

**STANDING AND THE ESTABLISHMENT
 CLAUSE IN THE WAKE OF ARIZONA
 CHRISTIAN SCHOOL TUITION
 ORGANIZATION V. WINN: WHO IS THE
 PROPER PLAINTIFF TO TAKE A STAND IN
 TAX CREDIT SCHOOL CASES?**

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INTRODUCTION

In *Arizona Christian School Tuition Organization v. Winn* (*ACSTO*), the United States Supreme Court once again denied plaintiffs their day in court to dispute an alleged Establishment Clause violation.¹ The plaintiffs challenged a convoluted Arizona statutory scheme, which allows individual taxpayers to give monetary contributions via a dollar for dollar tax credit to School Tuition Organizations (STOs). The STOs then discriminate on religious grounds funneling the vast majority of the money to religious schools.²

The plaintiffs in *ACSTO* sought standing under the narrow *Flast v. Cohen* exception to the general bar against taxpayer standing.³ This exception has served as a bulwark protecting citizens from Establishment Clause violations for over four decades.⁴ Relying on Supreme Court precedent, the Ninth Circuit Court of Appeals held that plaintiffs met their burden of proving standing to challenge the Arizona statute under *Flast*.⁵

Contradicting its own precedent in a related case, the Court created an arbitrary distinction between tax credits and

¹ *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

² *Id.* at 1440-41.

³ *Id.* at 1440 (citing *Flast v. Cohen*, 392 U.S. 83 (1968)).

⁴ *Flast*, 392 U.S. at 103-04. “Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause and fought for its adoption was that the taxing and spending power would be used to favor one religion over another or to support religion in general.” *Id.* at 103. Because of the unique qualities and history underlying the Establishment Clause, the Court reasoned “[it] was designed as a specific bulwark against such potential abuses of governmental power, and that clause of the First Amendment operates as a specific constitutional limitation upon the exercise by Congress of the taxing and spending power conferred by Art. I, § 8.” *Id.* at 104.

⁵ *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1008 (9th Cir. 2009) (“Because plaintiffs have alleged that the state has used its taxing and spending power to advance religion in violation of the Establishment Clause, we hold that they have standing under Article III to challenge the application of [s]ection 1089.”).

appropriations.⁶ The Court reasoned that a tax credit bypasses government control and cannot be viewed as a government expenditure.⁷ Individuals choosing to opt out of the program are not coerced to contribute their “three pence” in aid of religion.⁸

The Court’s use of the standing doctrine to curtail the Establishment Clause is not a new phenomenon.⁹ However, the *ACSTO* decision is unique because it creates a roadmap for legislatures to freely circumvent the Establishment Clause via tax credits and potentially insulate the laws from federal judicial review.¹⁰

⁶ *Ariz. Christian Sch. Tuition Org.*, 131 S. Ct. at 1447-48. Writing in dissent, Justice Kagan “noted when this Court previously addressed a different issue in this lawsuit, the Plaintiffs invoke[d] the Establishment Clause to challenge ‘an integral part of the State’s tax statute’ that ‘is reflected on state tax forms’ and that is part of the calculus necessary to determine tax liability.” *Id.* at 1452 (Kagan, J., dissenting) (quoting *Hibbs v. Winn*, 542 U.S. 88, 119 (2004) (Kennedy, J., dissenting)). In *Hibbs v. Winn*, the Court considered the constitutionality of Arizona’s section 1089 law in relation to the Tax Injunction Act. *Hibbs*, 542 U.S. at 93. Notably, Justice Kennedy, joined by Justices Scalia and Thomas, who would later comprise the majority in *ACSTO*, dissented, treating section 1089 as a tax assessed on individual taxpayers where the revenue would ultimately be controlled by the State. *Id.* at 119 (Kennedy, J., dissenting). “As anyone who has paid taxes must know . . . if owed payment were not included with the tax filing, the State’s recording of one’s liability on the State’s rolls would certainly cause subsequent collection efforts . . . [and] would propel collection by establishing the State’s legal right to the taxpayer’s moneys.” *Id.* At the heart of the *ACSTO* decision, however, the Court created a distinction between tax credits and appropriations because the State never controls the taxpayers’ money. *See infra* Part III.A.

⁷ *See infra* notes 90-92 and accompanying text.

⁸ *See infra* Section III.A.

⁹ *See generally* *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 608-09 (2007) (plurality opinion) (holding that Executive Branch expenditures supporting religious institutions failed to qualify as a Congressional act and plaintiffs could not claim standing under the *Flast* exception); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 479 (1982) (holding that plaintiffs lacked standing because the transfer of government property to a religious institution was not a Congressional act, but instead was initiated by the Department of Health, Education and Welfare).

¹⁰ Concern over the *ACSTO* decision is not limited to governmental violations of the Establishment Clause. While outside the scope of this article, the reasoning in *ACSTO* could be used by state and municipal governments to violate numerous constitutional rights. The Supreme Court of Missouri has already used the *ACSTO* decision to deny standing to plaintiffs challenging the constitutionality of the Distressed Areas Land Assemblage Tax Credit. *Manzara v. State*, 343 S.W.3d 656 (Mo. 2011) (en banc).

Concerned with the Supreme Court's systemic denial of standing in Establishment Clause cases, this Comment seeks to first demonstrate that the Arizona statute in question warrants judicial review. Second, this Comment asserts that parents and children excluded from the statute's benefits or parents denied the opportunity to compete for scholarships have the best hope of substantively challenging section 1089 under *Texas Monthly v. Bullock*. Even though it may still be possible to challenge the constitutionality of the Arizona statute, success under any Establishment Clause doctrine is questionable. Thus, this Comment will discuss how the majority's repeated denial of standing creates the disconcerting possibility that no plaintiff exists to challenge Establishment Clause violations, undermining the very goal the Court is seeking to protect: preservation of the integrity of the federal judiciary.

In Part I, this Comment will explore the standing doctrine, including the *Flast* exception, and the Court's limited analysis in *Texas Monthly*. Part II will analyze a subsection of the Supreme Court's Establishment Clause case law focusing on *Zelman v. Simmons-Harris* and *Texas Monthly*. Part III will discuss the *ACSTO* decision and its potential ramifications. Part IV will examine why Arizona's convoluted statutory scheme warrants federal judicial review. In Part V, this Comment asserts that *Texas Monthly* provides the best chance for the intended beneficiaries to establish standing by focusing on the underinclusive effects of section 1089. Finally, Part VI discusses why it is vital to the continued legitimacy of the Establishment Clause and the federal courts to grant standing to parents being denied the benefits intended for them under section 1089.

I. STANDING

Originating from Article III's case-and-controversy requirement, "[t]he fundamental aspect of standing is that it focuses on the party seeking to get his complaint before a federal court and not on the issues he wishes to have adjudicated."¹¹ The

¹¹ *Flast v. Cohen*, 392 U.S. 83, 99 (1968). The standing doctrine serves four essential values: separation of powers, judicial efficiency, ensuring a specific

Court has held that the Constitution requires a plaintiff to “allege [a] personal injury fairly traceable to the defendant’s allegedly unlawful conduct and likely to be redressed by the requested relief.”¹²

Of the three elements in the standing analysis, injury-in-fact plays a central role because causation and redressability are determined in relation to how a court characterizes the injury.¹³ While no formula exists to determine what injuries are sufficient to accord standing,¹⁴ violations of constitutional rights concerning individual liberties are generally deemed sufficient.¹⁵ In fact, “[f]ederal judicial review [has proven] particularly important in enjoining and redressing constitutional violations inflicted by all levels of government.”¹⁶

Causation and redressability are often treated as two sides of one test. The plaintiff must demonstrate “a causal connection between the injury and the conduct complained of—the injury has to be fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court.”¹⁷ Finally, the plaintiff must

controversy is being debated, and fairness to non-litigants. ERWIN CHERMERINSKY, *FEDERAL JURISDICTION* 56-57 (6th ed. 2012).

¹² *Allen v. Wright*, 468 U.S. 737, 751 (1984). In shortened form, the elements are generally known as injury-in-fact, causation, and redressability. See Laura A. Smith, *Justiciability and Judicial Discretion: Standing at the Forefront of Judicial Abdication*, 61 *GEO. WASH. L. REV.* 1548, 1560 (1993).

¹³ CHERMERINSKY, *supra* note 11, at 59, 74. Ensuring a plaintiff has suffered a personal injury serves five policies: the Court is not issuing advisory opinions, separation of powers, concreteness, sharper facts for easier and more accurate resolution, and ensuring the plaintiff has a personal stake in the controversy. *Id.* at 60. A fine balance must be drawn because the Court alternatively declared a prudential policy behind the standing doctrine, which bars plaintiffs with generalized grievances. *Id.* at 91. “The prohibition against generalized grievances prevents individuals from suing if their only injury is as a citizen or a taxpayer concerned with having the government follow the law.” *Id.*

¹⁴ *Id.* at 67. Injuries that have qualified under the standing doctrine include a desire to use or observe an animal species—even for aesthetic purposes, diminution of water allocations because of the Endangered Species Act, economic harms, facing possible criminal prosecutions, loss of the right to sue in the parties’ choice of forum, and change in market conditions. *Id.* at 72-73.

¹⁵ *Id.* at 68-69.

¹⁶ *Id.* at 44-45.

¹⁷ *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotation marks omitted).

demonstrate that the courts are *likely* to be able to redress the situation and offer suitable relief.¹⁸

In *Frothingham v. Mellon*, the Court first articulated the standing doctrine while creating a general bar against taxpayer standing.¹⁹ The Court's decision provides a useful example of how the three standing requirements work together. Concerned about advisory opinions, the separation of powers, and general grievances, the Court reasoned that "[t]he party who invokes [the federal courts] must be able to show . . . he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally."²⁰ When a plaintiff seeks standing based on his taxpayer status, the alleged injury is the government's use of the taxpayer's money in violation of the Constitution.

