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STANDING TO CHALLENGE TAX-EXEMPT STATUS: THE SECOND CIRCUIT’S COMPETITIVE POLITICAL ADVOCATE THEORY

INTRODUCTION

In two recent cases, the Court of Appeals for the Second Circuit articulated a new article III standing theory,1 which has been termed competitive advocate standing.2 Under this theory, plaintiffs may satisfy the Constitution’s case or controversy requirement by alleging that discriminatory enforcement of a statute grants an unfair advantage to a political competitor which thereby diminishes the plaintiffs’ ability to compete effectively in the political arena.3 In Fulani v. League of Women Voters Education Fund4 and In re United States Catholic Conference,5 plaintiffs brought suits challenging the tax-exempt status of political competitors. In both cases, defendants challenged plaintiffs’ standing. Despite similar factual situations in the two cases, the Second Circuit reached different conclusions on the question of plaintiffs’ standing.

Article III of the Constitution permits federal courts to hear only “cases” or “controversies.”6 The case or controversy requirement encompasses several determinations,7 including whether the parties are

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2. See Catholic Conference, 885 F.2d at 1028.
3. See Catholic Conference, 885 F.2d at 1028-29; Fulani, 882 F.2d at 625-26. Plaintiffs who have asserted standing as competitive advocates have participated in the political process, for example, by running for office, by being political activists and participating in political debate, and by supporting candidates for public office. See Catholic Conference, 885 F.2d at 1021; Fulani, 882 F.2d at 623. Competitive advocates may allege harm to one of several constitutional interests, all of which pertain to political participation, including: a first amendment right of political speech, a fifth amendment right to equal protection of the laws, or an unenumerated constitutional right to vote and participate in the political process. See Fulani v. League of Women Voters Educ. Fund, 684 F. Supp. 1185, 1186 (S.D.N.Y. 1988), aff’d, 882 F.2d 621 (2d Cir. 1989); Abortion Rights Mobilization, Inc. v. Regan, 544 F. Supp. 471, 481 (S.D.N.Y. 1982), rev’d sub nom. In re United States Catholic Conference, 885 F.2d 1020 (2d Cir. 1989), cert. denied, No. 89-1242 (April 30, 1990) (LEXIS, Genfed Library, US file).
4. 882 F.2d 621 (2d Cir. 1989).
6. See U.S. Const. art. III, § 2, cl. 1. This limitation ensures that the federal courts do not issue advisory opinions that would violate the constitutional doctrine of separation of powers. See Allen v. Wright, 468 U.S. 737, 750 (1984); Flast v. Cohen, 392 U.S. 83, 94-97 (1968); infra note 8 and accompanying text.
seeking an advisory opinion,8 whether the question is moot,9 and whether the plaintiffs have standing to maintain the action.10 The determination of whether standing exists is the most difficult component of the case or controversy analysis.11

In order to show standing, a “plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.”12 As a result, the Supreme Court has traditionally required the plaintiff to assert an “injury in fact,”13 which is “distinct and palpable”14 and not “abstract” or “hypothetical.”15 A distinct injury affects the plaintiff in a manner different from

10. See Allen v. Wright, 468 U.S. 737, 750-51 (1984); Schlesinger, 418 U.S. at 215; Flast v. Cohen, 392 U.S. 83, 95 (1968). The fundamental purpose of the standing requirement is to ensure that the party seeking relief has alleged sufficient “personal stake in the outcome of the controversy” to guarantee that issues are presented to federal courts in an adversary manner. Flast, 392 U.S. at 99 (quoting Baker, 369 U.S. at 204). For a general discussion of the Article III standing requirements, see infra notes 12-24 and accompanying text.
11. “Standing has been called one of ‘the most amorphous [concepts] in the entire domain of public law.’” Flast, 392 U.S. at 99 (quoting Professor Paul A. Freund); see also Nichol, Injury and the Disintegration of Article III, 74 Calif. L. Rev. 1915 (1986) (“after almost two hundred years, the judiciary has yet to outline successfully the parameters of a constitutional ‘case’ [or controversy]”); Sunstein, Standing and the Privatization of Public Law, 88 Colum. L. Rev. 1432, 1433-34 (1988) (Supreme Court's current standing approach results in decisions denying standing when it should be granted, and granting standing when it should be denied).
14. Warth v. Seldin, 422 U.S. 490, 501 (1975); see, e.g., Allen v. Wright, 468 U.S. 737, 756 (1984) (injury to children's ability to achieve an education in racially integrated school is concrete and personal); S plastics, 412 U.S. at 689 (injury based upon aesthetic and environmental interest is a perceptible and distinguishable harm).
the population at large. A palpable injury requires a "litigant’s harm to be tangible or concrete."

