No. 14-2988

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Craig Keefe,

Appellant,

vs.

Beth Adams, Connie Frisch, and Kelly McCalla

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA,
THE HONORABLE JOAN N. ERICKSEN, JUDGE

Civil No. 13-326

RULE 29(b) MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE IN SUPPORT OF APPELLANT

STUDENT PRESS LAW CENTER, ELECTRONIC FRONTIER FOUNDATION, AMERICAN BOOKSELLERS FOUNDATION FOR FREE EXPRESSION and NATIONAL COALITION AGAINST CENSORSHIP

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MOTION

This case presents important and far-reaching issues implicating the authority of state colleges and universities to regulate the speech of their students at all times, on campus or off, even in informal social settings and even when they are voicing opinions on matters of public concern. Amici are four national First Amendment organizations that deal regularly with censorship issues involving the rights of young people to express themselves online.

The Student Press Law Center ("SPLC") is a non-profit, non-partisan organization that, since 1974, has been the nation's only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment. The SPLC provides free legal information and educational materials for student journalists, operates a nationwide referral network of pro-bono counsel that represents students in First Amendment disputes with their institutions, and publishes the widely used media-law reference textbook, *Law of the Student Press*, now in its fourth edition. Because of the heavy censorship of student expression in school-affiliated media, the SPLC has special concern for keeping independent, non-school-subsidized online media beyond the reach of regulators who may abuse their authority to retaliate for speech critical of or embarrassing to the institution.

The Electronic Frontier Foundation ("EFF") is a non-profit civil liberties organization that has worked for more than twenty years to protect consumer interests, innovation, and free expression in the digital world. EFF and its more than 27,600 dues- paying members have a strong interest in helping the courts and policy-makers apply First Amendment principles in a manner that protects the constitutional rights of those who use technology to communicate. EFF works directly with students, student journalists, and young adult community activists to increase awareness and facilitate engagement in advocacy for digital freedom issues. EFF frequently assists students of all educational levels who are threatened with disciplinary action from school officials who seek to impose their authority over student's off-campus, online activities, and recognizes that such attempts pose a serious infringement on students' First Amendment rights. EFF has a strong interest in maintaining the Supreme Court's landmark holding in *Tinker v. Des Moines Independent Community School District*, 393 US 503 (1969) as a shield against infringements on students' speech rights rather than as a sword to punish off-campus speech.

The American Booksellers Foundation for Free Expression ("ABFFE") is the bookseller's voice in the fight against censorship. Founded by the American Booksellers Association in 1990, ABFFE's mission is to promote and protect the free exchange of ideas, particularly those contained in books, by opposing

restrictions on the freedom of speech; issuing statements on significant free expression controversies; participating in legal cases involving First Amendment rights; collaborating with other groups with an interest in free speech; and providing education about the importance of free expression to booksellers, other members of the book industry, politicians, the press and the public.

The National Coalition Against Censorship (NCAC) is an alliance of more than fifty national non-profit literary, artistic, religious, educational, professional, labor, and civil liberties groups that are united in their commitment to freedom of expression. Since its founding in 1974, NCAC has worked through education and advocacy to protect the First Amendment rights of thousands of authors, teachers, students, librarians, readers, artists, museum-goers, and others around the country. NCAC is particularly concerned about laws affecting online speech which are likely to have a disproportionate effect on young people who use social media as a primary means of communication, may engage in ill-considered but harmless speech online, and may employ abbreviated and idiosyncratic language that is subject to misinterpretation.

Amici believe their appearance will be of benefit in the Court's consideration of this appeal for several reasons. First, the case is a relatively novel one. While cases involving content-based regulation of speech on social media have been litigated to conclusion with some regularity at the K-12 level, it is

exceedingly rare for a Court of Appeals to hear a case involving punishment of an adult-aged college student for off-campus speech on social media. In the college setting, deference to institutional interests is diminished and the interests of the speaker are heightened; consequently, established K-12 jurisprudence is of limited value. The Supreme Court has not had occasion to rule on the applicability of established student-speech jurisprudence in the off-campus social media setting. As a result, the Court is writing on a relatively clean slate, and its ruling will be influential on courts throughout the country as future such situations work their way through the appeal process.

Second, the case has considerably broader potential impact than may appear from its face. While the plaintiff/appellant, Craig Keefe, may have engaged in relatively low-value speech, tempting the Court to side with the regulator, the standard set forth by the Court below—that a student may be summarily expelled from college with minimal process if his academic department deems his off-campus speech to be "unprofessional"—sweeps in considerably more (and higher-value) speech than the profane Facebook argument that led to Keefe's expulsion. Amici speak for the journalists, bloggers, activists, creative writers and artists whose speech may at times use harsh language that provokes complaints from offended audience members—exactly the type of speech that the First Amendment exists to protect, nowhere more so than on the campus of a college or university.