The federal taxpayer's "interest in the moneys of the treasury . . . is comparatively minute and indeterminable."²¹ Thus, the plaintiff cannot argue that the government *caused* the plaintiff's injury because it is impossible to prove his money was used to support the alleged spending in violation of the Constitution. Even if a federal court declared a law violated the Constitution, the plaintiff cannot demonstrate that his injury would be *redressed* because there is no guarantee the taxpayer would be refunded the money. In all likelihood, the plaintiff's money would simply be reallocated to another government project.²²

¹⁸ *Id.* at 561 ("[I]t must be 'likely' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision.").

¹⁹ *Frothingham v. Mellon*, 262 U.S. 447, 478-79 (1923). *Massachusetts v. Mellon* was a companion case decided at the same time, which denies standing to the state of Massachusetts. *Massachusetts v. Mellon*, 262 U.S. 447 (1923).

²⁰ *Frothingham*, 262 U.S. at 488.

²¹ *Id.* at 487.

²² *See id.* at 487-88. *Frothingham* pre-dates the Court's articulation of the three required elements of standing. Thus, the Court did not explicitly discuss the elements as injury-in-fact, causation, and redressability. The Court's main concern in *Frothingham* was the prudential concern of generalized grievances. *Id.* at 487 ("If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same . . . in respect of every other appropriation act and statute whose administration requires the outlay of public money.").

A. The Flast Exception

In *Flast v. Cohen*, the Court dismissed a formalistic approach to taxpayer standing, deciding there may be a logical nexus between an alleged constitutional violation and taxpayer standing when the plaintiff alleges an Establishment Clause violation.²³ “Our history vividly illustrates that one of the specific evils feared by those who drafted the Establishment Clause . . . was that the taxing and spending power would be used to favor one religion over another or to support religion in general.”²⁴ In light of the founders’ concerns, the Court determined that the Establishment Clause exacted a specific constitutional limitation on Congressional taxing and spending power under Article I, Section 8.²⁵

To gain standing under the narrow *Flast* exception, a plaintiff must meet a two-part test.²⁶ “First, the taxpayers must establish a logical link between that status and the type of legislative enactment attacked. . . . Secondly, the taxpayer must establish a nexus between that status and the precise nature of the constitutional infringement.”²⁷ Over time, the *Flast* exception has been curtailed to the sole factual situation where a legislature employs its taxing and spending power in violation of the Establishment Clause.²⁸

Under the current standing rubric, taxpayers are personally injured by Congressional spending in violation of the Establishment Clause. Once the injury is viewed as a legislative act, causation and redressability become superfluous elements. If the *Flast* injury has been demonstrated, taxpayers can claim governmental spending *caused* their injury and can be *redressed*

²³ *Flast v. Cohen*, 392 U.S. 83, 102 (1968) (“[I]n ruling on standing, it is both appropriate and necessary to look to the substantive issues . . . to determine whether there is a logical nexus between the status asserted and the claim sought to be adjudicated.”).

²⁴ *Id.* at 103

²⁵ *Id.* at 104.

²⁶ *Id.* at 102.

²⁷ *Id.*

²⁸ *See generally* *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587 (2007); *Richardson v. United States*, 468 U.S. 317 (1984); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464 (1982); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208 (1974).

by enjoining the government from establishing religion in violation of the Constitution.

B. Standing in Texas Monthly When the Underinclusive Nature of a Statute Causes an Injury

In *Texas Monthly v. Bullock*, the Court considered a Texas law that exempted only religious publications from paying sales and use taxes.²⁹ Texas had a similar tax exemption for non-religious publications, but the state repealed that law and subsequently reinstated it three years later while litigation was pending.³⁰ Texas Monthly, a non-religious publication, sued to recover the taxes it had paid during this three-year period.³¹

The Court first addressed Texas's argument that Texas Monthly could not prove standing. The State asserted that Texas Monthly could not demonstrate an injury because the state had cured the underinclusive nature of the tax exemption by reinstating a similar provision for non-religious publications.³² Alternatively, Texas contended that if the statute had been deemed unconstitutional, the state would have repealed the exemption from religious publications, leaving no cognizable injury.³³

Writing for the Court, Justice Brennan rejected the State's argument that it would have repealed the tax exemption for religious publications leaving Texas Monthly without a cognizable injury.³⁴ While admitting the exact methodology of relief was not for the Court to decide, the Court found that Texas could not amend an unconstitutional statute to survive scrutiny and deny a plaintiff a continuing injury.³⁵ Allowing states to repair statutes "would effectively insulate underinclusive statutes from

²⁹ *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 5 (1989).

³⁰ *Id.*

³¹ *Id.* at 6.

³² *Id.*

³³ *Id.* at 7-8.

³⁴ *Id.* at 8.

³⁵ *Id.*

constitutional challenge, a proposition [the Court] soundly rejected.”³⁶

The Court upheld the plaintiff’s standing to challenge the constitutionality of the statute.³⁷ While the statutory scheme may have been constitutional at the time of judicial review, the Court found that a “live controversy persists over Texas Monthly’s right to recover the \$149,107.74 it paid.”³⁸ Thus, the prior economic injuries, caused by underinclusive statutes disproportionately benefiting religious institutions, were deemed a sufficient injury even after the constitutional issues had subsequently been resolved.

C. An Ideological Divide within the Standing Doctrine

Theoretically, the standing doctrine is limited to a threshold determination of whether the plaintiff can seek relief through the federal courts. However, since standing was first articulated in 1923,³⁹ a deep ideological divide has developed between the Supreme Court Justices. At the center of the debate, the Justices disagree about the role that federal courts should play within American society and the level of deference that should be given to the Executive and Legislative Branches.⁴⁰

The Justices, who are focused on preventing abuse of individualized rights by the other branches of government, believe the federal courts should play an active role protecting individual liberties.⁴¹ As far back as *Marbury v. Madison*, it was “a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress.”⁴² Justices

³⁶ *Id.* at 8 (quoting *Arkansas Writers’ Project, Inc. v. Ragland*, 481 U.S. 221, 227 (1987)).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Frothingham v. Mellon*, 262 U.S. 447 (1923).

⁴⁰ CHEMERINSKY, *supra* note 11, at 56.

⁴¹ *See id.* at 44-45 (“Federal judicial review is particularly important in enjoining and redressing constitutional violations inflicted by all levels of government and government officers. Thus, while justiciability doctrines serve[s] . . . important goals . . . it is at least equally important that the doctrines not prevent courts from performing their essential function in upholding the Constitution of the United States and preventing and redressing violations of federal laws.”).

⁴² *Marbury v. Madison*, 5 U.S. 137, 147 (1803).

espousing this view wish to enforce individual rights enshrined in the Constitution, giving continued validity to Chief Justice Marshall's words.

Justices advocating a limited role for the federal court system believe deference should be given to the Legislative and Executive Branches.⁴³ These Justices fear the legitimacy of the federal courts is more susceptible to erosion because it is the only unelected branch of the federal government.⁴⁴ Thus, "the law of Art[icle] III standing is built on a single basic idea—the idea of separation of powers. It is this fact which makes possible the gradual clarification of the law through judicial application."⁴⁵

While standing should be limited to an initial procedural determination of the plaintiff's ability to be heard in federal courts, the ideological divide between Justices creates substantive consequences. By expanding or narrowing the categories of plaintiffs who may access federal courts, the Justices affect the scope of the individual liberty at issue.⁴⁶ When Justices invoke standing to define the role of the federal courts in American society, the right in question is implicitly either expanded or narrowed.

II. THE ESTABLISHMENT CLAUSE

The First Amendment of the U.S. Constitution provides: "Congress shall make no law respecting an establishment of

⁴³ See CHEMERINSKY, *supra* note 11, at 56 ("[C]oncern for separation of powers also must include preserving the federal judiciary's role in the system of government. Separation of powers can be undermined by . . . undue restriction.").

⁴⁴ See *id.* ("Standing . . . focuses attention directly on the question of what is the proper place of the judiciary in the American system of government.").

⁴⁵ *Allen v. Wright*, 468 U.S. 737, 752 (1984); see generally CHEMERINSKY, *supra* note 11 at 56 (invoking the separation of powers is used to "minimize[] judicial review of the actions of the other branches of government").

⁴⁶ See generally F. Andrew Hessick, *Standing, Injury in Fact, and Private Rights*, 93 CORNELL L. REV. 275, 295-99 (2008) (explaining that the introduction of the injury-in-fact requirement was originally intended to broaden access to the courts but has been employed by some justices to restrict which rights can be pursued in federal courts). For Justices espousing a limited federal court system, standing is often used to narrow the potential scope of the rights. Meanwhile, Justices who believe in a more active federal court system expand the scope of the right granting standing where the plaintiff's right to be in court is questionable.

religion.”⁴⁷ The Court has declared that “[t]he establishment of religion clause of the First Amendment means at least this: Neither a state nor the Federal Government . . . can pass laws which aid one religion, aid all religions, or prefer one religion over another.”⁴⁸ Relying on Thomas Jefferson’s famous words regarding the separation of church and state, the Court said, “No tax in any amount, large or small can be levied to support any religious activities or institutions, whatever they may be called, or whatever form they may adopt to teach or practice religion.”⁴⁹

While continuing to adhere to these basic principles,⁵⁰ the Court has created mayhem for lower courts in determining whether a law violates the Establishment Clause. The Court has analyzed potential Establishment Clause violations under the *Lemon* test, which includes three prongs: purpose, primary effect, and entanglement.⁵¹ Justice O’Connor advanced an alternate test, known as the endorsement test, which considers whether a law “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

⁴⁷ U.S. CONST. amend. I.

⁴⁸ *Everson v. Bd. of Educ.*, 330 U.S. 1, 15 (1947) (continuing with an extensive list of restricted activities including setting up churches, influencing a person to attend or bar their access to a desired church, and punishment for beliefs or disbeliefs). In *Everson*, the Court explicitly incorporated the Establishment Clause as binding on the states via the Fourteenth Amendment. *Id.*

⁴⁹ *Id.* at 16.