The Supreme Court has recognized several theories in an effort to define the standing requirement. Each of these theories provides a framework for the relatively rare instances in which a plaintiff advances an abstract constitutional claim. For example, the Supreme Court has recognized taxpayer standing, under which plaintiffs may challenge the constitutionality of congressional expenditures made under the taxing and spending authority. The Court has also recognized voter standing, which allows plaintiffs to allege a violation of their right to vote under the fourteenth amendment. In addition, the Court has recognized that associations may have standing to sue either in their individual or representative capacity.

This Note evaluates the efficacy of competitive advocate standing. Part I reviews the Second Circuit’s articulation of the competitive advocacy standing theory. Part II discusses the genesis of the theory and

17. Nichol, supra note 11, at 1923; see Warth, 422 U.S. at 501.
19. For the purposes of determining standing, courts must accept as true all of the material allegations of a plaintiff’s complaint and must construe the complaint in favor of the complaining party. See Warth v. Seldin, 422 U.S. 490, 501 (1975). A credible allegation of injury is sufficient to satisfy the first standing requirement because the inquiry focuses solely on a federal court’s jurisdiction to hear the plaintiff’s claim, not on the claim’s merits. See Allen v. Wright, 468 U.S. 737, 755-56 (1984); Warth, 422 U.S. at 501. Thus, even though a court determines that a plaintiff has standing she may still lose her case on the merits. See Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 630 (2d Cir. 1989).
21. In order to establish taxpayer standing, courts must satisfy a two-pronged test. See id. First, the challenged expenditure must be pursuant solely to Congress’ power under the taxing and spending clause, and not an expenditure of funds in an essentially regulatory statute. See id. Second, a taxpayer must establish a nexus between her taxpayer status and the precise nature of the alleged constitutional infringement. See id. Under the second prong, a taxpayer must allege that the “challenged enactment exceeds specific constitutional limitations” imposed upon Congress, such as limitations imposed by the first amendment. Id. at 102-03.
23. See, e.g., Baker v. Carr, 369 U.S. 186, 207-08 (1962) (“injury which appellants assert is that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties”).
24. See, e.g., Warth, 422 U.S. at 511 (“Even in the absence of injury to itself, an association may have standing solely as the representative of its members.”); Sierra Club v. Morton, 405 U.S. 727, 739 (1972) (“It is clear that an organization whose members are injured may represent those members in a proceeding for judicial review.”).
argues that the Court of Appeals for the Second Circuit applied a new label to an existing theory of standing and buttressed the theory with additional case law. Part III suggests that the Second Circuit's application of competitive advocate standing has been inconsistent and should be reconciled.

I. THE REQUIREMENTS FOR COMPETITIVE ADVOCATE STANDING

A plaintiff who claims competitive advocate standing alleges that the government enforces a statute in a discriminatory manner which confers an unfair advantage upon a political adversary. As a result, the plaintiff's ability to compete effectively in the political arena is diminished. The competitive advocate, therefore, asserts the same type of injury—alleged harm to a statutorily or constitutionally protected interest—as a plaintiff in the traditional standing model. Competitive advocate standing differs from the traditional model, however, because the alleged injury results from the granting of an advantage to a competitor, and not from the direct withholding of a benefit due the plaintiff.

In Fulani v. League of Women Voters Education Fund and In re United States Catholic Conference, the plaintiffs alleged that tax-exempt organizations with whom they competed engaged in political activity in violation of Internal Revenue Code section 501(c)(3). In both cases,


26. See Catholic Conference, 885 F.2d at 1029; Fulani, 882 F.2d at 626. A general claim that the government enforce the law is insufficient to confer standing because the resulting injury is not distinct. See Allen v. Wright, 468 U.S. 737, 754 (1984); supra notes 14-17 and accompanying text. A competitive advocate, on the other hand, avoids this problem by alleging that the discriminatory enforcement of a statute distinctly and palpably diminishes her political speech. See Catholic Conference, 885 F.2d at 1028-29; Fulani, 882 F.2d at 625.


28. 882 F.2d 621 (2d Cir. 1989).


