

No. 08-472

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In the Supreme Court of the United States



KEN L. SALAZAR, SECRETARY OF THE INTERIOR,  
ET AL.

*Petitioners,*

v.

FRANK BUONO,

*Respondent,*



*ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT*



**AMICUS CURIAE BRIEF OF THE  
AMERICAN CIVIL RIGHTS UNION  
IN SUPPORT OF PETITIONERS**



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## QUESTIONS PRESENTED

1. Whether respondent has standing to maintain this action given that he has no objection to the public display of a cross, but instead is offended that the public land on which the cross is located is not also an open forum on which other persons might display other symbols.

2. Whether, assuming respondent has standing, the court of appeals erred in refusing to give effect to the Act of Congress providing for the transfer of the land to private hands.

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The American Civil Rights Union (ACRU) is a nonpartisan legal policy organization dedicated to defending all constitutional rights, not just those that might be politically correct or conform to a particular ideology. It was founded in 1998 by longtime Reagan policy advisor and architect of modern welfare reform Robert B. Carlson, and since that time has briefed as amicus curiae on constitutional law issues in cases across the nation.

Those individuals setting the ACRU's policy as members of its Policy Board are: former U.S. Attorney General Edwin Meese III, former Circuit Judge for the U.S. Court of Appeals for the D.C. Circuit, and Dean of Pepperdine Law School Kenneth W. Starr, former Assistant Attorney General for Civil Rights William Bradford Reynolds, John M. Olin Distinguished Professor of Economics at George Mason University Walter Williams, former Harvard University Professor Dr. James Q. Wilson, Ambassador Curtin Windsor, Jr., and Dean Emeritus of the UCLA Anderson School of Management J. Clayburn LaForce.

This case is of interest to the ACRU because we seek to ensure that all constitutional rights are fully protected, not just those that may advance a

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<sup>1</sup> Peter J. Ferrara and Kenneth A. Klukowski authored this brief for the American Civil Rights Union (ACRU). No counsel for either party authored this brief in whole or in part and no one apart from the ACRU made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and were timely notified.

particular ideology. This includes the proper application of the Establishment Clause of the First Amendment.

### SUMMARY OF ARGUMENT

The instant case presents a question of first impression before this Court. After several rounds of litigation, Congress enacted a statutory provision granting Respondent Frank Buono the relief he sought, and the executive branch set about administering that relief. The respondent then sought and obtained a federal injunction to stop the very relief he had pursued for years, and now claims this Court's jurisdiction to continue adjudicating this matter.

The question therefore presented in this brief is whether the injury that Respondent Buono claims as his basis for standing is still fairly traceable to the federal government, or instead if his action in obtaining an injunction to bar relief constitutes an intervening act that negates traceability. For the reasons set forth below, Respondent Buono does not have standing under Article III.

Standing requires that a plaintiff suffer a particular form of injury that is fairly traceable to the defendant's challenged conduct and would likely be redressed by the court granting the requested relief. Standing arises from the Article III case-or-controversy requirement.

On behalf of Petitioner Ken Salazar, the United States focuses its argument on the question of whether Mr. Buono suffers an injury sufficient for Article III, rightly arguing that he does not. *Amici*

supporting the petitioner offer supplemental points regarding the first prong of the standing analysis.

However, the second prong of the standing inquiry, traceability, is more deserving of this Court's examination. While this Court should and must inquire into whether Mr. Buono has suffered an Article III injury, a consideration of traceability is also necessary.

Assuming *arguendo* that Mr. Buono suffers from an injury-in-fact, such injury is no longer fairly traceable to the federal government. It is instead fairly traceable only to the respondent's own actions in obtaining a court order to prevent the granting of relief. Any remaining injury is likewise deficient for Article III purposes.

This Court should explore the traceability issue to clarify this point of law. The exception to the general rule from *Frothingham v. Mellon* barring taxpayer standing, an exception originating in *Flast v. Cohen* for Establishment Clause suits, is an anomaly that has not been fully explicated by this Court. With the most recent treatment of this exception in *Hein v. Freedom From Religion Foundation*, there are many questions regarding the scope of the *Flast* exception, and lower courts require guidance on this issue. Mr. Buono's case provides an ideal vehicle for such guidance.