Third, the case presents an issue of special importance because it is the first and perhaps only opportunity for this Circuit to distance itself from the patently erroneous ruling in *Tatro v. University of Minnesota*, 816 N.W.2d 509 (Minn. 2012), decided by only three of the seven active justices because of four recusals. In that case, the justices purported to create a never-before-recognized exception to the First Amendment that is flatly inconsistent with U.S. Supreme Court precedent. The *Tatro* ruling—that students' speech loses its First Amendment protection if it is deemed to violate "established professional conduct standards," without inquiry into whether those professional standards could themselves be applied constitutionally to social-media speech on personal time—is patently erroneous for the reasons explained in Amici's brief. Because of the untimely death of the plaintiff in the *Tatro* case shortly after the Minnesota Supreme Court's ruling, the case could not be appealed to the U.S. Supreme Court and remains on the books as a departure from well-settled First Amendment jurisprudence. This case thus carries additional importance and complexity because it enables the federal courts to set right the error that could not be corrected in Amanda Tatro's case itself, recognizing the invalidity of that rogue decision and directing that Keefe's case be reconsidered without reliance on it. Because Minnesota state case law is now irreconcilable with U.S. Supreme Court precedent, the continued existence of *Tatro* on the books will confuse speakers and regulators alike—imposing an

impermissible chill on Minnesota students when they speak on personal, off-campus time—unless this Court sets the matter straight.

For all of the aforesaid reasons, Amici respectfully move for leave to file the attached brief in support of Plaintiff-Appellant Keefe.

Dated: November 24, 2014

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Filed in Support of Appellant; Seeking Reversal

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CORPORATE DISCLOSURE STATEMENTS

Amicus, the Student Press Law Center, is an IRS 501(c)(3) nonprofit corporation incorporated under the laws of the District of Columbia with offices in Arlington, Virginia. The Center does not issue stock and is neither owned by nor is the owner of any other corporate entity in part or in whole. The corporation is operated by a fifteen-member Board of Directors.

Amicus, the Electronic Frontier Foundation (EFF) does not have a parent corporation and no publicly held corporation owns 10% or more of its stock.

Amicus, the American Booksellers Foundation for Free Expression (ABFFE) is an IRS 501(c)(3) corporation incorporated under the laws of Delaware with offices in New York, N.Y. ABFFE does not issue stock and is neither owned by nor is the owner of any other corporate entity in part or in whole. ABFFE is operated by a twelve-member board of directors.

Amicus, the National Coalition Against Censorship (NCAC) is an IRS 501(c)(3) nonprofit corporation organized under the laws of New York with offices in New York, N.Y. It neither has ownership in, nor is owned by, any other corporate entity in whole or in part.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATE STATUTES

RULES

CONSTITUTIONAL PROVISIONS

INTEREST OF AMICI

The Student Press Law Center ("SPLC") is a non-profit, non-partisan organization that, since 1974, has been the nation's only legal assistance agency devoted to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment. The SPLC provides free legal information and educational materials for student journalists, and its legal staff jointly authors the widely used media-law reference textbook, *Law of the Student Press*.

Because of the heavy censorship of on-campus student journalism, students are increasingly taking their speech off campus to address issues important to their lives. The SPLC consequently has special concern for maintaining the safety of non-school-funded websites as places where young journalists can call public attention to problems in their schools without fear of censorship. Although this case does not involve student journalism, the district court's logic and ultimate conclusions could be applied to student journalists in a way that greatly circumscribes their ability to speak on matters of public concern.

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apply First Amendment principles in a manner that protects the constitutional rights of those who use technology to communicate. EFF works directly with students, student journalists, and young adult community activists to increase awareness and facilitate engagement in advocacy for digital freedom issues. EFF frequently assists students of all educational levels who are threatened with disciplinary action from school officials who seek to impose their authority over student's off-campus, online activities, and recognizes that such attempts pose a serious infringement on students' First Amendment rights. EFF has a strong interest in maintaining the Supreme Court's landmark holding in *Tinker v. Des Moines Independent Community School District*, 393 US 503 (1969), as a shield against infringements on students' speech rights rather than as a sword to punish off-campus speech.

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members of the book industry, politicians, the press and the public. ABFFE, which is incorporated in Delaware and has its principal place of business in New York, has hundreds of bookseller members who are located from coast to coast.

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This brief is accompanied by a motion for leave to appear as amicus pursuant to Fed. R. App. P. 29(b).

[1] NCAC's members include organizations such as the American Civil Liberties Union, Authors Guild, American Association of University Professors, PEN American Center, and the National Council of Teachers of English. The views presented in this brief, however, are those of NCAC alone and do not necessarily represent the views of any of its members.

No party's counsel authored the brief in whole or in part and no person other than amici contributed money that was intended to fund preparing or submitting the brief.

ARGUMENT

When a college student speaks on his personal time outside the confines of the campus to a willing audience of social media users, the college's legitimate interest in regulating the student's speech is at its nadir. Whatever the scope of a college's authority to regulate or penalize speech to a captive in-class audience, a much greater burden of justification is imposed on the college that reaches into a student's off-campus communications.

Arguably, *off-campus* communications could not be punished by a college even if punishment was "necessary to avoid material and substantial interference with schoolwork or discipline"—the standard that applies in the on-campus, K-12 setting.[2] But the Court need not reach that question because it is undisputed that the speech at issue here did *not* cause a material disruption in the classroom. Instead, the only question is whether colleges can—summarily and with minimal due process—expel students for *non-disruptive, off-campus* speech merely because the college feels the speech is "unprofessional." And answering "yes" to this question would put far too much discretion in the hands of government regulators—authority that history demonstrates will be abused to silence critics and whistleblowers.

