No. 14-2988

THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CRAIG KEEFE,

Plaintiff-Appellant,

v.

BETH ADAMS, *et al.,*

Defendants-Appellees.

Appeal from U.S. District Court for the District of Minnesota
(0:13-cv-00326-JNE-LIB)

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION OF MINNESOTA AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae American Civil Liberties Union of Minnesota is not a publicly traded corporation. There are no parent corporations or other publicly held corporations that own 10 percent or more of *amicus*.

Dated: November 24, 2014

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103589684v1

Appellate Case: 14-2988 Page: 2 Date Filed: 12/08/2014 Entry ID: 4223340

TABLE OF CONTENTS

CORPORATE DISCLOSURE STATEMENT i

TABLE OF AUTHORITIES iii

STATEMENT OF INTEREST OF *AMICUS CURIAE*..1

INTRODUCTION 2

ARGUMENT 4

I. The District Court Erred in Construing and Applying Constitutional Procedural Due Process Rights...4

A. The definition of, and constitutionally-required procedural due process for, academic and disciplinary dismissals from a degree program at a state college is well-settled. 4

B. A student's dismissal from a degree program at a state college for violation of rules of conduct and ethics is based on disciplinary rather than academic reasoning. 6

II. The District Court Erred in Construing and Applying Constitutional Free Speech Rights. 11

A. It is well-settled that a licensed professional's speech outside the confines of a professional environment is entitled to the full protections of the First Amendment...13

B. A college student's speech, particularly speech outside the confines of the curricular environment, is entitled to the full protections of the First Amendment...19

CONCLUSION 25

CERTIFICATE OF COMPLIANCE.. 26

CERTIFICATE OF VIRUS SCAN 27

CERTIFICATE OF SERVICE 28

103589684v1

Appellate Case: 14-2988 Page: 3 Date Filed: 12/08/2014 Entry ID: 4223340

TABLE OF AUTHORITIES

Cases

Ashcroft v. ACLU,
535 U.S. 564 (2002)..12

Bd. of Curators of the Univ. of Mo. v. Horowitz,
435 U.S. 78 (1978)... passim

Bd. of Regents v. Southworth,
529 U.S. 217 (2000)..20

Bethel Sch. Dist. No. 403 v. Fraser,
478 U.S. 675 (1986)... 10, 11, 22, 23

Brown v. Entm't. Merchs. Assoc.,
131 S.Ct. 2729 (2011)..12

Burnham v. Ianni,
119 F.3d 668 (8th Cir. 1997) 12

Chaplinsky v. New Hampshire,
315 U.S. 568 (1942)..12

Cohen v. California,
403 U.S. 15 (1971)..11

DeJohn v. Temple Univ.,
537 F.3d 301 (3d Cir. 2008) 22

Fenje v. Feld, 398 F.3d 620 (7th Cir. 2005) 5, 9

Gentile v. Bar of Nevada,
501 U.S. 1030 (1991) 15

Goldfarb v. Va. State Bar,
421 U.S. 773 (1975)..13

Goss v. Lopez,
419 U.S. 565 (1975).. 4, 11

Guse v. Univ. of S.D.,
No. 08–4119, 2011 U.S. Dist. LEXIS 34621 (D.S.D. Mar. 30, 2011)............7

Hazelwood Sch. Dist. v. Kuhlmeier,
484 U.S. 260 (1988)..23

Healy v. James,
408 U.S. 169 (1972).. 20, 21

Henderson v. Engstrom,
No. 10–4116, 2012 U.S. Dist. LEXIS 129850 (D.S.D. Sept. 12, 2012).........5

Ikpeazu v. Univ. of Neb.,
775 F.2d 250 (8th Cir. 1985) 6

Keeton v. Anderson-Wiley,
664 F.3d 865 (11th Cir. 2011) 18

Keyishian v. Board of Regents,
385 U.S. 589 (1967)...21

King v. Governor of N.J.,
767 F.3d 216 (3d Cir. 2014) 14

Ku v. Tennessee,
332 F.3d 431 (6th Cir. 2003) 9

Lowe v. SEC,
472 U.S. 181 (1985)...13

Marinello v. Bushby,
No. 98-60021, 1998 U.S. App. LEXIS 39083 (5th Cir. Nov. 17, 1998)........18

Mauriello v. Univ. of Med. & Dentistry,
781 F.2d 46 (3d Cir. 1986) 5

McCauley v. Univ. of Virgin Islands,
618 F.3d 232 (3d Cir. 2010) 22, 23

Miller v. California,
413 U.S. 15 (1973)...12

Monroe v. Ark. State Univ.,
495 F.3d 591 (8th Cir. 2007) 6, 7, 8

Moore-King v. Cnty of Chesterfield,
708 F.3d 560 (4th Cir. 2013) 14

Morse v. Frederick,
551 U.S. 393 (2007)...11

Navato v. Sletten,
560 F.2d 340 (8th Cir. 1977) 11

Neonatology Assocs., P.A. v. Comm'r,
293 F.3d 128 (3d Cir. 2002) 1

103589684v1

Appellate Case: 14-2988 Page: 5 Date Filed: 12/08/2014 Entry ID: 4223340

New Jersey v. T.L.O.,
469 U.S. 325 (1985)..22

New York v. Ferber,
458 U.S. 747 (1982)..12

Oyama v. Univ. of Haw.,
Civ. No. 12-00137, 2013 WL 1767710 (D. Haw. Apr. 23, 2013)(unpublished)..18

Papish v. Univ. of Miss. Curators,
410 U.S. 667 (1973)..20

Planned Parenthood of SE Pennsylvania v. Casey,
505 U.S. 833 (1992).. 15, 16

Reno v. ACLU, 521 U.S. 844, 870 (1997) 11, 12

Richmond v. Fowlkes,
228 F.3d 854 (8th Cir. 2000) 5, 6

Roach v. Univ. of Utah,
968 F. Supp. 1446 (D. Utah 1997) 10

Shaboon v. Duncan,
252 F.3d 722 (5th Cir. 2001) 9

Sweezy v. New Hampshire,
354 U.S. 234 (1957)..21

Tinker v. Des Moines Independent Community School District, 393 U.S. 503
(1969).. passim

U.S. v. Lacefield,
250 F. App'x. 670 (6th Cir. 2007)..9

United States v. Wunsch,
84 F.3d 1110 (9th Cir. 1996) 15

Voices for Choices v. Ill. Bell Tel. Co.,
339 F.3d 542 (7th Cir. 2003) 1

Watson v. State of Maryland,
218 U.S. 173 (1910)..13

Widmar v. Vincent,
454 U.S. 263 (1981)..24

Wollschlaeger v. Florida,
760 F.3d 1195 (11th Cir. 2014) 13, 16

Appellate Case: 14-2988 Page: 6 Date Filed: 12/08/2014 Entry ID: 4223340

Woodis v. Westark Comm. Coll.,
160 F.3d 435 (8th Cir. 1998) 5

Yoder v. Univ. of Louisville,
526 F. App'x 537 (6th Cir. 2013) 9

State Cases

Heinecke v. Department of Commerce,
810 P.2d 459 (Utah Ct. App. 1991) 17

Reyburn v. Minnesota State Bd. of Optometry,
78 N.W.2d 351 (Minn. 1956) 17

Stephens v. Pennsylvania State Bd. of Nursing,
657 A.2d 71 (Pa. Commw. Ct. 1995) 17

Tatro v. Univ. of Minn.,
816 N.W.2d 509 (Minn. 2012) 18

State Statutes

Minn. Stat. § 148.251, subd. 1(1) 14
Minn. Stat. § 148.261 ....7, 15, 16
Minn. Stat. § 148.57, subd. 3 17

State Regulations

Minn. R. 6301.2320, subd. A 14

Minn. R. 6301.2340, subp.3 14

Federal Court Rules

6th Cir. L.R. 32.1(b) 9

8th Cir. L.R. 32.1A 8

Fed. R. App. Proc. 29(c)(5) 1

Other Authorities

American Nursing Association's Code of Ethics 7

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The American Civil Liberties Union is a nationwide, nonprofit, nonpartisan organization with over 300,000 members dedicated to defending the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. The American Civil Liberties Union of Minnesota ("ACLU-MN") is one of its statewide affiliates with more than 7,000 members. Since its founding in 1952, the ACLU-MN has engaged in constitutional litigation, both directly and as *amicus curiae*, in a wide variety of cases. Among the rights that the ACLU-MN has litigated to protect are the constitutional rights to due process and free speech.

As Circuit Judge, and now Justice Alito, stated in *Neonatology Assocs., P.A. v. Comm'r*, "[e]ven when a party is very well represented, an *amicus* may provide important assistance to the court." 293 F.3d 128, 132 (3d Cir. 2002). Here, ACLU-MN presents "ideas, arguments, theories, [and] insights" not "found in the parties' briefs" intended to assist the Court in protecting the proper scope of due process and free speech constitutional privileges. *Voices for Choices v. Ill. Bell Tel. Co.*, 339 F.3d 542, 545 (7th Cir. 2003).

[1] Pursuant to Fed. R. App. Proc. 29(c)(5), *amicus* states that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amicus curiae*, its members, or its counsel, made any monetary contribution to the preparation or submission of this brief.

INTRODUCTION

Appellant is a Licensed Practical Nurse. In 2012, he was pursuing a college degree with the goal of becoming a registered nurse. Appellees summarily dismissed him from the nursing program based on the content of his personal Facebook page. The district court concluded the dismissal was for academic rather than disciplinary reasons, despite no connection between Appellant's speech, on the one hand, and the curricular requirements of the nursing program, on the other hand. The district court further concluded the state may regulate and punish speech deemed "unprofessional," despite no connection between the speech, on the one hand, and the state's interest in regulating either patient care or curricular performance, on the other hand. The district court erred in reaching both conclusions.