⁵⁰ One of the guiding principles used by the Court is that the “First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.” *McCreary Cnty v. ACLY of Ky.*, 545 U.S. 844, 860 (2005) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)). In *McCreary County v. ACLY of Ky.*, Justice Scalia, joined by Chief Justice Rehnquist and Justice Thomas, called into doubt whether the First Amendment applies when the debate is between religion and nonreligion. *Id.* at 893 (Scalia, J., dissenting) (“With respect to public acknowledgement of religious belief, . . . the Establishment Clause permits . . . disregard of polytheists and believers in unconcerned deities, just as it permits the disregard of devout atheists.”).

⁵¹ *Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (“[T]he statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . . finally, the statute must not foster an excessive government entanglement with religion.” (citation omitted) (internal quotation marks omitted)).

the political community. Disapproval sends the opposite message.”⁵²

In *Lynch v. Donnelly*, the Court “emphasized [its] unwillingness to be confined to any single test or criterion in this sensitive area.”⁵³ Instead, the Court tends to pick and choose which test it wishes to apply on a case-by-case basis. This haphazard approach has left lower courts “in hopeless disarray, and the task of parsing the Supreme Court’s recent Establishment Clause cases prove[s] nothing short of Herculean.”⁵⁴ Even when the Court agrees a specific test should be used, “the Justices who have adopted the . . . test do not agree on how it should be applied.”⁵⁵ The Court’s inconsistency even lead Justice Thomas to write a ten page dissent from a denial for certiorari in 2011 stating that “[o]ur jurisprudence provides no principled basis by which a lower court could discern whether *Lemon*/endorsement, or some other test, should apply in Establishment Clause cases.”⁵⁶

One element, however, persists in all of the Establishment Clause cases regardless of the test used by the Court: whether the law has a primary effect of advancing religion. Because of the consistent use of the primary effect prong, this Comment focuses on that prong in analyzing the *ACSTO* decision and the Arizona statutory scheme at issue.⁵⁷

⁵² *Lynch v. Donnelly*, 465 U.S. 668, 688 (1984) (O’Connor, J., concurring). “[T]he constitutional inquiry should focus on the character of the government activity that might cause such divisiveness, not on the divisiveness itself.” *Id.* at 689. Justice O’Connor’s advancement of the endorsement test originated as a concurring opinion. The endorsement test, however, has garnered significant weight and is often applied in Establishment Clause cases. The endorsement test is viewed from the perspective of a “reasonable observer . . . [who] must be deemed aware of the history and context of the community and forum in which the religious display appears.” *Capital Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780 (1995) (O’Connor, J., concurring).

⁵³ *Lynch*, 465 U.S. at 679.

⁵⁴ *Weinbaum v. Las Cruces Public Schs.*, 465 F. Supp. 2d 1116, 1126 (E.D. N.M. 2006) (internal quotation marks omitted).

⁵⁵ *Bauchman v. W. High Sch.*, 132 F.3d 542, 552 (10th Cir. 1997).

⁵⁶ *Utah Highway Patrol Ass’n. v. Am. Atheists, Inc.*, 132 S. Ct. 12, 14 (2011) (Thomas, J., dissenting), *denying cert. to* 637 F.3d 1095 (10th Cir. 2010).

⁵⁷ While the focus is narrowed to the effect of the Arizona law, this Comment is not suggesting that a suitable class of plaintiffs would not have valid arguments under the purpose, entanglement, or endorsement tests. The plaintiffs would have powerful arguments that the Arizona statute violates the Establishment Clause under all of these potential tests.

*A. Zelman & Indirect Aid to Religious Elementary and
Secondary Schools*

In *Zelman v. Simmons-Harris*, the Court reviewed a broad government initiative to provide private secular and sectarian schooling options to parents in Cleveland, Ohio where the schools were in a perpetual state of crisis.⁵⁸ The Ohio program gave money directly to parents for tuition assistance based on financial need, allowing them to choose either sectarian or secular schooling options.⁵⁹ All schools, including the religious institutions, participating in the program agreed not to discriminate on religious grounds.⁶⁰

The Court, extrapolating from portions of the *Lemon* test, acknowledged that the Establishment Clause “prevents a State from enacting laws that have the ‘purpose’ or ‘effect’ of advancing or inhibiting religion.”⁶¹ *Zelman* focused on the program’s primary effect, and determined that the program neither advanced nor inhibited religion in violation of the Establishment Clause.⁶² The key element in *Zelman* was that parents, the intended beneficiary of the scheme, were given absolute discretion in determining which school, religious or secular, would receive the state tuition

⁵⁸ *Zelman v. Simmons-Harris*, 536 U.S. 639 (2002).

⁵⁹ *Id.* at 646.

⁶⁰ *Id.* at 645.

⁶¹ *Id.* at 648-49; *see also* *Mueller v. Allen*, 463 U.S. 388, 403 n.11 (1983) (discarding entanglement from the *Lemon* test in indirect aid to school cases because it “must be regarded as confined to cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools”). In analyzing the purpose prong, courts should give deference to the espoused purpose of a statute. *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 864 (2005). The *Zelman* Court held the legislative purpose of defraying the cost of private education in districts in crisis was valid. *Zelman*, 536 U.S. 639. However, if a secular purpose is doubtful, the *Lemon* primary effects inquiry may help decide whether the espoused purpose is a sham. *Wallace v. Jaffree*, 472 U.S. 38, 76 (1985) (O’Connor, J., concurring). The question becomes “whether an objective observer, acquainted with the text, legislative history, and implementation of the statute, would perceive it as a state endorsement.” *Id.*

⁶² *Zelman*, 536 U.S. at 652.

assistance revenue.⁶³ In effect, the parents' decision broke any perceived governmental endorsement of religion.⁶⁴

The Court also found significant the breadth of beneficiaries and that the statute defined those eligible to receive aid based on financial considerations.⁶⁵ The program "provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious."⁶⁶

*B. Texas Monthly & Underinclusive Statutes Which
Disproportionately Benefit Religion*

Unlike *Zelman*, the Court in *Texas Monthly v. Bullock* found the breadth of beneficiaries insufficient to pass constitutional scrutiny.⁶⁷ The government may enact programs that incidentally benefit religion without violating the Establishment Clause.⁶⁸ The government may not, however, "abandon[] secular purposes in order to put an imprimatur on one religion, or on religion, as such, or to favor the adherents of any sect or religious organization."⁶⁹

⁶³ *Id.* at 655 ("[N]o reasonable observer would think a neutral program of private choice, where state aid reaches religious schools solely as a result of the numerous independent decisions of private individuals, carries with it the *imprimatur* of government endorsement.").

⁶⁴ *Id.*

⁶⁵ *Id.* at 653 ("[The program] confers educational assistance directly to a broad class of individuals defined without reference to religion Program benefits are available to participating families on neutral terms, with no reference to religion. The only preference stated anywhere in the program is a preference for low-income families, who receive greater assistance and are given priority for admission at participating schools.").

⁶⁶ *Id.* at 662.

⁶⁷ *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) ("Texas' sales tax exemption for periodicals published or distributed by a religious faith and consisting wholly of writings promulgating the teaching of the faith lacks sufficient breadth to pass scrutiny under the Establishment Clause.").

⁶⁸ *Id.* at 10-11. Indeed, America has a long history of granting tax exemptions for religious institutions. In *Walz v. Tax Commission*, the Court unanimously sustained a state exemption from taxation of "property used exclusively for religious, educational or charitable purposes" by a non-profit organization. *Walz v. Tax Comm'n*, 397 U.S. 664, 666-67 (1970).

⁶⁹ *Tex. Monthly*, 489 U.S. at 8-9.

In *Texas Monthly*, the deciding factor was that the law did not “confer[] upon a wide array of nonsectarian groups as well as religious organizations in pursuit of some legitimate secular end.”⁷⁰ The Court reasoned if the religious tax exemption burdens non-beneficiaries, even indirectly, by dispersing other costs forcing non-qualifying taxpayers to make up the costs, the effect advances religion.⁷¹ Thus, the law in *Texas Monthly* had a “forbidden ‘effect[]’ . . . [because] the *government itself* . . . advanced religion through its own activities and influence.”⁷²

III. ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION V. WINN

Arizona Revised Statute Section 43-1089 (section 1089) allows individual taxpayers to apply for a dollar-for-dollar tax credit for contributions made to School Tuition Organizations (STOs).⁷³ Originally enacted in 1997, the Arizona legislature’s purpose was to “provid[e] equal access to a wide range of schooling options for students of every income level by defraying the costs of educational expenses incurred by parents.”⁷⁴ Clearly, the statute is intended to benefit parents and children seeking diversity in schooling options.⁷⁵

The plaintiffs, Arizona taxpayers, alleged that the statute, as applied, violates the Establishment Clause.⁷⁶ Section 1089 funnels

⁷⁰ *Id.* at 14.

⁷¹ *Id.* at 14-17.

⁷² Corp. of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos, 483 U.S. 327, 337 (1987). The *Texas Monthly* Court also held that the Texas law failed the purpose test. *Tex. Monthly*, 489 U.S. at 14-15. Finally, the Court reviewed the excessive entanglement prong of the *Lemon* test and determined that the Texas law was not an impermissible entanglement of the state with religious institutions. *Id.* at 20-22.

⁷³ ARIZ. REV. STAT. ANN. § 43-1089(A) (2005 & Supp. 2010).

⁷⁴ *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1011-12 (9th Cir. 2009).

⁷⁵ As further support that parents of school-aged children are the intended beneficiaries, the statute specifically provides that a certified STO must be established to pay “educational scholarships or tuition grants to children to allow them to attend any qualified school of their *parents’* choice.” § 43-1089(G)(3) (emphasis added).