[2] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969).

America is more reliant on college students than ever before to meet citizens' basic needs for information.[3] According to one recent study, one out of eight journalists covering state capitols is a college student, and in three states, college journalists actually outnumber professionals in the press corps.[4] To do their jobs, these students must be assured that the censorship authority of college administrators will not follow them into their off-campus lives as journalists, with expulsion lurking if some aggrieved reader should complain that their choice of language is "unprofessional." There is no "unprofessionalism" exception to the First Amendment when the regulator is a college and the speaker is a student using personal, off-campus means of communication. For the welfare of America's most vulnerable journalists, this Court must say so unequivocally.

I. College students speaking on matters of public concern enjoy strong First Amendment protections, especially off-campus, even if the speech is offensive.

The district court characterized the statements at issue in this case as follows:

> [They] belittled another student for receiving testing accommodations, asserted there was not enough whiskey to control the anger that arose out of a late change to a group project, professed his need for anger

[3] Jonathan Peters & Frank LoMonte, "College Journalists Need Free Speech More Than Ever," THE ATLANTIC, March 1, 2013, *available at* http://www.theatlantic.com/national/archive/2013/03/college-journalists-need-free-speech-more-than-ever/273634/ (last viewed Nov. 17, 2014).

[4] Jodi Enda *et al.*, "America's Shifting Statehouse Press," PEW RESEARCH CENTER, July 10, 2014, *available at* http://www.journalism.org/2014/07/10/americas-shifting-statehouse-press/ (last viewed Nov. 17, 2014).

> management, questioned whether anyone had heard of mechanical pencils and promised to give somebody a hemopneumothorax with an electric pencil sharpener, and called a fellow student a "stupid bitch."

Dkt. 65 at 24. Clearly, the district court disapproved of Keefe's mode of expression, and amici agree Keefe's choice of words was coarse and offensive, and likely an ineffective way to communicate his frustrations. But the district court's job was not to give Keefe a lesson in persuasive writing or punish his potty mouth. Its job was to consider the substance of his speech, and the context in which it was made, and to decide whether he could be punished for that speech in a manner consistent with the First Amendment. Controlling Supreme Court precedent makes clear his discipline was unconstitutional.

A. Keefe's speech was on a matter of public concern and is entitled to special protection under the First Amendment.

"'[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.'" *Snyder v. Phelps*, 131 S.Ct. 1207, 1217, 1215 (2011) (quoting *Connick v. Myers*, 461 U.S. 138, 145 (1983)). Such speech cannot be punished merely because it is "unrefined" or "upsetting." *Id.* at 1217, 1219.

Thus in *Snyder*, the Court held that defendants could not be held liable for picketing a military funeral with signs that said things such as "Thank God for Dead Soldiers," "Priests Rape Boys," "God Hates Fags," "You're Going to Hell," and "God Hates You." The issues these statements highlighted—"the political and

moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy"—were, according to the Court, matters of "public import" and thus could not be restricted. *Id.* at 1217.

The Court explained that we must tolerate this sort of "insulting," even "outrageous" speech in public debate "'in order to provide adequate "breathing space" to the freedoms protected by the First Amendment.'" *Id.* at 1219 (quoting *Boos v. Barry*, 485 U.S. 312, 322, 108 S.Ct. 1157, 99 L.Ed.2d 333 (1988)); *see also United States v. Alvarez*, 132 S.Ct. 2537, 2543 (2012) ("'[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content'" (quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573, 122 S.Ct. 1700, 152 L.Ed.2d 771 (2002)).

Although neither *Snyder* nor *Alvarez* was a school speech case, the principles those decisions adopt apply with equal force in the educational setting. In fact, four years before *Snyder*, the Supreme Court explicitly rejected the argument that student speech—even at the K-12 level—may be proscribed merely because it is "offensive." *See Morse v. Frederick*, 127 S.Ct. 2618, 2629 (2007). The Court explained that adopting a broad "offensiveness" rule would stretch its school speech precedents too far: "After all," it said, "much political and religious

speech might be perceived as offensive to some. The concern here is not that Frederick's speech was offensive, but that it was reasonably viewed as promoting illegal drug use." *Id.*

And in a case that, like this one, involved punishment under a college-level code of conduct, the Court made clear that "the mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.'" *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973). Specifically, the plaintiff was found to have violated provisions of the student code that required students "to observe generally accepted standards of conduct" and that prohibited "indecent conduct or speech"—language difficult to distinguish from the vague "unprofessional" standard at issue here.

Although he used coarse, even hyperbolically violent language, Keefe's statements focused, in their essence, on (1) his concerns with his nursing program's curriculum[5] and (2) his belief that his instructors were engaged in gender discrimination.[6] Thus, like the speech in *Snyder*, Keefe's speech related to

[5] For example, he rhetorically asked why he had to continue to repeat and be evaluated on certain competencies, and suggested that his instructors were overly controlling. *See* Dkt. 65 at 5.

[6] For example, he wrote that "if your [sic] a female you can go talk to the instructors and get a special table in the very back of the class . . . . I think its [sic] just one more confirmafion [sic] of the prejudice in the program" and that "[i]ts

matters of public concern—whether his college was providing a worthwhile educational experience, free of gender bias—and is thus entitled to "'special protection.'" *Snyder*, 131 S.Ct. at 1215. Keefe's decision to express his doubts on this topic in coarse language did not remove his speech from the protections of the First Amendment and did not give Defendants the authority to punish him.

B. Supreme Court precedent recognizes that college students are not subject to the same limits on their speech as school children.

The Supreme Court has, over the years, placed limits on the speech of schoolchildren out of concern for schools' educational mission and because schoolchildren make for a captive, highly impressionable audience. In a series of student speech cases dating back to 1969, the Supreme Court has held that the on-campus speech of K-12 students may be punished if it causes "substantial disorder" in the work and discipline of the school, *Tinker*, 393 U.S. at 513; that K-12 schools may determine "what manner of speech in the classroom or in school assembly is inappropriate," *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986); and that "educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns." *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273

[sic] really not your fault that the whole sexism thing happens in the nursing program." *See* Dkt. 65 at 5–6.

(1988). Most recently, in *Morse*, the Court held that a school may restrict student speech that administrators reasonably regard as promoting illegal drug use, at least if it occurs at a school event. 127 S.Ct. at 2629.

None of the justifications identified by the Court for restricting student speech exist here: Keefe's statements did not cause a substantial disruption; they were not made at a school assembly or event; they did not bear the imprimatur of his institution; and they did not promote illegal drug use.

And moreover, even if Keefe's statements could be put in one of these buckets, the above-referenced decisions all dealt with children in grades K-12, and the Court has long-held that adult college students are entitled to substantially more latitude—indeed, that protecting free speech at the college level is at the core of what this country stands for:

> [T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960). The college classroom with its surrounding environs is peculiarly the "'marketplace of ideas,'" and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom. *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967).

Healy v. James, 408 U.S. 169, 180–81 (1972); *see also id.* at 184. More recently, in *Rosenberger v. Rector & Visitors of University of Virginia*, the Court noted that the danger of chilling speech "is especially real in the University setting":

> [U]niversities began as voluntary and spontaneous assemblages or concourses for students to speak and to write and to learn. The quality and creative power of student intellectual life to this day remains a vital measure of a school's influence and attainment. For the University, by regulation, to cast disapproval on particular viewpoints of its students risks the suppression of free speech and creative inquiry in one of the vital centers for the Nation's intellectual life, its college and university campuses.

515 U.S. 819, 835–36 (1995) (internal citation omitted).

The Eighth Circuit has taken these sentiments to heart: In *Bystrom v. Fridley High School*, a case in which the court held that a high school could prevent on-campus distribution of an underground newspaper, it stated: "[W]e deal here only with secondary schools. Specifically, what we say in this opinion does not apply to college or other post-secondary campuses and students. Few college students are minors, and colleges are traditionally places of virtually unlimited free expression." 822 F.2d 747, 750 (8th Cir. 1987); *see also McCauley v. Univ. of the Virgin Islands*, 618 F.3d 232, 242–47 (3d Cir. 2010) (stating that "the teachings of *Tinker*, *Fraser*, *Hazelwood*, *Morse*, and other decisions involving speech in public elementary and high schools, cannot be taken as gospel in cases involving public universities").

Keefe is not a child, and his speech was not directed at children. He is an adult, and his speech was presumably directed to his peers—his family, friends, and acquaintances on Facebook. His speech caused no disruption, and Defendants simply cannot meet the heavy burden imposed upon them to justify their actions.

C. Supreme Court precedent also recognizes that schools cannot restrict off-campus speech to the same extent as on-campus speech.

Keefe—an adult college student who made statements on a matter of public concern—ought to be immune from punishment for yet a third reason: he made the statements at issue not during class or on campus but in the free-wheeling world of Facebook.

Unlike the situation at hand, all the cases cited above—*Tinker*, *Frazer*, *Hazelwood*, and *Morse*—involved speech that took place *at school*.[7] Indeed, *Tinker*'s most quotable sentence revolves around the "schoolhouse gate," 393 U.S. at 506, and recognizes that, to achieve their educational mission, schools must be able to restrict speech that takes place on the campus side of this portal, even if the

[7] The student in *Morse* was technically not on school property—he was across the street from his school when he unfurled his banner, but the Supreme Court found this technicality immaterial. It stated, "The event occurred during normal school hours. It was sanctioned by Principal Morse 'as an approved social event or class trip,' and the school district's rules expressly provide that pupils in 'approved social events and class trips are subject to district rules for student conduct.' . . . Frederick cannot 'stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.'" 127 S.Ct. at 2624 (internal citations omitted).

speech would otherwise be beyond their control. Nowhere in *Tinker* did the Court suggest that a school's powers to restrict student speech extends *beyond* the schoolhouse gate, and the Supreme Court has never "allowed schools to punish students for off-campus speech that is not school-sponsored or at a school-sponsored event and that caused no substantial disruption at school." *J.S. v. Blue Mountain Sch. Dist.*, 650 F.3d 915, 933 (3d Cir. 2011).

Quite the opposite: the Court has made clear that schools generally *cannot* restrict or punish student's off-campus speech. For example, in *Morse*, the Court held that if the high school student in *Fraser*—who delivered a speech at a school assembly in which he employed an "'elaborate, graphic, and explicit sexual metaphor'"—had instead "delivered the same speech in a public forum outside the school context, *it would have been protected*." *Morse*, 127 S.Ct. at 2626 (quoting *Fraser*, 478 U.S. at 678) (emphasis added); *accord Hazelwood*, 484 U.S. at 266.

Meanwhile, scores of lower-court rulings—including those of this Circuit—have accepted as a given that speech outside the "schoolhouse gate" is afforded greater protection than on-campus speech. In *Bystrom*, for example, the Eighth Circuit stated,

> The school district asserts no authority to govern or punish what students say, write, or publish to each other or to the public at any location outside the school buildings and grounds. If school authorities were to claim such a power, quite different issues would be raised, *and the burden of the authorities to justify their policy under*

> *the First Amendment would be much greater, perhaps even insurmountable*.

822 F.2d at 750 (emphasis added); *see also Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 259 (3d Cir. 2002) ("*Tinker* acknowledges what common sense tells us: a much broader 'plainly legitimate' area of speech can be regulated at school than outside school."); *Thomas v. Bd. of Educ.*, 607 F.2d 1043, 1050 (2d Cir. 1979) ("[B]ecause school officials have ventured out of the school yard and into the general community where the freedom accorded expression is at its zenith, their actions must be evaluated by the principles that bind government officials in the public arena.").

The policies underlying the Court's school speech cases—the need for the school to achieve its educational mission, to protect impressionable and "captive" children from inappropriate content, and to have some say in speech that may be perceived as reflecting the school's viewpoint (such as in the case of a student newspaper)—simply do not apply here.

Facebook postings are not forced on captive viewers. The speech must be affirmatively sought out. Viewers who are offended can look away. The potential audience is not limited to school listeners—indeed, the speech may not even be directed at school listeners at all. It is one thing to say a school can interfere with a student's communications with fellow students; it is quite another to say that a college may interfere with the student's ability to communicate with the general

public. While this case is about Facebook, if colleges have control over everything a student says off-campus on personal time, that subsumes not just social media but letters to the local newspaper, interviews with a television station, remarks delivered to a meeting of the Board of Regents, or anything else that a college might desire to regulate. The potential to chill so much whistleblowing speech is intolerable.

If Keefe had been hostile in one of his classes—if he had called someone a "stupid bitch" to her face, during class—there is no question that his instructor would have been well within his authority in asking Keefe to leave and even in lowering his grade. But what Keefe did—write about his frustrations on Facebook—is categorically different. If the students who were bothered by his speech didn't like it, they simply should have avoided his Facebook page—rather than choosing to interact with it as the district court's opinion indicates they did. The law must recognize the difference between unavoidable on-campus speech and completely avoidable off-campus speech by applying a more protective legal standard to the latter.

II. A public college may not impose discipline based on the anticipation that, once admitted to a regulated profession, a student will engage in speech violating professional standards.

A. *Tatro* is inconsistent with established First Amendment precedent and should not be followed.

The court below relied on the Minnesota Supreme Court's errant reasoning in a somewhat analogous case, *Tatro v. University of Minnesota*, 816 N.W.2d 509 (Minn. 2012), in finding that speech deemed to violate "professional standards" is constitutionally unprotected and can be grounds for summarily removing a student from college. Because of the death of the plaintiff, the *Tatro* ruling was never appealed to the U.S. Supreme Court, but there is every reason to believe that the Court would have overturned the decision as flatly inconsistent with decades of student-speech jurisprudence. This Court must take the opportunity to disavow *Tatro* and to make clear that the federal courts should not rely on it, before more students are needlessly harmed.

In *Morse*, the Supreme Court made abundantly clear that it would entertain no further incursions into student First Amendment rights. *See Morse*, 551 U.S. at 423 (Alito, J., concurring) (joining the majority's ruling "on the understanding that the opinion does not hold that the special characteristics of the public schools necessarily justify any other speech restrictions"). The *Tatro* ruling—that speech loses its constitutional protection if it contravenes "established professional conduct standards"—is just that: an additional speech restriction beyond those recognized by the Supreme Court. *Tatro* is irreconcilable not only with *Morse* but with *Tinker*, which set a far more demanding standard for the exercise of school punitive authority. Since K-12 students are not subject to "professional conduct

standards," *Tatro* produces the indefensible result that college students have less constitutionally protected freedom to speak than those in middle school. This simply cannot be the law.

