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High Court Hears Free Speech Case Over Cheerleader's Snapchat Post

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WASHINGTON (CN) — Hearing the case of a cheerleader kicked off of her high school squad over a profane Snapchat post, U.S. Supreme Court justices asked attorneys hypothetical questions Wednesday to parse out what types of speech schools can regulate.

In 1969, the high court ruled in *Tinker vs. Des Moines Independent Community School District* that students had a right to wear black armbands in protest of the Vietnam War but said such protests could be regulated on-campus if they are disruptive to school functions. But Wednesday's hearing centered on the issue of whether schools can regulate speech outside of school grounds.

Brandi Levy of Pennsylvania was 14 years old in 2017 when she wrote "fuck school fuck softball fuck cheer fuck everything" on the social media website Snapchat, a platform that erases messages between users after a certain amount of time. When her comments got back around to her coaches, she was removed from her junior varsity spot on the Mahanoy Area School District's cheerleading squad.

Levy and her parents sued the school, and a federal judge and the Third Circuit both agreed the district had violated her First Amendment rights. Writing for a three-judge panel, U.S. Circuit Judge Cheryl Ann Krause found that since Levy had made the post off campus, over the weekend and without school resources, her speech was protected.

However, Lisa Blatt, a Williams & Connolly attorney representing the school district, argued before the nation's high court Wednesday that off-campus speech can be restricted in some ways under the *Tinker* precedent.

"First, off-campus speech, particularly on social media can be disruptive," Blatt said. "The internet's ubiquity, instantaneous and mass dissemination and potential permanence make the speaker's location irrelevant. Yet the decision below arbitrarily treats location as dispositive."

Justice Samuel Alito said that if schools have any authority under *Tinker* outside of school, there needs to be a clear rule about what speech is restricted. He offered up a hypothetical involving a transgender student.

“A student believes that someone who is biologically male is a male and there is a student who is biologically male but identifies as a woman and has adopted a female name, but the student who has the objection refers to this person by the person’s prior male name and uses male pronouns,” Alito said. “Can the school do something about that?”

“*Tinker*’s been around for 51 years, the federal government has like 10 federal agencies that deal with this, schools have to deal with this every day,” Blatt said, referring to bullying in general. “They try not to make mistakes while keeping kids from killing themselves because they’re bullied.”

David Cole, an ACLU attorney representing Levy, argued Wednesday that the bedrock principle of the First Amendment is that speech cannot be punished solely because listeners object to that speech. *Tinker*’s narrow exception of that rule for disruptive speech only applies to school-sanctioned settings, he said.

“[Levy] was punished for merely expressing frustration with a four-letter word, to her friends, outside of school, on a weekend,” Cole said. “Her methods may seem trivial, but for young people, the ability to voice their emotions to friends without fear of school censorship may be the most important freedom of all.”

Tabitha Escalante, a judicial advocacy associate with March for Our Lives – a student activism group formed after the 2018 Marjory Stoneman Douglas High School shooting, focused largely on support for gun control legislation – said in an email to Courthouse News that the school district’s interpretation of *Tinker’s* regulatory authority was unworkable. The group filed an amicus brief with the Supreme Court alongside other student activism organizers, arguing it was alarming a district would want to penalize a student for off-campus speech.

“Certainly, some forms of political speech can be considered ‘disruptive,’ especially if the political views expressed are unpopular,” Escalante wrote. “But the First Amendment does not protect popular speech, it protects all speech. As students, it is our right to be able to speak our minds about issues that are important to us, whether or not they are popular.”

She added: “And even more importantly, as student activists who have used social media and other off-campus speech to organize, a ruling in favor of the school district could jeopardize our ability to organize effectively.”

Ilya Shapiro, a senior fellow in constitutional studies at the libertarian-leaning Cato Institute, noted in email that the justices seemed hesitant Wednesday to extend the school district’s authority to police students’ speech.

“Today, the justices recognized that the internet allows even off-campus, non-curricular speech to be disruptive, but were clearly uneasy at extending school authority to police students 24 hours a day, seven days week,” Shapiro wrote. “Ultimately the former high school cheerleader will (and should) win, because students don’t shed their constitutional rights *outside* those gates when the gates become digital.” (Parentheses and emphasis in original.)

Shapiro pointed to questions posited by Justice Elena Kagan about what speech can be considered under the school's purview, which included examples like students' messages about organizing a senior skip day off-campus, refusing to do English work unless more authors of color were assigned in a curriculum or warning prospective gay students there is homophobia at the school and to stay away.