⁷⁶ *Winn*, 562 F.3d at 1005. The Ninth Circuit stated that, as state taxpayers, the “plaintiffs have alleged that the state has used its taxing and spending power to

taxpayer money through STOs that are allowed to discriminate exclusively on religious grounds.⁷⁷ “The availability of scholarships to particular students and particular schools . . . depends on the amount of funding a STO receives, the range of schools to which it offers scholarships and the STO’s own scholarship allocation decisions and eligibility criteria.”⁷⁸ Of the current STOs who openly discriminate on religious grounds, three control over eighty-five percent of the tax credit contributions available to parents seeking financial assistance.⁷⁹ Not surprisingly, one of these STOs is Arizona Christian School Tuition Organization, a defendant in this case. The primary effect of the statute is that parents seeking the benefits of Arizona’s program do not have the genuine choice vital to the constitutionality of *Zelman*. Instead, parents’ choices are limited by the STOs that are discriminating based on religious affiliation.⁸⁰

advance religion in violation of the Establishment Clause, [and] we hold that they have standing under Article III to challenge the application of [s]ection 1089.” *Id.* at 1008. A prior facial challenge regarding the constitutionality of section 1089 was previously rejected by the Arizona Supreme Court on the merits. *Kotterman v. Killian*, 972 P.2d 606 (Ariz. 1999) (en banc).

⁷⁷ See § 43-1089(H)(2) (limiting STOs’ ability to contribute to “qualified schools” that do not “discriminate on the basis of race, color, handicap, familial status or national origin.”); *Winn*, 562 F.3d at 1006 (“[P]laintiffs allege, because the largest STOs restrict their scholarships to sectarian schools, students who wish to attend non-religious private schools are disadvantaged in terms of the STO-provided scholarships available to them.”).

⁷⁸ *Winn*, 562 F.3d at 1006.

⁷⁹ *Id.* The three STOs receiving the largest amount of donations include the Catholic Tuition Organization of the Diocese of Phoenix, Arizona Christian School Tuition Organization, and Brophy Community Foundation. When the case was originally heard as a facial challenge to the Arizona program, the ninth circuit noted that during the first year of mandatory reporting, “STOs reported . . . receiv[ing] \$1.8 million in contributions. At least 94% of that amount was donated to STOs that restrict their scholarships or grants to students attending religious schools; three religious STOs received 85% of the donations made that year.” *Winn v. Killian*, 307 F.3d 1011, 1014 (9th Cir. 2002), *aff’d sub nom.* *Hibbs v. Winn*, 542 U.S. 88 (2004).

⁸⁰ This is exactly what the Ninth Circuit determined on review of the case. *Winn*, 562 F.3d at 1017-18. The court dismissed ACSTO’s suggestion that the program’s filtering mechanism through taxpayer’s choice breaks the link of government control. *Id.* at 1018-1023. “Although the Arizona legislature has chosen an alternative method of allocating the funds that [s]ection 1089 makes available to STOs, the Court clarified in *Bowen* that it was the legislature’s exercise of its taxing and spending power, rather

A. *The Supreme Court Fundamentally Alters Standing—
Narrowing the Flast Exception & Casting Doubt on
Establishment Clause Cases*

Writing for the majority, Justice Kennedy began by conducting a thorough review of the general bar against taxpayer standing.⁸¹ The majority's focus on the general bar against taxpayer standing was unusual since the plaintiffs' sole contention was that they met the narrow *Flast* exception.⁸² As the Ninth Circuit noted, the *ACSTO* plaintiffs established the requisite elements of standing under the *Flast* exception.⁸³

The majority clearly had an alternate plan. Justice Kennedy introduced the extensive background concerning the general bar against taxpayer standing because the Justices were redefining *Flast* in an attempt to narrow the doctrine to near extinction. Arizona's statutory scheme based on tax credits provided the perfect avenue to redefine the injury-in-fact element of standing as it relates to the Establishment Clause.

Part of the historical foundation for *Flast's* interpretation stemmed from the words of James Madison, the leading architect of the Establishment Clause.⁸⁴ Madison famously said, "[T]he same authority which can force a citizen to contribute three pence . . . of his property for the support of any one establishment, may force him to conform to any other establishment."⁸⁵ Until *ACSTO*, the Court consistently treated Madison's "three-pence" statement metaphorically, acknowledging the injury as a psychological injury based on Madison's concern "that religious liberty ultimately would be the victim if government could employ its taxing and spending powers to aid one religion over another or to aid religion in general."⁸⁶ Thus, *Flast* defined the injury-in-fact as *any*

than the actions of the agency, that permitted taxpayers to raise an Establishment Clause challenge." *Id.* at 1010.

⁸¹ *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1442-45 (2011). Justice Kennedy's opinion was joined by Chief Justice Roberts, and Justices Scalia, Thomas, and Alito. *Id.* at 1439.

⁸² See Brief for Respondents at 38, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (Nos. 09-987, 09-991), 2010 WL 3624706, at *33-44.

⁸³ See *supra* note 76 and accompanying text.

⁸⁴ *Flast v. Cohen*, 392 U.S. 83, 103-04 (1968).

⁸⁵ *Id.* at 103. (quoting 2 WRITINGS OF JAMES MADISON 183, 186 (Hunt ed. 1901)).

⁸⁶ *Id.* at 103-04.

legislative spending in direct violation of the specific constitutional limitation imposed by the Establishment Clause.⁸⁷

The *ACSTO* decision reflects a sharp deviation from the well-established tax-and-spend limitation on the legislatures' ability to support religion. Ignoring the psychological harm traditionally recognized by the Court, the *ACSTO* Court focused on a literal interpretation that the government is only barred from spending an individual's "three-pence" towards religion.⁸⁸ The Court concluded that the injury "alleged in Establishment Clause challenges to federal spending [is] the very 'extract[ion] and spen[ding]' of 'tax money' in aid of religion alleged by a plaintiff."⁸⁹ In effect, the Court shifted the Establishment Clause injury from the psychological harm caused by legislative support of religion via its tax-and-spend power to defining the injury in purely monetary terms relating to individual taxpayers

Once this transition was complete, the Court continued by distinguishing between tax credits and governmental expenditures.⁹⁰ If the funds were sourced from the state coffer, "the taxpayer's direct and particular connection with the establishment [would] not depend on economic speculation or political conjecture. The connection would exist even if the conscientious dissenter's tax liability were unaffected or reduced."⁹¹ Instead of viewing Arizona's program as a legislative initiative, the Court opted to treat it as if the "government decline[d] to impose a tax," which destroys the "connection

⁸⁷ See *supra* Part I.A. Prior to *ACSTO*, the *Flast* exception continued to stand for this proposition even after numerous cases had narrowed the application of the exception to Congressional use of the tax-and-spend power in violation of the Establishment Clause. See *supra* note 28 and accompanying text.

⁸⁸ *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1447 (2011). The transformation in defining the injury from a metaphoric violation of conscience to a personalized injury based on economic terms is even more astounding considering that the majority continues to treat a legislature's tax-and-spend power as a metaphor. See *infra* notes 84-86 and accompanying text.

⁸⁹ *Ariz. Christian Sch. Tuition Org.*, 131 S. Ct. at 1446 (citations omitted).

⁹⁰ *Id.* at 1447 ("[T]ax credits and governmental expenditures do not both implicate individual taxpayers in sectarian activities.").

⁹¹ *Id.* The Court's discussion of this scenario where the government uses its tax-and-spend power to actively levy taxes and spend the money in support of religion represents the final sliver remaining of the *Flast* exception in the wake of the *ACSTO* decision.

between dissenting taxpayer and alleged establishment.”⁹² Despite the fact that section 1089 heavily relies on legislative support and government expenditures to oversee the program, the Court effectively removed the Arizona government from the analysis.

By defining the injury in exclusively economic terms and allowing the Arizona legislature to remove itself from the analysis via a tax credit, the Court equated the *Flast* exception with the general bar against taxpayer standing. Plaintiffs can never prove they suffered an injury regardless of their ties to the legislation. Similar to the bar against taxpayer standing, the plaintiffs in *ACSTO* will never be able to demonstrate causation or redressability. The Court explicitly foreclosed all plaintiffs from challenging section 1089:

Objecting taxpayers know that their fellow citizens, not the State, decide to contribute and in fact make the contribution. These considerations prevent any injury the objectors may suffer from being fairly traceable to the government. And while an injunction against application of the tax credit most likely would reduce contributions to STOs, that remedy would not affect noncontributing taxpayers of their tax payments. As a result, any injury suffered by respondents would not be remedied by an injunction limiting the tax credit’s operation.⁹³

Because Arizona’s tax credit system always allows individuals to choose whether to give money to an STO or to regularly pay their taxes, no individual exists that may challenge the constitutionality of section 1089 under the *Flast* exception. The bar against plaintiffs seeking access to the federal courts via *Flast* is not limited to Arizona taxpayers generally. The parents, who are supposed to directly benefit from section 1089, also retain the choice to donate their money to a STO through a tax credit or pay their regular taxes.⁹⁴ Now that all plaintiffs are foreclosed from establishing standing under the *Flast* exception, the

⁹² *Id.*

⁹³ *Id.* at 1448.

⁹⁴ *See supra* notes 73-75 and accompanying text.

majority's plan is complete and a variation of the general bar against taxpayer standing now exists.

B. Justice Kagan Dissenting in ACSTO

Writing for the dissent, Justice Kagan forcefully criticized the majority's decision to deny plaintiffs' standing.⁹⁵ The dissent believed the plaintiffs demonstrated standing under *Flast* by showing they were challenging whether section 1089, enacted under the state's taxing-and-spending authority, violated the Establishment Clause.⁹⁶

Echoing the Ninth Circuit's findings, Justice Kagan believed the distinction between appropriations and tax credits was unprincipled and had absolutely no basis in the Court's case law.⁹⁷ Regardless of what it is called, the effect remains that the government is financing religion, and taxpayers should be afforded standing to challenge the law.⁹⁸ Justice Kagan critiqued the majority for invoking "form . . . over substance, and [allowing] differences that make no difference determine access to the Judiciary. . . . [T]he casualty is a historic and vital method of enforcing the Constitution's guarantee of religious neutrality."⁹⁹

Justice Kagan was particularly disturbed by the majority's blatant break from the Court's established precedent to achieve its goal of restricting the *Flast* exception.¹⁰⁰ "This and every federal court has an independent obligation to consider standing, even when the parties do not call it into question."¹⁰¹ The majority did not limit its analysis to section 1089, but continued by casting doubt over the very Establishment Clause cases that provide

⁹⁵ *Ariz. Christian Sch. Tuition Org.*, 131 S. Ct. at 1450-63 (Kagan, J., dissenting).