Mr. Buono's alleged injury is not fairly traceable to the defendant. Mr. Buono's "injury" was that taxpayer funds were supporting the Latin cross atop Sunrise Rock in the Mojave National Preserve ("Mojave cross"). Mr. Buono sought and obtained an injunction to bar the transfer of the cross to a private party, the Veterans of Foreign Wars ("VFW"), in a

land exchange for a parcel of VFW-owned land resulting in no loss to taxpayers.

First, the his action in obtaining this injunction constitutes an intervening act, such that his injury is no longer traceable to any official or subdivision of the Interior Department in any manner that can be characterized as “fair.” Instead, Mr. Buono’s injury is fairly traceable to his own actions.

Second, his injury cannot be traced to the statutory provision authorizing the transfer. This provision is not an exercise of power under the Tax and Spending Clause. Therefore it does not qualify for the *Flast* exception.

Another reason *Flast* does not apply is the separation of powers. This Court has set forth special concerns for the separation of powers where *Flast* is involved. As this case now continues after the elected, coequal branches have taken extraordinary measures that would have fully resolved this situation, separation-of-powers concerns naturally arise from the judiciary nullifying those efforts.

For these reasons, this injury is beyond *Flast*. Outside the *Flast* exception, it falls within the general rule barring taxpayer standing.

Beyond those reasons pertaining only to Establishment Clause taxpayer standing, there are broader constitutional implications and policies that would be contravened by finding standing in this case. The nature and purpose of standing doctrine would be violated, as these entail a limited role for the judiciary in our democratic society, and would be in derogation of interbranch relations.

Judicial resolution is entirely unnecessary here because everything has been done to provide Mr. Buono with the relief he sought. Not only should Mr. Buono not have standing, this case itself should now be moot and beyond the purview of the courts.

Further, finding that Mr. Buono retains standing would lead to the misappropriation of judicial power. All steps had been taken to grant Mr. Buono relief, and the political branches had crafted a solution providing this relief while preserving the war memorial at issue. This solution involved interbranch coordination and cooperation with the private sector. To allow a plaintiff to set all of that to naught by insisting that judicial power be exercised to provide a result beyond the long-requested relief—in this case, the result being the destruction of the memorial, would be an improper use of judicial power.

Finally, finding that Mr. Buono has standing would waste scarce judicial resources. A solution had been not only offered, but actually enacted and was underway, when Mr. Buono secured an injunction to stop the granting of relief and bring this matter back into court. The judiciary has already expended more than enough resources on this matter, and it should have been fully resolved by now. To further involve the courts when such involvement is not only unnecessary, but actually prolongs the original controversy and prevents its resolution, is an utter waste of court resources.

For all these reasons, Mr. Buono lacks standing. This Court should therefore hold that Respondent Buono lacks standing, vacate the judgment below, and remand for dismissal.

## ARGUMENT

Respondent Frank Buono lacks standing to continue with the instant case. Respondent argues that the fact that the Latin cross atop Sunrise Rock in the Mojave National Preserve (the “Mojave cross”) continues to sit upon public land violates the Establishment Clause, U.S. Const. amend. I, and that he has standing to pursue this case. “To qualify for standing, a claimant must present an injury that is concrete, particularized, and actual or imminent; fairly traceable to the defendant’s challenged behavior; and likely to be redressed by a favorable ruling.” *Davis v. FEC*, 128 S. Ct. 2759, 2768 (2008) (citation omitted). These elements comprise the constitutional minimum for a plaintiff to satisfy the Article III case-or-controversy requirement. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (citing U.S. Const., art. III, § 2, cl. 1). As a general rule, taxpayers cannot assert as a justiciable injury that taxpayer money is being spent in any particular manner. *Frothingham v. Mellon*, 262 U.S. 447, 488 (1923). An exception to this general rule where Establishment Clause claims are asserted was created by *Flast v. Cohen*, 293 U.S. 83, 104 (1968).

Petitioner Ken Salazar and *amici* offer persuasive arguments as to why no such injury exists. But regardless of whether such an injury exists, any such injury is no longer fairly traceable to the defendant’s challenged actions, thereby precluding the possibility that Respondent Buono has standing. To find that Respondent Buono has standing under the current circumstances would not only be inconsistent with this Court’s precedents, it would also violate the nature and purposes of

standing doctrine as this Court has explained them. Since Respondent Buono lacks standing, this Court should so hold, and order this case dismissed for lack of jurisdiction.

