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OFF-CAMPUS INTERNET STUDENT SPEECH ENTITLED TO CONSTITUITIONAL PROTECTION

The U.S. Supreme Court ruled today that a cheerleader's expletive-filled social media posting about her school is protected under the First Amendment. Schools generally have limited authority to regulate their students' on-campus speech only when that speech "materially and substantially" interferes with school activities. *Tinker v. Des Moines*, 393 US 503 (1969).

Appellate Courts have been grappling for decades on how to apply the *Tinker* standard to off-campus speech, especially in the broader school environment of online learning and social media. Today's ruling further clarifies the application of *Tinker* to off-campus speech and the impacts of social media use by students.

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Brandi Levy was a cheerleader who posted a photo on Snapchat of her and a friend raising their middle fingers and captioned the photo with the uncensored message "f**k school f**k softball f**k cheer f**k everything," after she didn't make the varsity cheerleading squad. After discovering the post, her school suspended her from the cheerleading squad. Her parents appealed to the school district to reconsider the discipline and, when unsuccessful, filed a federal lawsuit arguing the discipline violated her off-campus free speech rights. A federal district court in Pennsylvania sided with Levy. On appeal, the 3rd U.S. Circuit Court of Appeals agreed with the lower court and found that the First Amendment precluded schools from regulating speech "that is outside school-owned, -operated, – or supervised channels."

While the U.S. Supreme Court did not agree with the 3rd Circuit's bright-line off-campus rule, the Court did agree that the school violated Levy's First Amendment rights. Justice Breyer, writing for the majority, wrote that some speech that takes place off campus can be regulated, such as bullying,

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harassment or threats aimed at teachers or other students. "[W]e do not believe the special characteristics that give schools additional license to regulate student speech always disappear when a school regulates speech that takes place off campus," he wrote. "The school's regulatory interests remain significant in some off-campus circumstances." However, Levy's Snapchat posting was found to not have caused a substantial disruption in school activities. The Court also found that Levy's First Amendment interest in making the statements outweighed the school's interests in attempting to regulate it based upon its content and the fact that it was made off-campus.

Although the Court did determine that the off-campus speech could be regulated by schools in some circumstances, it specifically noted that there was a distinct difference in a schools' interest in regulating on-campus speech as opposed to off-campus speech and that the "leeway the First Amendment grants to schools in light of their special characteristics is diminished" when off-campus speech is involved. The Court specifically declined to adopt a bright-line rule as to when the First Amendment would permit a school to regulate off-campus

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speech and instead left it to "future cases to decide where, when and how" the special features of off-campus speech will still permit regulation by the schools.

Given the absence of a bright-line rule, schools should remain careful when addressing potential actions against students based upon off-campus speech even when published on social media accounts. As a practical matter, the punishment of off-campus social media postings will at a minimum require significant evidence of substantial disruption within the learning environment as opposed to mere discomfort with the expression of an unpopular viewpoint.

If you have any questions about this ruling's impact or any questions arise regarding off-campus student speech, please do not hesitate to contact one of our attorneys to provide guidance and assistance.

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