⁹⁶ *Id.* at 1451-52.

⁹⁷ *Id.* at 1452 ("[T]his distinction finds no support in case law, and just as little in reason. In the decades since *Flast*, no court—not one—has differentiated between appropriation and tax expenditures.").

⁹⁸ *Id.* at 1450.

⁹⁹ *Id.* at 1458.

¹⁰⁰ *Id.* at 1450.

¹⁰¹ *Id.* at 1454.

guidance regarding the appropriate jurisdictional requirements of the standing doctrine.¹⁰²

Finally, the dissent expressed concern that the majority's analysis will be used by legislatures to openly circumvent the Establishment Clause: "Today's decision devastates taxpayer standing in Establishment Clause cases."¹⁰³ In some cases, no plaintiff will suffer an individualized harm, outside of his taxpayer status, sufficient to prove standing under the Establishment Clause jurisprudence.¹⁰⁴ By destroying the *Flast* exception, the Court "diminish[es] the Establishment Clause's force and meaning."¹⁰⁵

IV. ARIZONA'S STATUTORY SCHEME WARRANTS FEDERAL JUDICIAL REVIEW

While *ACSTO* will have significant ramifications on the Establishment Clause and the Court's standing analysis, the importance of finding a plaintiff who could substantively challenge section 1089 would be less pertinent if the constitutional challenge was not meritorious. Section 1089 poses new questions that remain unanswered because standing was denied. To better understand the constitutional issues raised in *ACSTO*, this Comment will compare section 1089 to the Ohio program deemed constitutional in *Zelman*.

A. Factual Differences between Zelman's program and Section 1089 at issue in ACSTO

A large part of the justification for the *Zelman* program was that Cleveland, Ohio's school district was in a state of crisis.¹⁰⁶ An

¹⁰² *Id.* at 1455; *accord id.* at 1448 ("The conclusion that the *Flast* exception is inapplicable at first may seem in tension with several earlier cases, all addressing Establishment Clause issues and all decided after *Flast*).

¹⁰³ *Id.* at 1462.

¹⁰⁴ *Id.* at 1451.

¹⁰⁵ *Id.* at 1451.

¹⁰⁶ *Zelman v. Simmons-Harris*, 536 U.S. 639, 644 (2002) ("The district had failed to meet any of the 18 state standards for minimal acceptable performance. Only 1 in 10 ninth graders could pass a basic proficiency examination, and students at all levels performed at a dismal rate compared with students in other Ohio public schools. More than two-thirds of high school students either dropped or failed out before graduation. Of those students who managed to reach their senior year, one of every four still failed

audit completed prior to the implementation of the program called it a “crisis that is perhaps unprecedented in the history of American education.”¹⁰⁷ Arizona, while admittedly suffering from lack of investment in their schools, does not rise to the same level of crisis that Ohio experienced. Unlike Ohio, which failed to turn around its schools after a federal court mandated improvements be made,¹⁰⁸ Arizona has made a choice to allocate fewer funds to its public school system than the vast majority of states.¹⁰⁹ The emergence of the voucher system has not alleviated the severe funding shortage in Arizona. Instead, section 1089 has taken “\$5 million annually from [the] public schools.”¹¹⁰

Unlike the Ohio program,¹¹¹ Arizona’s program does not target families based on financial need. Arizona’s legislature explicitly stated that the purpose of section 1089 is to “provid[e] equal access to a wide range of schooling options *for students of every income level* by defraying the costs of educational expenses

to graduate. Of those students who did graduate, few could read, write, or compute at levels comparable to their counterparts in other cities.”).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ Jamie Gumbrecht, *Which Places Spent Most Per Student on Education?*, CNN (Jun. 21, 2012, 6:15 PM), <http://schoolsofthought.blogs.cnn.com/2012/06/21/which-places-spent-most-per-student-on-education> (spending the third lowest amount per pupil averaging \$7,848 even though the national average is \$10,615); *see also* Dennis Hoffman & Tom R. Rex, *Education Funding in Arizona: Constitutional Requirement and the Empirical Record: A Report from the Office of the University Economist*, ARIZ. STATE UNIV. SCH. OF BUS. 1, 4 (2009), http://www.asu.edu/budgetcuts/documents/Education_Funding_in_Arizona_Constitutional_Requirement_and_the_Empirical_Record.pdf (“Despite the demonstrably low public funding for education in Arizona, it might be possible to argue that the constitutional funding requirement is being met if measures of educational achievement indicate that Arizona is in line with the rest of the nation. However, on most measures of elementary and secondary student performance, Arizona ranks among the bottom tier of states.”).

¹¹⁰ ASBA: *Vouchers are Bad Education Policy*, ARIZ. SCH. BDS. ASSOC., <http://www.azsba.org/docs/ASBA%20-%20Vouchers%20Are%20Bad%20Education%20Policy.pdf>. Money is not only being extracted from the public school system. The “[Arizona Department of Revenue] indicates they will incur increased administrative costs due to the added oversight and reporting requirements.” H.B. 2264, 49th Leg., 2d Reg. Sess. (Ariz. 2010).

¹¹¹ *Zelman*, 536 U.S. at 646 (“Tuition aid is distributed to parents according to financial need. Families with incomes below 200% of the poverty line are given priority and are eligible to receive 90% of private school tuition up to \$2,250.”).

incurred by parents.”¹¹² The funds taxpayers contribute to STOs are finite, and choices must be made regarding who will obtain the scholarships to private schools.¹¹³ Because section 1089 does not stipulate that financial need must be considered when awarding scholarships, the government cannot guarantee that access to schools are provided on an equal basis.¹¹⁴ The concern that parents with financial need are being denied access to the program is so great that a five person ad hoc committee reevaluated section 1089 and specifically called for change in this area.¹¹⁵ One of the committee’s revised provisions “require[d] each applicant’s financial need be considered by an STO in awarding, designating and reserving scholarships and grants.”¹¹⁶

Finally, the *Zelman* program contained a stipulation that religious schools wishing to participate and receive funds were prohibited from discriminating based on religion.¹¹⁷ Section 1089

¹¹² Winn v. Ariz. Christian Sch. Tuition Org., 562 F.3d 1002, 1011-12 (9th Cir. 2009).

¹¹³ Arizona recently doubled the amount individuals may claim as tax credits to give to STOs because supposedly students are already waiting for additional funds in order to gain access to the private schools. See *infra* note 146 and accompanying text.

¹¹⁴ See ARIZ. REV. STAT. ANN. § 43-1603(B) (Supp. 2010) (“To be eligible for certification and retain certification, the school tuition organization: (1) Must allocate at least ninety percent of its annual revenue . . . for educational scholarships or tuition grants. (2) Shall not limit the availability of educational scholarships or grants to only students of one school. (3) May allow donors to recommend student beneficiaries, but shall not award, designate or reserve scholarships solely on the basis of donor recommendations. (4) Shall not allow donors to designate student beneficiaries as a condition of contribution to the organization, or facilitate, encourage or knowingly permit the exchange of beneficiary student designations . . .”). The fact that financial need is not a mandatory consideration calls into doubt the espoused purpose of the Arizona program. If the statutory purpose is to provide equal access to educational opportunities, parents in lower socio-economic classes would need greater assistance in “defraying the costs of educational expenses.” See *supra* note 112 and accompanying text.

¹¹⁵ H.B. 2264. The Speaker of the Arizona House of Representatives appointed the five person ad hoc committee in 2009. H.B. 2264. While outside the scope of this article, the recommendations made by the committee suggest that the level of government entanglement with religious institutions is growing due to section 1089.

¹¹⁶ H.B. 2264.

¹¹⁷ *Zelman*, 536 U.S. at 645 (“Participating private schools must agree not to discriminate on the basis of race, religion, or ethnic background, or to advocate or foster unlawful behavior or teach hatred of any person or group on the basis of race, ethnicity, national origin, or religion.” (citation omitted) (internal quotation marks omitted)).

does not contain a similar prohibition.¹¹⁸ In fact, the Arizona program allows religious discrimination at two distinct levels. First, the schools are allowed to discriminate in determining which students will be admitted to the school.¹¹⁹ Second, and more importantly, the STOs, which rely on the continuation of section 1089, are barred from discriminating on every possible ground with the sole exception of religion.¹²⁰ For many of the STOs, their exclusivity and ability to discriminate serves as a marketing tool. Catholic Education Arizona says it is “committed to allocating . . . annual revenues for scholarships and grants to children attending the schools owned and operated by the Roman Catholic Diocese.”

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B. By Stripping the Parents’ of Genuine Choice, Section 1089’s Primary Effect Advances Religion

Even if the Court is willing to brush aside all of the factual differences between *Zelman* and section 1089, one distinction vital to the constitutionality of *Zelman* remains untested. In *Zelman*, the Court emphasized the importance of the intended beneficiaries retaining genuine choice in allocating the tuition assistance to the school of their choice.¹²² *Zelman*’s holding stated that the program “benefits directly to a wide spectrum of individuals, defined only

¹¹⁸ See *supra* note 77 and accompanying text (qualifying schools must “not discriminate on the basis of race, color, disability, familial status or national origin.”).

¹¹⁹ ARIZ. REV. STAT. ANN. § 43-1089(H)2(a) (2010) (qualifying schools must “not discriminate on the basis of race, color, handicap, familial status or national origin.”).