- I. **Assuming *arguendo* that an injury-in-fact exists, and regardless of whether it does, the injury is no longer fairly traceable to the defendant because the plaintiff's intervening actions negate traceability.**

Given that the United States and *amici* have argued at length that there is no justiciable injury in this case, the American Civil Rights Union agrees that no such injury exists without discussion. But assuming *arguendo* that there is a justiciable injury, it would no longer be traceable to Defendant Salazar because Plaintiff Buono's securing of the most recent injunction destroys any such traceability. Without traceability, Mr. Buono lacks standing.

The importance of the standing issue in the instant case cannot be overstated. "The term 'standing' subsumes a blend of constitutional requirements and prudential considerations." *Valley Forge College v. Americans United*, 454 U.S. 464, 471 (1982) (citing *Warth v. Seldin*, 422 U.S. 490, 498 (1975)). Standing is "not merely some troublesome hurdle to be overcome ... so as to reach the 'merit's of a lawsuit which the party desires to have adjudicated . . . ." *Id.* at 475. This Court has made abundantly clear that it is not "the business of the federal courts [to correct] constitutional errors," *Id.* at 489, and therefore that the standing inquiry is not flexible whenever it becomes inconvenient. *Id.* As this Court stated in *Valley Forge*, so too it can be

said of the Ninth Circuit here, that for the reasons explained below the “Court of Appeals in this case ignored unambiguous limitations on taxpayer and citizen standing.” *Id.* at 288.

Alleged injuries that amount to violating a private right to a government that does not establish a religion is insufficient to satisfy Article III standing requirements. *Id.* at 482–83, 489–90 n.26. As explained in detail below, certain criteria must be met for the *Flast* exception to the general bar on taxpayer standing to apply. As is often the case with cases asserting an injury involving the Establishment Clause, this case “falls outside the the [*sic*] narrow exception that *Flast* created to the general rule against taxpayer standing established in *Frothingham*.” *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553, 2568 (2007) (quoting *Bowen v. Kendrick*, 487 U.S. 589, 618 (1988)) (internal quotation marks omitted).

**A. This Court should address the question of traceability regardless of whether Respondent Buono has suffered an Article III injury.**

“Standing is ‘perhaps the most important’ of the justiciability doctrines.” H. Elliott, *The Functions of Standing*, 61 Stan. L. Rev. 459, 465 (quoting *Allen v. Wright*, 468 U.S. 737, 750 (1984)). As such it behooves this Court to develop all three prongs of the tripartite standing doctrine as questions relating to each of those prongs properly present themselves. This Court would do well to illuminate the constitutional deficiencies with the “injury” that Respondent Buono alleges. However,

the constitutional objections raised by the second standing prong—traceability—are clearer and starker, and thus more deserving of this Court’s attention.

This Court will provide useful guidance to the lower courts by expressly holding that traceability is lacking here. The lower courts are dependant on this Court’s guidance. *Altria Group, Inc. v. Good*, 129 S. Ct. 538, 555 (2008) (Thomas, J., dissenting); *see also James v. United States*, 550 U.S. 192, 210 (2007). Rather than focusing on the relatively close questions of what constitutes an Article III injury under *Flast* and its progeny, this Court can clearly circumscribe the limits of *Flast* by examining traceability. Recent developments in this case compel the conclusion that any injury cannot fairly be traced to federal action.

The doctrine of taxpayer standing for Establishment Clause claims is currently in a state of flux that requires explication and clarification by this Court. *See* K. Klukowski, *In Whose Name We Pray: Fixing the Establishment Clause Train Wreck Involving Legislative Prayer*, 6 *Geo. J.L. & Pub. Pol’y* 219, 274–76 (2008). Since standing is such a significant issue for the judiciary, and matters touching upon religion are of such importance to many millions of Americans (on both sides of the issue), uncertainty regarding the anomalous Establishment Clause exception to *Frothingham* do a disservice to the courts and to potential litigants. Further development of this doctrine is therefore essential.

It is the significance of standing that requires this development, as it goes to the core of the Article III case-or-controversy requirement. “No principle is more fundamental to the judiciary’s proper role in

our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *Raines v. