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ARIZONA CHRISTIAN SCHOOL TUITION ORGANIZATION V. WINN: RELIGION STOLE THE MONEY FROM THE TAXPAYER JAR—NO STANDING, THEN WHO?

*Elleny Christopoulos**

The Establishment Clause of the First Amendment protects against government-established religion. This protection is meaningless, however, if those protected are unable to challenge Establishment Clause violations because they lack standing. In Flast v. Cohen *in 1968, the U.S. Supreme Court created an exception that allowed for taxpayer standing in certain cases. But in* Arizona Christian School Tuition Organization v. Winn*, the Court narrowed the doctrine by finding that some taxpayers did not have standing to challenge a law that granted tax credits to people who contributed to scholarship organizations, which included religious schools. The Court reasoned that the tax credits in* Arizona Christian *were different from the government expenditures in* Flast*; therefore, the Court held that the* Flast *exception did not apply. This Comment examines the Court's ruling in* Arizona Christian *and argues that it should have allowed standing to maintain the integrity of the First Amendment and the freedom from government-established religion.*

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I. INTRODUCTION

A well-known riddle poses the question: if a tree falls in the woods with no one around to hear, does it make a noise? Likewise, if the government spends money on religion and no one has standing to bring a lawsuit, is there a constitutional violation? In the federal judicial system, a lack of standing makes the case nonjusticiable, and the case cannot be heard on its merits.[1] If strict standing limitations restrict a citizen's ability to challenge constitutional violations, then who will be able to challenge those violations? This Comment focuses on the U.S. Supreme Court's decision in *Arizona Christian School Tuition Organization v. Winn*,[2] which narrowed the definition of standing, thereby restricting a citizen's access to federal courts in the Establishment Clause context.[3]

Arizona Christian was a challenge to an Arizona law that granted tax credits to those who contributed money to organizations that provided scholarships to students attending private schools, including religious schools.[4] The Court addressed only the issue of standing in the case, deciding whether Arizona taxpayers had standing to challenge an alleged violation of the Establishment Clause.[5] The Court found that the plaintiffs did not have standing in the case for two reasons: (1) the plaintiffs did not meet the general requirements for standing;[6] and (2) the plaintiffs did not meet the exception to the general rule against standing because government expenditures are different from tax credits.[7]

In deciding *Arizona Christian*, the Court made a clear distinction between government expenditures and tax credits, holding that plaintiffs who challenge government expenditures for religious purposes have standing, whereas plaintiffs who challenge tax credits for religious purposes do not.[8] This Comment argues that this distinction is inappropriate because tax credits for religious purposes

1. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).
2. 131 S. Ct. 1436 (2011).
3. *See id.*
4. *Id.* at 1440.
5. *Id.*
6. *Id.* at 1444–45.
7. *Id.* at 1447.
8. *Id.*

cause the same harm to the taxpayer that government expenditures do. Accordingly, the Court should have found standing in this case.

Part II of this Comment gives a brief history of the standing doctrine and the Establishment Clause. Part III discusses *Arizona Christian* and its factual background. Part IV explains the reasoning of the Court. Part V discusses the potential negative effect of *Arizona Christian* on future Establishment Clause cases, asserting that if taxpayers do not have standing to challenge Establishment Clause violations such as this, no one will have the ability to challenge such violations. Finally, Part VI concludes by arguing that the Court should have decided *Arizona Christian* differently in order to maintain the integrity of the First Amendment and the freedom from government-established religion.

II. HISTORICAL FRAMEWORK

In order to fully understand the nature of the Court's decision in *Arizona Christian*, it is necessary to first understand the background principles of the standing doctrine. Accordingly, this section discusses: (1) standing in general; (2) taxpayer standing; and (3) exceptions to the general standing requirement.

A. Standing in General

Article III of the Constitution mandates that federal courts rule only on cases or controversies.[9] Although Article III does not use the term "standing" in its language,[10] the Court has historically interpreted this mandate to mean that plaintiffs must first establish standing in order to bring a case in federal court.[11] The Court's interpretation came from the English legal tradition requiring "the need to redress an injury resulting from a specific dispute."[12] As part of the system of checks and balances between the branches of the government, the standing requirement acts as a restriction on the federal judiciary.[13] The judiciary does not have the power to question the constitutionality of acts of the legislative or executive branches

9. *Id.* at 1442; Allen v. Wright, 468 U.S. 737, 750–51 (1984).
10. U.S. CONST. art. III.
11. *See Ariz. Christian*, 131 S. Ct. at 1442.
12. *Id.* at 1441.
13. *Id.* at 1442.

