

# CLIENT NEWS BRIEF

## Student Plaintiffs Seek Review by the United States Supreme Court in American Flag T-Shirt and Student Free Speech Case

As reported by Lozano Smith in March 2014, in February of last year the U.S. Ninth Circuit Court of Appeals issued its original ruling in *Dariano v. Morgan Hill Unified School District*, a case that posed the question of whether an administrator violated students' constitutional rights by requiring them to remove American flag clothing on Cinco de Mayo. In its original opinion, the Ninth Circuit held that the administrators did *not* violate the students' free speech rights in the case, basing its decision upon: (1) the foreseeable threat of violence that day to the students wearing such apparel; and (2) the school's history of gang and race-related violence at the school, including a similar threat of violence on Cinco de Mayo the prior school year.

In September of 2014, the Ninth Circuit [amended its original opinion in \*Dariano\*](#). While the Court's amended opinion maintained its holding that the plaintiff students' free speech rights were not violated, the Court expanded its reasoning to discuss the "heckler's veto" doctrine. Under federal case law, the heckler's veto doctrine usually does not allow the censoring of speech just because other groups might react unpleasantly to the speech. In its amended opinion, the Court reasoned that the heckler's veto doctrine does not apply in the context of a public school. Under *Dariano*, if school administrators can reasonably determine that a future disruption or future violence might occur (under *Tinker v. Des Moines Independent Community School District* (1969) 393 U.S. 503), they can prohibit the speech that might trigger such disruption or violence, regardless of how peaceful the speaker might be.

Recently, the plaintiffs in *Dariano* filed a petition for certiorari with the United States Supreme Court, requesting that the high court take up the case. Since that time, various interested parties have begun to weigh in. Among others, former student plaintiffs from the Supreme Court's landmark *Tinker* decision, Mary Beth and Todd Tinker, filed a brief in support of the plaintiffs encouraging the Supreme Court to grant review and reverse the Ninth Circuit's opinion. In the coming months, the school district will have the opportunity to respond to the students' request for Supreme Court review. If the Supreme Court takes up the case it will be heard in the fall of 2015. It has been over five years since the Supreme Court decided a case directly applicable to the nation's schools, and not since 2007, with the Court's decision in *Morse v. Frederick* (2007) 551 U.S. 393, regarding the ability to regulate student speech promoting illegal drug use, has the Court issued an opinion regarding student free speech rights.

For further information about this case, or student free speech rights in general, please feel free to contact one of our [eight offices](#) located statewide. You can also visit our [website](#), follow us on [Facebook](#) or [Twitter](#), or download our [Client News Brief App](#).

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