The district court adopted a novel and overbroad view of the state's ability to regulate and punish speech under the guise of academic administration. The decision permits the state to characterize its regulation and punishment of student speech unconnected to the curricular requirements as academic, rather than disciplinary. In doing so, the decision runs afoul of binding precedent that distinguishes between academic and disciplinary dismissals, and the constitutionally-required procedural due process for each.

With regard to licensed professionals, it is well-established that the state may regulate their speech when there is a connection between the regulation and the state's interest in protecting the public. Absent the required connection, the state's regulatory interest yields to the full protections of the First Amendment. There is no basis to conclude that a college student pursuing a licensed professional degree is entitled to fewer constitutional free speech privileges than those of the licensed professional. Neither the Supreme Court nor the Eighth Circuit has ever held that a college student's speech, particularly off-campus speech, is entitled to less than the full protections of the First Amendment.

The "substantial-disruption" test applicable to secondary school student speech, as set forth in *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969), does not apply to Appellant's speech. In the view of the Supreme Court, the college educational system's mission is not to teach students shared societal values and modes of civil discourse, but to question those previously taught to them as children. A college education seeks to expose students' minds to sensitive material, not shield them from it. To accomplish this mission, the state may not punish college students for speech otherwise entitled to the full protections of the First Amendment.

ARGUMENT

I. The District Court Erred in Construing and Applying Constitutional Procedural Due Process Rights.

The level of due process applied to a student's dismissal from a state college turns on whether the dismissal was imposed for academic or disciplinary reasons. *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 86 (1978).[2] Appellant was dismissed from a state college associate degree nursing program for speech deemed "unprofessional" in purported violation of the nursing program's conduct and ethics rules. The district court incorrectly characterized the dismissal as academic and, therefore, subject to lesser procedural due process than otherwise required. Binding precedent holds that punishments for violations of rules of conduct and ethics are disciplinary.

A. The definition of, and constitutionally-required procedural due process for, academic and disciplinary dismissals from a degree program at a state college is well-settled.

When a state school dismisses a student from a degree program for disciplinary reasons, the student is entitled to "adequate notice, definite charge, and a hearing with an opportunity to present one's own side of the case and with all

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[2] Appellees do not dispute that Appellant had a valid property interest in continued enrollment in the nursing program. (*See* Add. 15A.) Once "due process applies, the question remains what process is due." *Goss v. Lopez*, 419 U.S. 565, 577 (1975); *see also Horowitz*, 435 U.S. at 84–85 (assuming without deciding the existence of a protected interest in a medical degree at a public university).

necessary protective measures." *Woodis v. Westark Comm. Coll.*, 160 F.3d 435, 440 (8th Cir. 1998) (citation omitted). Disciplinary decisions bear a "resemblance to traditional judicial and administrative factfinding" and "[a] public hearing may be regarded as helpful to the ascertainment of misconduct." *Horowitz*, 435 at 87-89 (citations omitted). The determination is not "dependent upon the analytical expertise of professional academicians." *Fenje v. Feld*, 398 F.3d 620, 624 (7th Cir. 2005) (citations omitted).

A disciplinary dismissal may be based on a student's "disruptive and insubordinate behavior" or "violation of a valid rule of conduct." *Horowitz*, 435 U.S. at 86, 90. When a student is compelled by a university's rule, order, or law to do something and is discharged for failing to do as ordered, the discharge is disciplinary. *Mauriello v. Univ. of Med. & Dentistry*, 781 F.2d 46, 50 (3d Cir. 1986). Students' ethical violations are also disciplinary in nature. *See, e.g.*, *Henderson v. Engstrom*, No. 10–4116, 2012 U.S. Dist. LEXIS 129850, at *23 (D.S.D. Sept. 12, 2012) (unpublished) (citing cases).

In contrast, when a school takes action against a student for poor academic performance, procedural due process requires that the student have prior notice of faculty dissatisfaction with his academic performance and of the possibility of dismissal, and the decision to dismiss the student must be "careful and deliberate." *Richmond v. Fowlkes*, 228 F.3d 854, 857 (8th Cir. 2000). Decisions to dismiss a

student for poor academic performance involve the determination of "an individual professor as to the proper grade for a student in his course" that "requires an expert evaluation of cumulative information and is not readily adapted to the procedural tolls of judicial or administrative decisionmaking." *Horowitz*, 435 U.S. at 89.

Dismissals for poor academic performance occur when the student's grades are problematic, ability to perform the work is suspect, class attendance is poor, or the student has other academic failings. *See, e.g.*, *Monroe v. Ark. State Univ.*, 495 F.3d 591, 595 (8th Cir. 2007) (academic dismissal because it was "undisputed that the University dismissed [the student] for failure to complete his course work"); *Richmond*, 228 F.3d at 857–58 (academic dismissal for receiving three negative evaluations when university policy allowed dismissal after two); *Ikpeazu v. Univ. of Neb.*, 775 F.2d 250, 253–55 (8th Cir. 1985) (academic dismissal for failing two of four required clerkships).

B. A student's dismissal from a degree program at a state college for violation of rules of conduct and ethics is based on disciplinary rather than academic reasoning.

Appellees dismissed Appellant from the nursing program due to alleged violations of rules of conduct and ethics contained or referenced in the nursing program student handbook. (Add. 91a–92a.) The student handbook states "students who fail to meet the moral, ethical, or professional behavioral standards of the nursing program are not eligible to progress in the nursing program." (*Id.*)

Examples of conduct that violate this provision, include, but are not limited to those cited in Appellant's dismissal letter, which were "behavior unbecoming of the [n]ursing [p]rofession" and "transgression of professional boundaries." (*Id.*)[3]

Dismissals based on rules of conduct or ethics are disciplinary. *See, e.g., Horowitz*, 435 U.S. at 86 (stating that a dismissal is disciplinary if it involves a "violation of a valid rule of conduct"); *Guse v. Univ. of S.D.*, No. 08–4119, 2011 U.S. Dist. LEXIS 34621, at *23 (D.S.D. Mar. 30, 2011)(unpublished) (dismissal because of violations of "ethical and professional standards of audiology" was disciplinary).

The district court—without any analysis or citations to the record—concluded that Appellant's "removal from the associate degree nursing program [was] properly regarded as an academic decision." (Add. 16A.) The two precedential cases relied upon by the District Court were *Horowitz* and *Monroe*.

[3] The student handbook language referenced in Appellant's dismissal letter is based on Minnesota Statutes § 148.261, which is entitled "Grounds for *disciplinary* action." *Id.* (emphasis added). The statute lists the grounds, including "unprofessional conduct." *Id.* § 148.261, subd. 1(6). The student handbook language also references the American Nursing Association's ("ANA") Code of Ethics, which explains the importance of "professional boundaries" in section 2.4. (*See* www.nursingworld.org/MainMenuCategories/EthicsStandards/CodeofEthicsforNurses/Code-of-Ethics.pdf.) Both the statute and the ANA Code of Ethics regulate nursing to insure the quality of patient care. And, as discussed in more detail *infra*, neither the statute nor the ANA Code of Ethics regulate speech that has no nexus to patient care—such as Appellant's Facebook posts.

Horowitz involved a medical student where several faculty members complained that her "performance was below that of her peers in all clinical patient-oriented settings, that she was erratic in her attendance at clinical sessions, and that she lacked a critical concern for personal hygiene." 435 U.S. at 80 (internal quotation omitted) . Because the school did not charge the student with violating a rule of conduct—like those in the student handbook—but rather alleged she was unable to perform in the clinical setting, the Supreme Court found that the school properly regarded the dismissal as academic. *Id.* at 91. Similarly, the Eighth Circuit held in *Monroe* that because it was "undisputed that the University dismissed [a nurse anesthesia student] for failure to complete his course work" the student's dismissal was academic, not disciplinary. 495 F.3d at 595. Thus, *Horowitz* and *Monroe* do not support the district court's conclusion that Appellant's dismissal was "properly regarded as an academic decision." (Add. 16A.) Both *Horowitz* and *Monroe* involved dismissals based on poor academic performance. Here, it is undisputed that Appellees dismissed Appellant for off-campus speech in alleged violation of the rules of conduct and ethics in the student handbook.

The remaining non-precedential decisions the District Court cited also involved dismissals based on poor academic performance. In *Yoder v. Univ. of*

Louisville, an unpublished Sixth Circuit case,[4] the court concluded that a nursing student was dismissed for academic reasons because she violated conditions for her enrollment in courses and participation in a clinical program. 526 F. App'x 537, 550 (6th Cir. 2013). In *Ku v. Tennessee*, the Sixth Circuit found that placing a student on a leave of absence after he failed an exam and a clinical professor reported that he lacked "medical and scientific knowledge" was an academic decision. 322 F.3d 431, 435–36 (6th Cir. 2003). Similarly, in *Fenje v. Feld*, the Seventh Circuit found that an anesthesiology resident who omitted his termination from a residency program application based on his "competency to deliver patient care" had been dismissed for academic reasons. 398 F.3d 620, 622 (7th Cir. 2005). The Fifth Circuit concluded in *Shaboon v. Duncan* that a student in a residency program was dismissed for academic reasons because she "fail[ed] to satisfy academic requirements" and demonstrated an inability "to care for patients." 252 F.3d 722, 727 (5th Cir. 2001).

There is no evidence poor academic performance influenced Appellees' decision to dismiss Appellant. The dismissal letter makes no mention of poor academic performance. (*See* App. 91a-92a.) Appellant had passing grades, was

[4] *Yoder* is entitled to no weight. In both the Sixth and Eighth Circuits "unpublished opinions . . . are not precedent." 8th Cir. L.R. 32.1A; *see also* 6th Cir. L.R. 32.1(b); *U.S. v. Lacefield*, 250 F. App'x. 670, 676 (6th Cir. 2007).

regularly attending classes, and had no issues in either his classroom curriculum or clinical responsibilities. (App. 175a–176a); *see also Roach v. Univ. of Utah*, 968 F. Supp. 1446, 1453 (D. Utah 1997) (finding dismissal was disciplinary because "there is no evidence that any perceived problems with [the student's] grades, inability to perform the work required by [the University], poor class attendance, or any failings whatsoever in an academic nature influenced the [school's] decision to suspend [him]").

