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Obama takes surprising stance in establishment case briefs

Erwin Chemerinsky is dean and distinguished professor of law, Raymond Pryke Professor of First Amendment Law, University of California, Irvine School of Law.



In a brief filed in the U.S. Supreme Court last week, the Obama administration came down clearly on the side of allowing Christian prayers before city council meetings. A few years ago, it filed a brief in favor of allowing state governments to give tax credits that greatly benefit religious schools. In both cases, the

Obama administration took a position strongly favored by the religious right and opposed by civil liberties groups.

In neither case was the Obama administration required to file a brief at all. The federal government was not a party to either suit. But in both cases, the Obama administration decided to participate and wrote briefs that are indistinguishable from what would have been expected from the Bush administration. It is deeply disturbing that the Obama administration has so abandoned the idea of a wall separating church and state that prior Democratic administrations have consistently favored.

The case currently pending before the Supreme Court is *Town of Greece v. Galloway*, which will be argued this fall. The Town of Greece is in upstate New York and has a population of about 100,000. Its town board meets once a month and prior to 1999 began each meeting with a moment of silence. From 1999-2007, the town invited only Christian ministers to deliver these prayers, and they often were overtly religious. As the 2nd U.S. Circuit Court of Appeals noted: "A substantial majority of the prayers in the record contained uniquely Christian language. Roughly two-thirds contained references to 'Jesus Christ,' 'Jesus,' 'Your Son,' or the 'Holy Spirit.'"

In 2007, the plaintiffs complained to the town board about this. In 2008, they filed a lawsuit alleging that the town board had aligned itself with the Christian faith in violation of the Establishment Clause of the First Amendment. For four months in 2008, the town board had prayers delivered by other than Christian ministers. But except for that, the prayers have always been by Christian clergy and usually expressly Christian in their content. For example, for 18 months in 2009 and 2010, while the litigation was pending, it is estimated that 90 percent of the prayers were explicitly Christian in their content.

Thirty years ago, in *Marsh v. Chambers*, 463 U.S. 783 (1983), the Supreme Court held that clergy-delivered, nonsectarian prayers before legislative sessions do not violate the Establishment Clause. The court stressed that the prayers in that case, before sessions of the Nebraska Legislature, did not exploit, proselytize or advance any one religion. But the prayers at the Greece town board meetings clearly violated this; over an 11-year period, they were virtually always delivered by Christian clergy

Criminal

Holder's reforms draw praise, calls for more specificity

U.S. Attorney General Eric Holder announced broad measures to overhaul the criminal justice system, characterizing the push to curb sentences for low-level offenders as a question of justice and racial equality.

Labor/Employment

Sexual desire need not be motivation in sexual harassment claims, according to new law

Gov. Jerry Brown signed SB 292 into law, which alters California's workplace discrimination law to include claims of sexual harassment that were not motivated by sexual desire.

Law Practice

Law firm alliance aims to make sustainability the legal world's new normal

The legal industry has been notoriously slow to jump on the "green" bandwagon, but the Law Firm Sustainability Network, which launched last week and touts 25 member firms, hopes to change that.

Bar Associations

Patent deal volume up, valuations down, ABA panel says

Patent transactions valued in the hundreds of millions of dollars appear to be slowing even as patent deal volume is on the rise, a panel of lawyers and consultants told an audience Sunday at the American Bar Association annual meeting.

Mergers & Acquisitions

Dealmakers

A roundup of recent mergers and acquisitions and financing activity and the lawyers involved.

Bar Associations

Clinton denounces Supreme Court's voting rights ruling

In a fiery speech at the American Bar Association annual meeting Monday, former Secretary of State Hillary Clinton denounced the U.S. Supreme Court's decision striking down the heart of the 1965 Voting Rights Act.

Government

and consistently explicitly Christian in their content.

The 2nd Circuit followed clearly established law and ruled against the Greece town board. *Galloway v. Town of Greece*, 681 F.3d 20 (2d Cir. 2012). The court said that the question was "whether the town's practice, viewed in its totality by an ordinary, reasonable observer, conveyed the view that the town favored or disfavored certain religious beliefs." The court concluded, "on the record before us, that the town's prayer practice must be viewed as an endorsement of a particular religious viewpoint." The court, in an opinion by Judge Guido Calabresi, noted that the town's selection process for clergy to deliver the prayers virtually ensured that Christian ministers would be selected, that virtually every prayer had been delivered by a Christian minister, and that the prayers usually had an explicit Christian content.

This should be an easy case. For decades, the Supreme Court has held that the government violates the Establishment Clause if the reasonable observer would perceive the government as endorsing religion or a particular religion. It is not possible to see the Town of Greece's practices in any other way. *Marsh v. Chambers* approved *nonsectarian* legislative prayers, but the Greece town board had consistently sectarian ones.

Liberals and conservatives agree to very little with regard to the meaning of the Establishment Clause, but they have shared the view that the government cannot favor some religions over others. But that is exactly what the Town of Greece was doing.

Justice Sandra Day O'Connor said that the purpose of the Establishment Clause is to make sure that no one is made to feel like an insider or an outsider by his or her government. She wrote: "Direct government action endorsing religion or a particular religion is invalid because it sends a message to nonadherents that they are outsiders, not full members of the political community, and an accompanying message to adherents that they are insiders, favored members of the political community." Any non-Christian attending the Greece town board meetings would immediately feel like an outsider, that he or she did not belong there.

I thus expected that if the Obama administration participated at all, it would file a brief in favor of affirming the 2nd Circuit. In fact, I thought that the Obama administration might choose not to participate because the 2nd Circuit opinion was so narrow and fact specific. The 2nd Circuit was clear that it was not invalidating all legislative prayers or even holding that they must always be nonsectarian. It just found based on the facts of this case that the Greece town board impermissibly aligned itself with Christianity.

But the Obama administration filed a brief urging the Supreme Court to reverse the 2nd Circuit and to rule in favor of the Town of Greece. It did not go as far as the town and its conservative advocates in urging the court to use this case to dramatically change the law of the Establishment Clause and to hold that the government acts unconstitutionally only if it literally establishes a church or coerces religious participation. But the Obama administration's brief clearly and unequivocally comes down on the side of the practices of the Greece town board.

By itself, this would be inexplicable, except for a brief the Obama administration filed in *Arizona School Tuition Organization v. Winn*, 131 S.Ct. 1436 (2011). Arizona law provides for a tax credit of up to \$500 for those contributing money to a school tuition organization. The overwhelming majority of these funds have gone to support Catholic and Evangelical Christian schools. The 9th U.S. Circuit Court of Appeals declared the Arizona tax credit system unconstitutional as an impermissible establishment of religion. The Obama administration filed a brief on behalf of Arizona urging the court to dismiss the case for lack of standing or in the alternative, to uphold the Arizona law. The Supreme Court, in a 5-4 decision, did the former and made it much harder for plaintiffs to challenge government support for religion.

Together, the two cases show the Obama administration's views of the Establishment Clause and they are much more on the side of the religious right than with civil liberties groups. As one who believes that Thomas Jefferson was right when he called for a wall separating church and state, the Obama administration's position is deeply disturbing. I hope that the Supreme Court will agree with the 2nd Circuit and find that the Greece town board violated the Establishment Clause.

Erwin Chemerinsky is dean and distinguished professor of law, Raymond

Banks: Still too big to fail? Experts at odds

What is the role of government oversight in the banking industry? A recent panel discussion on the subject quickly turned into a back-and-forth squabble over whether banks - years after the 2008 financial crisis - are still positioning themselves to be "too big to fail."

Bar Associations

Justice Kennedy: Law is the 'kinship that binds us'

U.S. Supreme Court Justice Anthony Kennedy called on lawyers of the American Bar Association to stand up for civics education, noting that the language of law isn't about legal jargon like "collateral estoppel" but the meaning of freedom.

From the law to the literary: ex-attorneys share stories

David O. Stewart - a longtime litigator with Ropes & Gray LLP - is one of dozens of lawyers who have made the leap to writing widely acclaimed books.

Former officials, civil liberties advocates clash over PRISM

Former government officials and civil liberties advocates clashed over the National Security Agency's PRISM surveillance program Saturday during an emotionally charged panel discussion at the American Bar Association's annual meeting.

Corporate

Three firms help with \$1.6 billion Dole deal

Gibson, Dunn & Crutcher LLP, Sullivan & Cromwell LLP and Paul Hastings LLP worked on the deal, which comes a decade after Murdock took the company private for \$2.5 billion in 2003.

Litigation

Justices: Jury, not judge, should decide city's eminent domain action against landowners

Property owners in the city of Perris got a break last week when a state appellate panel reversed a trial court's decision regarding the city's eminent domain action against the owners, letting the issue instead be decided by a jury.

Environmental

Logging plan threatens 80 spotted owls, says lawsuit

Environmental groups sued the federal government Monday alleging its approval of a plan to log 150,000 acres in Siskiyou County poses a serious risk to northern spotted owls and salmon.

Civil Rights

Bill protecting transgender students becomes law

Gov. Jerry Brown on Monday signed the first law in the nation granting transgender students in public schools access to sex-segregated activities

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and facilities, such as restrooms, regardless of the student's gender.

Law Practice

Law Society of Hong Kong allows Quinn Emanuel's Hong Kong office to practice as foreign firm

The Law Society of Hong Kong will allow the Hong Kong office of Quinn Emanuel Urquhart & Sullivan LLP to practice as a foreign law firm, the firm announced Monday.

Government

Bill to shield small businesses from retroactive tax passes Assembly committee

Businesses faced with massive retroactive taxes after an appeals court struck down a state tax exemption may get some relief from a Senate bill.

Litigation

Battle between S&P and government over alleged fraud intensifies

It's been a seesaw battle between the government and ratings giant Standard & Poor's as the massive \$5 billion civil fraud suit brought by the Department of Justice and the U.S. attorney's office in the Central District moves forward.

Government

Prop. 65 reform proposal disappoints business, rankles environmentalists

Changes to California's toxics-warning law have businesses feeling like they've gained little, while an expanded exemption for small businesses from lawsuits has environmentalists thinking twice about supporting a final bill.

California Courts of Appeal

SF court scrutinized over jury fee collection

The 1st District Court of Appeal wants to hear why a San Francisco Superior Court judge required eight groups of plaintiffs and defendants involved in asbestos-related litigation to pay more than \$44,000 in jury selection fees.

Bankruptcy

Dewey seeks to reclaim money paid right before bankruptcy

The Dewey & LeBoeuf LLP estate filed a series of actions Friday seeking to recover \$5.7 million from transfers that occurred in the 90-day window before the firm filed for bankruptcy.

Obituaries

William P. Clark, 1931-2013

Retired California Supreme Court Justice William P. Clark Jr. died Saturday at the age of 81 after a long battle with Parkinson's disease.

Corporate

Venture capital lawyers prep for guidance