RECENT CASES

FIRST AMENDMENT — STUDENT SPEECH — THIRD CIRCUIT APPLIES *TINKER* TO OFF-CAMPUS STUDENT SPEECH. — *J.S. ex rel. Snyder v. Blue Mountain School District*, 650 F.3d 915 (3d Cir. 2011) (en banc).

Since at least *Tinker v. Des Moines Independent Community School District*,[1] the Supreme Court has struggled to strike the appropriate balance between public school students' First Amendment rights and schools' need to preserve order. With the recent rise of online communication and social media, the constitutional status of student speech that takes place outside school hours and off campus, but that can cause on-campus disruptions, has been increasingly contested. Recently, in *J.S. ex rel. Snyder v. Blue Mountain School District*,[2] the Third Circuit overturned a middle school student's suspension for posting, from her parents' home computer, a vulgar social networking profile that mocked her principal.[3] To reach that result, the court assumed, without deciding, that schools could punish students for off-campus speech, subject to the "substantial disruption" test articulated in *Tinker*.[4] Applying that test, the court found both that school officials could not have reasonably foreseen that the profile would cause substantial disruption at school and that it did not in fact cause substantial disruption.[5] Yet in doing so, the court dodged the relevant constitutional question. Before proceeding with the *Tinker* inquiry, the court should have reached the issue of the constitutional status of off-campus student speech and held that it should not be subject to on-campus discipline.

In 2007, J.S. was an eighth-grade student at Blue Mountain Middle School in Orwigsburg, Pennsylvania.[6] In March, she created a fake profile for her school principal, James McGonigle, on the social networking website MySpace.[7] The profile did not identify McGonigle by name or location, but it did contain his official school district photograph.[8] The contents of the profile were "vulgar" and "juvenile,"[9] including listing McGonigle's interests as "hitting on students and their

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1 393 U.S. 503 (1969).
2 650 F.3d 915 (3d Cir. 2011) (en banc).
3 *Id.* at 920.
4 *Id.* at 926; *see Tinker*, 393 U.S. at 514.
5 *J.S.*, 650 F.3d at 928.
6 J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 290 (3d Cir. 2010).
7 *J.S.*, 650 F.3d at 920.
8 *Id.*
9 *Id.*

parents"[10] and claiming in the "About me" section that McGonigle was a "sex addict."[11] J.S. made the profile private, limiting access to those whom J.S. invited to be MySpace friends, including around twenty-two students in the school district.[12] At the time, school computers blocked access to MySpace.[13] McGonigle nevertheless learned about the profile from another student and subsequently suspended J.S. for ten days.[14]

J.S. and her parents, the Snyders, brought suit against the school district in the U.S. District Court for the Middle District of Pennsylvania, alleging that the school district had violated J.S.'s First Amendment rights.[15] The district court granted the school district's motion for summary judgment.[16] Judge Munley began by asserting that *Tinker* did not govern this case.[17] In *Tinker*, the Supreme Court upheld the right of public school students to wear black armbands to protest against the Vietnam War, so long as they did so "without 'materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school' and without colliding with the rights of others."[18] Although noting that J.S.'s conduct might not have involved the level of "substantial disruption"[19] required to justify discipline under *Tinker*, Judge Munley declined to apply *Tinker*, which involved political speech, to this case.[20] Finding that J.S.'s speech was "vulgar and offensive,"[21] Judge Munley held that the governing precedent, instead, was *Bethel School District v. Fraser*.[22] In *Fraser*, the Supreme Court rejected a challenge to disciplinary measures taken after a student gave a sexually explicit speech at a school assembly.[23] The Court did not apply the *Tinker* disruption test in that case and instead looked to the nature of the speech itself.[24] The district court noted that the most recent school speech case to reach the Supreme

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[10] *Id.* (quoting 2 Appendix on Behalf of Appellants at A38, *J.S.*, 650 F.3d 915 (No. 08-4138)) (internal quotation mark omitted).

