

# TEXAS LAWYER

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## Principals Prevail in En Banc 5th Circuit Candy Cane Case

### APPELLATE LAWYER of the WEEK

by JOHN COUNCIL  
jcouncil@alm.com

The full 5th U.S. Circuit Court of Appeals handed public school administrators and their lawyer Tom Brandt a big victory on Sept. 27, ruling that two elementary school principals are immune from suit for allegedly preventing students from distributing religious gifts at school.

Two students and their parents originally filed the so-called "Candy Cane case," *Doug Morgan, et al. v. Lynn Swanson, et al.*, in the U.S. District Court for the Eastern District of Texas in 2004 after the principals told the parents the children could not distribute gifts, including candy cane-shaped pens, at an on-campus winter party. Attached to the pens were laminated cards titled "Legend of the Candy Cane" and text discussing the "Christian origin of candy canes," the plaintiffs alleged in their brief to the en banc 5th Circuit.

A federal trial court rejected the defendant principals' motion to dismiss the suit based on qualified immunity, and the principals appealed. A three-judge panel of the 5th Circuit affirmed the trial court last year. The defendants then sought en banc review, which the 5th Circuit granted.

Writing for the majority, 5th Circuit Judge Fortunato "Pete" Benavides said the law on whether elementary school administrators can be sued for alleged religious free-speech violations is too unclear to allow the suit go forward.

"We hold today that the principals are entitled to qualified immunity because

clearly established law did not put the constitutionality of their actions beyond debate," Benavides wrote. "When educators encounter student religious speech in schools, they must balance broad constitutional imperatives from three areas of First Amendment jurisprudence: the Supreme Court's school-speech precedents, the general prohibition on viewpoint discrimination, and the murky waters of the Establishment Clause.

"They must maintain the delicate constitutional balance between students' free-speech rights and the Establishment Clause imperative to avoid endorsing religion. 'The many cases and the large body of literature on this set of issues' demonstrate a 'lack of adequate guidance,' which is why no federal court of appeals has ever denied qualified immunity to an educator in this area," Benavides continued. "We decline the plaintiffs' request to become the first."

Brandt, a director in Dallas' Fanning Harper Martinson Brandt & Kutchin who represents the principals, says he is pleased with the decision.

"I believe that the court really seriously grappled with the issues involved here and they recognized that this case involved a lot of very complicated issues. Even though the fact pattern is very simple, the legal issues are very complex," Brandt says. "And Judge Benavides, who wrote the opinion on qualified immunity, did a very good job of laying out all of the issues and all of the conflicts that exist in the case law."



**Tom Brandt**

Kelly Shackelford, president and chief counsel for Plano's Liberty Institute, a religious freedom organization that represents the plaintiffs in *Morgan*, is disappointed with the 5th Circuit's qualified immunity ruling.

"We think they made a mistake and just hope it won't encourage more lawlessness,"

Shackelford says.

He notes that the court did state that religious viewpoint discrimination in public schools is still unconstitutional.

"Maybe we're able to talk to the school district and have them agree not to allow this type of conduct and we can be done," Shackelford says. "But if not, the litigation obviously continues."

Former U.S. Solicitor General Paul Clement, now a partner in Washington, D.C.'s Bancroft who argued for the plaintiffs at the 5th Circuit, did not return a telephone call seeking comment. Neither did Baylor University President Ken Starr, who argued on behalf of amici Marie Barnett Snodgrass before the 5th Circuit. Snodgrass was an original plaintiff in *West Virginia v. Barnette*, a landmark 1943 decision in which the U.S. Supreme Court held that elementary school students have First Amendment rights.

"The lawyers on the other side were definitely top-notch," Brandt says. "You had Paul Clement and Ken Starr and just to have argued against them was a lot of fun. I feel a little like Rocky right now."

