American Bar Association
Section of State and Local Government Law

2013 Midyear Meeting

The Candy Cane Case: A Long and Difficult Journey

Thomas P. Brandt
Joshua A. Skinner
Fanning Harper Martinson Brandt & Kutchin, P.C.

February 7, 2013
Dallas, TX

Whoever coined the phrase "It's as easy as taking candy from a baby" could never have imagined how difficult it might be to litigate the issue. The purpose of this paper is to report on and reflect on the Fifth Circuit's *en banc* decision in *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011), the so-called "Candy Cane Case." The "Candy Cane Case" grinds on and on. The elementary school children who brought candy canes to school will soon be graduating from high school. The fight continues. There does not appear to be an end in sight. Although it is certainly true that "all things must pass" it appears that the "Candy Cane Case" passes more slowly than most.

After more than eight years of litigation, the only thing that is absolutely clear is that the law is not. Lynn Swanson and Jackie Bomchill were granted qualified immunity from the student's claims because the law was not clear. Everything else about the *en banc* opinion is dicta. There may be strong signals given by the court about certain issues but ultimately the only question properly joined and necessary for the decision was the issue of clearly established law.

The *en banc* decision actually raises many more questions than it answers but it is certainly important to understand the signals given as well as to understand the questions raised since this area of the law will undoubtedly continue to foster protracted litigation.

A Cautionary Note about the "Facts" of the Case

In order to properly understand the *Morgan en banc* decision one must start with realization that the facts in the case are in dispute and have, to this day, not been decided by a finder of fact. Despite eight years of litigation, the case has still not been tried. Amazingly, as of yet, not a single deposition has been taken.

One of the many reasons for the length of the case and the lack of depositions is the fact that so many school officials were sued in their individual capacities. Given that the school officials asserted qualified immunity in motions to dismiss and asserted their right to be protected from discovery, it is no wonder that the case did not proceed forward on what some may consider to be a normal course of litigation.

The "facts" for the *en banc* decision in *Morgan* are simply those facts asserted by the Plaintiffs in their complaint. The true facts may be determined at some future date, but the *en banc Morgan* "facts" are simply those assertions of fact made by the Plaintiffs in their complaint. With that understanding of the term "facts", the *en banc* court ruled that both Swanson and Bomchill were entitled to qualified immunity. The basic "facts" of the case then are as follows:

STATEMENT OF THE "FACTS"

I. Swanson and Bomchill were following policy, not acting based on any hostility toward religion.

The allegations in this case are lengthy, repetitive and vague. The basic storyline, however, is fairly straightforward. Plaintiffs allege that Swanson and Bomchill, elementary school principals in Plano ISD, restricted the distribution at school of non-curricular, religious materials to their elementary-age students (second through fifth grade) based on the religious content of the materials. Plaintiffs, all elementary school students in approximately second through fifth grade (at the time of the events), allege that they had a First Amendment right to distribute the non-curricular, religious materials to their classmates during school regardless of whether other students or their parents had consented to the distribution.

A. Swanson's and Bomchill's acted not out of any personal hostility toward religion, but in conformity with school policy, supervisors' directions and lawyers' advice.

This case has been characterized as part of a "War on Christmas."[1] The factual allegations in Plaintiffs' Complaint, however, do not evince any hostility on the part of Swanson or Bomchill toward religion, toward Christians, nor toward Christmas. Plaintiffs' complaint does not allege that Swanson or Bomchill acted out of a personal animosity toward religion. Plaintiffs do not allege that Swanson or Bomchill acted from any personal hostility toward religion[2]; only that they were

---

[1] *See, e.g.*, JOHN GIBSON, THE WAR ON CHRISTMAS: HOW THE LIBERAL PLOT TO BAN THE SACRED CHRISTIAN HOLIDAY IS WORSE THAN YOU THOUGHT 55-75 (Sentinel 2005), which devotes an entire chapter to this litigation.

[2] Plaintiffs' complaint generally alleges "viewpoint discrimination," a conclusory statement open to varying interpretations. Swanson and Bomchill have consistently interpreted Plaintiffs' vague allegation of "viewpoint discrimination" in accordance with the factual allegations in Plaintiffs' complaint that Swanson and Bomchill, in accordance with Plano ISD policy and their supervisors' instructions, restricted the distribution of religious materials and were motivated by concern that the religious materials might offend other students and their parents or might cause a violation of the Establishment Clause. In response to Swanson's and Bomchill's petition for rehearing, Plaintiffs allege that Swanson and Bomchill restricted religious speech because they disagreed with Plaintiffs' viewpoint. The factual allegations, however, do not support a claim that Swanson or Bomchill acted out of ill will or animus toward or disagreement with religion or Christianity.

acting pursuant to Plano ISD policy and supervisors' instructions.[3] The school district's lawyers were advising the supervisors. Plaintiffs allege that Swanson and Bomchill were poorly trained.[4] Plaintiffs allege that the motivation behind the direction and training given to Swanson and Bomchill was that students in elementary schools constitute a "captive audience."[5] The simple truth (which is not found in the Plaintiffs' complaint) is that both Lynn Swanson and Jackie Bomchill are Christians. They celebrate Christmas with their families and they attend church. Although some may have tried to demonize them, the truth is that they are both good, Christian women who were trying to do their best in a difficult situation. Any suggestion that they have any animosity toward Christians, Christianity or Christmas is absolutely false.

B. The policy to which Swanson and Bomchill conformed sought to restrict the distribution of religious materials in order to avoid offending other students and parents and to avoid any possible Establishment Clause claims.

The allegations indicate that the Plano ISD officials, especially the upper administration (Swanson's and Bomchill's supervisors[6]), directed Swanson and Bomchill out of a concern that the other students constituted a "captive audience" and that permitting the distributions might constitute a Constitutional violation. Counsel for Plaintiffs, Mr. Shackelford, conceded this when he characterized the school officials' conduct as based on a mistaken belief that exclusion of religious materials is required to comply with the Establishment Clause. As Judge Brown noted during the temporary restraining order hearing at the commencement of this litigation, "I've had several 1st Amendment cases involving the Plano School District in the past. And I know they try to follow the law, but that's not always easy."

---

[3] This allegation is repeated in at least thirty-three (33) separate paragraphs of Plaintiffs' complaint. Nowhere in Plaintiffs' complaint is there a single, fact-specific allegation which indicates any anti-religious animus on the part of Swanson and Bomchill.

[4] Plaintiffs' complaint is that Swanson and Bomchill were poorly trained principals who were being directed by uninformed supervisors who were advised by incompetent lawyers.

[5] Even when alleging their entitlement to punitive damages, Plaintiffs never allege any intentional misconduct, hostility, malice, ill will or animosity toward religion in general or Christianity in particular Plaintiffs instead merely allege in a conclusory manner that the individual defendants acted with reckless and callous indifference to the lawful and constitutionally protected rights of Plaintiffs.

[6] Swanson's and Bomchill's supervisors, Superintendent Doug Otto and Assistant Superintendent Carole Griesdorf, were earlier granted qualified immunity.

As alleged, this case is about confusion regarding the interplay between the courts' Establishment Clause jurisprudence and the special role that public schools play in the education of elementary school children. Swanson and Bomchill were obedient employees, not protagonists in an anti-Christian campaign. If the "War on Christmas" exists, Lynn Swanson and Jackie Bomchill are civilians caught in the cross-fire.

II. Plaintiffs allege restrictions on religious messages at Thomas Elementary.

A. Swanson allegedly directed teachers to restrict the distribution of religious gifts during classroom winter-break parties.

The Morgans and the Wades allege that from 2001 to 2003, Swanson, principal of Thomas Elementary, prevented Plaintiffs from distributing religious items in gift bags at the school's December winter-break parties, but permitted students to distribute non-religious items.[7]

Plaintiffs allege that, before 2001, students at Thomas Elementary were permitted to give gift bags to their classmates at the December winter-break party. The Wades allege that in December 2001, Swanson instructed classroom teachers to inspect gift bags brought by students to determine whether or not they contained religious materials. Swanson allegedly instructed the teacher's, pursuant to Plano ISD policy and custom, to prevent the distribution of religious material. The Wades allege that Michaela Wade's gift bag was searched by her teacher and, when it was discovered that Michaela's gift bag contained religious pencils, Michaela was prevented from distributing the pencils to her classmates. Michaela's pencils contained the religious message: "Jesus is the Reason for the Season." Plaintiffs allege that students with secular gifts were permitted to distribute their gifts.

The Morgans allege that in December 2003, Swanson prevented Jonathan Morgan, a third-grade student, from distributing, to his classmates, candy cane shaped pens with an attached religious message regarding the alleged religious origin of the candy cane.

---

[7] Swanson is alleged to have taken action only regarding activities in the school during the school day. With regard to Bomchill, all but one of her actions is alleged to have taken place in the school during the school day. The only exception with respect to Bomchill involved the supervision of children as they were leaving school at the end of the school day.

In anticipation of the party, Doug and Robin Morgan, Jonathan's parents, communicated with Plano ISD officials to learn the policies of Plano ISD regarding student-to-student distribution of religious materials. The Morgans contacted Carole Griesdorf, Assistant Superintendent, who directed them to Swanson.

The Morgans met with Swanson on December 4, 2003, and expressed their objections to Plano ISD's policies relating to the distribution of religious materials during the winter-break parties and the exclusion of references to the party as a "Christmas" party. Swanson replied that parents and volunteers are prohibited by Plano ISD policy from using symbols that would represent Christmas or the Christian religion during the winter-break party. Plaintiffs allege that the exclusion applied generally to religious celebrations, not just Christian celebrations. The Morgans discussed with Swanson the alleged events from December 2001, when school officials prevented Michaela Wade from distributing religious gifts to her classmates during the winter-break party. Swanson allegedly stated that she was aware of the incident, that school personnel had acted properly, that the restriction was in accordance with the policy of Plano ISD, and that this restriction had been approved by the "highest levels" of Plano ISD. Swanson allegedly stated that Plano ISD policy prohibits one student from distributing to another student, while on school property, any material that is of a religious nature or that contains a religious viewpoint. Swanson allegedly told the Morgans that Jonathan would not be permitted to distribute candy canes with the attached Christian message during the winter-break parties. The Morgans asked Swanson to verify her understanding of Plano ISD policy. Swanson allegedly called them on December 8, 2003, and verified that her understanding of the policy had been confirmed by the administration.