30. See Catholic Conference, 885 F.2d at 1022; Fulani, 882 F.2d at 624-25. Both cases involved a challenge to the tax-exempt status of organizations under Internal Revenue Code, 26 U.S.C. § 501(c)(3), which confers tax-exempt status upon organizations that meet its requirements. Section 501(c)(3) provides tax exempt status to:

Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, . . . no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation (except as otherwise provided in subsection (h)), and which does not participate
the plaintiffs sued the federal government charging that discriminatory enforcement of the Internal Revenue Code diminished their ability to compete in the political arena by granting an economic advantage to a political competitor.\footnote{31}

\textit{Fulani} involved a challenge to the section 501(c)(3) tax-exempt status of the League of Women Voters by a third-party presidential candidate.\footnote{32}

The plaintiff alleged that the federal government’s failure to enforce the Internal Revenue Code against the League distorted the political process by allowing the League to subsidize, through the section 501(c)(3) exemption, the campaigns of other candidates to the disadvantage of her campaign.\footnote{33}

The Second Circuit found the harm asserted by the plaintiff—a diminished voice in the presidential election—sufficient to satisfy the injury in fact requirement for standing.\footnote{34} In particular, the court noted that the plaintiff’s exclusion from the televised presidential primary debates impaired her ability to compete equally with other significant presidential candidates.\footnote{35} Taking a broad view of the injury asserted, the court held that the plaintiff need not prove that exclusion from the primary debates

\textit{in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.}

26 U.S.C. § 501(c)(3) (1988) (emphasis added). Donations to an organization meeting the section 501(c)(3) requirements are tax deductible. \textit{See generally} 26 U.S.C. § 170(c) (1988) (listing permissible tax-deductible donations). As conditions of tax-exempt and tax-deductible status, a section 501(c)(3) organization is prohibited from devoting more than an insubstantial part of its activities in an attempt to influence legislation, including contacting or urging the public to contact members of a legislative body for the purpose of opposing or supporting legislation or participating directly or indirectly in any political campaign. \textit{See} 26 C.F.R. 1.501(c)(3)-1(b)(v)(3) (1989).

\footnote{31} \textit{See Catholic Conference,} 885 F.2d at 1022; \textit{Fulani,} 882 F.2d at 625.

\footnote{32} \textit{See Fulani,} 882 F.2d at 623.

\footnote{33} \textit{See id.} at 625. As a result, the plaintiff sought to compel the federal government to revoke the League’s section 501(c)(3) tax-exempt status. \textit{See id.} at 623. The plaintiff also alleged that “the League had engaged in impermissible ‘partisan’ activity when it denied her the right to participate in the Democratic and Republican primary debates,” in violation of the League’s tax-exempt status. \textit{Id.} at 624. The plaintiffs contended that the section 501(c)(3) prohibitions against electioneering obligated the League to use non-partisan criteria in their candidate selection process. \textit{See id.} at 625. For relief, the plaintiff initially sought to enjoin the League from holding any presidential primary debates without inviting her to participate on equal terms. \textit{See id.} at 623. For the purposes of determining standing, the court discussed only the claim against the federal government, since at the time of the appeal the debates in question had already been held. \textit{See id.} at 625.

\footnote{34} \textit{See id.} at 626.

\footnote{35} \textit{See id.} The court noted that “[i]t is beyond dispute that participation in these debates bestowed on the candidates who appeared in them some competitive advantage over their non-participating peers.” \textit{Id. see also} Johnson v. FCC, 829 F.2d 157, 165 (D.C. Cir. 1987) (“[petitioners’] inclusion in the televised debates undoubtedly would have benefitted their campaign”); 2 R. Bauer & D. Kafka, United States Federal Election Law 29 (1984) (major party competitors in candidate debates receive “substantial media exposure without charge [which] constitute[s] a benefit of considerable value” to them at expense of non-major party candidates).
affected the election results in order to have standing to sue. 36

One month later, the Second Circuit decided In re United States Catholic Conference 37 without any discussion of its opinion in Fulani. The plaintiffs in Catholic Conference, a group of section 501(c)(3) tax-exempt abortion rights organizations, 38 challenged the tax-exempt status of the Catholic Church. 39 The plaintiffs alleged that the federal government failed to enforce the Internal Revenue Code's prohibition against lobbying 40 by not revoking the Church's section 501(c)(3) status when the Church endorsed or supported pro-life political candidates and opposed pro-choice candidates. 41 The plaintiffs also charged that this disparate treatment afforded a competitive advantage to the Catholic Church through the section 501(c)(3) tax subsidy, which concomitantly diminished the plaintiffs' effectiveness in the political arena. 42

In contrast to Fulani, Catholic Conference held that the plaintiffs' alleged injury was insufficient to meet the article III standing requirements. 37 The Second Circuit held that the plaintiffs were not competitive advocates because they did not compete with the Catholic Church in the political arena, in that "they [chose] not to match the Church's alleged

36. See Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 627 (2d Cir. 1989). In addition to holding that the plaintiff had met the injury-in-fact requirement, the court also found that she had satisfied the article III redressability and traceability standing requirements. See id. at 627-28; supra note 12 and accompanying text.