¹²⁰ In fact, STO’s only prohibition against discrimination is found in the definition of qualified schools. See ARIZ. REV. STAT. ANN. § 43-1603(A) (Supp. 2010). Qualified schools are not barred from discriminating on religious grounds. See *supra* notes 116-117 and accompanying text. As the Ninth Circuit noted, “nothing in the state precludes STOs from funding scholarships to schools that provide religious instruction or that give admissions preferences on the basis of religious affiliation.” *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1005 (2009).

¹²¹ *About us*, CATHOLIC EDUC. ARIZ., <http://www.catholictuition.org/aboutus.aspx> (last visited Dec. 21, 2012). The Catholic Education Arizona STO is formerly known as The Catholic Tuition Organization Diocese of Phoenix. *CTODP Is Now Catholic Education Arizona*, CATHOLIC EDUC. ARIZ., http://www.catholictuition.org/news_article.aspx (last visited Dec. 21, 2012). The plaintiffs in *ACSTO* alleged the Catholic Tuition Organization Diocese of Phoenix in conjunction with two other STOs controlled over eighty-five percent of taxpayers’ contributions. See *supra* note 79 and accompanying text.

¹²² See *supra* notes 62-64 and accompanying text.

by financial need and residence in a particular school district. It permits such individuals to exercise *genuine choice among options public and private, secular and religious*. The program is therefore a program of true private choice.”¹²³ The genuine and private choice of the beneficiaries in *Zelman* broke any “*imprimatur* of government endorsement.”¹²⁴

Section 1089, however, vests the first decision with the taxpayers who are given the choice of which STO they wish to donate their tax credit.¹²⁵ This decision is followed by the STOs that are afforded the opportunity to choose which schools will be eligible to receive the taxpayers’ funds in the form of scholarships.¹²⁶ Notably, the STOs, pursuant to legislative action, are not prohibited from discriminating on religious grounds against either the schools placed on their roster, or the children seeking tuition assistance.¹²⁷ Finally, after the choice has been whittled down by two previous layers of choice, parents are allowed to compete for the funds. The level of choice given to the parents, the intended beneficiaries, in *Zelman* and *ACSTO* are drastically different.

Whether section 1089 could survive constitutional scrutiny remains unanswered, but it is a question worthy of judicial review. The *Zelman* Court offered a framework to analyze the constitutionality of section 1089. Writing in concurrence, Justice O’Connor offered the clearest guidance:

Courts are instructed to consider two factors: first, whether the program administers aid in a neutral fashion, without differentiation based on the religious status of *beneficiaries* or providers of services; second, and more importantly, whether *beneficiaries* of indirect aid have a genuine choice among religious and nonreligious organizations when determining the organization to which they will direct that aid.¹²⁸

¹²³ *Zelman*, 536 U.S. at 662 (emphasis added).

¹²⁴ *Id.* at 655 (citing *Mueller v. Allen* 463 U.S. 388, 399 (1983); *Witters v. Wash. Dep’t of Servs. for the Blind*, 474 U.S. 481 (1986); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993)).

¹²⁵ *Winn*, 563 F.3d at 1005-06.

¹²⁶ *Id.* at 1006.

¹²⁷ See *supra* notes 118-120 and accompanying text.

¹²⁸ *Zelman*, 536 U.S. at 669 (O’Connor, J., concurring) (emphasis added).

Notably, the *Zelman* Court adopted the intended beneficiaries' point-of-view as the starting point of the analysis.¹²⁹ Because *Zelman* was not concerned with third party filtering mechanisms, this starting point was logical.

If the analytical framework enunciated in *Zelman* remains good law, section 1089 cannot possibly survive either subsection of the test. The program is not administered neutrally “without differentiation based on the religious status of beneficiaries or providers of services” because parents and their children can be openly discriminated against based on section 1089, by both the schools and the STOs.¹³⁰ The evidence suggests that the statute has a discriminatory effect on parents.¹³¹ Three STOs who openly discriminate on religious grounds control over eighty-five percent of the potential tuition funds.¹³² By the time the program reaches the parents, their choices have been limited in a distinctly non-neutral fashion.

The control that section 1089 gives to STOs in discriminating and allocating resources to both schools and parents also demonstrates that parents are not being given the *genuine choice* between sectarian and secular schooling options. The *Zelman* Court was clear that the statute must give beneficiaries a genuine choice.¹³³ The Court did not hold that legislatures could create a convoluted statutory structure where they vested the choice in a third party filtering mechanism that was given full rights to discriminate as it sees fit.¹³⁴ Once again, a religious school

¹²⁹ *Id.* at 644 (The program “confer[red] educational assistance directly to a broad class of individuals defined without reference to religion, *i.e.*, any parent of a school-age child who resides in the Cleveland City School District.”).

¹³⁰ *See id.* at 669 (O'Connor, J., concurring); *see supra* notes 117-21 and accompanying text. Notably, the secular and sectarian schools also face potential discrimination by being excluded from the STOs roster of schools allowed to receive the tuition funds. *See infra* note 152 and accompanying text.

¹³¹ *Winn v. Ariz. Christian Sch. Tuition Org.*, 562 F.3d 1002, 1013-14 (2009).

¹³² *See supra* note 79 and accompanying text.

¹³³ *See Zelman*, 536 U.S. at 662-63 (“[T]he Ohio program is entirely neutral with respect to religion. It provides benefits directly to a wide spectrum of individuals, defined only by financial need and residence in a particular school district. It permits such individuals to exercise genuine choice among options public and private, secular and religious. The program is therefore a program of true private choice. . . . we hold that the program does not offend the Establishment Clause.”).

¹³⁴ *See id.*

benefitting from section 1089 demonstrates the restrictive choice and coercive effect that Arizona's program has on parents. The American Indian Christian Mission School, listed under the ACSTO umbrella, boasts about the coercive effect the program has on school children and their parents: "[S]ome of the children do not come from Christian families, their parents know they will receive spiritual training . . . pray[] with us that these children will continue to be open and receptive to the message of Christ and will be witnesses to their families and to their own people."¹³⁵

The *Zelman* Court's emphasis on genuine choice is especially pertinent because the parents' decision to send their children to secular or sectarian institutions broke the *imprimatur* of governmental endorsement.¹³⁶ When the decision is not vested in the intended beneficiaries, the result is governmental endorsement of religion. Having failed both prongs of the test articulated in *Zelman*, section 1089 raises concerns unlike any case that has been before the Court. At a bare minimum, Arizona's program warrants federal judicial review.

V. *TEXAS MONTHLY*—OFFERING HOPE THAT A PLAINTIFF
EXISTS TO TAKE A STAND & CHALLENGE SECTION 1089'S
CONSTITUTIONALITY

The dramatic differences between *Zelman* and ACSTO demonstrate that section 1089 warrants judicial review. Because ACSTO's logic also inhibits the intended beneficiaries from challenging section 1089 under the *Flast* exception, this Comment seeks to find an alternative approach to establish standing. ACSTO's explicit reference to *Texas Monthly* provides hope that section 1089 can be substantively challenged. While refraining from saying a plaintiff may succeed in establishing standing under *Texas Monthly*, Justice Kennedy recognized that a plaintiff may be afforded standing under Article III via direct harm or the "costs and benefits [that] can result from alleged discrimination in the

¹³⁵ *The American Indian Christian School*, THE AMERICAN INDIAN CHRISTIAN MISSION, <http://www.aicm.org/ourschool.htm> (last visited Dec. 21, 2012).

¹³⁶ See *supra* notes 62-64 and accompanying text.

tax code, such as when the availability of a tax exemption is conditioned on religious affiliation.”¹³⁷

Unlike the *Flast* exception, which prior to *ACSTO* focused on the legislative act as the constitutional violation,¹³⁸ *Texas Monthly*’s standing analysis centered on the economic injury that the plaintiff suffered.¹³⁹ *Texas Monthly*’s economic injury stemmed from the underinclusive effect of repealing the secular exemption while leaving the religious exemption intact.¹⁴⁰ While *Texas Monthly* focused on the economic injury caused by the state’s tax exemption, the Court did not limit its decision by requiring a monetary injury.¹⁴¹

Similar to *Zelman*, the *Texas Monthly* Court emphasized that the breadth of intended beneficiaries must be expansive enough to quell concerns that the intended purpose of the law was to advance religion.¹⁴² The substantial underinclusion of parents seeking tuition assistance through section 1089 demonstrates that the scope of Arizona’s program may not reach a wide enough group of intended beneficiaries to survive constitutional scrutiny.¹⁴³

Parents seeking tuition assistance can allege two distinct injuries as a result of the underinclusive nature of section 1089 in order to establish standing. Drawing a clear corollary with *Texas Monthly*, parents who have been denied tuition assistance have suffered an economic injury. A parent who was denied the average scholarship awarded under section 1089 from 2003 through 2011 would have suffered injuries amounting to \$14,796.¹⁴⁴ The

¹³⁷ Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1440 (2011).

¹³⁸ See *supra* Parts I.A. & II.A.

¹³⁹ See *supra* notes 37-38 and accompanying text.

¹⁴⁰ See *supra* notes 29-31, 37-38 and accompanying text.

¹⁴¹ See Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v. Grumet, 512 U.S. 687, 690, 704-05 (citing *Texas Monthly* to support striking down a law that disproportionately benefited one small religious group by carving out a special school district).

¹⁴² Tex. Monthly, Inc. v. Bullock, 489 U.S. 1, 15-16 (1989); see *supra* Part II.A.

¹⁴³ See *supra* notes 76-80 and accompanying text.