unless there is an actual case or controversy brought before it.[14] This limit is said to "maintain the public's confidence in an unelected . . . judiciary" and give legitimacy to judicial decrees.[15]

According to the Court's interpretation of Article III, standing has three basic requirements: (1) the plaintiff must suffer an actual particularized injury; (2) "there must be a causal connection between the injury and the conduct complained of"; and (3) it must be likely that the injury can be redressed by a court decision.[16] The party who brings the claim bears the burden of establishing these elements.[17] The injury must be actual or imminent and not hypothetical.[18] The causal connection between the injury and the conduct cannot be "too attenuated."[19] As to redressability, "a plaintiff satisfies the . . . requirement when he shows that a favorable decision will relieve a discrete injury to himself. He need not show that a favorable decision will relieve his *every* injury."[20] All three of these requirements must be satisfied for a plaintiff to establish standing under Article III.[21] Too much speculation regarding any of these requirements suggests that a plaintiff will not have standing to bring a case.[22]

B. Taxpayer Standing

Taxpayer standing is analyzed as a separate, extremely limited category. The general concept that standing cannot be based only on a plaintiff's taxpayer status dates back to 1923's *Frothingham v. Mellon*[23] case.[24] There, a taxpayer alleged that certain federal expenditures exceeded Congress's constitutional authority.[25] The

14. *See id.*; *see* Lujan v. Defenders of Wildlife, 504 U.S. 555, 559–60 (1992).
15. *Ariz. Christian*, 131 S. Ct. at 1442.
16. *Lujan*, 504 U.S. at 560–61.
17. *Id.* at 561; FW/PBS, Inc. v. Dallas, 493 U.S. 215, 231 (1990).
18. *Lujan*, 504 U.S. at 560.
19. Allen v. Wright, 468 U.S. 737, 752 (1984).
20. Larson v. Valente, 456 U.S. 228, 243 n.15 (1982).
21. *Lujan*, 504 U.S. at 560–61.
22. *Id.*
23. 262 U.S. 447 (1923).
24. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1443 (2011); Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 599–600 (2007); *Frothingham*, 262 U.S. at 487.
25. *Frothingham*, 262 U.S. at 479–80. The plaintiff in *Frothingham* brought an action challenging the "Maternity Act," which appropriated federal funds to the states to help reduce maternal and infant mortality. *Id.* at 479. The plaintiff alleged that the act was a usurpation of power that the Constitution had not granted Congress and was therefore unconstitutional. *Id.*

taxpayer claimed injury based on her potential increase in tax liability due to Congress's unconstitutional spending.[26]

The Court rejected the taxpayer's argument because the alleged injury was too "remote, fluctuating and uncertain" to constitute a case or controversy under Article III.[27] Because millions of other taxpayers shared the taxpayer's interest in how the government spent her money, the Court found that the issue was not for the judiciary to decide but rather a matter of public concern to be resolved through the political system.[28] Thus, the Court held that the taxpayer did not have standing.[29] Since *Frothingham*, it has been nearly impossible for a plaintiff to have standing based on taxpayer status alone without meeting an exception to the taxpayer-standing rule.[30]

C. Exception to the Rule— Establishment Clause Standing

The Court created an important exception to the taxpayer-standing rule in *Flast v. Cohen*[31] in 1968.[32] There, it allowed taxpayer standing where taxpayers challenged an alleged violation of the Establishment Clause.[33] Specifically, the taxpayers challenged a federal statute that allowed government expenditures to financially support, among other things, the purchase of textbooks and other instructional material in religious schools.[34] The Court held that the taxpayers had standing, and it created a two-part test to determine when standing exists simply based on the plaintiff's status as a taxpayer.[35]

The first part of the test requires that a plaintiff show a "logical link" between his or her taxpayer status and the "type of legislative enactment attacked."[36] In *Flast*, this link existed because the taxpayers alleged that the government collected and spent tax dollars

26. *Id.* at 477.
27. *Id.* at 487.
28. *Id.* at 487–89.
29. *Id.* at 488.
30. *See* Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1443 (2011).
31. 392 U.S. 83 (1968).
32. *Id.* at 102.
33. *Id.* at 85–88.
34. *Id.*
35. *Id.* at 102–03.
36. *Id.* at 102.

on religious schools.[37] The second part of the test requires that there be a "nexus" between the taxpayer status and the "precise nature of the constitutional infringement alleged."[38] In *Flast*, the taxpayers met this condition because the complaint alleged that the government had violated the Establishment Clause, unlike in other cases where taxpayers did not allege a constitutional violation.[39]