Although the court conceded the plaintiff's standing, she ultimately lost on the merits when the court determined that exclusion from the presidential primary debates did not amount to partisan activity on the part of the League. See Fulani, 882 F.2d at 629-30. 37. 885 F.2d 1020 (2d Cir. 1989), cert. denied, No. 89-1242 (April 30, 1990) (LEXIS, Genfed Library, US file). Catholic Conference was heard by the Supreme Court on an issue unrelated to competitive advocate standing. See United States Catholic Conference v. Abortion Rights Mobilization, Inc., 487 U.S. 72 (1988). The issue in this prior case was whether the Catholic Church, as a non-party witness in contempt of court for failing to comply with discovery requests, could challenge the jurisdiction of the district court. The Supreme Court held that they could, see id. at 76, and remanded the case to the Second Circuit to determine jurisdiction. The Second Circuit issued the opinion which is the subject of this Note.

38. The relevant plaintiffs for competitive advocacy purposes were Internal Revenue Code section 501(c)(3) & (4) tax-exempt organizations that supported a woman's right to choose an abortion. See Catholic Conference, 885 F.2d at 1021.

39. See id.

40. See supra note 30.

41. See Catholic Conference, 885 F.2d at 1022. The plaintiffs also contended that the Church contributed "substantial sums of money to 'right to life' and other political groups which have, directly or indirectly, supported the political candidacies for public office of persons favoring anti-abortion legislation." Id.

42. See id. at 1028-29. For relief, plaintiffs sought declarations that the defendants had violated both section 501(c)(3) and the establishment clause of the first amendment of the Constitution. See id. at 1023; U.S. Const. amend. I, cl. 1. The plaintiffs also sought injunctive relief to compel the government to revoke the Church's tax-exempt status, to collect the back taxes, and to notify contributors to the Catholic Church of its change in tax status. See Catholic Conference, 885 F.2d at 1023.

43. See Catholic Conference, 885 F.2d at 1031.

44. See id. at 1029. The court also examined whether plaintiffs had standing under three other theories. Clergy plaintiffs claimed that failure of the government to enforce
electioneering with their own.\textsuperscript{345} The dissent concluded that the plaintiffs did compete with the Church in the abortion debate.\textsuperscript{46} The dissent argued that the plaintiffs need not have violated the tax code in order to be competitors, and that the plaintiffs did not forgo electioneering as a matter of personal preference, but rather out of obedience to a requirement of an act of Congress.\textsuperscript{47} Therefore, the "competition [was] between those tax-exempt organizations that [were] abiding by the limitations of section 501(c)(3) in their advocacy on the abortion issue and the Catholic Church, which [was] violating these limitations in the advocacy of its point of view."\textsuperscript{348}

II. GENESIS OF COMPETITIVE ADVOCATE STANDING

Although competitive advocate standing is a new theory in name, the federal courts of the District of Columbia have developed an identical theory.\textsuperscript{49} The Second Circuit replicated this theory,\textsuperscript{50} labeled the doc-

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\item the Internal Revenue Code against the Catholic Church was an impermissible subsidy of religion, and thereby denigrated their dissimilar religious views. \textit{See id.} at 1024. Taxpayer plaintiffs claimed that the government's subsidy of the Church's political activities was the equivalent of government expenditure to establish religion and violated the establishment clause of the first amendment. \textit{See id.} at 1027. Voter plaintiffs claimed that the government's refusal to revoke the Catholic Church's tax-exempt status impaired and diminished their right to vote. \textit{See id.} at 1028. The court determined that the plaintiffs did not have standing under any of these theories. \textit{See id.} at 1026 (clergy standing); \textit{id.} at 1028 (taxpayer standing); \textit{id.} at 1028 (voter standing).
\item Id. at 1029. The Court also denied standing on another ground: recognition of competitive advocate standing upon these facts would make it "difficult to deny standing to any person who simply expressed an opinion contrary to that of the Catholic Church." \textit{Id.} at 1030. \textit{But see United States v. SCRAP, 412 U.S. 669, 687 (1973) (standing should not be denied simply because many people suffer same injury); Tax Analysts & Advocates v. Schultz, 376 F. Supp. 889, 898 (D.D.C. 1974) (same). The Catholic Conference dissent was unpersuaded by the majority's reasoning on this point. As the dissent pointed out, the majority failed to consider that the plaintiffs were not citizens at large, but rather organizations that advocated a specific point of view, and that were constrained in their advocacy by a federal statute. \textit{See Catholic Conference, 885 F.2d at 1033 (Newman, J., dissenting). The dissent also noted that the court's concern on this point was unnecessary because whether an individual citizen could challenge the Church's action is a "question far beyond the narrow issue we are required to decide in this case." \textit{Id.}
\item \textit{See Catholic Conference, 885 F.2d at 1033.}
\item Id.
\item Id.
\end{itemize}
trine competitive advocate standing, and buttressed it with a well-established line of Supreme Court economic competitor cases.\textsuperscript{51}