The district court accepted Appellees' novel formulation that dismissals for academic reasons includes dismissals for speech, even off-campus speech, deemed "unprofessional." (Add. 16A.) But allowing a dismissal unrelated to grades, attendance, and classroom or clinical responsibilities to be characterized as academic erodes the Supreme Court's distinction between academic and disciplinary decisions found in *Horowitz*. The district court's decision would also permit the state to regulate college student speech as academic when regulation of the similar speech by a high school student has been held to be disciplinary, and thus entitled to greater constitutional procedural due process. *See, e.g.*, *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 688 (1986) (suspension for lewd comments

during high school event was disciplinary, *not* academic).[5] For this reason alone, *amicus curiae* ACLU-MN urges reversal of the district court's decision.[6]

II. The District Court Erred in Construing and Applying Constitutional Free Speech Rights.

The Internet's "unlimited, low-cost capacity for communications of all kinds" has fueled a dramatic increase in speech central to the stability of our democracy. *Reno v. ACLU*, 521 U.S. 844, 870 (1997). Social media sites, like Facebook, amplify speech in ways unimagined just a few years ago. Whatever the

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[5] Further, the Supreme Court has repeatedly stated high school students are entitled to the full protections of the First Amendment for speech beyond the schoolhouse gate and outside school-sponsored activities. *See, e.g., Fraser*, 478 U.S. at 688 ("If Respondent had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate . . . .") (Brennan, J. concurring) (citing *Cohen v. California*, 403 U.S. 15 (1971)); *Morse v. Frederick*, 551 U.S. 393, 405 (2007) ("Had Fraser delivered the same speech in a public forum outside the school context, [he] would have been protected.") (citing *Fraser*, 473 U.S. at 682-83). There is no basis for the district court's decision limiting the First Amendment privileges of college student off-campus speech more than high school student off-campus speech.

[6] Even if an academic dismissal standard is properly applied in this case, the district court erred in finding that the Appellees provided Appellant with the required due process. Prior to dismissing a student for academic reasons, procedural due process requires, at a minimum, "some kind of notice" of the charges against the student and "some kind of hearing" at which the student is given the opportunity to be heard. *Goss*, 419 U.S. at 734; *Navato v. Sletten,* 560 F.2d 340, 345 (8th Cir. 1977). Despite repeated requests, Appellant was provided no prior notice of the charges against him before the December 5 meeting with school officials when they informed him he was being dismissed from the nursing program. This does not constitute adequate due process under Supreme Court and Eighth Circuit precedent.

challenges to applying the Constitution to ever-advancing technology, "the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary when a new and different medium for communication appears." *Brown v. Entm't. Merchs. Assoc.*, 131 S.Ct. 2729, 2733 (2011) (internal quotation marks and citation omitted). The Court's cases "provide no basis for qualifying the level of First Amendment scrutiny that should be applied" to new technologies. *Reno*, 521 U.S. at 870. In general, the government may not restrict speech because of its message, its ideas, its subject matter, or its content. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002); *Burnham v. Ianni*, 119 F.3d 668, 674 (8th Cir. 1997).[7]

Appellant was dismissed from the nursing program for off-campus, on-line speech deemed "unprofessional" in purported violation of the nursing program's conduct and ethics rules. The district court incorrectly concluded Appellee's regulation of Appellant's speech was subject to lesser scrutiny than otherwise required by binding precedent. Appellant's online speech unconnected to patient care or curricular requirements is entitled to the full protections of the First Amendment.

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[7] *But see New York v. Ferber*, 458 U.S. 747, 764 (1982) (child pornography is unprotected speech); *Miller v. California*, 413 U.S. 15, 23 (1973) (obscene speech is unprotected speech); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942) (fighting words are unprotected speech).

A. It is well-settled that a licensed professional's speech outside the confines of a professional environment is entitled to the full protections of the First Amendment.

A state's police power extends to the regulation of "certain trades and callings, particularly those which closely concern the public health[,]" *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910), and states have "broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). However, a state's power to regulate professional speech is not unbridled.

A licensed professional's speech outside the confines of professional relationships is entitled to the full protections of the First Amendment. *See Lowe v. SEC*, 472 U.S. 181, 232 (1985). When there is no "personal nexus between professional and client" and the professional "does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice . . . ." *Id.* A restriction "is no longer a regulation of a profession but a regulation of speech" and "must survive the level of scrutiny demanded by the First Amendment." *Id.* at 230; *see also Wollschlaeger v. Florida*, 760 F.3d 1195, 1218 (11th Cir. 2014) (requiring "a personal nexus between professional and client" to justify limitation on speech rights) (internal quotation omitted); *Moore-King v. Cnty of Chesterfield*, 708 F.3d 560, 569 (4th

Appellate Case: 14-2988 Page: 20 Date Filed: 12/08/2014 Entry ID: 4223340

Cir. 2013) (same); *King v. Governor of N.J.*, 767 F.3d 216, 231-32 (3d Cir. 2014) (same).

