20, subd. 4 (2011).

The University of Minnesota's Mortuary Science Program is accredited by the American Board of Funeral Service Education ("ABFSE") and satisfies the educational requirement for a Minnesota license to practice mortuary science. *See id.*, <http://www.mortuaryscience.umn.edu>. The University's Mortuary Science Program's mission statement provides:

Funeral directors are health care professionals who serve others during a time of loss, pain and grief. The mission of the Program is to skillfully combine the study of behavioral, physical and applied sciences for the goal of preparing graduates for careers as knowledgeable, skilled and innovative funeral service professionals. Program graduates will be prepared to serve bereaved members of their communities in a manner that is proficient, dignified and caring.

Id. The objectives of the Program include:

1. To enlarge the background and knowledge of students about the funeral service profession;
2. To educate students in every phase of funeral service, and to help enable them to develop proficiency and skills necessary for the profession;
3. To educate students concerning the responsibilities of the funeral service profession to the community at large;
4. To emphasize high standards of ethical conduct;
5. To provide a curriculum at the post-secondary level of instruction;
6. To encourage student and faculty research in the field of funeral service;
7. To encourage faculty and students to be advocates for the profession of funeral service.

Id. (emphasis added). The Mortuary Science Program is part of the University of Minnesota Medical School. *Id.* The objectives of the University's Mortuary Science Program mirror the objectives required by the program's accrediting agency. *See* ABSFE Accreditation Standards, available at <http://www.abfse.org/docs/standards.pdf>.

Minnesota law prohibits individuals who hold a license to practice mortuary science from engaging in unprofessional conduct. Minn. Stat. § 149A.70, subd. 7 (2011). Unprofessional conduct includes the failure to act with “dignity and respect” towards the deceased. *Id.* The mortuary science course rules that Ms. Tatro violated are consistent with the ethical and professional standards that members of the mortuary science profession are required to follow. “[T]he reason that [the mortuary science course] rules are strict is to set standards for behavior from the beginning of the program that will carry into the profession.” (Addendum 30A).

B. Ms. Tatro Complains of Academic Decisions by the University.

The sanctions Ms. Tatro is challenging are primarily academic sanctions. As a result of violating course rules, she was given an “F” in her anatomy lab course,³ required to take an ethics course, and required to write a letter to a faculty member addressing the issue of respect within the department and the profession. As a result of her threats of violence, Ms. Tatro was required to complete a psychiatric evaluation at the student health clinic and to comply with recommendations. (Addendum 30A.) Ms. Tatro was also placed on academic probation, meaning that if she is found to violate the Student Code of Conduct in the future, she may be subject to a more severe sanction.⁴ (Addendum 31A.) Notably, these sanctions were imposed because the University believed that Ms. Tatro’s “actions were inappropriate for someone in [the mortuary science] profession.” (Addendum 30A.) The sanctions were designed to “facilitate [Ms. Tatro’s] personal and professional development.” (*Id.*)

C. Campuses Must Take Threats of Violence Seriously.

Although Ms. Tatro now claims that her postings were merely literary and satirical expression, she testified in the hearing before the Campus Committee on Student

³ The course rules stated that students could be evicted from the course if they violated course rules. The Court of Appeals properly noted, “[a] student evicted from a class near the end of a term does not receive a passing grade...and on this record, this sanction is not arbitrary, oppressive, or unreasonable.” *Tatro*, 800 N.W.2d at 822 (citation omitted).

⁴ The sanction of academic probation appears to relate both to Ms. Tatro’s threats of violence and violation of course rules. (Addendum 31A.)

Behavior that she intended at least one comment to be threatening. (Addendum 30A). Further, members of the Mortuary Science program felt threatened by Ms. Tatro's comments and conduct. (*Id.*) The University concluded that Ms. Tatro's postings had a negative impact on the program. (*Id.*)