A. Political Competition Cases

The federal courts of the District of Columbia have developed a standing theory identical to competitive advocate standing, whereby plaintiffs allege that a statute grants an unfair advantage to their competitors by exclusively subsidizing their competitors' voices.\textsuperscript{52} This economic advantage, plaintiffs allege, diminishes their ability to affect the political process.\textsuperscript{53} The federal courts of the District of Columbia have found this to be a sufficient injury for article III standing.\textsuperscript{54}

For example, in \textit{Common Cause v. Bolger},\textsuperscript{55} congressional candidates and their supporters alleged that the government discriminatorily enforced\textsuperscript{56} the congressional franking statute,\textsuperscript{57} thus allowing it to subsidize effectively the campaigns of incumbent members of Congress.\textsuperscript{58} This subsidy, plaintiffs argued, diminished their ability to compete in the polit-


\textsuperscript{53} See, e.g., \textit{International Ass'n of Machinists}, 678 F.2d at 1098 (union members alleged "relative diminution of their political voices—their influence in federal elections—as a direct result of the discriminatory imbalance Congress is alleged to have ordered"); \textit{Taxation with Representation}, 676 F.2d at 721-22 (disparate tax treatment under Internal Revenue Code causes plaintiffs substantial disadvantages, such as diminished fundraising capabilities); \textit{Tax Analysis & Advocates}, 376 F. Supp. at 898 (plaintiffs alleged government tax advantage to large political contributors diminishes their ability to affect electoral process).

\textsuperscript{54} See, e.g., \textit{International Ass'n of Machinists}, 678 F.2d at 1098 (relative diminution of political voices is sufficient injury for article III standing); \textit{Taxation with Representation}, 676 F.2d at 722-23 (injury due to disparate application of tax code is sufficient for article III standing); \textit{Tax Analysis & Advocates}, 376 F. Supp. at 899 (diminished ability to affect electoral process is sufficient for article III standing). \textit{But see} \textit{Fulani v. Brady}, 729 F. Supp. 158, 162-63 (D.D.C. 1990) (injury from loss of media exposure due to exclusion from presidential debates is abstract and speculative and thus insufficient for article III standing).

\textsuperscript{55} 512 F. Supp. 26 (D.D.C. 1980).

\textsuperscript{56} See \textit{id.} at 32.


\textsuperscript{58} See \textit{Common Cause}, 512 F. Supp. at 28.
ical process and thereby violated their first and fifth amendment rights.\textsuperscript{59}

The district court found that plaintiffs had standing to sue because they were "substantial users of the mail for political campaign purposes."\textsuperscript{60} Under this theory, plaintiffs were allegedly injured by the illegal mail subsidy that the government granted to their competitors.\textsuperscript{61} The court noted that while this type of competitor status was usually granted in the commercial context,\textsuperscript{62} it would be "strange" to deny such standing to substantial users of the mail for political purposes.\textsuperscript{63}

The approach taken by the District of Columbia federal courts is analytically identical to that taken by the Second Circuit in both \textit{Fulani} and \textit{Catholic Conference}. Additionally, the plaintiffs alleged the same injury in the District of Columbia and Second Circuit cases. Both alleged that the federal government had discriminatorily enforced a federal statute\textsuperscript{64} which conferred an unfair economic advantage upon a competitor,\textsuperscript{65} and which in turn diminished the plaintiffs' effectiveness in the political arena.\textsuperscript{66} It is thus evident that the Second Circuit has not developed a new theory of standing, but rather has attached a new label to a theory previously relied upon by other federal courts.