[11] *Id.* at 921 (quoting 2 Appendix on Behalf of Appellants, *supra* note 10, at A38).

[12] *Id.*

[13] *Id.*

[14] *Id.* at 921–22.

[15] *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517, at *3 (M.D. Pa. Sept. 11, 2008).

[16] *Id.* at *9.

[17] *Id.* at *6.

[18] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 513 (1969) (alteration in original) (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

[19] *J.S.*, 2008 WL 4279517, at *4 (quoting *Tinker*, 393 U.S. at 514) (internal quotation mark omitted).

[20] *Id.*

[21] *Id.*

[22] 478 U.S. 675 (1986).

[23] *Id.* at 685.

[24] *See id.* at 683.

Court, *Morse v. Frederick*,[25] had also turned on the nature of the speech in question — in that case, speech that arguably promoted drug use[26] — rather than on the extent of the disruption it caused.[27] Applying the *Fraser* standard, the court held that because J.S.'s speech was vulgar and had some effect on campus, the school district could constitutionally punish her for it even if it did not create a substantial disruption.[28]

The Third Circuit affirmed.[29] Judge Fisher, writing for the panel,[30] rejected J.S.'s argument that *Tinker* should be limited to on-campus speech, holding that a school "need not satisfy any geographical technicality" to punish disruptive speech.[31] Applying the *Tinker* test, the court held that McGonigle's fear of substantial disruption was sufficiently well established that his actions did not violate J.S.'s First Amendment rights.[32] Judge Fisher further observed that it would be impractical to draw a sharp distinction between on- and off-campus speech given the tendency of extracurricular activities, school trips, and the internet to blur such boundaries.[33]

Dissenting from the First Amendment ruling, Judge Chagares argued that the majority greatly expanded school officials' authority over their students, vesting them "with dangerously overbroad censorship discretion."[34] Instead, Judge Chagares would have held that J.S.'s speech did not create a sufficient likelihood of disruption to justify punishment under *Tinker*.[35]

After rehearing en banc, Judge Chagares wrote for the majority[36] to reverse the district court on the First Amendment challenge, applying much of the reasoning from his earlier dissent.[37] The court began by assuming, without deciding, that the *Tinker* framework applied to J.S.'s speech.[38] Turning to the test's disruption prong, Judge Chagares compared the record in this case with the record in *Tinker* to determine whether the present record evinced a higher likelihood of disruption.

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25 127 S. Ct. 2618 (2007).

26 The students in *Morse* had unveiled a fourteen-foot-long banner saying "BONG HiTS 4 JESUS" at a school-sponsored event. *Id.* at 2622.

27 *See* J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., No. 3:07cv585, 2008 WL 4279517, at *6 (M.D. Pa. Sept. 11, 2008).

28 *See id.*

29 J.S. *ex rel.* Snyder v. Blue Mountain Sch. Dist., 593 F.3d 286, 290 (3d Cir. 2010).

30 Judge Fisher was joined by District Judge Diamond, sitting by designation.

31 *J.S.*, 593 F.3d at 301.

32 *Id.* at 300.

33 *Id.* at 307. The court rejected J.S.'s vagueness and overbreadth claims for similar reasons. *See id.*

34 *Id.* at 308 (Chagares, J., concurring in part and dissenting in part).

35 *Id.* at 313.

36 Judge Chagares was joined by Chief Judge McKee and Judges Sloviter, Ambro, Fuentes, Smith, Hardiman, and Greenaway.

37 *See J.S.*, 650 F.3d at 920.

38 *Id.* at 926.

Judge Chagares noted that, in *Tinker*, there was evidence that the black armband protest had caused a significant amount of disruption, including comments, mockery, and warnings from other students and a math class that was "practically 'wrecked'" by the protest.[39] Nevertheless, the Court in that case concluded that there were not "*any facts*" in the record that could reasonably have led school authorities to predict a substantial disruption.[40] Judge Chagares concluded that J.S.'s speech was certainly not more disruptive than the speech in *Tinker*, given that J.S. took steps to make the profile private, did not identify McGonigle by name or location, and posted content "so juvenile and nonsensical that no reasonable person could take [it] seriously."[41] As a result, even if *Tinker* governed this case, it could not support J.S.'s suspension.

Next, the court rejected the application of *Fraser* to off-campus speech, noting that the Supreme Court in *Morse* had clearly foreclosed that possibility by stating that "[h]ad Fraser delivered the same speech in a public forum outside the school context, it would have been protected."[42] Moreover, Judge Chagares reasoned, to apply *Fraser* to off-campus speech would give school officials the power to punish any student speech relating to school, in any place and at any time, as long as they deemed that speech offensive.[43]

Judge Smith concurred[44] but would have expressly held that *Tinker* does not apply to off-campus speech.[45] First, *Tinker* was premised on the special characteristics of the school environment, and subsequent decisions such as *Fraser* and *Morse* have been explicitly confined to on-campus speech.[46] Second, extending *Tinker* to cover off-campus speech would give schools the power to punish any student speech on any subject matter and in any context if it would cause substantial disruption in school.[47] *Tinker* itself contemplated the suppression of political speech,[48] if it created sufficient disruption, and to extend the authority to suppress such speech off campus would threaten students' right, for example, to blog about contentious social issues.[49] Third, if *Tinker* were extended to off-campus speech, Judge Smith argued, there

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[39] *Id.* at 928 (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 517 (1969) (Black, J., dissenting)).

[40] *Id.* at 929 (quoting *Tinker*, 393 U.S. at 514 (emphasis added)).

[41] *Id.*

[42] *Id.* at 932 (alteration in original) (quoting Morse v. Frederick, 127 S. Ct. 2618, 2626 (2007)) (internal quotation marks omitted).

[43] *Id.* at 933.

[44] Judge Smith was joined by Chief Judge McKee and Judges Sloviter, Fuentes, and Hardiman.

[45] *J.S.*, 650 F.3d at 936 (Smith, J., concurring).

[46] *Id.* at 937–38.

[47] *Id.* at 939.

[48] Although *J.S.* did not involve political speech, Judge Smith noted that First Amendment protection does not depend on the social value of any given type of speech. *See id.*

[49] *See id.*

would be no principled basis to prevent similar regulation of speech by adults that might cause on-campus disruption, such as the undoubtedly disruptive speech of those who protested against school segregation.[50]

Judge Smith noted that because of the "'everywhere at once' nature of the internet," the determination of what should qualify as off-campus speech could not turn simply on the location of the speaker.[51] Thus, for example, he would consider off-campus speech intentionally directed toward a school, such as a disruptive email sent to school faculty from a student's home computer, to be on-campus speech and therefore governed by *Tinker*.[52] Nevertheless, it would not be enough that speech might foreseeably reach an on-campus audience, if it were not intentionally targeted at the school, since such a foreseeability standard could be stretched to cover otherwise protected speech.[53]

Judge Fisher wrote in dissent,[54] arguing that the majority misconstrued the facts of the case and thus underestimated the potential for disruption caused by J.S.'s actions.[55] Although Judge Fisher agreed that the majority was correct to compare the facts in this case to those in *Tinker*, he would have held that several important distinctions between the cases deprived J.S.'s speech of protection[56]: first, *Tinker* dealt with political speech, which was not involved in this case; second, unlike the speech in *Tinker*, J.S.'s speech was directed at a school official; finally, J.S.'s speech was vulgar and obscene and could cause disruption by undermining both McGonigle's authority and general discipline in the school.[57] Judge Fisher was particularly concerned by the disruptive potential of the internet and by the growing phenomenon of online bullying of students and teachers,[58] and he noted that the ability to access the internet on cell phones made it difficult to separate the on- and off-campus effects of online speech.[59]

It is precisely this "everywhere at once" quality of the internet that highlights the need to resolve the constitutional issue in this case. Because the internet blurs the line between students' school and home lives, there is a significant risk that lower protections for on-campus speech might seep into all areas of students' lives, with significant potential consequences for their First Amendment rights. Although it is normally appropriate for appellate courts to decide cases on the nar-

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50 *Id.* at 940.
51 *Id.*
52 *Id.*
53 *See id.*
54 Judge Fisher was joined by Judges Scirica, Rendell, Barry, Jordan, and Vanaskie.
55 *J.S.*, 650 F.3d at 941, 943 (Fisher, J., dissenting).
56 *See id.* at 943.
57 *See id.* at 943–45.
58 *See id.* at 946–47.
59 *Id.* at 951–52.

rowest available bases and to avoid constitutional issues where possible, the court in this case should have decided the status of off-campus speech because of the potential chilling effects of failing to reach the issue: declining to decide whether *Tinker* applies off campus will have much the same effect as holding that it does. The court should have addressed the issue squarely and adopted the concurrence's reasoning to hold that off-campus speech is subject to general First Amendment protections and is not limited by *Tinker*.

The court's reluctance to issue a categorical ruling in this case is understandable. If the internet's erosion of the boundaries between home and school has increased the risk that *Tinker* might bleed into students' off-campus lives, it has also heightened the potential for off-campus speech to cause serious problems on campus.[60] The phenomenon of cyberbullying, for example, cannot reasonably be understood as either a purely on-campus or a purely off-campus occurrence. The impulse to avoid a broad pronouncement in this area while the underlying social conditions are in a state of flux makes a certain degree of sense. Nevertheless, the court's narrow ruling entails many of the same effects on students as a broad application of *Tinker* to off-campus speech would have.

The Supreme Court has often warned of the dangers of "chilling effects" in the First Amendment context, where fear of punishment silences even those whose speech would be protected. As the Court explained in *Gooding v. Wilson*,[61] "persons whose expression is constitutionally protected may well refrain from exercising their rights" out of fear of punishment when the law governing their speech is unclear or too broad.[62] The Court has sometimes used an anti-chilling rationale to favor broad constitutional rulings over narrow constructions of contested statutes. For example, in *Citizens United v. Federal Election Commission*,[63] Justice Kennedy rejected a narrowing construction of the relevant statute, holding that "[p]rolix laws chill speech for the same reason that vague laws chill speech: People 'of common intelligence must necessarily guess at [the law's] meaning and differ as to its application.'"[64] The Court proceeded to reach the constitutional

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[60] As Judge Fisher noted, almost two-thirds of students own a cell phone by the age of fourteen, and nearly three-quarters of high school students own one. *Id.* at 951 (citing AMANDA LENHART ET AL., PEW INTERNET & AM. LIFE PROJECT, TEENS AND MOBILE PHONES 9 (2010), *available at* http://www.pewinternet.org/~/media//Files/Reports/2010/PIP-Teens-and-Mobile-2010-with-topline.pdf). Almost a quarter of children ages twelve to seventeen use their phones to access social networking sites such as MySpace and Facebook. *Id.* (citing LENHART, *supra*, at 56). Under such circumstances, anything a student posts online could and often will reach an on-campus audience. *See id.* at 951–52.

[61] 405 U.S. 518 (1972).

[62] *Id.* at 521.

[63] 130 S. Ct. 876 (2010).

[64] *Id.* at 889 (second alteration in original) (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926)).

question.[65] Justice Kennedy was particularly concerned that "intricate case-by-case determinations" would chill core political speech.[66]

By proceeding with the *Tinker* inquiry in this case without deciding on its applicability, the court left the door open for school policies that significantly chill the off-campus speech of students, including speech that, if it were not disruptive, would clearly lie at the core of the First Amendment's protections, particularly political speech.[67]

The risk of a chilling effect is particularly acute in cases such as this one, given the intensely fact-specific nature of the *Tinker* inquiry.[68] Because the determination of a substantial disruption depends almost entirely on the facts of the case at issue, students will often have almost no basis on which to predict whether their speech would fall within *Tinker*'s ambit. These concerns apply a fortiori to cases where the school official need show only a reasonable fear of substantial disruption, rather than its actual occurrence.