II. **Legal Context.**

Minnesota courts generally defer to University decisions. *See Bailey v. University of Minnesota*, 290 Minn. 359, 360-61; 187 N.W.2d 702, 703-04 (1971). This is particularly true when the University's academic judgments are at issue. "When judges are asked to review the substance of a genuinely academic decision, such as this one, they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment." *Regents of Univ. of Michigan v. Ewing*, 474 U.S. 214, 225 (1985); *see also Board. of Curators, Univ. of Missouri v. Horowitz*, 435 U.S. 78, 90-91 (1978). The reason for courts' deference to academic decisions is the courts' recognition that "[j]udicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint." *Id.* at 91 (citation omitted) "The educational process ... centers around a continuing relationship between faculty and students in which the teacher must occupy many roles – educator, adviser, friend, and at times, parent substitute." *Id.* at 90 (citation omitted). "This is especially true as one advances through the varying regimes of the educational system and the instruction

becomes both more individualized and more specialized.” *Id.* (holding that medical school student was not deprived of constitutional rights when she was dismissed from medical school for academic reasons, including poor performance in clinical patient-oriented settings and a lack of “critical concern for personal hygiene.”)

The U.S. Supreme Court has recognized that institutions have special rights to academic freedom under the First Amendment, including “the freedom to make decisions about how and what to teach.” *Board of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 237 (2000). “Academic freedom thrives not only on the independent and uninhibited exchange of ideas among teachers and students, but also, somewhat inconsistently, on autonomous decision making by the academy itself.” *Ewing.*, 474 U.S. at 226 n. 12.

It is the business of a university to provide that atmosphere which is most conducive to speculation, experiment, and creation. It is an atmosphere in which there prevail ‘the four essential freedoms’ of a university – to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study.

Sweezy v. New Hampshire, 354 U.S. 234, 237 (1957) (Frankfurter, J. concurring in result). The assignment of a letter grade by a university professor is a symbolic communication and is entitled to some measure of First Amendment protection. *Parate v. Isibor*, 868 F.2d 821, 827 (6th Cir. 1989). “[T]he decision of an individual professor as to the proper grade for a student in his course ... requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial and administrative decisionmaking.” *Horowitz*, 435 U.S. 78 at 90.

While university students also have First Amendment rights, the U.S. Supreme Court has repeatedly recognized “a university’s right to exclude even First Amendment activities that violate reasonable campus rules or substantially interfere with the opportunity of other students to obtain an education.” *Widmar v. Vincent*, 454 U.S. 263, 277 (1981); *see also Healy v. James*, 408 U.S. 169, 189 (1972). “In the context of the ‘special characteristics of the school environment,’ the power of government to prohibit ‘lawless action’ is not limited to acts of a criminal nature. Also prohibited are actions which ‘materially and substantially disrupt the work and discipline of the school.’” *Healy v. James*, 408 U.S. at 189 (quoting *Tinker v. Des Moines Independent Sch. Dist.* 393 U.S. 503, 513 (1969)).

Courts around the country have dismissed First Amendment challenges to a school or University’s academic decisions. In *Settle v. Dickson County School Bd.*, the Sixth Circuit Court of Appeals upheld a teacher’s decision to give a student a failing grade on a class assignment despite the student’s claim that she had a First Amendment right to write a paper on a topic that had not been approved by the teacher. 53 F.3d 152, 156 (6th Cir. 1995). As the concurring judge aptly noted, “The bottom line is that when a teacher makes an assignment, even if she does it poorly, the student has no constitutional right to do something other than that assignment and receive credit for it. It is not necessary to try to cram this situation into the framework of constitutional precedent, because there is no constitutional question.” *Settle v. Dickson County School Bd.*, 53 F.3d 152, 158 (6th Cir. 1995) (J. Batchelder concurring).

Similarly, in *Brown v. Li*, the Ninth Circuit dismissed a graduate student's First Amendment challenge to a university's decision not to accept his master's thesis when, after approval of the thesis by his committee, the student attempted to add to the thesis two pages of "disacknowledgements" insulting his thesis committee. *Brown v. Li*, 308 F.3d 939 (9th Cir. 2002). The Ninth Circuit held that the committee members had an affirmative First Amendment right not to approve Plaintiff's thesis. *Id.* at 952. The Court further held that because the master's thesis was part of the curriculum, it was subject to the institution's reasonable regulation. *Id.*

Plaintiff was given reasonable standards for [his thesis], including a pedagogically appropriate requirement that the thesis comply with professional standards governing his discipline. . . . Plaintiff's committee members acted well within their discretion, and in conformity with the First Amendment, when they declined to approve the noncompliant section. Their decision was reasonably related to a legitimate pedagogical objective: teaching Plaintiff the proper format for a scientific paper.