The *Flast* Court found support for this exception to taxpayer standing by looking at the nation's history, particularly the writings of James Madison.[40] The Madisonian view was that a taxpayer should not have to contribute any amount of his property—not even "three pence"—to religious purposes.[41] Turning to *Flast*, the injury was not monetary from any increase in taxes as a result of the law but rather that the "conscience would be violated if citizens were required to pay taxes to support religious institutions with whose beliefs they disagreed."[42] *Flast* was significant because it was the first successful taxpayer standing case.[43] However, since *Flast*, the Court has been unwilling to find this exception to the general taxpayer-standing rule outside the context of Establishment Clause claims.[44]

37. *Id.* at 103; *cf.* Doremus v. Bd. of Educ., 342 U.S. 429 (1952) (finding no standing in an Establishment Clause case where the plaintiff sued when federal funds were used for recitation of Bible cases in public school because it involved at most an incidental expenditure of tax funds).

38. *Flast*, 392 U.S. at 102.

39. *Id.* at 103. Compare the constitutional challenge in *Flast*, where a specific constitutional clause was challenged, to the nonspecific challenge in *Frothingham*. *See supra* note 25 and accompanying text.

40. Ariz. Christian Sch. Tuition Org. v. Winn, 131 S. Ct. 1436, 1446 (2011); *Flast*, 392 U.S. at 103.

41. *Flast*, 392 U.S. at 103 (quoting 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* THE WRITINGS OF JAMES MADISON 183, 186 (Gaillard Hunt ed., 1901)).

42. Noah Feldman, *Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 351 (2002).

43. *See Flast*, 392 U.S. at 85, 106.

44. *Ariz. Christian*, 131 S. Ct. at 1445; Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 609 (2007) ("[This Court has] declined to lower the taxpayer standing bar in suits alleging violations of any constitutional provision apart from the Establishment Clause.").

III. STATEMENT OF THE CASE

A. Factual Background

Arizona Christian was a challenge to an Arizona law that provides tax credits for contributions to school tuition organizations (STOs).[45] These STOs use the contributed funds to give scholarships to students attending private schools.[46] Many of the private schools that receive scholarship money are religious schools.[47] Respondents in this case, a group of Arizona taxpayers ("the taxpayers"), challenged the tax credits, alleging that government support of these religious schools through tax credits is a violation of the Establishment Clause under the First and Fourteenth Amendments.[48]

Specifically, the taxpayers challenged section 43-1089 of the Arizona Tax Code.[49] The statute allows for tax exemptions by granting Arizona taxpayers dollar-for-dollar tax credits for contributions to designated STOs.[50] Taxpayers are allowed a maximum credit of $500 per person and $1,000 per married couple.[51] Further, taxpayers may carry forward the credit for five years if the credit exceeds the individual's tax liability.[52] Section 43-1089 sets out various conditions that an entity must meet in order to qualify as an STO, including: (1) "[t]he organization was required to be exempt from federal taxation under § 501(c)(3) of the Internal Revenue Code of 1986"; (2) "[i]t could not limit its scholarships to students only attending one school"; and (3) it had to distribute "'at least ninety percent of its annual revenue for educational scholarships or tuition grants' to children attending qualified schools."[53] A "qualified school" is "defined in part as a private school in Arizona that [does] not discriminate on the basis of race, color, handicap, familial status,

45. *Ariz. Christian*, 131 S. Ct. at 1440.
46. *Id.*
47. *Id.*
48. *Id.*
49. ARIZ. REV. STAT. ANN. § 43-1089 (2010); *Ariz. Christian*, 131 S. Ct. at 1440.
50. *Ariz. Christian*, 131 S. Ct. at 1440 (citing § 43-1089(A)).
51. *Id.* (citing § 43-1089(A)).
52. *Id.* (citing § 43-1089(D)).
53. *Id.* (citing § 43-1089(G)(3)).

or national origin."[54] This definition does not include discrimination on the basis of religion or gender.[55]

The taxpayers "alleged that § 43-1089 allows STOs 'to use State income-tax revenues to pay tuition for students at religious schools' [that] 'discriminate on the basis of religion in selecting students.'"[56] Specifically, the taxpayers alleged that Arizona's STO tax credits had an estimated annual value of more than $50 million.[57] The taxpayers claimed that they had standing to challenge Arizona's law based on their status as Arizona taxpayers.[58]

B. Procedural History

Originally, the taxpayers brought their case in state court and challenged the law by invoking both the U.S. Constitution and the Arizona Constitution.[59] On appeal, the Arizona Supreme Court rejected the claim on its merits without addressing the taxpayers' standing.[60] After the Arizona Supreme Court ruled, the U.S. Supreme Court denied certiorari of that case.[61]