To equate the First Amendment rights of college students facing punishment by government regulators with those of non-student professionals in the workplace, as the court below did in reliance on *Tatro*, poses a host of both doctrinal and practical problems. To the extent that "professional conduct standards" refers to standards set by *private* standard-setters in a *non*-governmental setting, those standards are completely irrelevant in a First Amendment analysis. A private employer could have fired John and Mary Beth Tinker for refusing to remove their antiwar armbands despite a supervisor's order to do so, could have fired Paul Cohen for wearing a "Fuck the Draft" jacket,[8] could have fired Xavier Alvarez for lying on his job application about being a Congressional Medal of Honor winner,[9] and could have fired Fred Phelps for making a televised spectacle of himself outside the funeral of a dead war hero.[10] Of course, the Supreme Court has told us that all of those acts are constitutionally protected against *government* sanction. Interposing private workplace standards as an end-run around First Amendment

[8] Cohen v. California, 403 U.S. 15 (1971).
[9] United States v. Alvarez, 132 S.Ct. 2537 (2012).
[10] Snyder v. Phelps, 131 S.Ct. 1207 (2011).

rights simply misconceives the unique relationship between government regulator and citizen.

Even if *Tatro* is understood to apply only to the standards set by other *governmental* regulatory bodies such as the Minnesota Board of Nursing that (like a state college) must adhere to First Amendment standards, it is still constitutionally infirm. It is too great a leap to conclude (as the court below did) that the authority, on paper, to reject a license application for "unprofessionalism" automatically means that a college can expel a student for what *the college* deems "unprofessional." A state licensing board must use its authority constitutionally, and there are serious questions whether a state agency could deny or revoke a license based on subjective disapproval of the applicant's rudeness on social media. A court must undertake an independent analysis of whether using state authority to punish "unprofessional" speech satisfies the test of constitutionality in the college/student setting, just as a reviewing court would have been required to undertake a First Amendment analysis had Amanda Tatro been denied state licensure as a funeral director. In that context, a court plainly could not fall back on the face of the licensing regulation and assume it to be constitutional in every application. The *Tatro* court skipped this essential step, and in reliance on *Tatro*, the court below replicated that fatal error.

If a person may be precluded from obtaining a degree in a particular field for noncompliance with the "accepted" standards of the profession, then professional standard-setters will have a stranglehold not just over who enters the profession, but who can obtain an educational credential that may not even lead to a decision to seek admittance to the profession. The dangers of "contracting out" college discipline in this way are obvious. Under the rule of *Tatro*, a college in the 1960s could have expelled a psychiatry student who dissented from the "accepted professional standard" that a patient identifying as homosexual was to be treated for mental illness. Had colleges held psychiatry students to the *Tatro* level of adherence to "professional standards," the American Psychiatric Association might still be ossified in that doctrine, which it formally abandoned in 1973.

As the APA example illustrates, "professional standards" are subject to change. To hold a college freshman in 2014 to the "accepted" standards of a profession he may not enter until 2018 punishes the student not for what he has said today, but for what he might say four years from now, assuming that the speech is even still a violation of professional standards by then. (This form of "anticipatory punishment"—based on the groundless assumption that a college student will not, upon entering the profession, stop acting like a college student and begin conforming to the professional licensing standards to which he is pledged—

calls to mind the dystopian future predicted in the film "Minority Report,"[11] in which suspects are incarcerated based on anticipated future criminality.)

For all of these reasons, the Minnesota Supreme Court fundamentally erred in creating a "professionalism" exemption to the First Amendment in *Tatro*. Because it is not possible to know how the court below would have ruled had *Tatro* been correctly decided, the court should be directed to reconsider the case without regard to the errant authority of *Tatro*.

B. Regardless of the *Tatro* rule, there was no basis to conclude that uncivil speech on social media is a punishable violation of "accepted professional standards."

Even if colleges have the *Tatro* level of authority over their students' off-campus social media lives—and plainly they do not—what Central Lakes College did here distorts the boundaries of *Tatro* beyond recognition. While Amanda Tatro's speech was found to be punishable because it evidenced disrespectful behavior toward cadavers while in the classroom, *see Tatro*, 816 N.W.2d at 522, Keefe's speech indicates nothing of the sort. At worst, Keefe's Facebook posts indicate that he is an argumentative person with a foul mouth in his personal, off-campus life. Colleges are not "24/7 personal niceness police," nor can they claim such authority based on references to vague professional licensing standards that, if applied to outside-of-work behavior, would themselves be unconstitutional.

[11] MINORITY REPORT (20th Century Fox/DreamWorks Pictures 2002).

The Minnesota Board of Nursing has declined to take away the licenses even of nurses who committed serious professional lapses endangering patient safety.[12] It is an unsustainable leap for college administrators to predict that the Board would have construed getting into a profane argument on Facebook to be a punishable violation of professional standards. Moreover, the Board of Nursing would have taken away Keefe's license only after providing a full-dress due process hearing,[13] something he was denied at Central Lakes.

The district court's assertion that Central Lakes was within its authority to punish Keefe for "unprofessional conduct" relies on a selectively incomplete reading of Minnesota statutes. In context, it is abundantly clear that the state's authority to refuse or revoke a license for unprofessionalism relates to

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[12] *See* Brandon Stahl, "In Minnesota, nurses in trouble get second chances," THE STAR TRIBUNE, *available at* http://www.startribune.com/lifestyle/health/226301371.html (last visited Nov. 17, 2014).