The essence of the regulatory scheme governing the nursing profession, including the regulations governing nursing education programs, is ensuring the safe and competent delivery of patient care. Minnesota law requires a licensed nursing program to "meet[] the program approval standards adopted by the board[,]" Minn. Stat. § 148.251, subd. 1(1), and "provide a framework for preparing *safe and competent* graduates for entry into practical and professional nursing . . . ." Minn. R. 6301.2320, subd. A (emphasis added). A nursing education program must also implement an evaluation plan "based on program outcomes and stakeholder input regarding *competence and safety*." Minn. R. 6301.2340, subp. 3 (emphasis added). The regulatory scheme does not attempt to regulate a nursing professional's conduct unrelated to patient care, and is instead limited to the regulation of conduct within the scope of the practice of nursing.

A nursing education program must "provide curriculum to enable the student to develop the competence necessary for the level, scope, and standards *of nursing practice*[,]" and "have learning activities with faculty oversight to acquire and demonstrate competence in clinical settings *with patients*. . . ." *Id.* (emphasis added). The nursing program must also "evaluat[e] student achievement of curricular objectives and outcomes *related to nursing knowledge and practice* . . .

." *Id.* (emphasis added). The regulations allow disciplinary action against nurses and nursing students "engaging in unprofessional conduct," but define "unprofessional conduct" as conduct that is "a departure from or failure to conform to board rules . . . or . . . 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*." Minn. Stat. § 148.261, subd. 1(6) (emphasis added). Thus, the state's power to regulate the nursing profession is not unbridled.

In the medical profession, courts do not permit the state to regulate speech untethered to insuring quality patient care simply because the state finds the speech offensive.[8] The state may only regulate speech when there is a nexus between the speech and patient care. For example, in *Planned Parenthood of SE Pennsylvania v. Casey*, the Supreme Court held that a regulation curtailing a physician's First Amendment rights was constitutional, "but only as part of the practice of medicine,

[8] Similarly, the state may not regulate speech made by attorneys without a showing that the expression "interfered with the administration of justice." *Gentile v. Bar of Nevada*, 501 U.S. 1030, 1058 (1991) (holding that if an attorney's conduct did not demonstrate "any real or specific threat to the legal process . . . his statements have the full protection of the First Amendment."); *United States v. Wunsch*, 84 F.3d 1110, 1117 (9th Cir. 1996) (vacating the district court's order finding a violation of a professional responsibility rule because the case involved "an isolated expression of a privately communicated bias with no facts that would show how that communication adversely affected the administration of justice").

Appellate Case: 14-2988 Page: 22 Date Filed: 12/08/2014 Entry ID: 4223340

subject to reasonable licensing and regulation by the State." 505 U.S. 833, 884 (1992) (citations omitted). Similarly, the Eleventh Circuit held in *Wollschlaeger v. Florida* that physician speech may be regulated when "[a]ny burden the [regulation] places on speech is . . . incidental to its legitimate regulation of the practice of medicine." 760 F.3d 1195, 1225 (11th Cir. 2014). Thus, the professional standards set forth in Minn. Stat. § 148.261, subd. 1 and incorporated into the nursing program student handbook must be tethered to the legitimate regulation of the practice of nursing to pass constitutional muster.

The District Court summarily concluded that Appellant's dismissal from the nursing program for off-campus speech unrelated to the practice of nursing or curricular performance was a proper exercise of the program's authority to discipline students for "behavior unbecoming of the Nursing Profession" or "transgression of professional boundaries." (Add. 23A.) But the District Court's conclusion ignores the focus on patient care in the grounds for discipline under Minn. Stat. § 148.261, subd. 1, and the required nexus between the regulation and the practice of nursing required by *Casey* and *Wollschlaeger*.

Further, each of the opinions relied on by the District Court involved regulation of *conduct* (rather than speech subject to the protections of the First Amendment) with a strong nexus to the practice of the profession, which supported the state's disciplinary action. For example, *Reyburn v. Minnesota State Bd. of*

Optometry affirmed disciplinary action against optometrists for paying a "steerer" to obtain business in violation of a statute that prohibited the "employment of 'cappers' or 'steerers' to obtain business." 78 N.W.2d 351, 354–51 (Minn. 1956) (citing Minn. Stat. § 148.57, subd. 3). *Stephens v. Pennsylvania State Bd. of Nursing* affirmed disciplinary action against a nurse who harassed patients and provided improper medication to patients—conduct clearly proscribed by professional regulations. 657 A.2d 71, 73 (Pa. Commw. Ct. 1995). And *Heinecke v. Department of Commerce* affirmed disciplinary action against a nurse who developed a personal relationship with a patient that jeopardized the patient's health—conduct prohibited by regulation. 810 P.2d 459, 460–62 (Utah Ct. App. 1991). These decisions stand for the unremarkable proposition that the state may regulate the conduct of medical professionals to protect patients. They do not support the novel proposition that state may regulate the speech of licensed professionals that has no connection whatsoever to the state's interest in regulating the practice of nursing.