Students are particularly vulnerable to having their speech chilled in this manner. School discipline by necessity involves relatively informal proceedings, which can be arbitrary and unfair.[69] School officials may cultivate reputations as strict disciplinarians to head off problems, and students may be reluctant to push boundaries when their rights are unclear. Students might also legitimately fear informal reprisals if they seek to challenge school officials in court.

Because the *Tinker* test turns on the outcome of a student's speech rather than its content, the test has the potential to sweep in any student speech on any topic — even core political speech — as long as it risks causing disruption at school. As the Court has noted, however, political speech is often disruptive by its very nature, and "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" are often the price of maintaining robust political debate.[70] Because students tend to interact with the same peer group both at and outside school,[71] off-campus speech by students, such as blogging about contentious social issues or participating in political campaigns, can easily spill over into on-campus conflict. In the ab-

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[65] *See id.* at 892.

[66] *Id.*

[67] *See, e.g.*, Buckley v. Valeo, 424 U.S. 1, 14 (1976) (per curiam) (describing political speech as "fundamental First Amendment activit[y]").

[68] This inquiry was so fact specific in this case that the majority and dissent could not agree whether the court's ruling created a circuit split. *See J.S.*, 650 F.3d at 931 n.8 ("[T]he dissent has overstated our sister circuit's law. Each case applying *Tinker* is decided on its own facts . . . .").

[69] *See generally* William G. Buss, *Procedural Due Process for School Discipline: Probing the Constitutional Outline*, 119 U. PA. L. REV. 545 (1971).

[70] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[71] *See, e.g.*, *J.S.*, 650 F.3d at 930 (noting that "[t]he fact that [J.S.'s] friends happen to be Blue Mountain Middle School students is not surprising").

sence of clear judicial guidance in this area, students and school districts alike will not know what law governs off-campus speech. Indeed, even the dissenting judges were confused on this point, referring to "the majority's apparent adoption of the rule that off-campus student speech can rise to the level of a substantial disruption,"[72] when in fact the majority had explicitly declined to decide the issue.[73] In light of such confusion, it may be too much to hope that principals will be particularly solicitous of the off-campus speech rights of their students, rather than taking all available measures to maintain discipline.

Confining *Tinker* to its on-campus roots would certainly restrict the power of school districts to regulate potentially disruptive speech. It would not, however, leave school officials entirely defenseless against the effects of off-campus speech. First, schools would retain the authority to punish any disruptive speech that took place on campus. If one assumes that an off-campus controversy would very often require some on-campus speech act to reignite the dispute in the school setting, the school would retain the power to suppress the problem at its point of entry and to punish any speech that sustained the disruption at school. Second, under Judge Smith's formulation, schools would retain the ability to punish speech originating off campus that intentionally targeted the school, which would likely sweep in a great deal of the conduct associated with cyberbullying, at least of teachers.[74] Finally, even if off-campus student speech were to enjoy the full protections of the First Amendment, it would not thereby be immunized from all threat of punishment. Just as speech by adults may fall foul of state tort law or harassment statutes, off-campus student speech would also be subject to such constraints.[75]

The court was right to find a First Amendment violation in this case, but it did so in a way that will make future encroachments on students' speech rights more likely. Because the court could have reached the constitutional issue without significantly impairing school districts' ability to maintain discipline, it should have held that *Tinker* does not apply off campus.

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[72] *Id.* at 941 (Fisher, J., dissenting).

[73] *Id.* at 926 (majority opinion).

[74] The precise boundaries of Judge Smith's standard are not entirely clear, but confining *Tinker* to on-campus speech and adopting a functional rather than formal definition of "on-campus" may provide one avenue for schools to police disruption adequately without excessively curtailing student speech.

[75] Admittedly, many of the standards involved in these other schemes may also have the chilling effects discussed above. Nevertheless, it can hardly be doubted that students would enjoy much wider latitude to speak under those standards than under the *Tinker* test.