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.

DISCUSSION: The ripeness of a takings claim is reviewed under *Williamson County's* two-pronged test, which requires that a plaintiff show "(1) the state regulatory entity has rendered a 'final decision' on the matter, and (2) the plaintiff has sought just compensation by means of an available state procedure."

Sherman acknowledged that the Town had not technically reached a final decision on his development, but raised an exception to the finality requirement: A property owner may be excused from the first prong of *Williamson County* either by showing that trying to obtain a final decision would be futile or by showing that the government authorities are creating repetitive and/or unfair land-use procedures to avoid making a final decision. Sherman combined these, claiming that the Town was erecting repetitive and unfair land-use procedures and in doing so was refusing to make a final decision, making it futile for Sherman to keep trying. The Circuit Court agreed--the Town had changed zoning regulations five times in six years, enacted a moratorium that only impacted Sherman's development, extended that moratorium, had him resubmit studies he already had, and had him pay fees after already complying with fee requests.

Whereas the District Court had adopted a narrow view of futility, holding that just because Sherman was made to "jump through hoops", it was difficult to infer the Town had put up a "brick wall," the Circuit found such a "brick wall" could be inferred based on the tactics used by the Town and the number of years over which those tactics were employed. As the Court stated "it is no simple task to distinguish procedures that are merely frustrating from those that are unfair or would be futile to pursue. But when the government's actions are so unreasonable, duplicative, or unjust as to make the conduct farcical, the high standard is met."

The Circuit Court also found for Sherman on the second prong of *Williamson County,* which required him to have sought just compensation through a state procedure before coming to federal court. Although Sherman erred by not bringing the case in state court first, he ultimately did so; the Town had then removed the state case to federal court and argued that Sherman's takings claim had to be dismissed since it could only be heard in state court.

The Second Circuit did not agree, citing a Fourth Circuit precedent that when a defendant in a takings case tries this "removal maneuver" the state filing prong of *Williamson County* is excused. To let a defendant engage in such a "tactic" would deny a plaintiff any relief at all or would, at the very least, require piecemeal litigation of the sort disfavored by courts.

As for the takings claim, the Circuit Court ruled in Sherman's favor under *Penn Central*, which requires courts to weigh "(1) the economic impact of the regulation on the claimant; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action." Each of the elements was met. First, Sherman could make no economic use of his property, because the Town "kept stringing [Sherman] along" by requiring study after study, new fees, new plans, compliance with new regulations every year or two, and to meet the whims of new employees after having complied with the requirements and addressed the concerns of old ones. Second, the Town interfered with Sherman's investment-backed expectations--when he bought the property it was already zoned residential, allowing for the reasonable expectation that he would recoup his investment. Last,

the most elusive element of *Penn Central* was also met because the character of the government's action was to single out Sherman's development in an unfair, unreasonable, and bad faith manner.

http://www.ca2.uscourts.gov/decisions/isysquery/61eb6196-4b31-42f2-b280-654a5c6c89eb/1/doc/13-1503_opn.pdf#xml=http://www.ca2.uscourts.gov/decisions/isysquery/61eb6196-4b31-42f2-b280-654a5c6c89eb/1/hilite/ (Last accessed June 19, 2014).

Trials: Judicial Immunity Protects Judge Who Removed Combative Public Defender from All Cases Before Him

Bright v. Gallia County, Nos. 13-3451/3907 (6th Cir. June 2, 2014).

An Ohio judge was found to be protected under judicial immunity where he removed a public defender from some 70 cases before him. The judge was found to have sufficient subject matter jurisdictional nexus to the underlying cases to provide him with authority to make such a removal decision.

The Gallia County, Ohio board of county commissioners contracted with a non-profit organization to hire public defenders to represent indigent criminal defendants. One such defender was Robert Bright. Bright represented a criminal defendant in the course of his job, and he negotiated a plea deal for the defendant, but the defendant hesitated to accept it during colloquy. "Mere seconds" after refusing to accept to the deal, he accepted it but the judge, Judge Evans, refused to accept it, saying "we're not going to play games." The judge continued to refuse to accept the plea in a pretrial meeting in chambers. Bright then made a motion in court to accept the plea and stated the judge was being arbitrary and unreasonable in refusing to even hold a hearing to determine whether the defendant's plea was willingly, knowingly, and voluntarily entered. He went on to criticize the judge's policies on "drop dead dates" for plea agreements, his refusal to conduct a full colloquy regarding the defendant's plea, and his refusal to accept no contest pleas. Despite emphatic arguments throughout the motion, he cited case law and made proper legal arguments.

Bright alleged that, after this motion Judge Evans contacted the Ohio disciplinary counsel. Evans also filed a public journal entry stating that Bright created a conflict with the court, and ultimately ordered Bright removed from the case. The Judge went further and filed public journal entries for every felony case Bright defended before him and removed him from each one, which totaled approximately seventy cases. Thereafter the non-profit for whom Bright worked terminated his employment because he could not practice before Judge Evans.

Bright filed suit against Judge Evans, the nonprofit, and the county alleging they violated his First and Fourteenth Amendment rights to free speech, free association, substantive and procedural due process, and to equal protection; that Judge Evans tortiously interfered with his contractual rights with the nonprofit; that the nonprofit breached his contract by terminating him without good cause; and that Judge Evans invaded his privacy by publicly announcing that he had filed grievances with the disciplinary board. Evans defended with the doctrine of judicial immunity. The District Court found the Judge's decisions to remove Bright from each and every