The District Court's reliance on a second line of authority for the proposition that Appellees may hold a student to the "standards of the nursing profession" is similarly misplaced. (Add. 23A.) Two of the decisions cited by the District Court involved students who were disciplined for violating specific professional standards applicable to the clinical and laboratory environment. *See Keeton v.*

Anderson-Wiley, 664 F.3d 865, 868 (11th Cir. 2011) (upholding discipline for student who expressed intent to counsel clients in clinical setting in violation of the professional code of ethics); *Tatro v. Univ. of Minn.*, 816 N.W.2d 509, 522 (Minn. 2012) (upholding discipline of mortuary science student for blogging that violated state statutes that required that cadavers be treated with dignity and respect, and the University's program rules that prohibited disrespectful language about cadaver dissection outside the laboratory).[9] Neither *Keeton* nor *Tatro* permitted regulation of a college student's off-campus speech based merely on generalized standards of professionalism untethered to clinical or curricular performance.

Accordingly, because there is no nexus between the content of Appellant's Facebook page and any "unnecessary danger to a patient's life, health, or safety[,]" Minn. Stat. § 148.261, subd. 1(6), Appellees' discipline of Appellant under the guise of policing "unprofessional conduct" violates his First Amendment privileges.

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[9] The District Court also cited *Oyama v. Univ. of Haw.*, Civ. No. 12-00137, 2013 WL 1767710, at *9 (D. Haw. Apr. 23, 2013) (upholding refusal to accept a student in student teaching program based on negative evaluations from professors), and *Marinello v. Bushby*, No. 98-60021, 1998 U.S. App. LEXIS 39083, *8 (5th Cir. Nov. 17, 1998) (unpublished) (upholding disciplinary action against student who failed or refused to complete school assignments), but there are no parallels between those decisions and this case because Appellant's speech was wholly unrelated to his curricular performance.

Appellate Case: 14-2988 Page: 25 Date Filed: 12/08/2014 Entry ID: 4223340

B. A college student's speech, particularly speech outside the confines of the curricular environment, is entitled to the full protections of the First Amendment.

Neither the Supreme Court nor the Eighth Circuit has held a college student's speech is afforded less than the full protections under the First Amendment. *Tinker* is the seminal secondary school student speech case, where the Court held the First Amendment applied to students in public schools and that administrators must demonstrate a constitutionally valid reason for any specific regulation of speech in the classroom. 393 U.S. at 511.

To justify restricting secondary school student speech, the school must establish that the speech in fact "materially disrupt[ed] classwork or involve[d] substantial disorder," or that school officials could reasonably "forecast substantial disruption of or material interference with school activities," not "a mere desire to avoid the discovery and unpleasantness that always accompany an unpopular viewpoint." *Id.* at 509-10, 513–14. *Tinker's* "substantial-disruption" test provides the framework for when secondary schools may regulate student speech.[10]

[10] In *Tinker* the speech at issue—armbands protesting the Vietnam War—prompted threats and warnings from, and teasing by, other students, as well as an in-class disturbance that involved a prolonged argument between a teacher and a student who was wearing one of the armbands. *Tinker*, 393 U.S. at 517 (Black, J., dissenting). The *Tinker* majority did not believe that such hallway and classroom disturbances constituted a substantial disruption of school activities. *Id.* at 514.

Appellate Case: 14-2988 Page: 26 Date Filed: 12/08/2014 Entry ID: 4223340

The Supreme Court has invoked *Tinker* in cases that concern the speech of college students, but only to explain that even high school students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," *id.* at 506, not to justify *curtailing* the speech rights of college students. *See, e.g.*, *Papish v. Univ. of Miss. Curators*, 410 U.S. 667, 671 n.6 (1973) (per curiam) (applying *Tinker*) to prohibit a university from expelling a student for selling a vulgar underground newspaper); *Healy v. James*, 408 U.S. 169, 174 (1972) (applying *Tinker* to prohibit a university from refusing to recognize a student group because of the group's political speech). Moreover, Appellees concede *Tinker* does not apply in this case.[11]

The Court has expressly recognized that "cases dealing with the right of teaching institutions to limit expressive freedom of students have been confined to high schools, . . . whose students and their schools' relation to them are different and at least arguably distinguishable from their counterparts in college education." *Bd. of Regents v. Southworth*, 529 U.S. 217, 238 n.4 (2000) (Souter, J., concurring) (citations omitted). The Court's pre- and post-*Tinker* cases emphasize the missions

[11] Appellees' concession is based on their novel formulation that academic determinations may include dismissals for offensive off-campus speech unconnected to academic performance or patient care. (*See* Add. 22A; *see also* Case No. 0:13-cv-00326 (D. Minn.), ECF No. 56 at 4 (Defs.' Reply Mem. Mot. Summ. J.).)

and student body characteristics of colleges require that college students enjoy the full panoply of First Amendment freedoms to which all adults are entitled, not the restricted version that *Tinker* and its progeny grant high school students, the vast majority of whom are minors.