Next, the taxpayers filed their action in the U.S. District Court for the District of Arizona.[62] Challenging the law as a violation of the First Amendment, as incorporated against the states by the Fourteenth Amendment, the taxpayers requested an injunction preventing the state from allowing religious STOs to claim the tax credit.[63] The district court held that the Tax Injunction Act jurisdictionally barred the case.[64] The U.S. Court of Appeals for the Ninth Circuit reversed, and the Supreme Court affirmed that decision in *Hibbs v. Winn*.[65]

On remand to the district court, the Arizona Christian School Organization and other interested parties intervened.[66] Again, the

54. § 43-1089(G)(2); *Ariz. Christian*, 131 S. Ct. at 1441.
55. *See Ariz. Christian*, 131 S. Ct. at 1441.
56. *Id.* (quoting Complaint at 125a–26a, Winn v. Killian, No. CIV 00-0287 (D. Ariz. Feb. 15, 2000)).
57. *Id.* at 1444.
58. *Id.* at 1440.
59. *Id.* at 1441.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* An injunction was only one of several remedies that the taxpayers requested. *Id.*
64. *Id.* The Tax Injunction Act is codified at 28 U.S.C. § 1341 (2006).
65. 542 U.S. 88 (2004).
66. *Ariz. Christian*, 131 S. Ct. at 1441.

district court dismissed the case for failure to state a claim.[67] The Ninth Circuit reversed the decision, finding that the taxpayers had standing under the *Flast* exception.[68] The Ninth Circuit denied en banc review,[69] and the Supreme Court granted certiorari.[70]

IV. REASONING OF THE COURT

The Court held in a 5–4 decision that the taxpayers lacked standing to bring the case.[71] The Court reasoned that the claimed harm is only speculative because taxpayers are not required to contribute any of their property to the establishment of religion.[72] Because the taxpayers lacked standing to bring their action, the Court dismissed the case, which could not be heard on its merits.[73]

A. Majority Opinion

In arriving at this decision, the Court relied on Article III of the Constitution, which gives the federal judiciary the power to resolve "cases" and "controversies."[74] First, the Court rejected the idea that the taxpayers had standing generally as taxpayers.[75] The Court maintained its general position that an individual who has paid taxes does not have a "continuing, legally cognizable interest in ensuring that those funds are not *used* by the Government in a way that violates the Constitution."[76] The Court reasoned that claims of taxpayer standing "rest on unjustifiable economic and political speculation."[77]

Here, the Court found similar problems with the taxpayers' claim because the injury to the taxpayer was too speculative.[78] In essence, proof of injury to a taxpayer requires two inferential steps:

67. *Id.*
68. *Id.*
69. Winn v. Ariz. Christian Sch. Tuition Org., 586 F.3d 649, 658 (9th Cir. 2009).
70. *Ariz. Christian*, 131 S. Ct. at 1436.
71. *Id.* at 1449.
72. *Id.* at 1447.
73. *See id.* at 1449.
74. U.S. CONST. art. III, § 2 ("The Judicial Power shall extend to all Cases, in Law and Equity . . . ."); *Ariz. Christian*, 131 S. Ct. at 1449.
75. *Ariz. Christian*, 131 S. Ct. at 1444–45.
76. *Id.* at 1442–43 (quoting Hein v. Freedom From Religion Found., Inc., 551 U.S. 587, 599 (2007)).
77. *Id.* at 1443.
78. *See id.* at 1444.

(1) injury to the state from an increased burden; and (2) injury to the taxpayer based on taxes that were raised to make up a deficit.[79] Even if the Court had accepted the taxpayers' claim that Arizona's STO credits were valued at $50 million a year (it neither accepted nor rejected this claim),[80] the Court still would not have found the injury that is required for taxpayer standing.[81] The injury might be speculative or nonexistent because the education of children is one of the state's principle missions and responsibilities.[82] By helping students obtain scholarships to private schools, the STO program may have lessened the burden on Arizona's public schools.[83] If the average cost of an STO scholarship is less than the average cost of educating an Arizona public school student is, then the STO tax credit may in fact not cause any financial loss to the state.[84]

Regardless, even if the STO credits did have negative effects on Arizona's budget, the Court concluded that further speculation would be required to find injury-in-fact to the taxpayer.[85] To show injury, the taxpayers would have had to demonstrate that Arizona lawmakers would actually raise the taxpayers' taxes in response to any deficit that the STO program caused.[86] No facts supported such a finding here.[87] Furthermore, the Court determined that finding causation in this situation was too speculative, stating that "the inferential steps to show causation and redressability depends on premises as to which there remains considerable doubt."[88] In sum, because of the speculation that is involved in finding actual injury, causation, and redressability, the Court did not find general taxpayer standing here.[89]

Second, the Court analyzed standing under the *Flast* exception, which was the taxpayers' main argument.[90] Although the taxpayers

79. *Id.*
80. *See id.*
81. *Id.*
82. *Id.*
83. *Id.* The Court acknowledged the Arizona Christian School Tuition Organization's assertion that studies indicated that the STO program may actually save the state money. *Id.*
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.*
89. *Id.* at 1443–45.
90. *Id.* at 1445.

claimed—and the Ninth Circuit agreed[91]—that their case fell under the exception to the general standing rule in *Flast*, the Court disagreed.[92] Instead, the Court narrowed the *Flast* decision by creating a clear distinction between government tax credits and government expenditures[93]: challengers of government expenditures have standing and challengers of tax credits do not.[94] Thus, the *Flast* Court dealt with a government expenditure of tax funds for religion and allowed taxpayer standing, while the Court in this case did not allow standing because a tax credit is not the same as a government expenditure.[95]

The Court recognized that tax credits and expenditures can have "similar economic consequences," yet it still distinguished them.[96] Government expenditures with taxpayer money cause a dissenter to "know[] that he has in some small measure been made to contribute to an establishment in violation of conscience."[97] In this situation, the Court recognized that there would be an injury to the taxpayer, even if no additional tax liability were imposed on the individual.[98] In contrast, when the government does not impose a tax, there is "no connection between [the] dissenting taxpayer and [the] alleged establishment."[99] Tax credits here are distinguished from government expenditures because Arizona taxpayers themselves choose whether

91. *Id.* at 1441.

92. *Id.* at 1447.

93. Tax credits are one form of tax expenditures. Stanley S. Surrey, *Tax Incentives as a Device for Implementing Government Policy: A Comparison with Direct Government Expenditures*, 83 HARV. L. REV. 705, 706 (1970). Tax expenditures are "monetary subsidies the government bestows on particular individuals or organizations by granting them preferential tax treatment." *Ariz. Christian*, 131 S. Ct. at 1452 n.1 (Kagan, J., dissenting) ("[D]efining 'tax expenditure' for the purposes of the federal government's budgetary process as 'those revenue losses attributable to provisions of the . . . tax laws which allow a special exclusion, exemption, or deduction from gross income or which provide a special credit, a preferential rate of tax, or a deferral of tax liability.'" (citing 2 U.S.C. § 622(3) (2006))). Tax expenditures are found within the Internal Revenue Code and, therefore, they receive less congressional and popular scrutiny than direct appropriations do. Bernard Wolfman, *Tax Expenditures: From Idea to Ideology*, 99 HARV. L. REV. 491, 493 (1985). In contrast, government expenditures are a form of direct government financial assistance, which includes direct grants, loans, interest subsidies, guarantees of loan repayment or interest payments, and insurance on investments. Surrey, *supra*, at 713.

94. *Ariz. Christian*, 131 S. Ct. at 1447.

95. *Id.*

96. *Id.*

97. *Id.* (quoting Flast v. Cohen, 392 U.S. 83, 106 (1968)).

98. *Id.*

99. *Id.*

or not to contribute to STOs,[100] unlike cases where the government collects money from taxpayers for religious purposes.[101] The Court found that because taxpayers can choose whether or not to contribute to STOs, tax credits are sufficiently distinguishable from expenditure cases.[102] The Court held that the tax credit here was not "tantamount to a religious tax or to a tithe and does not visit the injury identified in *Flast*."[103] Thus, the taxpayers neither met the general taxpayer-standing rule nor the *Flast* exception, and the Court dismissed the case for lack of standing.[104]

B. Dissenting Opinion

Justice Kagan authored the dissent in *Arizona Christian*.[105] First, the dissent agreed with the majority that there was no standing under the general taxpayer-standing rule.[106] However, the dissent disagreed with the majority by finding that the case did fit within the *Flast* standing exception.[107] Primarily, the dissent was not persuaded by the majority's finding that there is a distinction between a tax credit and an expenditure, stating that the distinction "has as little basis in principle as it has in our precedent."[108]

The dissent explained how the taxpayers clearly had standing under the *Flast* decision.[109] First, the taxpayers challenged a provision under the Arizona Tax Code that the legislature enacted under its taxing and spending powers—satisfying part one of the *Flast* test,[110] which requires a "logical link" between taxpayer status and the "type of legislative enactment attacked."[111] Second, the

100. *Id.*
101. *Id.*
102. *Id.*
103. *Id.*
104. *Id.* at 1449. Justice Scalia wrote a short concurrence in which Justice Thomas joined. *Id.* (Scalia, J., concurring). The concurrence agreed that there was no standing in this case, and went further to reject the *Flast* standing exception. *Id.* at 1449–50 ("*Flast* is an anomaly in our jurisprudence, irreconcilable with the Article III restrictions on federal judicial power that our opinions have established. I would repudiate that misguided decision and enforce the Constitution.").
105. *Id.* at 1450 (Kagan, J., dissenting). Joining Justice Kagan were Justice Ginsburg, Justice Breyer, and Justice Sotomayor. *Id.*
106. *Id.* at 1451.
107. *Id.*
108. *Id.* at 1450.
109. *Id.* at 1451–52.
110. *Id.*
111. Flast v. Cohen, 392 U.S. 83, 102 (1968).

taxpayers alleged that the Arizona tax provision violated the Establishment Clause—satisfying part two of the test,[112] which requires a "nexus" between taxpayer status and the "precise nature of the constitutional infringement alleged."[113] In order to show that this case challenged a law under the tax power, the dissent pointed to the Court's ruling on another issue in *Hibbs*, where it stated that the claim challenged "an integral part of the State's *tax* statute."[114]

Next, the dissent explained why the majority's reasoning was flawed in distinguishing tax credits and government expenditures.[115] It noted that *Flast* was decided more than forty years ago, and since then not one court, including the U.S. Supreme Court, has distinguished between the two for the purposes of standing.[116] In other cases, the Court has recognized that "[t]ax breaks 'can be viewed as a form of government spending.'"[117]

In addition to this strong precedent, the dissent provided logical reasons for not distinguishing between tax credits and expenditures.[118] Although they differ, tax credits and expenditures are both ways in which the government can monetarily support an organization.[119] As the dissent pointed out, "the distinction is one in

112. *Ariz. Christian*, 131 S. Ct. at 1451–52 (Kagan, J., dissenting).

113. *Flast*, 392 U.S. at 102.

114. *Ariz. Christian*, 131 S. Ct. at 1452 (Kagan, J., dissenting) (quoting Hibbs v. Winn, 542 U.S. 88, 119 (2004) (Kennedy, J., dissenting)).

115. *Id.* The dissent also points out that even on the majority's own terms, standing should result in this case. *Id.* at 1458 n.9. Arizona's tax credit program "in fact necessitates the direct expenditure of funds from the state treasury." *Id.* at 1458–59 n.9. Presumably, activities to support the STO program cost money, which comes from the state treasury. *Id.* at 1459 n.9. Thus, the government has "extract[ed] and spen[t]" the taxpayers' money to implement the tax credit program. *Id.*

116. *Id.* at 1455. The Court specifically noted five Supreme Court cases involving similar facts and where standing was found: *Walz v. Tax Commission of City of New York*, 397 U.S. 664 (1970); *Hunt v. McNair*, 413 U.S. 734 (1973); *Committee for Public Education & Religious Liberty v. Nyquist*, 413 U.S. 756 (1973); *Mueller v. Allen*, 463 U.S. 388 (1983); and *Hibbs v. Winn*, 542 U.S. 88 (2004). *Id.* at 1453. Although standing was not the issue in these cases, every federal court has an independent obligation to consider standing even if the parties do not question it. *Id.* at 1454. The dissent noted that these cases are significant because they suggest that the taxpayers should have standing here as well, based on this precedent. *Id.*

117. *Id.* at 1456 (quoting Camps Newfound/Owatonna, Inc. v. Town of Harrison, 520 U.S. 564, 589–90 n.22 (1997)); *see also* Ark. Writers' Project, Inc. v. Ragland, 481 U.S. 221, 236 (1987) (Scalia, J., dissenting) ("Our opinions have long recognized . . . the reality that [tax expenditures] are 'a form of subsidy that is administered through the tax system' . . . .").

118. *Ariz. Christian*, 131 S. Ct. at 1455.

119. Additional sources suggest that there is little to no difference between tax credits and government expenditures. *See* STANLEY S. SURREY & PAUL R. MCDANIEL, TAX EXPENDITURES 3 (1985) (explaining that tax expenditures "represent government spending for favored activities or groups, effected through the tax system rather than through direct grants, loans, or other forms

search of a difference."[120] If the government cannot support religious causes through direct spending, the obvious alternative would be to offer tax credits that cannot be challenged due to lack of standing.[121]

