Appeal No. 05-1130

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREEDOM FROM RELIGION
FOUNDATION, INCORPORATED; ANNE
GAYLOR; ANNIE LAURIE GAYLOR, et al.,

Plaintiffs-Appellants,

v.

ELAINE L. CHAO, TOMMY G. THOMPSON,
and ALBERTO GONZALES, et al.,

Defendants-Appellees.

On Appeal from the United States District Court
For the Western District of Wisconsin
Case No. 04 C 0381 S
The Honorable John C. Shabaz Presiding

REPLY BRIEF OF APPELLANTS

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UNITED STATES DISTRICT COURT
FOR THE SEVENTH CIRCUIT

FREEDOM FROM RELIGION
FOUNDATION, INC.; ANNE NICOL
GAYLOR; ANNIE LAURIE GAYLOR;
and DAN BARKER,

Plaintiffs-Appellants,

v. Case No. 05-1130

JIM TOWEY, PATRICK PURTILL, BRENT
ORRELL, BOBBY POLITO, RYAN
STREETER, et al.,

Defendants-Appellees.

REPLY BRIEF OF APPELLANTS

I. EXECUTIVE MISUSE OF TAXPAYER APPROPRIATIONS IN VIOLATION OF THE ESTABLISHMENT CLAUSE IS NOT JUDICIALLY INSCRUTABLE.

The parties agree that the challenge in this case involves the alleged misuse of federal taxpayer appropriations made pursuant to the Taxing and Spending Clause of the United States Constitution, Art. I, § 8. These taxpayers, in other words, are complaining about the use of their taxes. A relationship, or nexus, therefore clearly exists between their status as taxpayers and the exercise of Congressional action under the Taxing and Spending Clause.

The parties also agree that the challenge in this case involves the alleged use of taxpayer money in violation of a specific constitutional limitation imposed upon the exercise by Congress of its Taxing and Spending authority, i.e., the Establishment Clause requirements.

The appellees do contend, however, that the misuse of taxpayer appropriations by Executive Branch officials to promote religion is not actionable by taxpayers qua taxpayers. According to appellees, these are not the right persons to complain about the use of tax appropriations that are being misused in violation of the Establishment Clause of the United States Constitution. The appellees claim that it is "far-fetched" to even think that Executive Branch officials should be limited in their use of tax appropriations to promote religion. (Appellees' Brief at 32.)

The appellees indulge in wishful thinking that leads them to the suspect conclusion that they are above the law. Why, after all, should Executive Branch officials have the right to use taxpayer appropriations to promote religion? Why is it "far-fetched" for taxpayers to object to the use of their taxes for this purpose?

The appellees claim the right to freely misuse Congressional tax appropriations on the purported basis that Congress did not first tell them to use the tax money to promote religion. Instead, they claim that President Bush made them do it, but more particularly, the appellees claim that the appellants lack standing because they do not allege "the invalidity of the funding statutes that support defendants' salaries and the work of their officers." (Appellees' Brief at 31-32.) According to the appellees, taxpayer standing requires a claim of facial invalidity of an organic statute authorizing payments that promote religion.

The law has been clear, however, at least since the Supreme Court's decision in Bowen v. Kendrick, 487 U.S. 589 (1988), that Executive actions utilizing taxpayer appropriations in violation of the Establishment Clause can be challenged by taxpayers, regardless whether Congress itself enacted a Constitutionally invalid underlying statute. The appellees, therefore,

incorrectly claim that taxpayer suits are only appropriate "in cases involving the validity of taxing and appropriations statutes." (Appellees' Brief at 25.) The Supreme Court's prior decision in Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974), moreover, does not alter that fundamental holding in Kendrick. The Schlesinger decision involved a Constitutional claim not arising out of the appropriation of taxpayer money under the Taxing and Spending Clause of the Constitution. Thus, appellees incorrectly construe Schlesinger to stand for the proposition that taxpayer standing only exists as to claims involving the invalidity of underlying Congressional statutes. (Appellees' Brief at 31.) That is simply not the case.

Similarly, the Supreme Court's decision in Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. 464 (1982), cannot be construed in light of Kendrick to only authorize taxpayer suits when the facial invalidity of an authorizing statute is alleged. Here, the appellees construe Valley Forge as denying taxpayer standing because the taxpayers in that case "did not challenge the federal statute that authorized the Secretary to transfer the property, but rather a particular Executive Branch action arguably authorized by the act." (Appellees' Brief at 22.) The appellees then reason ostensibly from Valley Forge that taxpayer standing necessarily requires a challenge to the facial validity of a federal statute that "arguably authorizes" Executive Branch actions. In fact, however, the Supreme Court held that Valley Forge did not involve a tax appropriation under the Taxing and Spending Clause at all, as necessary for taxpayer standing. This was the basis for the Supreme Court's decision. By contrast, the interpretation advanced by the appellees in this case is totally irreconcilable with the subsequent Kendrick decision.

The appellees' arguments in this case ultimately suffer the fatal weakness that they do not make taxpayer standing turn upon a fact related to the status of being a taxpayer. The appellees ultimately cannot deny that Kendrick does allow taxpayers to challenge the misuse of taxpayer appropriations by the Executive Branch, even when Congress has acted blamelessly. In other words, Congressional responsibility for the misuse is not essential to taxpayer standing under Kendrick. The appellees argue, however, that regardless of any Congressional responsibility for the misuse, only certain types of executive misuse is actionable by taxpayers, i.e., the misuse of tax appropriations earmarked for a particular organic spending program, rather than the misuse of taxpayer appropriations made as general appropriations to the Executive Branch.

The purported distinction urged by the appellees does not turn upon any rationale related to a litigant's status as a taxpayer. In both instances, Congress has made appropriations without any facially objectionable content, yet taxpayers allegedly can only challenge the misuse of tax money when the appropriation was earmarked for a specific spending program, rather than as part of general appropriations for government operations. From a taxpayer perspective, this distinction has no relationship to the fact of the misuse involving appropriations under the Taxing and Spending Clause of the Constitution.

The appellees' claimed distinction is certainly not as conceptually elegant as they suggest. On the contrary, the proposed distinction by the appellees is arbitrary, while ignoring the Supreme Court's attempt to relate taxpayer standing to one's status qua a taxpayer. In fact, the injury that triggers taxpayer standing under the Supreme Court's test is the misuse of tax appropriations, either by Congress or by the Executive Branch, in violation of a specific constitutional restriction on the Taxing and Spending Authority of Congress. As Justice

O'Connor stated in her Concurrence in Kendrick, 487 U.S. at 622: "The dissent says, and I fully agree 'public funds may not be used to endorse the religious message.'" (The dissent by Justice Blackmun was joined in by four justices, and included the unambiguous statement that "public funds may not be used to endorse the religious message." Id. at 642. At least five justices in Kendrick, therefore, recognized the general proscription that the Establishment Clause imposes on the use of public tax proceeds to endorse religion.)

The relevant injury a taxpayer suffers is his liability for taxes used in a manner that exceeds specific Constitutional limitations imposed upon the exercise of the Congressional Taxing and Spending power, and not simply that an enactment is generally beyond the powers delegated to Congress. "When the government spends public money in violation of the Establishment Clause, a taxpayer suffers a direct injury because the government is improperly promoting religion." Karsney v. O'Keefe, 225 F.3d 929, 936 (8th Cir. 2000). The threshold relationship that a taxpayer must allege in order to have standing, therefore, is that he is a taxpayer whose taxes are being misused in violation of a specific prohibition of the Constitution, i.e., the Establishment Clause.

Here, the appellants satisfy the first part of the Supreme Court's test for taxpayer standing, as articulated in Flast v. Cohen, 392 U.S. 83 (1968), and subsequently applied in Kendrick. The appellants are taxpayers who are complaining about the misuse of tax appropriations in a way that violates the Establishment Clause of the Constitution. That is all that is necessary to satisfy the first part of the Flast test for taxpayer standing. The Taxing and Spending Clause of the Constitution simply does not distinguish between appropriations made to the Executive Branch for earmarked spending programs versus general appropriations made to

support government operations. The law does not recognize a distinction between such appropriations, including because the Executive Branch has no independent authority to spend a nickel from the United States Treasury without an appropriation from Congress. The Supreme Court has expressed what is perhaps the quintessential axiom of appropriations law as follows:

> "The established rule is that the expenditure of public funds is proper only when authorized by Congress, not that public funds may be expended unless prohibited by Congress." United States v. McCollom, 426 U.S. 317, 321 (1976).

President Bush's "Faith Based Initiative" is subject to the same dependence on appropriations from Congress as are all activities of the Executive Branch. In fact, each of the Executive Orders related to the President's Faith Based Initiative includes explicit language acknowledging that the "actions directed by this Executive Order shall be carried out subject to the availability of appropriations and to the extent permitted by law." See E.O. 13198, 66 Fed. Reg. 8497 (Jan. 29, 2001); E.O. 13199, 66 Fed. Reg. 8499 (Jan. 29, 2001).

The President knew that his Initiative was dependent upon Congressional tax appropriations which Congress has made to the Executive Branch without placing any restrictions on the use of such appropriations. Congress, therefore, has implicitly ratified, as its own, the decision to use budget appropriations related to the President's Faith Based Initiative, as courts have readily held. See Swayne and Hoyt, Ltd. v. United States, 300 U.S. 297, 301 (1937); Equal Employment Opportunity Commission v. Dayton Power & Light Company, 605 F. Supp. 13 (S.D. OH 1984); Equal Employment Opportunity Commission v. State of Delaware, 595 F. Supp. 568, 573 (D. DE 1984); Muller Optical Company v. Equal Employment Opportunity Commission, 574 F. Supp. 946, 953 (W.D. TN 1983) ("Congressional

ratification may occur when both houses of Congress either pass legislation appropriating funds to implement an Executive Order or make reference to the Executive Order in subsequently passed legislation.").

The alleged misuse of taxpayer appropriations to promote religion in this case did not occur without Congressional action appropriating the misused funds in the first instance. The Executive Branch, even by Executive Order, cannot conceive budget appropriations independent of Congress. The appropriations misused in this case instead do derive from Congress' Taxing and Spending authority under Art. I, §8, and the appellants have a logical nexus to support their standing. If not taxpayers, then who? The appellee's would say "No one!" but the law quite logically says otherwise.

II. THE SKY WILL NOT FALL

The appellees suggest that if taxpayer standing depends upon no more than the misuse of Congressional tax appropriations by the Executive Branch, then the Supreme Court's attempts to constrain taxpayer standing will be defeated. The insinuation of the appellees' argument is that the recognition of standing by taxpayers to challenge the Executive misuse of tax appropriations in violation of the Establishment Clause will open the floodgates to unmanageable amounts of litigation. According to the appellees, "the sky is falling."

The appellees' argument does not withstand scrutiny. The Flast requirement of a relationship between a taxpayer and the misuse of tax appropriations has never been construed as the primary barricade to the courthouse door, and the proof is in the pudding, as evidenced by the appellees' own interpretation of Flast and Kendrick.

The appellees admit, at least, that the first "nexus" test of Flast recognizes taxpayer standing if federal tax appropriations are misused by the Executive Branch in the administration of an earmarked Congressional spending program, even if not as to general appropriations for the operation of the Executive Branch. Even with the appellees' qualification, however, Executive action in administering most of the federal budget would be fair game for challenges. In other words, the qualification for taxpayer standing urged in this case, would not preclude federal taxpayer standing under Flast to challenge the majority of expenditures made under the federal budget. Presumably, therefore, since the Flast decision in 1968, the Federal Government has been subject to a barrage of taxpayer-inspired litigation. Yet, that has not been the case. Federal taxpayer lawsuits, even as to the Executive administration of earmarked program appropriations, have been relatively rare until recently. There are simply not many decisions, for example, since Kendrick that even address the issue.

Recognition of taxpayer standing does not threaten to bring the operations of the federal government to a halt because it is the second "nexus" test of Flast that really operates as the gatekeeper, i.e., the requirement that the taxpayer allege a misuse of appropriations in violation of a specific Constitutional limitation on the Taxing and Spending Power of Congress. The only such limitation that the Supreme Court, or any other court, has ever recognized relates to Establishment Clause claims. That is what has limited the scope of federal taxpayer standing. As the Court of Appeals stated in District of Columbia Common Cause v. District of Columbia, 858 F.2d 1, 14 (D.C. Cir. 1988):

> "Flast has limited federal taxpayer challenges by means of the second nexus, thereby insuring an appropriately limited role for federal courts." See Moore v. United States House of

Representatives, 733 F.2d 946, 959 n.1 (D.C. Cir. 1984, Scalia, J., concurring).

Standing for these taxpayers to challenge the Executive Branch's use of budget appropriations in violation of the Establishment Clause will not open a floodgate of litigation, unless the Executive Branch intends to engage in a massive campaign to violate the Establishment Clause. That risk is manageable and controllable by the Executive Branch, and, in any event, the risk of litigation is no greater than the risk of taxpayer litigation to challenge the Executive misuse of tax appropriations in the administration of earmarked spending programs.

The scope of actionable misuse of budget appropriations, nonetheless, is definitely broader than that implied by the appellees. They suggest that only specific disbursements of tax money to religious organizations are actionable by taxpayers. (Appellees' Brief at 27-30.) The endorsement of religion that is prohibited by the Establishment Clause, however, is not limited to federal funding of faith based organizations, as the appellees imply. In fact, the type of endorsement at issue in this case, conducted ostensibly under the guise of outreach to faith based organizations, is clearly actionable whether done pursuant to general operating appropriations, or if done as part of the administration of a specific earmarked program, such as under the Compassion Capital Fund. Certainly the endorsement of religion under the guise of outreach using Compassion Capital Funds, would be actionable by taxpayers, even under the appellees' restricted test for taxpayer standing. The argument that outreach activities endorsing religion by the Executive Branch, using budget appropriations, otherwise are not actionable by taxpayers simply exemplifies the arbitrariness of the appellees' arguments in this case. They do not offer a principled standing test that can distinguish Kendrick.

CONCLUSION

For all the above reasons, the decision of the district court denying appellants standing to proceed should be reversed by the Court of Appeals.

Dated this 24th day of May, 2005.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1.

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 2,503 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(I).

2.

This brief complies with the typeface requirements of Fed. R. App. 32(a)(5), and the type style requirements of Fed. R. App. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect 10 in 12 point Times New Roman.

This 24th day of May, 2005.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Reply Brief of Appellants upon opposing counsel via U.S. Mail and addressed to the following:

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I hereby certify that I have on this day e-mailed a PDF version of the foregoing Reply Brief of Appellants to Lowell V. Sturgill, Jr. at lowell.sturgill@usdoj.gov.

This 24th day of May, 2005.

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Frederick Caraccio