\textbf{B. Economic Competitor Cases}

The Second Circuit relied upon a series of Supreme Court economic competitor cases for analytical support of its competitive advocate theory.\textsuperscript{67} These cases arose when banks diversified their functions and began to compete in the delivery of incidental banking services.\textsuperscript{68}

\begin{itemize}
\item \textsuperscript{59} See id. at 32.
\item \textsuperscript{60} Id. at 31.
\item \textsuperscript{61} See id.
\item \textsuperscript{62} See id.; see also 39 C.F.R. \textsection{} 954.10 (1989) (allowing intervention in proceedings before postal service to challenge competitor's second class mail classification).
\item \textsuperscript{65} See \textit{Catholic Conference}, 885 F.2d at 1021; \textit{Fulani}, 882 F.2d at 625; \textit{International Ass'n of Machinists}, 678 F.2d at 1098; Taxation with Representation, 676 F.2d at 722-23; \textit{Common Cause}, 512 F. Supp. at 31; Tax Analysts & Advocates, 376 F. Supp. at 898.
\item \textsuperscript{66} See \textit{Catholic Conference}, 885 F.2d at 1029; \textit{Fulani}, 882 F.2d at 625; \textit{International Ass'n of Machinists}, 678 F.2d at 1098; Taxation with Representation, 676 F.2d at 722-23; \textit{Common Cause}, 512 F. Supp. at 31; Tax Analysts & Advocates, 376 F. Supp. at 898.
\item \textsuperscript{67} See supra note 51.
\item \textsuperscript{68} Section 24 of the National Bank Act lists permissible activity for national banks, including "all such incidental powers as shall be necessary to carry on the business of banking." 12 U.S.C. \textsection{} 24 (1988). Additionally, section 1864 of the 1964 National Bank Act provides: "No bank service corporation may engage in any activity other than the performance of bank services for banks." 12 U.S.C. \textsection{} 1864 (1964). At issue in the eco-
The paramount economic competitor case is *Association of Data Processing Service Organizations v. Camp.* The plaintiffs in *Data Processing* challenged a federal ruling that allowed national banks to provide data processing services to customers and to other banks. The plaintiffs alleged that this ruling contravened provisions of the National Bank Act, which prohibited bank service corporations from engaging in "any activity other than the performance of bank services for banks." To meet the standing requirement, the plaintiffs alleged that their future profits would be diminished by competition from national banks providing data processing services.

The Court termed the case a "competitor's suit," and found that the challenged action caused plaintiffs sufficient injury in fact to confer standing. Thus, the *Data Processing* holding supports the Second Circuit's contention that competitor status can be a basis for standing. Additionally, the Supreme Court laid the groundwork for competitive advocate standing by indicating that an injury that is not economic in nature, such as an aesthetic, conservational or spiritual interest, could be sufficient to confer standing.

The Second Circuit relied on the Supreme Court precedent in *Data Processing* in developing the competitive advocate theory, concluding that "political competitors arguably should fare as well [as economic competitors]." The court also relied on other economic competitor cases that provide a foundation for the competitive advocate theory.

The economic competitor suits was whether the services in question were permissible under these statutes. *See Arnold Tours, Inc. v. Camp, 400 U.S. 45, 46 (1970); Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. 150, 157 (1970).*

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70. See id. at 151.
71. 12 U.S.C. § 1864 (1964); see supra note 68.
72. 12 U.S.C. § 1864 (1964); see Data Processing, 397 U.S. at 155; supra note 68.
73. In fact, one of the named bank defendants was preparing to perform data processing services for two of the plaintiffs' customers. *See Association of Data Processing Serv. Orgs. v. Camp, 397 U.S. at 150, 152 (1970).*
74. Id. (emphasis in original).
75. See id.
78. In Arnold Tours, Inc. v. Camp, 400 U.S. 45 (1970), travel agents challenged a ruling by the Comptroller of the Currency that permitted banks to provide travel services to their customers. *See id. at 45 n.1. Plaintiffs alleged that they had lost and would continue to lose business as a result of the ruling. See id. at 45. Extending the *Data Processing* holding, the Court determined that plaintiffs had standing to sue because national banks "compete with travel agents no less than they compete with data processors when they provide data-processing services." *Id. at 46.*

In *Clarke v. Securities Industry Association, 479 U.S. 388 (1987),* the Supreme Court held that the plaintiffs had standing to challenge a Comptroller's ruling that allowed
In these cases, the plaintiffs alleged that a government misinterpretation of the National Bank Act allowed banks to compete with the plaintiffs in contravention of congressional banking restrictions. The Supreme Court found that the plaintiffs had standing as economic competitors to challenge these rulings.

The competition that was found sufficient to confer standing in these economic competitor cases is analytically similar to the competition that underlies the competitive advocacy theory. It is not, however, completely analogous. In the economic competitor cases, the plaintiffs contended that a government misreading of the National Bank Act allowed a third party, who was not previously a competitor, to compete with the plaintiffs. A competitive advocate, in contrast, lawfully competes with an adversary and alleges that government action has unlawfully conferred an advantage upon a competitor which has not been conferred upon the plaintiff. Nonetheless, as the Second Circuit has indicated, the Supreme Court’s acceptance of competition as a basis for standing provides strong support for the competitive advocate standing doctrine.