The dissent used several hypothetical examples to make this point, such as a tax credit of $500 that rewards members of the Jewish faith for their religious devotion in lieu of receiving an annual stipend, or a tax credit that subsidizes the ownership of crucifixes.[122] Here, for example, the government would be directly giving a member of the Jewish faith money for their religious devotion, which would allow a taxpayer to challenge an alleged Establishment Clause violation.[123] In contrast, using the majority's logic,[124] no standing would be allowed if the government was to give a tax credit, rather than make a direct expenditure, for the same purpose. The dissent used these examples to help show why the majority's reasoning was not sound in distinguishing between government expenditures and tax credits for Establishment Clause standing.[125]

V. ANALYSIS: THE FUTURE OF ESTABLISHMENT CLAUSE STANDING

Arizona Christian sets a dangerous precedent for the future of Establishment Clause cases. In the words of Justice Kagan, it "devastates taxpayer standing."[126] By calling the injury to taxpayers "speculative" at best when the government monetarily supports religion through tax credits, the Court has narrowed *Flast*'s taxpayer-standing exception and significantly limited challenges to violations

of government assistance"); David A. Weisbach & Jacob Nussim, *The Integration of Tax and Spending Programs,* 113 YALE L.J. 955, 972 (2004) ("[A]ny government program can be implemented through a direct expenditure or through the tax system."); Erskine Bowles & Alan Simpson, *A Real Budget Deal? Yes, We Still Can*, WASH. POST, Feb. 20, 2011, at A19 (referring to "tax expenditures" as "the various deductions, credits and loopholes that are just spending by another name," in their roles as cochairmen of the National Commission of Fiscal Responsibility and Reform).

120. *Ariz. Christian*, 131 S. Ct. at 1455 (Kagan, J., dissenting).

121. *See id.*

122. *Id.* at 1457.

123. *See id.* at 1447.

124. *Id.*

125. *See id.* at 1457 ("The effect of each form of subsidy is the same, on the public fisc and on those who contribute to it. Regardless of which mechanism the State uses, taxpayers have an identical stake in ensuring that the State's exercise of its taxing and spending power complies with the Constitution.").

126. *Id.* at 1462.

of the Establishment Clause.[127] However, in the words of James Madison, government should not "force a citizen to contribute three pence only of his property for the support of any one establishment."[128] Yes, the Court was technically correct that the taxpayer is not directly forced to contribute his property to support religion.[129] However, what significance, if any, does the Establishment Clause have if the government can so easily get around this prohibition by using tax credits to support religion? With no taxpayer standing for challenging religion-related tax credits, who can challenge these laws as constitutional violations? In *Arizona Christian*, the tax credits from the STO program amounted to approximately $50 million per year.[130] Using the majority's logic, there is essentially no limit on financial governmental support of religion, as long as it is in the form of tax credits.[131]

The *Flast* opinion posed a hypothetical that questioned whether a taxpayer would have standing to challenge government spending for the building of a church.[132] This question demonstrated the great need for an exception to the taxpayer-standing rule for Establishment Clause cases.[133] The Court's answer made clear that taxpayers must be able to challenge this impermissible governmental support of religion.[134] Likewise, if the question was whether a taxpayer would have standing to challenge a tax credit for those who give money to build a church, the answer should still be the same—because in both instances, the effect of the subsidy on the taxpayer is the same.[135] The answer here should be clear, too—that the taxpayer must be

127. *See id.* at 1447.

128. Flast v. Cohen, 392 U.S. 83, 103 (1968) (quoting 2 JAMES MADISON, *Memorial and Remonstrance Against Religious Assessments*, *in* THE WRITINGS OF JAMES MADISON 183, 186 (Gaillard Hunt ed., 1901)).

129. *See Ariz. Christian*, 131 S. Ct. at 1447 ("A dissenter whose tax dollars are 'extracted and spent' knows that he has in some small measure been made to contribute to an establishment in violation of conscience . . . . When the government declines to impose a tax, by contrast, there is no such connection between dissenting taxpayer and alleged establishment." (citations omitted)).

130. *Id.* at 1444.

131. *See id.* at 1447.

132. *Flast*, 392 U.S. at 98 n.17.

133. *See id.* (noting that if taxpayers were denied standing without exception, "a taxpayer would lack standing even if Congress engaged in such palpably unconstitutional conduct as providing funds for the construction of churches for particular sects").

134. *See id.*

135. *Ariz. Christian*, 131 S. Ct. at 1457 (Kagan, J., dissenting) ("The effect of each form of subsidy is the same, on the public fisc and on those who contribute to it.").

allowed to challenge this impermissible government support of religion.