After their meeting with Swanson, the Morgans sent another email to Griesdorf. Griesdorf confirmed Swanson's understanding of the policy, and stated that students could not distribute anything of a religious nature to their classmates during the winter-break parties or at any time while on school property.

After receipt of Griesdorf's email, Plaintiffs, through their attorney, Mr. Shackelford, sent a demand letter to Swanson. In the letter, Shackelford sought to inform her that, in his opinion, the Constitution precluded the restrictions on Jonathan Morgan's distribution of religious materials during the winter-break parties. Shackelford admitted that actions "to suppress Christmas celebrations demonstrate that many school officials mistakenly believe that allowing seasonal religious expression" would violate the Establishment Clause.

Although Shackelford's letter was addressed to Swanson, the response to the letter came from the school district's attorney, Mr. Richard Abernathy, who explained why Plano ISD did not believe that the restrictions at Thomas Elementary violated the Constitution. Abernathy explained that the "holiday party at issue is a classroom activity that has a clearly defined curricular purpose to teach social skills and respect for others in a festive setting. This activity is highly structured, supervised and regulated." He explained that the Third Circuit had recently re-affirmed,

> under almost identical facts to those present here, that a school's restrictions on an elementary school student's distribution of candy canes and pencils containing a religious message during a classroom holiday party did not violate the First Amendment. *Walz v. Egg Harbor Township Board of Edu.*, 342 F.3d 271 (3d Cir. 2003).

Id. Shackelford did not respond to Abernathy's letter.

On the day of the December 2003 winter-break party, Jonathan Morgan attempted to bring and distribute the candy canes with the attached religious message. Jonathan, and his father, were told that Jonathan could distribute his gift bags on the information table in the school library or he could distribute them on a public sidewalk or off school property, but not in the classroom.

B. Swanson was concerned about the alleged banning of "Merry Christmas" messages on greeting cards and the alleged banning of the colors red and green.

Swanson's actions indicate that she was attempting to adhere to Plano ISD policy and that she was concerned about allegations that religious messages or themes were being unnecessarily discouraged. When Swanson was informed that certain teachers were instructing their students not to write "Merry Christmas" on greeting cards, Swanson said that she would investigate the matter. Swanson also stated that she would investigate allegations that the colors red, green and red/green plaid were prohibited in the decorations, plates, cups, napkins, etc. for winter-break parties.[8]

[8] Plaintiffs allege that the guidelines are attached to their complaint as Exhibit 3. Exhibit 3, which contains guidelines for parents assisting classroom teachers, does not contain any such instructions. Plaintiffs presumably mean Exhibit 12, which contains guidelines relating to school parties. Exhibit 12, however, also does not contain any prohibitions on "Christmas" colors. *Id.* Exhibit 12 makes no reference to items that are green, red or plaid. It simply says to bring white plates and napkins.

III. Plaintiffs allege restrictions on religious messages at Rasor Elementary.

A. Bomchill allegedly restricted the distribution of religious drama tickets in order to avoid offending other students.

The Vershers allege that, in January 2004, Bomchill, then-principal of Rasor Elementary, prohibited Stephanie Versher, a fifth-grade student, from distributing, to her classmates, tickets to a religious drama. Neither Stephanie nor her mother, Sherrie Versher, nor their lawyers made any attempt to present the religious drama tickets to Bomchill for prior review, as required by Plano ISD policy. [Plano ISD Policy FNAA (Local)].[9]

While at school, Stephanie spoke with various classmates about the religious drama and passed out tickets to those students who expressed an interest in the drama. The Vershers allege that, when Bomchill spoke with Sherrie Versher about the drama tickets, Bomchill indicated that the tickets could not be distributed because other students might disagree with the Christian viewpoint and complain. Bomchill did not prohibit Stephanie from speaking to her classmates about the drama while at school nor did Bomchill prohibit Stephanie from distributing the tickets off campus.

B. Bomchill allegedly restricted the distribution to students of pencils containing a religious imprint.

The Vershers allege that on January 16, 2004, Bomchill prevented Stephanie Versher from distributing religious items (pencils with a religious message) at her half-birthday party in the school cafeteria and in front of the school, on school property at the end of the school day. The Vershers allege that Bomchill permitted the distribution of non-religious items at birthday parties. Neither Stephanie nor her mother, Sherrie Versher, nor their attorneys attempted to present the pencils to Bomchill for review until just before the start of the party. Plano ISD policy required that materials be submitted for review at least three days prior to the proposed date of distribution.[10]

---

[9] The requirement of prior submission has been declared constitutional by the magistrate. Mag. J. Rpt. & Rec. (September 3, 2010), Civil Action No. 4:04-CV-447 (E.D. Tex.). The policy also provides an appeal process which Plaintiffs did not use.

[10] The Vershers allege that Sherrie Versher attempted to meet with Bomchill the day before the party to discuss the distribution of brownies. Sherrie Versher did not attempt to meet with Bomchill about the pencils until the day of the party, just before it was going to begin. The panel mistakenly asserts that Sherrie Versher attempted to meet with Bomchill the day before to discuss the pencils. *See Morgan*, 627 F.3d at 174.

On the day of the party, Sherrie Versher took the brownies and two sets of pencils (one set having a Christian imprint) to Bomchill's office. Before arriving at Bomchill's office, Security Police Specialist John Beasley handed Sherrie Versher a letter accusing her of distributing material to students on school property and threatening her with legal action. After he gave her the letter, he escorted her to Bomchill's office.

Bomchill allegedly accused Sherrie Versher and her daughter of distributing the religious drama tickets on school property in violation of Plano ISD policy and threatened them with legal action if they did not cease violating district policy. Bomchill also allegedly stated that Stephanie could not distribute the religious pencils during the birthday party, but could distribute the other pencils. In the middle of the discussion, Sherrie Versher stepped into the hallway and called her attorney to discuss legal restrictions that could be placed on the distribution of the religious pencils. After consulting with her attorney, Sherrie Versher expressed no further complaint. As she left the school office, Versher "thought out loud to herself 'Satan is in the building.'"

Sherrie Versher then went to the birthday party in the cafeteria where Stephanie passed out the other pencils. After the party was over, Sherrie Versher was escorted from the building by Beasley who allegedly falsely accused her of creating a disturbance.[11] Plaintiffs allege that two City of Plano police pulled Sherrie Versher over after she drove away from the building and questioned her about her "Satan is in the building" comment. Plaintiffs do not allege that Bomchill had any involvement in calling the City police.

At the end of the school day, Sherrie Versher walked to Rasor Elementary to meet her daughters as they left school. Stephanie was outside the school building on the sidewalk and lawn amid a small group of her classmates. Stephanie was distributing the religious pencils to her classmates. Bomchill stopped Stephanie and allegedly scolded her for distributing the religious pencils on school property. Plaintiffs allege that Bomchill had previously approved the distribution of the pencils "outside the building," but that after school, Bomchill was claiming to have approved this distribution only off of Plano ISD property. An argument ensued as to Bomchill's precise instructions. Sherrie Versher then left. *Id.*

---

[11] The district court granted Beasley qualified immunity. The magistrate stated, "Mr. Beasley provides security for PISD, and it appears that after Ms. Versher had audibly uttered 'Satan is in the building' and continued to roam the halls of the elementary school after her daughter's half birthday was completed, Mr. Beasley would be acting within his authority to ask her to leave the building. For the safety of the students, adults should not be allowed to roam through the halls of an elementary school without permission from the school administration."

PROCEDURAL HISTORY OF THE CASE

Plaintiffs[12] brought suit against Plano Independent School District ("Plano ISD") and various school employees, including Lynn Swanson ("Swanson") and Jackie Bomchill ("Bomchill"), on December 15, 2004.[13] That first day of litigation witnessed nearly 400 pages of pleadings filed.[14] The original complaint was brought on behalf of ten plaintiffs against seven defendants and contained seven causes of action, requests for declaratory and injunctive relief, actual and punitive damages and attorneys fees. Plaintiffs also brought an Establishment Clause claim in which they claimed that the school's policies "create an excessive entanglement with religion."

Although Plaintiffs originally brought claims on behalf of both parents and students, they have since waived all but one parental claim. The last eight years of litigation have witnessed the dismissal of all but one of the individual defendants on the basis of qualified immunity.[15] In the *en banc* appeal before the Fifth Circuit, there were fewer factual allegations for the Court to consider because that appeal only involved events that occurred at Thomas Elementary (where Lynn Swanson was principal) and Rasor Elementary (where Jackie Bomchill was principal). The Fifth Circuit and the lower court have already upheld the facial constitutionality of Plano ISD policies restricting student-to-student distribution of non-curricular materials that were at issue in this litigation. *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740 (5th Cir. 2009); Mag. J. Rpt. & Rec. (September 3, 2010), Civil Action No. 4:04-CV-447 (E.D. Tex.).

Relying on *Morse v. Frederick*, 551 U.S. 393 (2007), as well as a host of other cases, Swanson and Bomchill filed their motion to dismiss based on qualified immunity. At that time, the "rigid order of battle" rule established in *Saucier v. Katz,* 553 U.S. 194 (2001), governed. This rule, not modified until *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009), required Swanson and Bomchill to

---

[12] The plaintiffs in the case at bar are Jonathan, Doug and Robin Morgan ("the Morgans"), Michael, Kevin, Jim and Sunny Shell ("the Shells"), Michaela, Christine, Bailey and Malcolm Wade ("the Wades"), and Stephanie M. and Sherrie Versher ("the Vershers") (jointly, "Plaintiffs").

[13] The current live pleading is Plaintiffs' Second Amended Complaint.

[14] 188 pages comprised the complaint and 198 pages comprised the application for a temporary restraining order.

[15] The one remaining individual defendant is Lynn Swanson. The one remaining claim against her is a parent-to-parent free speech claim brought by Mr. Doug Morgan. Mr. Morgan claims that Lynn Swanson violated his free speech right to distribute religious materials to other parents during the students' winter break party at school. The magistrate has recommended that Ms. Swanson be granted qualified immunity from this claim. The Plaintiffs have filed objections to the magistrate's report and recommendation. We are currently awaiting a ruling from the District Court on this issue.

address the underlying constitutional question first, even though that issue is much more difficult than the issue involving "clearly established law." Obedient to the requirements of *Saucier*, Swanson and Bomchill argued first that the First Amendment does not apply to restrictions on the distribution of non-curricular materials by elementary school students to their classmates during the school day and, second, that the law was not clearly established.

The magistrate judge recommended denial of Swanson's and Bomchill's motion, and Swanson and Bomchill filed timely objections.

Before the district court had ruled on Swanson's and Bomchill's objections, the Supreme Court issued *Pearson*, emphasizing: (1) that public officials "are entitled to rely on existing lower court cases without facing personal liability for their actions" even if those cases come from other circuits or states, and (2) that the law is not clearly established when a split develops *after* the events that gave rise to the lawsuit. *Id.* at 822-23. Swanson and Bomchill filed a supplement to their objections, bringing *Pearson* to the attention of the court.

The magistrate withdrew his earlier report and issued a revised report, still recommending that the motion be denied. Swanson and Bomchill filed objections to the revised report. The district court adopted the magistrate's revised report and Appellants filed their notice of appeal.

A panel of the Fifth Circuit affirmed the decision of the district court. *Morgan v. Swanson*, 610 F.3d 877 (June 30, 2010), revising its opinion on July 1st. Swanson and Bomchill filed a petition for rehearing en banc. The panel issued an amended opinion. 627 F.3d 170 (November 29, 2010).

The case was orally argued before the *en banc* Court of Appeals in New Orleans on May 23, 2011. Two former solicitor generals of the United Sates, Ken Starr and Paul Clement, argued on behalf of the Plaintiff-Appellees. On September 27, 2011, the *en banc* Court of Appeals issued its opinion granting qualified immunity to Lynn Swanson and Jackie Bomchill. *Morgan v. Swanson*, 659 F.3d 359 (5th Cir. 2011).

Below is the summary of the argument we presented to the *en banc* court. Following the summary of our argument is a description of the decision and an analysis of the questions raised by the decision.

SUMMARY OF OUR ARGUMENT

> This case again requires analysis of the delicate balance that public school administrators must strike between protecting the First Amendment right to free speech and avoiding endorsing religion in violation of the Establishment Clause. The many cases and the large body of literature on this set of issues demonstrate the lack of adequate guidance to enable teachers and principals to determine whether the decisions they make comply with constitutional standards. … [D]ecisions in such seemingly innocuous and benign activities as elementary school parties … too often lead to protracted litigation.

Pounds v. Katy Indep. Sch. Dist., 730 F. Supp. 2d 636, 638 (S.D. Tex. 2010) (Rosenthal, J.).

Reasonable people continue to disagree, at times fiercely, about the appropriate role of religion in American public life. Some believe that our public institutions, including our public elementary schools, should leave ample room for religious speech. Others believe that governmental institutions, and especially public schools, should be predominantly or even exclusively secular. Still others strive to find some middle ground between these positions.

These policy disputes frequently become constitutional disputes, as many citizens reasonably believe that their policy prescriptions are commanded by the Constitution. In countless threatened or filed lawsuits, advocates for a more robust protection for religious speech and practice have argued that the First Amendment requires that such speech or practice be permitted, while proponents of a more secular public square have insisted that the Establishment Clause requires precisely the opposite.

Federal judges have been similarly divided. For example, in *Rosenberger v. University of Virginia*, 515 U.S. 819 (1995), five Justices of the Supreme Court asserted that the Free Speech Clause *required* that the University of Virginia fund a student religious publication, *id.* at 837, while four Justices concluded that the Establishment Clause *prohibited* such funding. *Id.* at 864.

Caught in the middle of these policy and constitutional debates are public officials—who are often left with little latitude for discretion, little margin for error. When, as here, the disputes involve competing claims of permission and prohibition, these disputes concern rival positions that leave little or no breathing room.

Qualified immunity provides school officials with the room to make reasonable mistakes without incurring personal, sometimes crushing, liability. Qualified immunity, as the Fifth Circuit has held, gives public officials *breathing space* in which to perform their duties. *Hernandez ex rel. Hernandez v. Tex. Dep't of Protective & Regulatory Servs.*, 380 F.3d 872, 879 (5th Cir. 2004). This breathing space is all the more vital where the public official must navigate not only between the conflicting requirements of local policy and the First Amendment, but also between the (sometimes) rival First Amendment values of free speech and non-establishment. Few, if any "bright lines exist in this complex field of First Amendment law," and thus qualified immunity protects "school officials, who often find themselves … subject to criticism and potential law suits regardless of the position they take." *Nurre v. Whitehead*, 580 F.3d 1087, 1102 (9th Cir. 2009) (Smith, J., concurring), *cert. denied*, 130 S. Ct. 1937 (2010).

This breathing space provided by qualified immunity is ample: Qualified immunity requires that the asserted constitutional right be so "clearly established" that a public official's violation of it shows that he or she either is "plainly incompetent" or has "knowingly violate[d] the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986).

The issue before the Fifth Circuit was, as the Plaintiffs asserted, "whether elementary school students have *any* First Amendment rights," *Morgan v. Swanson*, 627 F.3d 170, 178 (5th Cir. 2010) (emphasis added), for they most certainly do, including the freedom from religious establishment. Rather the question is whether the *scope* of their First Amendment rights were so clearly established in this specific context that Swanson's and Bomchill's alleged conduct reflected plain incompetence or a knowing violation of the law. More specifically, the issue before the Fifth Circuit was whether it was clearly established that the First Amendment prohibits elementary school administrators from regulating the distribution of non-curricular materials to their students at school, based on the religious content of the non-curricular materials, even where such restrictions are motivated not by any disagreement with or animus toward the religious content, but by an effort to comply with local school district policy and the Establishment Clause.

Swanson and Bomchill were entitled to qualified immunity because, in light of the confusion among the federal courts regarding student speech rights, the law was not clearly established. The panel and the district court failed to properly analyze the precedents from other circuits because they neglected two key holdings in *Pearson v. Callahan*, 555 U.S. 223, 129 S. Ct. 808 (2009). First, public officials are entitled to rely on lower court opinions from other circuits in determining what they are permitted to do. *Id.* at 822-23. Second, the law is not clearly established when the courts do not agree, even if it only became apparent that there is confusion after the events in the case in question. *Id.* at 823. The district court and the panel failed to properly consider precedents from other circuits and failed to consider judicial opinions that were issued after the events of the case at bar.

The confusion among the courts is well illustrated by the conflict between the panel's decision and the Ninth Circuit's decision in *Nurre* that a school's restricting the performance of *Ave Maria*, based on its religious content, did not violate the First Amendment. In dissenting from the denial of certiorari in *Nurre*, Justice Alito noted that the *Nurre* decision provides a basis for discriminating against religious speech in public schools and, moreover, "authorizes school administrators to ban any controversial student expression at any school event." *Nurre v. Whitehead*, 130 S. Ct. 1937, 1940 (2010). Despite this strong disagreement, the panel and the district court concluded that it "has been clear for over half a century" that discrimination against religious speech in elementary schools is prohibited. *Morgan v. Swanson*, 627 F.3d 170, 171 (5th Cir. 2010). As the Supreme Court held over a decade ago and reaffirmed in *Pearson*, "If judges thus disagree on a constitutional question, it is unfair to subject [public officials] to money damages for picking the losing side of the controversy." *Wilson v. Layne*, 526 U.S. 603, 618 (1999).

Moreover, Swanson and Bomchill were entitled to qualified immunity because the decisions of the Supreme Court and the Fifth Circuit do not clearly establish that their actions, in the specific context alleged, would violate Plaintiffs' First Amendment rights. Neither the Supreme Court nor the Fifth Circuit has ever addressed this issue, and the decisions from other federal courts have provided confused and conflicting answers. *See, e.g., Walker-Serrano v. Leonard*, 325 F.3d 412, 417-18 (3d Cir. 2003) ("if third graders enjoy rights under *Tinker*, those rights will necessarily be very limited."). The district court and the panel erred by failing to recognize that the "clearly established" inquiry "'must be undertaken in light of the specific context of the case, not as a broad general proposition.'" *Brosseau v. Haugen*, 543 U.S. 194, 198 (2004).

Relying on the Supreme Court's holdings in (1) *Barnette*, establishing a right for public school students to refrain from reciting the pledge of allegiance,[16] (2) *Tinker*, establishing a right for high school students to wear arm bands in protest of the Vietnam War,[17] and (3) *Good News Club*, holding that Establishment Clause concerns arising from the presence of young children in a limited public forum do not justify restrictions on content-based speech that is directed at their parents,[18] the district court and the panel mistakenly concluded that "it has been clear for over half a century that the First Amendment protects elementary school students from religious-viewpoint discrimination." *Morgan*, 627 F.3d at 171. The district court and panel obfuscated the critical differences between those cases and the facts alleged here: *Barnette* concerned a freedom from compulsory speech, not the freedom to affirmatively speak; *Tinker* concerned limited affirmative free-speech in high schools, not elementary schools; and *Good News Club* concerned the use of a facility in proximity to elementary-age children, not the First Amendment rights of such students to speak at school to other such students. The cases relied upon by the district court and panel did not clearly establish the law in the specific context of this case. *See Brosseau*, 543 U.S. at 198.

In addition, the district court and panel failed to consider the way those supposedly clearly established precedents had been interpreted by lower courts. In the intervening time between the district court's decision and the panel's decision, the Supreme Court held that confusion among the lower courts as to how to interpret a decision of the Supreme Court is strong evidence that the law was not clearly established. *Safford Unified Sch. Dist. v. Redding*, __ U.S. __, 129 S. Ct. 2633 (2009).

Alternatively, Swanson and Bomchill argued that they should be granted qualified immunity because the First Amendment does not prohibit elementary school educators from regulating the distribution of written materials to their students at school.[19] Parents expect elementary schools to teach their children the basics of reading, writing and arithmetic; not to serve as a battleground in the

---

[16] *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Walker-Serrano*, 325 F.3d at 417.

[17] *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Morse v. Frederick*, 551 U.S. 393, 403-04 (2007); *id.* at 429 (Breyer, J., concurring) (*Tinker* clearly established that "school officials could not prohibit students from wearing an armband in protest of the Vietnam War, where the conduct at issue did not 'materially and substantially disrupt the work and discipline of the school.'").

[18] The district court relied heavily on *Good News Club v. Milford Central School*, 533 U.S. 98 (2001), which held that speech may not be excluded from a limited public forum solely on the basis of the religious nature of the speech. *Id.* at 105-06. As the Court's opinion makes clear, that the events occurred in a school building was incidental to the issue presented to the Supreme Court.

[19] Plaintiffs and the panel mischaracterized Swanson's and Bomchill's argument as an attack on First Amendment speech rights for elementary school students in all contexts.

debates over religion in the public square. The district court's decision undermines the ability of elementary school educators to fulfill their duty to the families who entrust the public schools with the education of their children, "but condition that trust on the understanding that the classroom will not be used to advance views that may conflict with the private beliefs of the student and his or her family." *Edwards v. Aguillard*, 482 U.S. 578, 584 (1987).

Defendants Swanson and Bomchill argued that they are reasonable public officials and that their alleged conduct, even if mistaken, was not so egregious as to reflect "plain incompetence" or "knowing violation of the law." They asked the Court to provide them ample breathing space, and ample room to make reasonable mistakes.

The *En Banc* Court's Opinion

The badly-splintered *en banc* decision can best be summarized as falling into three main groups and a single judge. The three main groups are: (1) the Benavides group; (2) the Jones group; and (3) the Elrod group. The single remaining judge is Judge Prado. Below is a brief synopsis of the groups and Judge Prado's positions.

<u>Benavides Group</u>: **King**, **Davis**, **Stewart** and **Dennis** joined **Benavides**' opinion, with the exception of specific sections (primarily the discussion of whether there was a constitutional violation). **Owen** joined the qualified immunity/clearly established sections of Benavides' opinion. Benavides' opinion states, "we REVERSE the judgment of the district court and REMAND with an instruction to dismiss the plaintiffs' claims as to Swanson and Bomchill in their individual capacities."

<u>Jones Group</u>: **Jolly**, **Southwick** and **Garza** joined **Jones**' opinion, except that Garza only joined the first paragraph. **Owen** joined Jones' opinion, except for the general adoption of certain sections of Judge Elrod's opinion. Jones' opinion states, "I regretfully vote to reverse the denial of qualified immunity to these principals."

<u>Elrod Group</u>: **Smith**, **DeMoss**, **Clement** and **Haynes** joined **Elrod**'s opinion. The Jones Group generally joined the Elrod Group as to the holding that the First Amendment applies in elementary schools, that *Tinker* is the default standard, and that the actions alleged would violate the First Amendment. Elrod's opinion also states, in a portion that was only joined by the Elrod Group, "The

complaint also alleges that the principals censored parent speech, but those claims were not subject to the motion to dismiss and remain pending before the district court."

Prado would have denied qualified immunity to Bomchill for the after-school and drama ticket incidents, but otherwise grants qualified immunity as to the remaining incidents.

Analysis of the Decision: More Questions than Answers

In their petition for writ of certiorari, the Plaintiffs' presented the following interpretation of the *Morgan* decision.

> The badly-splintered *en banc* decision below casts doubt on the one clear principle that emerges from this Court's student speech cases: that all students, including elementary school students, have at the very least the basic First Amendment right to be free from discrimination against their private, non-curricular speech based *solely* upon its religious viewpoint.

The petition for writ of certiorari went on to say that the *Morgan* decisions "sows confusion where there had been clarity."

Prior to the Fifth Circuit's en banc decision in *Morgan v. Swanson*, it was unclear whether the First Amendment Free Speech Clause provided affirmative speech rights to elementary school students at school.[20] In *Morgan*, however, a majority of the judges on the Fifth Circuit concluded that the Free Speech Clause does apply to the speech of elementary school students while they are at school and that restrictions on religious speech *solely* because it is religious violate the First Amendment.[21] This conclusion was, of course, dicta since there was no need to decide the constitutional question once it was determined that the law at the time was not clearly established.[22] Unfortunately, the Fifth Circuit was unable to garner a majority as to how the Free Speech Clause applies in elementary schools. The only other substantive holdings from *Morgan* relate to "school-sponsored" speech and to the application of the Establishment Clause in elementary schools.

[20] *Id.*, at 382 (Benavides, J.).
[21] *Id.* at 403-405 (Elrod, J.).
[22] This dicta does not have to be followed even in the later proceedings of the *Morgan* case. It cannot be considered law of the case as to Plano ISD since Plano ISD was not a party to the Morgan *en banc* appeal.

Under *Morgan*, the "school-sponsored" speech exception should be construed narrowly.[23] It only applies to activities that may fairly be characterized as part of the curriculum, which are supervised by faculty members, and designed to impart particular knowledge or skills so that the views of the individual speaker may not be erroneously attributed to the school. The classic examples are the school newspaper and school plays.[24] Neither in its discussion of *Hazelwood* nor in its application to the facts alleged in *Morgan* did the majority consider whether elementary school students might be more likely to attribute individual speech to a school. The Court merely concluded that the factual allegations, as alleged, did not indicate that they would be likely to misperceive the speech as coming from the school.[25]

The Court went on to state that the Establishment Clause draws a sharp distinction between government speech endorsing religion, which the Establishment Clause forbids, and private speech endorsing religion, which the Free Speech and Free Exercise Clauses protect.[26] This conclusion is relatively uncontroversial. The significant part is relegated to a footnote: "The principals contend that elementary school students are more impressionable and therefore this case involves heightened Establishment Clause concerns. This is without merit."[27] Leaving aside the fact that the principals in *Morgan* did not argue that there are heightened Establishment Clause concerns in elementary schools, numerous courts and judges *have* made that argument, repeatedly. Moreover, it is unclear whether there was a majority ruling from the Fifth Circuit on this footnote (or the proper interpretation of it), so the question of whether the Establishment Clause concerns permit greater restrictions in elementary schools likely remains open for the time being.