As the Court explained in *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967), the university classroom "is peculiarly the 'marketplace of ideas.'" The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" *Id.* at 603 (citations omitted).

> The essentiality of freedom in the community of American universities is almost self-evident. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

Id. (quoting *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957)).

The Court has stressed that colleges do not share the "special characteristics" of the secondary school environments that justify certain student speech restrictions. Thus, the Court held in *Healy v. James* that the "precedents of [the] 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." 408 U.S. at 180.

Appellate Case: 14-2988 Page: 28 Date Filed: 12/08/2014 Entry ID: 4223340

Additional differences between secondary schools and colleges bolster the conclusion that *Tinker* does not justify restrictions on college student speech. *First*, "'public elementary and high school administrators,' unlike their counterparts at public universities, 'have the unique responsibility to act *in loco parentis*.'" *McCauley v. Univ. of Virgin Islands*, 618 F.3d 232, 243 (3d Cir. 2010) (quoting *DeJohn v. Temple Univ.*, 537 F.3d 301, 315 (3d Cir. 2008)); *see also Fraser*, 478 U.S. at 684 (noting "the obvious concern . . . of . . . school authorities acting *in loco parentis* to protect children . . . from exposure" to offensive language). Because secondary school officials must act in the stead of their students' parents, they, like parents, are granted "a good deal of latitude in determining which policies will best serve educational and disciplinary goals." *McCauley*, 618 F.3d at 244. Thus, the *in loco parentis* relationship that primary and secondary schools share with their students, and that justifies restrictions on speech that undermines the value systems with which those schools aim to indoctrinate their students, cannot similarly justify such restrictions at the college level.

Second, elementary and high schools, unlike colleges and universities, have a variety of special disciplinary needs that allow "the enforcement of rules against conduct that would be perfectly permissible if undertaken by an adult." *New Jersey v. T.L.O.*, 469 U.S. 325, 339 (1985). For example, secondary school

Appellate Case: 14-2988 Page: 29 Date Filed: 12/08/2014 Entry ID: 4223340

students may be subjected to compulsory attendance rules, and within the school, teachers and administrators may mandate the ways in which students are allowed to spend their time. In contrast, and

> [u]nlike the strictly controlled, smaller environments of public elementary and high schools, where a student's course schedule, class times, lunch time, and curriculum are determined by school administrators, public universities operate in a manner that gives students great latitude: for example, university students routinely (and unwisely) skip class; they are often entrusted to responsibly use laptops in the classroom; they bring snacks and drinks into class; and they choose their own classes. In short, public university students are given opportunities to acquit themselves as adults. Those same opportunities are not afforded to public elementary and high school students.

McCauley, 618 F.3d at 246 (footnote omitted). Such discipline has no such educational component at the college level, where adult students are expected to discover the value of questioning societal expectations and rules.

Finally, as the Court has stressed repeatedly, the differing maturity levels of the student bodies in secondary and post-secondary schools allow elementary and high school officials—but not college or university officials—to limit speech that might be offensive or upsetting to children. The *Hazelwood Sch. Dist. v. Kuhlmeier* Court recognized that elementary and high school administrators "must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics . . . ." 484 U.S. 260, 272 (1988); *see also Fraser*, 478 U.S. at 683 ("The [lewd and

Appellate Case: 14-2988 Page: 30 Date Filed: 12/08/2014 Entry ID: 4223340

offensive] speech [at issue] could well be seriously damaging to its less mature audience."). Because college "students are . . . young adults [and] are less impressionable than younger students," *Widmar v. Vincent*, 454 U.S. 263, 274 n.14 (1981), college officials cannot assert that they share the need of secondary school administrators to protect impressionable young minds from offensive speech.

In order to accomplish the mission of the college educational system, the state may not regulate and punish student speech otherwise entitled to the full protections of the First Amendment. The college educational system's mission depends on it.

Appellate Case: 14-2988 Page: 31 Date Filed: 12/08/2014 Entry ID: 4223340

CONCLUSION

Amicus curiae ACLU-MN respectfully urges reversal of the district court's decision. It is inconsistent with binding precedent (1) distinguishing between constitutionally-required procedural due process for dismissals from a state school based on academic and disciplinary reasoning, (2) entitling licensed professional speech with no nexus to the performance of professional duties to the full protections of the First Amendment, and (3) entitling college student speech, particularly off-campus speech, to the full protections of the First Amendment.

Dated: November 24, 2014

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Appellate Case: 14-2988 Page: 32 Date Filed: 12/08/2014 Entry ID: 4223340

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This brief complies with the type-volume limitation of Fed. R. App. P. 29(b) and 32(a)(7)(B) because it contains 6,953 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6), as it has been prepared in a 14-point, proportionally spaced typeface, Times New Roman, by using Microsoft Word 2007.

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Appellate Case: 14-2988 Page: 33 Date Filed: 12/08/2014 Entry ID: 4223340

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Appellate Case: 14-2988 Page: 34 Date Filed: 12/08/2014 Entry ID: 4223340

CERTIFICATE OF SERVICE

I hereby certify that on November 24, 2014, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the CM/ECF system.

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