However, it seems that the majority in *Arizona Christian* would answer this question differently because of the majority's clear distinction between tax credits and government expenditures: taxpayers have standing to challenge government expenditures but do not have standing to challenge tax credits.[136] Accordingly, a taxpayer likely could not challenge a law that provides tax credits to those who support building a church because, under *Arizona Christian*, opponents of tax credits do not have standing under the *Flast* exception.[137] The distinction lies in how the church receives the money, but under either situation the result is essentially the same—the government financially supports the building of a church.[138] This hypothetical helps to show possible outcomes after the decision in *Arizona Christian* and why the majority's reasoning sets a dangerous precedent for the future of the Establishment Clause.

With no taxpayer standing to challenge an alleged Establishment Clause violation, such as in *Arizona Christian*, an alternative method is to change the law through the political process[139]—which is easier said than done.[140] An informal inquiry of religion in Arizona makes this point.[141] Religion in Arizona is dominated by Christianity,

136. *Id.* at 1447–48 (majority opinion).

137. *Id.*

138. *See id.* at 1457 (Kagan, J., dissenting).

139. *See id.* at 1443 (suggesting that where no "judicial controversy" exists, the matter should be pursued through the political process).

140. Another interesting alternative is presented by Professor Zelinsky of Harvard. *See* Edward A. Zelinsky, *Are Tax "Benefits" Constitutionally Equivalent to Direct Expenditures?*, 112 HARV. L. REV. 379, 380 (1998). Zelinsky suggests a useful alternative to simply distinguishing between government expenditures and tax credits in the standing context. *Id.* at 400. Instead of this generalized separation of the two categories, he suggests that the two often overlap, and that "where others perceive two self-contained categories—tax benefits and direct expenditures—[he] see[s] two overlapping bell-shaped curves." *Id.* When the two overlap, he proposes treating tax credits in a similar manner to expenditures, and he proposes treating them differently when they do not overlap. *Id.* at 381–82. In distinguishing between tax credits and direct expenditures, Zelinsky examined them in terms of their permanence, eligibility, and quantity. *Id.* at 400. This method would require a case-by-case analysis to determine when a tax credit is similar to a government expenditure. *Id.* at 382. In doing so, courts would examine the nature of a tax credit compared to that of direct expenditure. *Id.* A case-by-case analysis may be a less efficient method, but, as Zelinsky suggests, doing so would still be a superior alternative to simply categorizing the two in distinct categories and never allowing standing for tax credit cases. *See id.* at 400.

141. *See* PEW FORUM ON RELIGION & PUBLIC LIFE, U.S. RELIGIOUS LANDSCAPE SURVEY 99 (2008), *available at* http://religions.pewforum.org/pdf/report-religious-landscape-study-full.pdf.

totaling 65 percent of its population, with the next highest religious group totaling only 22 percent of the population.[142] Given these statistics, the religious minority likely cannot win through the political process, and the law in Arizona will not change.[143] Thus, without proper intervention by the Court, the Establishment Clause loses significant value because the religious minority that is negatively affected by government support of religion cannot challenge alleged violations. The Establishment Clause was enacted to protect the religious minority—not to protect the majority from religion being forced on it.[144] For these reasons, it is disconcerting that the Court in *Arizona Christian* disregarded these principles through its further limitation of the standing doctrine.

VI. CONCLUSION

Arizona Christian substantially altered and limited the standing exception that the Court created in *Flast*. Distinguishing between governmental expenditures and tax credits allows for governmental support of religion by limiting the people who have standing to challenge such forms of monetary support. With no taxpayer standing to challenge alleged Establishment Clause violations, the significance of the right to be free from government-established religion is lost. This ruling significantly diminishes First Amendment protections and is therefore a step in the wrong direction for this country.

142. *Id.* These statistics are by no means a formal investigation of Arizona's religious population; rather they serve as a simple example to illustrate this point. *See id.* at 2.

143. *See generally* Jeanne C. Fromer, *An Exercise in Line-Drawing: Deriving and Measuring Fairness in Redistricting*, 93 GEO. L.J. 1547, 1591 (2005) (explaining how redistricting schemes allow states to create districts in order to encourage representation in government by minority groups that include racial, ethnic, economic, and religious minorities, because otherwise it would be difficult for those minorities to enter into politics).

144. Caroline Mala Corbin, *Ceremonial Deism and the Reasonable Religious Outsider*, 57 UCLA L. REV. 1545, 1551–52 (2010) ("[O]ne of the Establishment Clause's main goals is to protect the freedom of conscience and equality of religious outsiders."); Steven B. Epstein, *Rethinking the Constitutionality of Ceremonial Deism*, 96 COLUM. L. REV. 2083, 2171 (1996) ("The purpose of the Constitution generally, and the Establishment Clause specifically, is to protect minorities from raw majoritarian impulses."); *see also* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943) ("The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities . . . .").