

Obama lawyers oppose suits enforcing separation of church and state

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The Obama administration intervened in the United States Supreme Court earlier this month to oppose a taxpayers' lawsuit seeking an injunction against an Arizona state scheme designed to funnel millions of tax dollars into religious education.

Of particular note was the thoroughly anti-democratic position taken during oral argument by Neal Katyal, Obama's solicitor General—the political appointee responsible for presenting the president's position to the Supreme Court.

Katyal told the nine members of the high court that taxpayers have no right to challenge unconstitutional governmental expenditures on religion when their own tax dollars cannot be traced to the spending. His remarks visibly astounded the more liberal justices, including Katyal's former supervisor Elena Kagan, whom he replaced as solicitor general after Obama appointed Kagan to the Supreme Court last summer.

If a majority of the Supreme Court justices accepts the Obama administration's position, which directly contradicts decades of precedent giving taxpayers the right to seek injunctions against unconstitutional religious expenditures, such violations of the First Amendment's Establishment Clause can no longer be challenged in court.

The Arizona law allows a dollar-for-dollar income tax credit—up to \$500 per person and \$1,000 per married couple—for payments directly to “school tuition organizations” (STOs), private, nonprofit corporations which in turn allocate the funds to scholarships for “nongovernmental primary or secondary schools.” Over 85 percent of the tax dollars passing through Arizona STOs are used to pay tuition for students attending religious schools, primarily those administered by the Catholic Church and evangelical Christians.

As pointed out by Paul Bender, the Arizona State University law professor who argued on behalf of the taxpayers, the scheme diverts tax dollars directly to private organizations, which then can allocate them to parents on condition that they send their children to religious schools, a clear violation of the Establishment Clause.

The Obama administration intervened in the case specifically to argue that the taxpayers lacked “standing” because the precise dollars the taxpayers paid in taxes did not go to the religious schools, rather money the state would have received from other taxpayers was used to fund the religious training.

At the beginning of Katyal's oral argument, Associate Justice Stephen G. Breyer, a judicial moderate, posed a hypothetical question: What if the government allowed religious taxpayers to check a box for a portion of their income tax to be paid directly to a church? “Does the government [meaning the Obama administration] think that there is no one who could challenge that?” Katyal responded, “I don't think that any taxpayer could challenge that.”

Associate Justice Ruth Bader Ginsburg, another liberal, reacted with surprise, asking the Obama attorney, “Does anyone have standing, in your view, to challenge this scheme?” Katyal responded, “The way this scheme is set up, our [the Obama administration's] answer is no.”

Referring to a landmark 1968 Supreme Court precedent authored by former Chief Justice Earl Warren, which allowed federal taxpayers to seek an injunction against the use of federal funds for secular instruction in religious schools, Ginsburg asked, “Isn't the underlying premise of *Flast v. Cohen* that the Establishment Clause will be unenforceable unless we recognize taxpayer standing?”

Kaytal responded, “I think *Flast* is a very narrow exception for when someone’s dollars are being taken out of their pocket and spent by the government on religion, and I don’t think that’s happening here.”

Breyer, obviously agitated, clearly saw the implications of Kaytal’s double talk. “*Flast* is gone; is that right? *Flast* is gone,” he said. “There is no more—there is nothing more to *Flast*, because it just happened that nobody had thought of this system at the time of *Flast*.”

Kagan jumped in, listing five other Establishment Clause decisions the Supreme Court rendered over the last 40 years based on taxpayer standing, stating, “But somehow nobody on the Court recognized that fact, nor did the Solicitor General recognize that fact?” Kaytal answered, “Right.”

This rejection of precedent was too much even for Associate Justice Anthony Kennedy, who is very conservative but sometimes acts independently of the ultra-right wing, four-vote bloc. “I just want to make sure I heard your answer to the—you said your answer is yes,” Kennedy asked, “you said, yes, she’s right; those cases were wrongly decided.” Kaytal agreed.

Obama once taught constitutional law and understands the implications of the position being taken by his solicitor general. Depriving taxpayers of standing to sue governments for funding religious institutions and activities facilitates the right-wing’s ongoing efforts to dismantle “the wall of separation between church and state”—to use Thomas Jefferson’s famous 1802 description of the purpose behind the First Amendment’s religion clauses.



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