¹⁴⁴ See *Private School Tuition Organization Income Tax Credits in Arizona: A Summary of Activity FY 2011*, ARIZ. DEPT. OF REVENUE 1, 5-6 (2011), <http://www.azdor.gov/Portals/0/Reports/2011-Private-School-Tuition-Organization-Individual-and-Corporate-Income-Tax-Credit-Report.pdf>. The analysis begins in 2003 because numbers reported prior to 2003 were not statutorily required and may not be an accurate reflection of the average scholarship awarded. *Id.* at 5. In addition, the

average scholarship, for the most part, is increasing. Comparing the average scholarship awarded in 2011 to the first year when STOs were statutorily required to produce their records, the amount of an average scholarship has risen by \$647.82.¹⁴⁵ In February 2012, Arizona signed into law a revision doubling the amount individuals may claim as tax credits donated to STOs.¹⁴⁶ If the average scholarship continues to grow at a greater pace than the number of scholarships awarded, section 1089 will remain underinclusive,¹⁴⁷ and parents seeking the benefits under section 1089 will continue to suffer an economic injury if they are excluded by the STOs because of their religious affiliation.

In addition, parents may also be able to establish an injury-in-fact based on the disparity of opportunity to compete for the tuition assistance. As previously discussed, three STOs control eighty-five percent of the scholarship funds and decide which parents will receive the allocated funds.¹⁴⁸ These STOs often discriminate against the parents based on religious affiliation.¹⁴⁹ The issue is more systemic, however, limiting parents' ability to compete for scholarships. "An analysis of 2008 scholarships . . . shows faith-based schools received 93 percent of the \$54 million given to school-tuition organizations that year. Some religious schools are closely linked to an STO, with most of the STO's donations going to one school or schools of one faith."¹⁵⁰

Arizona report cautions that the average amount of scholarships to one individual child may be greater because parents can obtain multiple scholarships from more than one STO. *Id.*

¹⁴⁵ See *id.* at 5-6.

¹⁴⁶ Patt Kossan, *Governor Signs Private School Tax Credit Bill Into Law*, ARIZ. REPUBLIC, (Feb. 29, 2012, 9:44 PM), <http://www.azcentral.com/news/articles/2012/02/29/20120229governor-signs-private-school-tax-credit-bill-into-law.html>.

¹⁴⁷ See *supra* note 144 at 5-6. The amount of the average scholarship increased from 2003 until 2009, when the average amount dropped. The numbers are misleading because "[m]any families seek scholarships from multiple STOs, resulting in one child being counted several times in the scholarship counts." *Id.* at 5.

¹⁴⁸ See *supra* notes 78-80 and accompanying text.

¹⁴⁹ See *supra* notes 80, 118-121 and accompanying text.

¹⁵⁰ Ronald J. Hansen & Pat Kossan, *The Tuition Tax Credit: Tuition-aid Benefits Wealthy Families, Raises Worry*, ARIZ. REPUBLIC (Aug. 1, 2009, 12:00 AM), <http://azcentral.com/news/articles/2009/08/01/20090801sto-whobenefits0801.html#ixzz20trl4p80>.

The primary effect of limiting the scholarships to parents of certain faiths is that it narrows the breadth of potential beneficiaries. If the primary effect framework articulated in *Zelman* is reviewed,¹⁵¹ the fact that parents are not offered tuition assistance in a neutral forum is apparent. In addition, parents are not being afforded a genuine choice in deciding whether to send their children to a religious or secular school. Because a select few STOs control such a significant amount of the tax credits and are allowed to discriminate and select which faiths they wish to support, the analysis is not limited to religion being preferred over secularism. Instead, section 1089 creates an environment where one religion is being preferred over another sect of religious beliefs.¹⁵²

Proving injury-in-fact alone is insufficient to establish standing. The parents still must demonstrate causation and redressability.¹⁵³ To be successful in establishing standing, the potential plaintiffs must demonstrate the government's action caused the injury and that the courts can provide relief.¹⁵⁴ Now, the importance of the *Flast* exception in defining the injury as a legislature's use of its tax-and-spend power in violation of the specific limitation imposed by the Establishment Clause becomes all too clear.¹⁵⁵ The most effective way of establishing that the harm was caused by governmental action is to tie the injury to Arizona's ratification and implementation of section 1089.

The majority in *ACSTO*, however, effectively removed the Arizona legislature from the analysis by creating an arbitrary

¹⁵¹ While *Zelman* is the controlling law for indirect aid to school cases, the Court in *Texas Monthly* substantively reviewed the Establishment Clause challenge under the three-pronged *Lemon* test: purpose, primary effect, and excessive entanglement. *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 9, 19 (1989).

¹⁵² See *supra* note 79 and accompanying text. Of the three STOs in control of eighty-five percent of the tax credits, two are almost exclusively dedicated to serving private Catholic schools. See *Participating Schools*, CATHOLIC TUITION ORG. OF THE DIOCESE OF PHOENIX, <http://www.catholictuition.org/schools.aspx> (last visited Feb. 24, 2013); see also *Our Schools*, BROPHY CMTY. FOUND., <http://brophyfoundation.org/our-schools/> (last visited Feb. 24, 2013). If these two STOs are awarding scholarships based on religious affiliation, then private Catholic schools and children are disproportionately reaping the benefits from the Arizona program compared to other religious sects.

¹⁵³ See *supra* notes 12, 17-22 and accompanying text.

¹⁵⁴ See *supra* notes 12-13, 17-18 and accompanying text.

¹⁵⁵ See *supra* notes 25-28, 83-89, 93-94 and accompanying text.

distinction between tax credits and government appropriations.¹⁵⁶ In effect, this allows the Court to claim, even under *Texas Monthly*, that the government did not *cause* the injury to the parents. Instead, the taxpayers who decided in mass to donate their tax credit to religious STOs are responsible for the injury.

Clearly, Arizona's legislature has taken an active role in deciding to allow the STOs to discriminate on religious grounds. Similar logic, however, can be used to exempt the government's action from causing the injury. Once again, taxpayers' choice is an issue. If the taxpayers' choose to donate to religious STOs, they should be afforded that right. In turn, STOs exercise their choice freely, wielding the authority to discriminate on religious grounds. This framework shifts responsibility away from the government and vests the causation of the injury to taxpayers and STOs. Needless to say, if the government did not cause the injury, then the federal courts would be unable to redress the situation and provide parents with effective relief.

Nevertheless, a tiny window remains where the parents could prove state action caused their injury. The Court has held that state action attempting to circumvent the Establishment Clause can itself be construed as a constitutional violation.¹⁵⁷ Potential plaintiffs must focus on the Arizona legislature's decision to allow the STOs to discriminate on religious grounds. While it would remain an extraordinarily convoluted system, section 1089 would not result in the same underinclusive effect if the STOs were prohibited from discriminating. The taxpayer's choice in determining which STO to donate to would be stripped of its discriminatory effect. STOs could not actively discriminate against students or the schools on their roster. Therefore, the breadth of potential beneficiaries, while still limited by financial resources, sweeps more broadly and the tuition assistance awarded to parents remains unaffected by the taxpayers or the STOs religious beliefs.

¹⁵⁶ See *supra* Part III.A.

¹⁵⁷ See *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 874 (2005); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000).

Considering the constant fluctuations of the standing doctrine,¹⁵⁸ especially as it relates to the Establishment Clause, there is no guarantee that the Court will continue to recognize the injuries discussed above. This fear is even more pronounced when attempting to invoke *Texas Monthly*, which was decided twenty-four years ago when the Court's composition was fundamentally different.¹⁵⁹

The economic injury is more likely to be recognized because it creates a more tangible assertion than parents' inability to compete for the benefits of section 1089.¹⁶⁰ Causation and redressability, however, are more likely to be proven when the injury is defined in terms of a legislative act. Thus, plaintiffs will be more likely to prove that the injury was caused by the government's action and it can be redressed by the Court if the injury is defined as the parents' inability to compete for scholarships based on the STOs ability to discriminate.¹⁶¹

¹⁵⁸ CHEMERINSKY, *supra* note 11 at 55 ("Many factors account for the seeming incoherence of the law of standing. The requirements for standing have changed greatly in the past twenty-five years as the Court has formulated new standing requirements and reformulated old ones. The Court has not consistently articulated a test for standing; different opinions have announced varying formulations for the requirements for standing in federal court. Moreover, many commentators believe that the Court has manipulated standing rules based on its views of the merits of particular cases.").

¹⁵⁹ *See* *Tex. Monthly v. Bullock*, 489 U.S. 1 (1989); *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011).

¹⁶⁰ Serious concerns are raised about the vitality of the Establishment Clause when plaintiffs challenging violations are forced to prove economic injuries. *See supra* notes 96-99, 103-105 and accompanying text.

¹⁶¹ Even if the plaintiffs are granted standing to substantively challenge section 1089, there is no guarantee that the plaintiffs would be successful. *Texas Monthly* left open the question of how broadly a statute must sweep in order to avoid being underinclusive. As Justice Brennan noted, "How expansive the class . . . must be to withstand constitutional assault depends upon the State's secular aim in granting a tax exemption." *Tex. Monthly, Inc. v. Bullock*, 489 U.S. 1, 15 (1989). The Court may decide that the aim in facilitating diverse educational opportunities is sufficient without reviewing the disparity between section 1089's espoused purpose and its primary effect. Alternatively, the Court may simply decide that the breadth of intended beneficiaries is sufficient to survive constitutional challenge under the Establishment Clause.