---

[23] *Id.* at 408.
[24] *Id.* at 408.
[25] This was precisely the issue raised by the Third Circuit Court of Appeals in *Walz v. Egg Harbor Township Board of Education*, 342 F.3d 271, 277 (3d Cir. 2003) (in the elementary school classroom, the "line between school-sponsored speech and merely allowable speech is blurred."). *Walz*, like *Morgan*, dealt with restrictions on the distribution of candy canes with an attached religious message, "Legend of the Candy Cane."
[26] *Morgan*, 659 F.3d at 409 (citing *Bd. of Educ. v. Mergens*, 496 U.S. 226, 250 (1990).
[27] *Id.* at *143 n.26 (relying on *Good News Club v. Milford Central Sch.*, 533 U.S. 98 (2001)). The extent to which this footnote should be applied outside the specific facts of *Morgan* is unclear. This portion of Judge Elrod's opinion is only the majority opinion because of its adoption by Judge Owen. Judge Owen, however, also adopted the portion of Judge Benavides' opinion, in which he states, "in *Good News Club*, the Supreme Court *reiterated* previous precedents assigning 'significance ... in the Establishment Clause context to the suggestion that elementary school children are more impressionable than adults.'" *Id.* at 381. Judge Elrod's opinion leave ambiguous whether the sentence "This is without merit," refers to the argument about elementary school students being more impressionable or whether that argument applies to the *Morgan* case. In light of Judge Owen's joining of the opinion, the best interpretation would appear to be that Judge Elrod's footnote is limited to the specific facts of *Morgan*.

The following questions remain open within the Fifth Circuit:

1. Whether the "material and substantial disruption" standard applies differently in elementary schools than in high schools. Numerous courts have indicated that the "material and substantial disruption" standard would apply differently in elementary schools.[28]

2. Whether the ability of school districts to restrict lewd or inappropriate speech applies differently in elementary schools than in high schools.[29]

3. Whether the term "viewpoint discrimination" means hostility toward a particular viewpoint or merely a restriction on a certain type of viewpoint based on some other concern. For instance, some courts have distinguished between (a) restrictions on religious speech in public schools *solely* because it is religious, and (b) restrictions on religious speech because it is likely to cause offense to other students.[30]

4. Whether school districts can practice "viewpoint discrimination" against student speech that is "school-sponsored." In cases where there is no hostility to the viewpoint, numerous courts have held that school districts may restrict student speech that is "school-sponsored," as they have variously interpreted the term "school-sponsored." *Morgan* indicates that some of the Fifth Circuit judges, perhaps a majority, might reject "viewpoint discrimination," even when applied to "school-sponsored" speech.[31]

5. Whether elementary-age students are more likely to (mis)perceive private speech as "school-sponsored" or "school-endorsed." While a majority of the Fifth Circuit concluded that the facts, as alleged in *Morgan*, did not

---

[28] *Id.* at 377 n.72 (Benavides, J.) (briefly discussing numerous cases questioning how to apply free speech guaranties in elementary schools); *see also id.* at 386-387.

[29] *Id.* at 387 ("[T]he threshold for what constitutes suggestive or lewd speech, as discussed in *Fraser*, might be lower in an elementary-school setting.").

[30] *Morgan* emphasizes that, "Accordingly, the principals were not permitted to discriminate on the basis of viewpoint; yet, in each incident the principals allegedly censored speech solely because it expressed a religious message." *Id.* at 409. *See also Hill v. Colorado*, 530 U.S. 703, 707-10 (2000) (finding no unconstitutional content-based discrimination where a statute restricting anti-abortion speech was not adopted "because of disagreement with the message [conveyed]"); *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (holding that "the principal inquiry in determining content-neutrality … is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys").

[31] This discussion was, like some of Judge Elrod's other more controversial claims, relegated to a footnote. *See Morgan*, 659 F.3d at 407 n.23.

indicate any likelihood that the private speech would be misperceived as "school-sponsored" or "school-endorsed," there is no clear majority ruling out the possibility that, under different factual allegations or based on evidence of what actually occurred or occurs in an elementary school, school officials might be able to impose greater restrictions under the "school-sponsored" exception or based on the Establishment Clause.

6. Whether there are additional circumstances that would justify schools districts in restricting or regulating student speech.

CONCLUSION

Constitutional law develops over time. It develops through the decisions made by the Supreme Court and the lower federal courts. An unstated assumption about the development of constitutional law is that over the course of time and through the decisions of the courts the law becomes clearer and clearer. The *Morgan en banc* decision stands in sharp contrast to this unstated assumption. The *Morgan* decision only made one thing clear. It made clear that Lynn Swanson and Jackie Bomchill are entitled to qualified immunity because the law was not clear. Aside from that one decision, the rest of the *en banc* decision raised more questions than it answered. The end result of the *Morgan* decision is that the fight over these issues will continue to grind on and on. We can certainly hope for a time when the law becomes more clear, but it does not seem that that time will be coming anytime soon.