III. RECONCILIATION OF FULANI AND CATHOLIC CONFERENCE

Although the facts of Fulani and Catholic Conference were similar, the Second Circuit, applying competitive advocate standing, reached different conclusions on the question of plaintiff’s standing. There is no principled distinction between the factual circumstances of the two cases. Therefore, it is possible to reconcile the two cases to ensure proper and uniform application of the doctrine in the future.

In Fulani, the court found the plaintiff’s diminished ability to compete in the electoral process sufficient injury for standing. The majority in banks to provide out-of-state discount brokerage services to the public. See id. at 390-92. The plaintiffs alleged that the practice had caused them financial injury and violated state bank branching law. See id. at 392-93. The Court, relying on Data Processing, held that the plaintiffs, as “competitors . . . , are very reasonable candidates to seek review of the Comptroller’s rulings.” Id. at 403.

80. See supra note 68 and accompanying text.
82. See supra notes 68-80 and accompanying text.
83. See supra notes 25-48 and accompanying text.
85. See supra notes 28-48 and accompanying text.
86. See Fulani v. League of Women Voters Educ. Fund, 882 F.2d 621, 626 (2d Cir. 1989); supra notes 25-34 and accompanying text. In reaching this conclusion, the court noted that elections in a democratic society “serve other purposes besides electing particular candidates to office. They are also used to educate the public, to advance unpopular ideas, and to protest the political order.” Fulani, 882 F.2d at 627 (quoting Common Cause v. Bolger, 512 F. Supp. 26, 32 (D.D.C. 1980)); cf. Buckley v. Valeo, 424 U.S. 1, 14-15 (1976) (the “ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the
Catholic Conference, on the other hand, held that the plaintiffs did not have standing as competitive advocates because they did not compete with the Catholic Church and because the tax status of the plaintiffs had been correctly assessed.

In Catholic Conference, the plaintiffs claimed the same deprivation of their rights to political speech as asserted in Fulani. The only difference between the two groups of plaintiffs was that in Catholic Conference the plaintiffs were advocates, not candidates. This different status, however, does not affect the plaintiffs' claimed injury: in both cases, the plaintiffs alleged that the government diminished their ability to engage in debate by promoting their adversaries' interests over their own.

The dissent in Catholic Conference offered a more principled reading of the allegations asserted and a more persuasive argument in favor of standing. The dissent sharply disagreed with the majority's determination that the section 501(c)(3) tax-exempt organizations did not compete with the Catholic Church and criticized the majority for taking an overly-narrow "view of both the realities of American political life and the contours of the doctrine of competitive advocate standing."

According to the dissent, competition existed between the plaintiffs, who complied with the limitations of section 501(c)(3) in their advocacy of the abortion issue, and the Catholic Church, whose advocacy in the abortion debate allegedly did not abide by these limitations. Hence, the plaintiffs should not have been denied competitive advocate standing simply because they obeyed an act of Congress, as they would have competed with their adversary but for the prohibitions of the Internal Revenue Code. The dissent, in addition, did not believe that one need compete in the identical manner as an opponent in order to establish competitive advocate standing. Political advocacy takes many forms: some run for office, some support candidates, and others devote their time and money to political causes. The plaintiffs in Catholic Conference...
ence did not compete in the political arena by supporting candidates for public office. Instead, they chose to advocate their competing views by distributing information, speaking, writing, marching, and "championing in countless other ways the cause of abortion rights."95

The dissent’s argument in favor of granting the Catholic Conference plaintiffs standing as competitive advocates96 is supported by the principle that a plaintiff need not violate a statute to question its constitutionality.97 Rather, a threat of prosecution under a statute may by itself be sufficient to confer standing.98 Therefore, the decision in Catholic Conference that the plaintiffs need actually engage in political activity in violation of their section 501(c)(3) status to qualify as competitors is inconsistent with Supreme Court precedent.

For example, in Athens Lumber Co. v. Federal Election Commission,99 a corporation’s shareholders had authorized its president to donate up to $10,000 in corporate political donations to federal election campaigns.100 Recognizing that this action would violate federal election laws,101 the shareholders made these donations contingent upon repeal of the congressional prohibition.102 Both the corporation and its president alleged that the election laws violated their first amendment rights because they were faced with the choice of having their right to speak diminished or exercising the right with the risk of suffering statutory penalties.103 But for the statute in question, the plaintiffs would have engaged in the proscribed conduct. The court found that the plaintiffs “should not be required to expose themselves to prosecution to secure the desired

95. Id. The dissent also would have granted standing to the plaintiff section 501(c)(4) organization on a similar theory. See id. at 1033. Section 501(c)(4) tax-exempt organizations are not subject to the restraints on political activity to which section 501(c)(3) organizations are, but donations that they solicit are not tax-deductible to their donors. See 26 U.S.C. §§ 170 (a), 501(e)(4) (1988). Under this variant of competitive advocate standing, both parties directly compete in the political arena through lobbying activities, but the Catholic Church arguably does so with a stronger voice because of its greater fundraising capabilities under sections 170 and 501(c)(3). See Catholic Conference, 885 F.2d at 1033-34. The plaintiff is injured, therefore, because the Catholic Church can engage in political activities and raise funds that are tax-deductible to its donors, while the plaintiff can engage in comparable political activity only with donations that are not tax-deductible. See id.

96. See supra notes 90-95 and accompanying text.


98. See supra note 97 and accompanying text.


100. See id. at 1008.

101. See, e.g., 2 U.S.C. § 441b(a) (1988) (unlawful for any corporation to make contributions or expenditures in connection with any political primary election, general election or primary caucus for federal office, as well as for candidates to receive such contributions).

102. See Athens Lumber, 689 F.2d at 1008.

103. See id. at 1011-12.
relief," as long as they have expressed an intention to engage in a course of conduct "arguably affected with a constitutional interest, but proscribed by a statute."  

The penalties faced by the plaintiffs in Athens Lumber and similar cases are analogous to the potential loss of tax-exempt status faced by the section 501(c)(3) organizations in Catholic Conference. By competing with the Catholic Church in the political arena, these organizations would have risked the revocation of their tax-exempt status. Consequently, reasoning similar to that used in these cases could have been used to support standing in Catholic Conference.

CONCLUSION

Competitive advocate standing provides a plaintiff with a framework for asserting a claim of political injury. Under this theory, plaintiffs can allege that the government has diminished their effectiveness in the political arena by granting an unfair advantage to a competitor. While the competitive advocate standing label is new, the concept is not. It has strong antecedents in cases holding that economic and political competitors may allege injury sufficient to confer standing.

104. Id. at 1012.
105. Id. (citing Babbitt v. United Farm Workers Nat'l Union, 442 U.S. 289, 298 (1979)). For support, Athens Lumber relied upon First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978), in which the Supreme Court held that the plaintiff did not have to violate a Massachusetts criminal statute, which prevented banks from making certain political contributions, in order to have standing to challenge the statute's constitutionality. See id. at 775. While the primary justiciability issue in this case was mootness, see id. at 774-75, the court acknowledged the anticipatory nature of the plaintiff's injury by referring to the "threat of prosecution" which the plaintiff faced. See id. at 775.

The Supreme Court's decision in Los Angeles v. Lyons, 461 U.S. 95 (1983), does not adversely affect this conclusion. In Lyons, the Supreme Court held that the plaintiff did not have standing to challenge the constitutionality of a police department's use of chokeholds. See id. at 111-12. Although the plaintiff had been subjected to a chokehold in the past, the Court determined standing did not exist because there was no "real and immediate threat that [petitioner] would again be stopped... by an officer... who would illegally choke him into unconsciousness." See id. at 105. This situation is distinguishable from the threat of prosecution asserted by the plaintiffs in Catholic Conference, Athens Lumber and Bellotti, because the plaintiffs in all three cases would have acted in the prohibited manner but for the proscribed penalties. The petitioner in Lyons, in contrast, could not demonstrate that he would in the future be both apprehended by the police and be subjected to a chokehold. See id. at 105.

106. As the government becomes increasingly involved in regulating the political process, the likelihood that some political participants will glean advantages at the expense of others is increased. Recent proposals to reform congressional election laws are one example. In an effort to reduce the ever-increasing costs of congressional campaigns, a bipartisan Senate commission recently proposed that free television time be distributed to the Democratic and Republican parties. The parties, in turn, would distribute this television time among their respective candidates. See Oreskes, Failures in a Political System Spur Momentum for Change, N.Y. Times, Mar. 21, 1990, at A1, col. 1, A22, col. 2. While such a proposal may reduce major party candidates' fundraising burdens, it has the necessary side-effect of subsidizing the campaigns of such candidates to the exclusion of any third party or independent candidates.
In the cases in which the Court of Appeals for the Second Circuit identified and applied competitive advocate standing, the plaintiffs asserted identical injuries: competitive disadvantage due to government distortion of the political process. Because there is no principled way to distinguish these two cases, it is apparent that the Second Circuit applied the competitive advocate theory inconsistently. Based upon the court’s articulation of the theory and the supporting case law, the stronger position is that competitive advocate standing was properly applied by the court in *Fulani* and by the dissent in *Catholic Conference*.

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