Id. See also *Pugel v. Board of Trustees of the Univ. of Illinois*, 378 F.3d 659, 667-670 (7th Cir. 2004) (upholding dismissal of graduate student for presenting fraudulent research results at off-campus academic conference and stating "the First Amendment does not protect Ms. Pugel from the academic and employment consequences that ensued from her research presentation when the University determined, through constitutionally adequate disciplinary proceedings, that the presentation was fraudulent"); *Keeton v. Anderson-Wiley*, 733 F. Supp.2d 1368 (S.D. Ga. 2010) (dismissing graduate student's First Amendment claim and upholding academic discipline imposed on counseling student who faculty determined was having trouble complying with the American Counseling Associations' Code of Ethics).

III. Institutions of Higher Education Have a Right to Evaluate All Professional Students in Accordance with the Ethical Standards of Their Profession.

The First Amendment arguments being made by Ms. Tatro totally overlook the academic decisions and judgments that are at issue here. The University made an academic judgment that Ms. Tatro's Facebook postings and conduct "were inappropriate for someone in [the mortuary science] profession." (Addendum 30A.) The University designed sanctions to "facilitate [Ms. Tatro's] personal and professional development." (*Id.*) The sanctions are consistent with the Mortuary Science program's pedagogical objectives of educating students concerning the responsibilities of the funeral service profession to the community and emphasizing high standards of ethical conduct. *See* <http://www.mortuaryscience.umn.edu>. This Court should defer to these pedagogical judgments by the university and its faculty. *Ewing*, 474 U.S. at 225; *see also Horowitz*, 435 U.S. at 90-91; *cf. Tinker*, 393 U.S. at 508 (noting that the student speech at issue did "not concern speech or action that intrudes upon the work of the schools.").

Ms. Tatro emphasizes that her posts were written off-campus. But regardless of where her statements were made, the statements violated course rules with which Ms. Tatro had agreed to comply. The course rules were consistent with the University's pedagogical objectives in teaching appropriate ethical standards and also served to protect the integrity of the University's willed-body program. The University has a right to issue reasonable academic discipline, consistent with its policies and practices, to enforce such course rules regardless of whether Ms. Tatro was on or off campus when she wrote the posts.

Furthermore, just as professionals may be sanctioned for their off-duty conduct that violates ethical rules, so too should professional students be subject to academic discipline when their on or off-campus conduct violates the ethical standards of their professional programs.⁵ Recognition as a professional in any profession is a privilege burdened with conditions. *See, e.g., Theard v. United States*, 354 U.S. 278, 281 (1957). Ms. Tatro had the privilege of being accepted into the Mortuary Science Program and she had the privilege of learning the skills of her chosen profession with a body that had been donated to the University. In exchange for the privilege of studying to become licensed in mortuary science and in exchange for the privilege to learn from a donated cadaver, Ms. Tatro agreed to treat the cadaver with respect and dignity, not to blog about her experiences in lab and not to engage in any conversation about dissecting the body that was not respectful and discreet. Ms. Tatro breached these promises and her professional obligations. She is not immune from academic discipline that is reasonably related to her violation of course rules and her violation of professional ethics.

Faculty in a professional program have a right and an obligation to make academic judgments about a student's failure to understand or adhere to ethical standards. It

⁵ The U.S. Supreme Court has held that "States have a compelling interest in the practice of professions within their boundaries, and, as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995). Professional students and professionals in a variety of areas – including medicine, law, education, nursing, counseling, and mortuary sciences – are required to learn and comply with ethical standards in their professions.

would infringe upon the First Amendment rights of the faculty of the Mortuary Science program for this court to order that Ms. Tatro be given a particular grade in her lab course, when her instructor recommended that she be given an “F.” *Parate v. Isibor*, 868 F.2d at 827. It would infringe on the academic freedom rights of the University if it could not require a student who needs improved skills or knowledge in his/her field to take an additional course as a condition of progressing in his/her program.

The decision of the University to impose academic discipline on Ms. Tatro is entitled to deference from this Court. It was reasonably related to a legitimate pedagogical concern. *See Widmar v. Vincent*, 454 U.S. at 277 (1981) (noting that University has a “right to exclude even First Amendment activities that violate reasonable campus rules.”) Moreover, it would substantially interfere with the work and educational mission of the University if it could not reasonably respond to ethical violations by professional students as the University did here. *Cf. Tinker*, 393 U.S. at 512-513. The University took reasonable action to address the ethical violations by Ms. Tatro and the sanctions imposed were appropriately tailored to address Ms. Tatro’s conduct and to further her personal and professional development. The University’s decision should be upheld.

IV. Willed-Body Programs Provide Critical Value to Medical Schools and Mortuary Science Programs and Colleges and Universities Must be Allowed to Set and Enforce Reasonable Rules to Protect the Integrity of Those Programs.

A. Willed-Body Donation Programs are Essential to the Educational Mission of Medical Schools and Programs in Mortuary Science.

Despite the development of technological aids for learning about human anatomy, whole cadaver dissection continues to be a critically important component of medical education and research. *See, e.g.,* Ebony Boulware et al., *Whole Body Donation for Medical Science: A Population-Based Study*, 17 CLINICAL ANATOMY 570 (2004) [hereinafter “Boulware et al, *Whole Body Donation for Medical Science*”]. No technology, textbook, or educational exercise exists that can provide the equivalent tactile learning experience of cadaver dissection – the exercise in understanding the textures, weights, inter-relationships, vulnerabilities, locations, and other physical attributes of the vast systems and tissues of the human body – save that of practicing on a living human being. While donations to medical science are increasingly supported by the public, (including through life-saving organ donations), the availability of whole, intact bodies for medical educational continues to be low, making each donation a precious resource for a university. *Id.* at 571.

The act of donating one’s own body or the body of one’s next of kin to medical education is a phenomenon that has emerged only in recent history and continues to be an exceedingly rare choice. *See e.g.,* Daryll Bullen, M.S. & Darrell Crase, Ph.D., *The Ultimate Gift: Body Donation*, 37 OMEGA 75 (1998)[hereinafter “*The Ultimate Gift*”]. Even when made, donations may not be successful depending upon the condition and

location of the body at the time of death or, for some schools, if the next of kin objects to the donation. *Id.* Prior to the availability of willed body donations, medical education relied upon state laws relinquishing the bodies of executed prisoners and unclaimed bodies, and, in many documented cases, “body snatching” from fresh graves – practices still relied upon today in countries without stable anatomy bequest programs. *See* Mary Roach, *STIFF* at 37-57 (W. W. Norton & Company, Inc. 2003) [hereinafter “*STIFF*”]. The transition to a practice supported primarily by willed bodies represents a dramatic shift in the perception of cadaver dissection by the general public. *See The Ultimate Gift* at 76; *see also* Ann Garment, Susan Lederer, M.A., Ph.D., Naomi Rogers, Ph.D. & Lisa Boulton, M.D., M.P.H., M.A., *Let the Dead Teach the Living: The Rise of Body Bequeathal in 20th Century America*, 82 *ACADEMIC MEDICINE* 1000 (2007) [hereinafter “*Let the Dead Teach the Living*”]. Sustaining this support relies upon the public’s confidence in the integrity of willed-body programs. *See The Ultimate Gift*, at 75-76.

B. The Role of the University in Protecting the Integrity of Willed Body Programs.

Recognizing that the sustainability of willed body programs depends upon the public’s trust that a willed body will be used for its intended purposes of education and research and will be treated with respect and dignity, over the last quarter of a century schools have adopted rigorous ethical standards for their anatomy bequest programs and communicated these standards to prospective donors and their families. *See STIFF* at 38.

In order to uphold their assurances to the donors and their families, schools have established and strictly enforce laboratory codes of conduct for all individuals seeking the

privilege of access to the donated bodies. To further bolster the public's trust in a school's solemn culture of respect for the donors, schools and students honor willed body donors and their families in a variety of acts of recognition, including plaques commemorating the names of the donors posted in medical schools, memorial services for the donors hosted by the students and attended by the donors' families and friends, and compilations of poetry and writings from students expressing their gratitude to their "silent teachers." See Garment et al, *Let the Dead Teach the Living* at 1003-1004; see also STIFF 37-39; see also K. Kraco, *Body Bequest Programs in Minnesota*, 6 MINNESOTA MEDICINE 8 (2004) (hereinafter "*Body Bequest Programs*").

These acts provide solace to families and loved ones, helping them to focus on the educational benefit to humanity and not the emotionally traumatic thoughts of the act of dissection itself, and can make a difference in a person's willingness to donate or support donations of their loved ones. As stated in a letter to the medical students of George Washington University Medical Center from the child of a donor, "I respect [my father's] decision, although to be honest it hurts me to think of Daddy being cut open by strangers. So I ask you all to consider the life which was once inside that body.... Learn well whatever he can teach you."

Simultaneously, these ethical standards and acts of recognition to the donors serve to develop respectful, ethical, and emotionally healthy future physicians and other professionals. For at least the last quarter of a century, the imperative has been enforced in medical schools of recognizing the humanity of the donors, emphasizing to students

the privilege of being able to dissect another human being, and in many schools, using the experience of the anatomy lab as the first step in a career-long striving to achieve a healthy balance between objectivity and empathy. *See e.g.* STIFF at 56; *see also* Scott Lozanoff, Ph.D., *The JABSOM Willed Body Donation Program, a Unique Medical Educational Experience*, 63 HAWAII MEDICAL JOURNAL 243 (2004). Additionally, most schools use the anatomy lab as an embarkation point for learning professional ethics, including respecting patient confidentiality. *See Whole Body Donation for Medical Science* at 570.

C. The University of Minnesota Reasonably Enforced its Anatomy Laboratory Rules.

The University of Minnesota’s Anatomy Laboratory Rules state that a mortuary science student has a “responsibility for treating the person who has given his/her own body to advance our education with utmost respect and dignity” and that “[c]onversational language of cadaver dissection outside the laboratory should be respectful and discreet. Blogging about the anatomy lab or the cadaver dissection is not allowable.” (Addendum 17A). Being fully informed of and in agreement with these obligations, Ms. Tatro posted a series of patently offensive messages on her Facebook page visible to hundreds of people referring to the cadaver that she was given the privilege to work with. If interpreted literally, Appellant’s posts suggest disturbing physical misuse of a cadaver. If interpreted as satire, which Appellant would evidently prefer, the posts make a mockery of the donor’s gift to medical education. In either case, as the University asserted and the Court of Appeals appropriately affirmed, “public

comments about ‘playing’ with or taking ‘aggression’ out on a cadaver are inconsistent with the notions of respect and dignity.” *Tatro v. University of Minnesota*, 800 N.W.2d 811, 818 (Minn.Ct. App. 2011) (Addendum 55A).

Ms. Tatro argues that her Facebook postings “were not in violation of the rules cited by the University” because she “did not reveal any privileged or specific information about her work with cadavers in the labs” and because her Facebook posts “cannot be definitively construed as ‘blogging.’” (App. Br. 18.)

Appellant’s arguments are misplaced, and demonstrate a lack of appreciation for the Anatomy Laboratory Rules and their intent. In the unique and fragile circumstance of a willed-body program, the viability of which depends upon the public’s trust, the fact that a body is not identified does little to insulate the program from a public perception that a body was treated disrespectfully. For a donor’s loved ones to learn that a cadaver – any cadaver – was treated in a disrespectful manner would reasonably raise alarms that the body subjected to such insult belonged to the person they knew and loved. But beyond the personal distress of the donors’ loved ones, the action can undermine the public’s trust and cause the greater community to refrain from making their own willed body donation or supporting the donations of their loved ones in the future. *See e.g., Body Bequest Programs* at 8.

Appellant further argues that her behavior was not in violation of the rules because it occurred off-campus, outside of the jurisdiction of the University. However, the Supreme Court has stated that student speech, “in class or out of it, which for any reason

... materially disrupts classwork or involves ... invasion of the rights of others is, of course, not immunized by the constitutional guarantee of freedom of speech.” *Tinker*, 393 U.S. at 513. Ms. Tatro’s comments substantially interfere with the rights of donors and donors’ families to expect that a donated body will be treated with respect and dignity. In addition, it would substantially interfere with the rights of the University if the University could not take reasonable action against students who violate course rules and agreements, such as those at issue here, designed to protect the integrity of its willed-body program.

In addition, to argue that violation of course standards, including referring to a cadaver in a patently offensive manner, should be permissible because it occurs in the realm of social media ignores the reality of modern communication, where “viral” messages spread with unprecedented speed. News of a breach of an Anatomy Bequest Program’s ethical standards in one location can easily undermine the public’s perception of other willed-body programs. For example, in 2004, a cadaver-brokering scandal at *UCLA*’s medical school resulted in frantic phone calls from prospective donors to the *University of Minnesota*’s Anatomy Bequest Program. *See e.g., Body Bequest Programs* at 8. In 2007, following a series of news stories on abuses to cadavers *in other countries*, prospective donors raised alarms that their own bodies might not be used appropriately, and schools, academic laboratories, and associations in the United States rushed to publicize their own codes of conduct and ethical standards as means of protecting the integrity of their programs. *See generally* Steven Labrash & Scott Lozanoff Ph.D.,

Standards and Guidelines for Willed Body Donations at the John A. Burns School of Medicine, 2007, 66 HAWAII MEDICAL JOURNAL 72 (2007).

And in fact, in this case “[Appellant’s] posts eventually reached families of anatomy-bequest-program donors and funeral directors, causing them to contact the university, expressing dismay and concern about [Appellant’s] conduct and to question the professionalism of the program in general – a 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.” *Tatro*, 800 N.W.2d at 822 (Addendum 62A).

Appellant protests that she was disciplined for engaging in speech “deemed harmful to the University’s image” or for “merely upsetting persons in her program” and argues that she “does not become responsible for censoring her writings or speech to maintain the University’s image because she is a student.” (Appellant’s Br. 21, 33). Appellant misstates the breadth of the University’s rules and the Court of Appeals’ holding. As aptly noted by the Court of Appeals, “the rules requiring respect and professionalism in the sensitive area of Mortuary Science appear designed to ensure ongoing trust [between donors and the Anatomy Bequest Program], and [Appellant] agreed to be bound by these rules as a condition of her access to a human donor.” *Tatro*, 80 N.W.2d at 822, (Addendum 62A.) This is a narrow responsibility, one Appellant undertook willingly, and one she failed to uphold.

This is not a case about a student's right, generally, to make statements that may affect the University's image or influence its financial supporters. This case involves the University's compelling need to set and enforce reasonable rules and conditions to protect the integrity of willed-body programs. Such programs may be sustained only to the extent they continue to hold the trust of the public. Facebook postings of the sort made by Appellant substantially interfere with, and pose a direct threat to, the viability of willed-body programs and the opportunity for other students to learn from a donated body. The University properly enforced reasonable rules designed to protect the integrity of its willed-body program.

V. In Order to Prevent Violence, Institutions of Higher Education Must Be Allowed to Respond to Concerning Behavior By Students, Including Statements Made On-Line.

As the Virginia Tech tragedy and other recent news stories sadly demonstrate, colleges and universities are not safe havens immune from violence. To the contrary, institutions have a compelling need to address warning signs of potential violence early in an effort to prevent violence. In this case, Ms. Tatro made a threat of violence that she both intended to be threatening and that others were threatened by. The University reasonably responded by requiring her to undergo a psychiatric evaluation and follow the recommendations made as a result of the evaluation.

In response to the Virginia Tech tragedy of April 2007, the U.S. Secret Service, the U.S. Department of Education, and the Federal Bureau of Investigation collaborated on a 2010 report regarding campus safety in the United States. *See* United States Secret

Service, United States Department of Education, Federal Bureau of Investigation, *Campus Attacks: Targeted Violence Affecting Institutions of Higher Education* (April 2010) [hereinafter “2010 Report”]. Of the 272 cases of “targeted violence”⁶ that served as the basis for the report, nearly one-third were preceded by “concerning behaviors...observed by friends, family, associates, professors, or law enforcement.” *Id.* at 23. Examples of such “concerning behaviors” include “paranoid ideas, delusional statements, changes in personality or performance, disciplinary problems on campus, depressed mood, suicidal ideation, non-specific threats of violence, increased isolation, ‘odd’ or ‘bizarre’ behavior, and interest in or acquisition of weapons.” *Id.* In a similar 2006 report on K-12 violence, concerning behavior was observed prior to fully 93% of the attacks studied.⁷ The 2010 Report notes that the difference in the rate of observed concerning behaviors between K-12 and institutions of higher education may be due, in part, to the comparatively irregular nature of contact between professors and their students, as well as the limited involvement of parents in the higher education setting. 2010 Report at 3-4.

Although college and university life is not necessarily conducive to closely observing concerning behaviors, institutions have nonetheless been accused of ignoring

⁶ Defined as “[a]n incident of violence where a known or knowable attacker selects a particular target prior to their violent attack.” *Id.* at n. 3 (citation omitted).

⁷ United States Secret Service, United States Department of Education. *Prior Knowledge of Potential School-Based Violence: Information Students Learn May Prevent a Targeted Attack* (May 2008), at 4.

warning signs that precede student violence.⁸ The 2010 Report emphasizes that profiles and stereotypes are not effective for predicting violent behavior; instead, “[j]udgments about an individual’s risk of violence should be based upon an analysis of his/her behaviors and the context in which they occur.” 2010 Report at n. 37. When such warning behaviors appear on social networking websites, colleges and universities must be allowed to respond as needed.⁹ As the Court of Appeals properly concluded, “[a] school need not wait for actual violence to occur before taking appropriate steps to ensure the safety of its community.” *Tatro*, 800 N.W.2d at 822 (Addendum 62A).

Higher education’s responsibility for the safety of its students is not new. Since 1991, several state and federal courts have found colleges and universities liable for failure to adequately protect their students—even from themselves.¹⁰ In one case, the surviving relative of a student who committed suicide on campus was allowed to sue the college for his wrongful death. *Schieszler v. Ferrum Coll.*, 236 F.Supp.2d 602 (W.D. Va. 2002). But the expectation that schools protect their students does not stop at the edge of campus; in another case, a lawsuit was allowed to go to trial over an institution’s liability for the off-campus rape of a student. *Nova Se. Univ. v. Gross*, 758 So. 2d 86 (Fla. 2000).

⁸ See, e.g., *Schools Ignoring Student Violence Warning Signs?*, CBS News, May 13, 2010, <http://www.cbsnews.com/stories/2010/05/13/earlyshow/main6479853.shtml>.

⁹ Violence may be preceded by unsettling posts made online. In Maryland, a college student posted threatening language on Twitter several days before fatally stabbing her roommate. See Virginia Terhune, *Grand jury indicts Bowie State student for murder*, Gazette.Net, Oct. 13, 2011, <http://www.gazette.net/article/20111013/NEWS/710139769/1010/grand-jury-indicts-bowie-state-student-for-murder&template=gazette>.

¹⁰ See Helen Hickey de Haven, *The Elephant in the Ivory Tower: Rampages in Higher Education and the Case for Institutional Liability*, 35 J.C. & U.L. 503, 589 (2009).

In the wake of the January, 2011 shooting of U.S. Representative Gabrielle Giffords and nineteen bystanders, some have even gone so far as to criticize a school for failing to protect the *community* from a *former* student.¹¹ The shooter, Jared Lee Loughner, had been a student at an Arizona community college but was suspended for his strange behavior and a particularly troubling YouTube post.¹² The school conditioned Loughner's return to campus on him seeking a mental health evaluation, but Loughner did not follow through and the school took no further action.¹³ Three and a half months later, the Loughner opened fire and killed six people.¹⁴ Some have also used this case to call for schools to investigate possible threats through social media like Facebook and Twitter.¹⁵

Statutes and regulations enacted over the last twenty years demonstrate a clear legislative intent to protect college and university students from acts of violence. In 1990, Congress passed the Crime Awareness and Campus Security Act, (the "Clery Act"), in memory of a college student who was brutally raped and murdered on her

¹¹ See A.G. Sulzberger & Trip Gabriel, *College's Policy on Troubled Students Raises Questions*, N.Y. TIMES, Jan. 13, 2011, at A17, <http://www.nytimes.com/2011/01/14/us/14college.html>.

¹² Rong-Gong Lin II et al., *School Releases YouTube Post from Loughner*, L.A. TIMES, Jan. 15, 2011, <http://articles.latimes.com/2011/jan/15/nation/la-na-arizona-shooting-20110115>.

¹³ Eric Lipton et al., *Arizona Suspect's Recent Acts Offer Hints of Alienation*, N.Y. TIMES, Jan. 8, 2011, at A18, http://www.nytimes.com/2011/01/09/us/politics/09shooter.html?_r=1.

¹⁴ *Id.*

¹⁵ See e.g. Johnny Lee, *Why Campus Security Teams Should Investigate Social Media in Threat Assessments*, http://epanicbutton.com/media/9441/social_media_article.pdf (last visited Nov. 23, 2011).

college campus. 20 USC § 1092(f) (2011).¹⁶ The Clery Act imposes three general categories of requirements upon institutions of higher education: 1) policy disclosure; 2) records collection and retention; and 3) information dissemination.¹⁷ At both the federal and state level, though, legislative and administrative action has moved beyond the Clery Act's reporting requirements in the direction of *prevention* of crime. In 2002, the U.S. Secret Service and the U.S. Department of Education produced a report recommending the implementation of "threat assessment teams" fashioned after the Secret Service's own threat assessment model.¹⁸ Although this 2002 report was directed at the K-12 educational setting, its principles have been applied to higher education.¹⁹ Since 2008, Virginia and Illinois—two states that experienced tragic episodes of student violence²⁰—have enacted statutes and regulations requiring their colleges and universities to create violence prevention committees. *See* Va. Code Ann. § 23-9.2:10 (2011), 110 Ill. Comp. Stat. 12/1 (2011), and 33 Ill. Reg. 8175 (2009).

In 2009, Virginia Tech published an analysis of its own threat assessment model, including discussion of the use of psychiatric evaluations. Marlsa R. Randazzo & Ellen

¹⁶ *See* U.S. Department of Education, Office of Postsecondary Education, *The Handbook for Campus Crime Reporting*, page 3 (2005).

¹⁷ *Id.*

¹⁸ *See* U.S. Department of Education & U.S. Secret Service, *Threat Assessment in Schools: A Guide to Managing Threatening Situations and to Creating Safe School Climates* (2002).

¹⁹ *Colleges Re-examine Safety After Rampage*, THE WALL STREET JOURNAL ON-LINE (January 25, 2011),

<http://online.wsj.com/article/SB10001424052748704279704576102083947571462.html>.

²⁰ The Virginia Tech shooting took place in April, 2007 and the shooting at Northern Illinois University occurred in February, 2008.

Plummer, *Implementing Behavioral Threat Assessment on Campus: A Virginia Tech Demonstration Project* at 23 (Nov. 2009). This report notes that “80 percent of counseling center directors surveyed from across the United States reported that they do mandatory assessments of persons of concern.” *Id.* at 58 (internal citation and emphasis omitted). In Ms. Tatro’s case, a psychiatric evaluation was necessary to determine whether she was a threat.

The safety of the campus community is critical to higher education’s mission of encouraging the free exchange of ideas. Comments of a threatening nature can squelch or discourage the free exchange of ideas. Ms. Tatro’s comments frightened both her peers and her professors, even causing one of her professors to shake visibly.

(Addendum 53A). If Ms. Tatro’s arguments – that she and other students have a right to make threats that cause fear in others without the possibility of any sanction from the university, not even a required psychological evaluation – are accepted by this Court, public colleges and universities would have very few means to try to stop violence on campus before it happens. It would substantially interfere with the University’s mission of providing a safe and effective learning environment for all students if the University was not allowed to impose any sort of discipline on a student whose threats caused fear in others. The discipline imposed – the psychiatric evaluation and academic probation – was reasonable and was narrowly tailored to help the University achieve its goal of preventing

violence on campus and providing a learning environment where the free exchange of ideas can thrive.²¹

CONCLUSION

A public university may, consistent with the First Amendment, issue reasonable academic discipline against a student who violates ethical standards and course rules where those course rules are reasonably related to the university's pedagogical goals and are necessary to protect the integrity of the university's willed body program. A public university may, consistent with the First Amendment, discipline a student who made a threat of violence and require her to undergo a psychiatric evaluation and comply with the evaluation's requirements. This Court should affirm the Court of Appeals' dismissal of Ms. Tatro's claims.

²¹ The applicable legal standards advocated by the University with respect to Ms. Tatro's violation of course rules and her threatening comments are correct. However, the discipline imposed by the University would satisfy an even stricter standard of review. The discipline was narrowly tailored to satisfy the university's compelling and substantial interests in preventing violence, teaching appropriate professional ethics, enforcing reasonable course rules, and protecting the integrity of willed body programs.

Dated: December 7, 2011

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 131 and Minn. R. Civ. App. P. 132 for a brief produced with proportional font and typeface in 13-point Times New Roman using Microsoft Word 2010.

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