Justice Sotomayor wrote the unanimous opinion; Justice Thomas wrote a concurring opinion in which Justices Alito and Scalia joined.

http://www.supremecourt.gov/opinions/13pdf/13-483_9o6b.pdf (last accessed June 19, 2014).

Education: Principal's Refusal to Allow Distribution of Religious Messages Is Not "Clearly Established" as Unconstitutional, Preserving Qualified Immunity

Morgan v. Swanson, No. 13-40433 (5th Cir. June 3, 2014).

A parent who was prevented by a public school principal from distributing candy with religious messages in a classroom has failed in his Section 1983 claim because the principal's actions were protected by qualified immunity, under a Fifth Circuit decision.

In 2003 Thomas Elementary School in Plano, Texas had an in-class winter party. Doug Morgan attended the party with his son Jonathan and, as part of a gift exchange, gave Jonathan candy canes with a religious message to distribute. The principal, Lynn Swanson, said that no religious material could be handed out, however, and recommended placing the candy canes on an "information table" where others could take them if they chose. Having been excluded from the gift exchange, the Morgan's filed suit under § 1983, alleging the principal violated Jonathan's First Amendment rights. The initial suit in the case was heard *en banc* by the Fifth Circuit, which held that Nathan had been discriminated against by principal Swanson on the basis of viewpoint, but that she was subject to qualified immunity because the relevant First Amendment law was too "abstruse" and "complicated" for her to know how to handle religious messages at school parties.

This second case arises because Mr. Morgan now claims he, like his son, suffered viewpoint discrimination when he was not allowed to distribute the candy canes to other adults at the party. The District Court dismissed this claim, holding Swanson was also entitled to qualified immunity against Mr. Morgan's claim as well.

HELD: The Fifth Circuit affirmed the District Court, holding since there was no authority recognizing Mr. Morgan's asserted right and that the area of law was "abstruse" and "complicated," Mr. Morgan's allegations failed to override Swanson's qualified immunity.

DISCUSSION: The narrow issue before the Circuit was whether Mr. Morgan had such a clearly established First Amendment right to distribute religiously-messaged candy canes at the school party that it overrode Swanson's qualified immunity. Qualified immunity protects a school official's discretionary decisions unless her conduct is "clearly established" as unconstitutional. Furthermore, educators enjoy a presumption in favor of qualified immunity, when no malice is present, given that courts recognize they have a "difficult job." The rare exceptions when educators have been denied qualified immunity include instances such as punishing a student for silently raising his fist instead of reciting the pledge of allegiance in class, or a coach

suspending a football player for reporting a teammate's assault on another student. In contrast, the Court found no such clearly established rule in this case, certainly nothing that gave Swanson "fair notice" of Morgan's right and her concomitant legal obligations attending it.

Morgan argued that his right to distribute the candy canes was clearly established given the fact that viewpoint discrimination regarding private speech is clearly unconstitutional. The Court agreed with the proposition that viewpoint discrimination is clearly unconstitutional, but held that such a general proposition does not suffice for qualified immunity analysis because it fails to give an educator any defined rules about what is and is not permissible in a given set of facts. Swanson's behavior could not, under these circumstances, be clearly established as unconstitutional. Morgan's claim failed to override Swanson's qualified immunity.

http://www.ca5.uscourts.gov/opinions/pub/13/13-40433-CV1.pdf (last accessed June 17, 2014).

Takings: "Final Decision" on Development Plan Not Necessary Where Town's Delay Tactics Show that Continued Application Efforts Would be Futile

Sherman v. Town of Chester, No. 13-1503-cv (2d Cir. May 16, 2014).

The Second Circuit recently reversed a lower court's decision that a developer's takings claim was not yet ripe, finding that, where the Town continually delayed and frustrated the developer's application process, the developer did not need to show a "final decision" against him before bringing suit.

In 2000 Steven Sherman bought property zoned for residential development in Chester, New York, paying $2.7 million. In 2003, the Town enacted new zoning regulations requiring Sherman to redraft his plans for the property. Sherman did so. The Town passed new zoning regulations in 2004 as well, again requiring Sherman to redraft his plans and resubmit them, which he did. The Town changed the zoning again in 2006 and 2007, and both times Sherman again complied. The Town enacted other hurdles to the development, including imposing a six-month moratorium that was ultimately extended to a year and a half--and only impacted Sherman, while other developments were permitted. Additionally, the Town changed engineers and planners, all of whom demanded new studies and the resubmission of prior studies, the payment of a $25,000 fee and then an additional $40,000 fee. By 2009, Sherman had expended $5.5 million in addition to the $2.7 million he spent to purchase the land, was no closer to breaking ground, and was essentially bankrupt. Sherman sued alleging a host of state claims, a discrimination claim, and a takings claim.

The District Court held Sherman's takings claim was not ripe under *Williamson County* because he had not received a final decision nor proven that continuing to seek one would be futile. It then ruled the other claims were also not ripe. Sherman appealed to the Second Circuit.

HELD: The Second Circuit reversed on the takings claim. It held that Sherman had proven that continuing to seek approval would be futile, and remanded for further proceedings on the remaining claims the District Court had dismissed.