VI. UNDERMINING THE LEGITIMACY OF FEDERAL COURTS—THE
 RAMIFICATION OF DENYING ALL PLAINTIFFS ACCESS TO
 SUBSTANTIVELY CHALLENGE ARIZONA’S STATUTORY SCHEME

Texas Monthly offers plaintiffs a viable option to establish standing in order to access federal courts and challenge the constitutionality of section 1089. Finding a suitable plaintiff that can challenge section 1089 is imperative because the continued vitality of the Establishment Clause depends on injured persons’ ability to access the federal courts.¹⁶²

American history is replete with examples of local and state governments overstepping the Constitutional limitation imposed by the Establishment Clause.¹⁶³ Federal courts play an

¹⁶² Given the fact that secular STOs are also highly dependent on the continued validity of section 1089, there is a distinct possibility that a secular STO would offer scholarship funds to any plaintiff in order to render the case moot. The discussion of constitutional review of Arizona’s convoluted system will continue as other states adopt similar provisions. Even though the statutory structure differs, Florida, Georgia, Iowa, Indiana, New Hampshire, Oklahoma, Rhode Island, and Virginia all have some form of tax credit scholarship program in place. *School Choice Programs*, THE FRIEDMAN FOUND. FOR EDUC. CHOICE, <http://www.edchoice.org/School-Choice/School-Choice-Programs.aspx> (last visited Oct. 7, 2012); see also FLA. STAT. ANN. §§ 1002.395, 1002.421 (West 2012); GA. CODE ANN. §§ 20-2A-1—6 (2009); IND. CODE ANN. §§ 6-3.1-30.5-1—15 (LexisNexis 2007 & Supp. 2010); IOWA CODE ANN. § 422.11S (West 2011); N.H. REV. STAT. §§ 77-G:1—10 (2012), available at <http://www.gencourt.state.nh.us/rsa/html/NHTOC/NHTOC-V-77-G.htm>; OKLA. STAT. tit. 68, § 2357.206 (2012), available at <http://www.oscn.net/applications/oscn/deliverdocument.asp?id=463918&hits=6850+6849+3271+3270+3256+3255+3250+>; R.I. GEN. LAWS §§ 44-62-1—7 (2010); VA. CODE §§ 58.1-439.25—.28 (2012), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+58.1-439.25>.

¹⁶³ See generally *McCreary Cnty. v. ACLU of Ky.*, 545 U.S. 844, 874 (2005) (holding the purpose of the County in erecting the Ten Commandments was a violation of the Establishment Clause); *Santa Fe Indep. Sch. Dist. v. Doe*, 530 U.S. 290, 316 (2000) (“[T]he simple enactment of this policy, with the purpose and perception of school endorsement of student prayer, was a constitutional violation.”); *Lemon v. Kurtzman*, 403 U.S. 602, 625 (1971) (“Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter . . . while some involvement and entanglement are inevitable, lines must be drawn.”); *Engel v. Vitale*, 370 U.S. 421, 424 (1962) (“We think that by using its public school system to encourage recitation of the Regents’ prayer, the State . . . has adopted a practice wholly inconsistent with the Establishment Clause.”); *Illinois ex. rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 212 (1948) (“Here not only are the state’s tax supported public school buildings used for the dissemination of religious doctrines. The State also . . . provide[s] pupils for their religious classes

indispensable role in protecting our individual liberties against local and state governments.¹⁶⁴ The laws injuring people under the Establishment Clause are often backed by popular support.¹⁶⁵ The injured, representing a minority of the population, are often not in a position to effect change through the political process.¹⁶⁶ Thus, they seek relief in the manner the Constitution envisioned—through the federal court system.

While standing theoretically is limited to gaining access to the federal courts, the ideological division on the Court can have a powerful effect on the scope of individualized liberties. For example, if the Court had decided *Frothingham* differently and not created a general bar against taxpayer standing, then any citizen would be granted access to the federal courts to challenge any government action involving government expenditures.¹⁶⁷ Such a decision would have vested too broad a right to citizens, creating a real threat that the Court would be inundated with

through use of the state's compulsory public school machinery. This is not separation of Church and State.”).

¹⁶⁴ See *supra* notes 15-16 and accompanying text.

¹⁶⁵ *Religious Displays and the Courts*, THE PEW FORUM ON RELIGION & PUBLIC LIFE 1, 1 (June 2007), http://www.pewforum.org/uploadedfiles/topics/issues/church-state_law/religious-displays.pdf (“In a 2005 survey conducted by the Pew Research Center, 83 percent of Americans said displays of Christmas symbols should be allowed on government property. In another 2005 . . . poll, 74 percent of Americans said they believe it is proper to display the Ten Commandments in government buildings.”).

¹⁶⁶ See *Summary of Key Findings*, PEW FORUM ON RELIGION & PUBLIC LIFE 1, 8 (2007), <http://religions.pewforum.org/pdf/report2religious-landscape-study-key-findings.pdf>. In 2007, 78.4% of the American population affiliated with some form of Christianity. *Id.* Meanwhile, only 4.7 percent of Americans identified with another world religion, including Judaism, Buddhism, Islam, and Hinduism. *Id.* Finally, 16.1% remained unaffiliated. *Id.* Admittedly, Christians are not a homogenous group. See *Id.* But given the disproportionate representation of Christians compared to other major religions and nonaffiliated persons, the minorities would have tremendous difficulty working through the political process to overcome the popular support of laws commanding support within the Christian faiths. See *supra* note 164 and accompanying text.

¹⁶⁷ Notably, no Justice has ever advocated this extreme of a position. In *Frothingham*, the Court articulated the dangers of providing unbridled access to the federal courts. *Frothingham v. Mellon*, 262 U.S. 447, 487 (1923) (“If one taxpayer may champion and litigate such a cause, then every other taxpayer may do the same, not only in respect to the statute here under review, but also in respect of every other appropriation act and statute whose administration requires the outlay of public money, and whose validity may be questioned.”).

plaintiffs seeking advisory opinions or that the Court would act as a super-legislature.

If the ideological divide swings too far in restricting access, then people who have suffered cognizable injuries are denied the check on legislative power intended by the Constitution. *ACSTO*'s reliance on the separation of powers to justify denying standing demonstrates the fundamental misunderstanding of the peculiar nature of Establishment Clause violations.¹⁶⁸ The ramifications are not confined to the facts of one particular case but spread throughout to limit the scope of the individual liberty.

This concern is amplified when the Establishment Clause is at issue because the injuries sustained by potential plaintiffs are generally not defined in economic terms.¹⁶⁹ Instead, as the *Flast* Court recognized over forty years ago, violations of the Establishment Clause create a unique psychological harm of preferring one religion over another or religion over irreligion.¹⁷⁰ Madison's three-pence metaphor was never intended, nor had it ever been interpreted prior to *ACSTO*, to mean that an individual is only harmed by governmental establishment of religion when the government spends your pence towards religion against your conscious.¹⁷¹

The majority attempts to justify denying plaintiffs' standing in *ACSTO* as a means of preserving the legitimacy of the federal court system.¹⁷² Yet, the argument for plaintiffs to establish standing under *Texas Monthly* contains multiple potentially devastating hurdles. If the intended beneficiaries of section 1089 cannot establish standing under either the *Flast* exception or *Texas Monthly*, then the Arizona program may be exempt from constitutional review. During oral arguments, the Solicitor General argued precisely this point.¹⁷³ When Justice Ginsburg directly asked if anyone had standing to challenge the

¹⁶⁸ *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436, 1441 (2011).

¹⁶⁹ *See supra* notes 97-99, 103-105 and accompanying text.

¹⁷⁰ *See supra* notes 4, 84-87 and accompanying text.

¹⁷¹ *See supra* notes 84-87, 93-94 and accompanying text.

¹⁷² *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. at 1442 ("Continued adherence to the case-or-controversy requirement of Article III maintains the public's confidence in an unelected but restrained Federal Judiciary.").

¹⁷³ *See* Transcript of Oral Argument at 8, *Ariz. Christian Sch. Tuition Org. v. Winn*, 131 S. Ct. 1436 (2011) (Nos. 09-987 & 09-991).

constitutionality of section 1089, the Solicitor General responded, “The way this scheme is set up, our answer is no.”¹⁷⁴

If plaintiffs are denied standing under *Texas Monthly*, the Solicitor General’s assessment might become a discouraging reality. Section 1089 clearly warrants federal judicial review. The distinguishing characteristics of Arizona’s program far outweigh the similarities found in the Ohio program deemed constitutional in *Zelman*.

The Establishment Clause is an individualized right vested with each citizen in America. For every right, there must be a legal remedy. As Chief Justice Marshall declared, “[T]he individual who considers himself injured, has a right to resort to the laws of his country for a remedy.”¹⁷⁵ The federal judiciary provides the forum where the injured can seek relief. When the federal courts deny standing to an individual who has a constitutionally protected right that has been violated by a legislative body, the legitimacy of the judicial branch is undermined. This is precisely the effect of the *ACSTO* decision. Because of the unique characteristics of injuries sustained under the Establishment Clause, the *ACSTO* Court potentially slammed the doors of the federal courts to the majority of plaintiffs seeking relief from violations of the Establishment Clause.

CONCLUSION

The Court has closed the federal courts to plaintiffs seeking relief under the *Flast* exception by creating an arbitrary distinction between tax credits and government appropriations. Even though the discriminatory STOs, which serve as a filtering mechanism, are heavily reliant on governmental action and support, the Court found that the Arizona legislature could not be held responsible because they did not directly control the tax credits. In addition, the Court used a literal interpretation of the limitation imposed on legislative action and redefined the *Flast* injury by narrowing its focus to purely economic terms.

Compared to *Zelman*, section 1089 poses new and difficult questions regarding the program’s constitutionality under the

¹⁷⁴ *Id.*

¹⁷⁵ *Marbury v. Madison*, 5 U.S. 137, 166 (1803).

Establishment Clause. While many significant factual distinctions can be made, section 1089's use of STOs as third-party filtering mechanisms, sanctioned by the government to discriminate against the intended beneficiaries on religious grounds, warrants federal judicial review.

Due to the ramifications of the *ACSTO* decision, parents who are the intended beneficiaries of section 1089 must seek an alternate way to establish standing in federal court. While several significant obstacles exist, potential plaintiffs' best chance of establishing standing is found under *Texas Monthly*.

Because the continued vitality of the Establishment Clause is contingent on plaintiffs who have been injured being afforded access to the federal courts, it is imperative that courts recognize the intended beneficiaries under the *Texas Monthly* doctrine. If plaintiffs with cognizable injuries are denied an opportunity to challenge section 1089, the legitimacy of the federal courts and the Establishment Clause will be severely undermined.

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