[13] The standards governing the Minnesota Board of Nursing are codified at Minn. Stat. §148.261. They provide that the Board may temporarily suspend a nurse's license for a violation of professional conduct standards before conducting a due process hearing only if the Board concludes that the nurse's conduct "would create a serious risk of harm to others." Even then, the suspension is automatically lifted unless the Board provides a full due process hearing comporting with the Administrative Procedure Act within 30 days. By contrast, Central Lakes College—having made neither a finding of dangerousness nor provided, before or afterward, a due process hearing—permanently removed a trainee from an academic program under circumstances that would not even support a temporary license suspension had the trainee been an actual practicing nurse. This is not an example of *enforcing* "accepted professional standards" but *going beyond* "accepted professional standards."

unprofessionalism that jeopardizes patient care, not some generalized sense that a person must be on "workplace best behavior" at all times when off duty. The Minnesota statute from which the trial court quoted says, in full, that a license may be denied or revoked for:

> (6) Engaging in unprofessional conduct, including, but not limited to, a departure from or failure to conform to board rules of professional or practical ***nursing practice*** that interpret the statutory definition of professional or practical nursing as well as provide criteria for violations of the statutes, or, if no rule exists, to the minimal standards of acceptable and prevailing professional or practical nursing practice, ***or any nursing practice that may create unnecessary danger to a patient's life, health, or safety.*** Actual injury to a patient need not be established under this clause.

Minn. Stat. §148.261(6) (emphasis added). In context, this regulation cannot defensibly be read as a restriction on unprofessional *social behavior*—rather, it plainly is about unprofessionalism *in the practice of nursing*.

In an instructive recent case illustrating the First Amendment limits on professional licensing boards, the Massachusetts Supreme Court decided that the First Amendment precluded revoking the license of a funeral director on the grounds of "unprofessional language," the same grounds for which Keefe was disciplined here. *Schoeller v. Bd. of Registration of Funeral Dirs.*, 977 N.E.2d 524 (Mass. 2012). In *Schoeller*, a funeral director lost his license after giving a newspaper interview during which, in an attempt at humor, he described in ghoulish detail the "nasty" details of dissecting human bodies. The court observed

that, although the funeral director was speaking about his work, he was doing so (as was Keefe) outside of his professional capacity; consequently, speech could be punished only if the regulation was narrowly tailored to serve a compelling governmental interest. *Id.* at 534. The court concluded that a generalized interest in the dignity of the profession is insufficient to sustain such a broad incursion into First Amendment rights; thus, the punishment was unconstitutional. *Id.* at 535.

To the extent that the standards of the Minnesota Board of Nursing could be read to extend to "unprofessional" speech in one's personal life that is unconnected to patient safety, those standards would be unconstitutional. Because there is no basis to believe that a personal argument on social media is a punishable violation of "established professional conduct standards," there was no "accepted" standard on which to base a disciplinary finding. Accordingly, even under the invalid precedent of *Tatro*—a standard far less protective of speech than the Constitution requires—Keefe's behavior was beyond the College's punitive authority.

III. Colleges cannot end-run due process by "rebranding" a disciplinary removal for off-campus misbehavior as "academic."

The district court erred in allowing Central Lakes to "rebrand" what plainly was a disciplinary determination to expel Keefe as an "academic removal," thus entitling him only to the minimal informal process he received. Allowing colleges to play such word-games undermines the right to due process and misconceives

why, in limited circumstances, colleges are permitted—for *genuinely* "academic" reasons—to impose penalties without full process.

When a student is expelled from college for disciplinary reasons, the student is entitled to due process that includes a formal hearing at which the student may call witnesses, present evidence and otherwise fully rebut the accusations against him. "Expulsion for misconduct triggers a panoply of safeguards designed to ensure the fairness of factfinding by the university." *Abbariao v. Hamline Univ. Sch. of Law*, 258 N.W.2d 108, 112 (Minn. 1977) (*citing Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961)).

Regardless of nomenclature, removing a student from his academic course of study for saying unkind things to people outside of class is, in the words of the *Abbariao* court, an "expulsion for misconduct." Keefe was not free simply to walk across campus and enroll in the engineering program to continue his education seamlessly. When a student is told he is unwelcome to return to college because of off-campus misbehavior, that student has experienced a "disciplinary expulsion," not an "academic removal."

Had Keefe been caught with drugs or gotten into a bar brawl, his removal would have been recognized as disciplinary and received due-process formalities. Speech cannot be placed into a uniquely *lesser*-protected category than felony

criminal behavior. Colleges cannot constitutionally say: We provide due process before punishing any act of off-campus personal misconduct—except speech.

The published disciplinary standards of Central Lakes College[14] recognize a distinction between what the College calls "social misconduct" (grounds for disciplinary action by the Office of Dean of Students) versus "academic and classroom misconduct" (grounds for more informal action by the student's academic department). Even by the college's own taxonomy, what Keefe is accused of doing fits within the former ("social") category entitling him to the full benefit of due process afforded to disciplinary removals.

This case is indistinguishable from the ruling of a sister court in Kansas which, in 2011, rejected a college's attempt to categorize as "academic" its dismissal of four students from a nursing program for unprofessional behavior on Facebook. *Byrnes v. Johnson Cnty. Cmty. Coll.*, No. 10-2690, 2011 WL 166715, (D. Kan. 2011). In the *Byrnes* case, the college summarily removed the students, without disciplinary due process, because they violated a "sense of propriety" by posting a photo to Facebook, taken during a clinical placement at the local hospital, of themselves posing with a placenta. If anything, the college's claim that the punishment was "academic" was far stronger in the *Byrnes* case, since the students

[14] Central Lakes College Code of Student Conduct Procedure 3.6.1, *available at* http://www.clcmn.edu/general/policies_pdf/3.6.1StudentCodeofConductProcedure.pdf (last viewed Nov. 17, 2014).

were actually on a practicum assignment at the time they took the photos at issue. Still, the court had no difficulty concluding that the punishment was disciplinary and required the formalities accompanying a disciplinary expulsion:

> As Defendants correctly note, higher educational institutions are given broad discretion by the courts with respect to their academic decisions. However, Defendants are in error in characterizing this incident as an 'academic' rather than a 'disciplinary' proceeding. To adopt the position of Defendants' witness would be to label any decision that involved an educational institution as therefore 'academic,' and effectively to eliminate the disciplinary category. The law is clear that academic decisions which are given deference are those related to matters such as the academic grade given a student for course work. This matter, involving alleged violations of codes of conduct, is clearly disciplinary, and the broader discretion afforded educational institutions does not apply.

Id. at *2.

The reason that courts have lowered the burden for imposing academic as opposed to disciplinary sanctions is deference to the subject-matter expertise of those who teach in a specialized field. *See Bd. of Curators v. Horowitz*, 435 U.S. 78, 90 (1978) (holding that "[l]ike the decision of an individual professor as to the proper grade for a student in his course, the determination whether to dismiss a student for academic reasons requires an expert evaluation of cumulative information and is not readily adapted to the procedural tools of judicial or administrative decisionmaking."). No medical training is necessary to assess insulting speech on social media, and no medical expertise was brought to bear in the decision to expel Keefe.

Those running academic programs have academic sanctions (grades, or in extreme cases, removal from a particular class) to enforce academic expectations. And those running professional programs can, with properly limited scope, require students to contractually sacrifice certain freedoms as a condition of participation when contractual formalities are satisfied and when the condition is necessary for the orderly conduct of the academic program (for instance, requiring that a law student in a clinical program agree to honor client confidences, which would directly relate to the performance of voluntarily undertaken academic responsibilities). But when punishment is disciplinary in character and is imposed in response to personal misconduct in violation of a disciplinary rule as opposed to a failure to perform up to academic expectations, the decision is no longer an academic one, and the safeguards accompanying a disciplinary case apply.

If being kicked out of school for off-campus misbehavior is to be regarded as an "academic" decision, then nothing is left of due process jurisprudence for disciplinary removals. If name-calling on social media is a sanctionable act of "unprofessionalism" subject to summary "academic" removal, then surely punching someone in a bar or being publicly intoxicated underage must be equally so. In short, every act covered by a campus disciplinary code is susceptible of being characterized as "unprofessional"—meaning that, in the view of the court

below, every disciplinary violation is now grounds for summary expulsion with minimal process.

If empowered by this Court to summarily expel students whose off-campus speech they find troubling, colleges inevitably will misuse that authority to remove critics—"inevitably," because they already have. In *Barnes v. Zaccari*, 669 F.3d 1295 (11th Cir. 2012), the president of Georgia's Valdosta State University summarily expelled, without pre-removal process, a student environmental activist whose blogging and leafleting the president found annoying. The Eleventh Circuit found the removal to be a violation of the student's clearly established due process rights, despite the college's insistence that the removal was justified by safety concerns over speech indicating that the student might be violent. *Id.* at 1307. Unless the ruling below is reversed, more Valdosta-style overreactions are the unavoidable result.

CONCLUSION

As the Supreme Court has reminded us on many occasions, "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *NAACP v. Button*, 371 U.S. 415, 433 (1963). A standard empowering college administrators to penalize "unprofessional" speech on off-campus social media by summary expulsion sweeps in a breathtaking amount of constitutionally protected speech—speech that

will impermissibly be chilled by the fear of career-derailing, life-altering punishment.

While Craig Keefe's musings on Facebook are perhaps not to be confused with a *Wall Street Journal* editorial, a social media user is not so much different from the "lonely pamphleteer" to whom the Supreme Court has, time after time, afforded the full dignity of the First Amendment. *Branzburg v. Hayes*, 408 U.S. 665, 704 (1972). When students use personal, off-campus time to engage in discourse on matters of public concern such as their perceptions of gender discrimination—even if that discourse is sharp and at times impolite—the First Amendment and the guarantees of Due Process must apply with full force. Because the district court afforded the College a "blank check" to impose content-based punishment without even the showing of "substantial disruption" that would have been required had Keefe spoken in the hallway of a junior high school, the decision below must be reversed.

Dated: November 24, 2014

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Dated: November 24, 2014

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CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system. The following participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system:

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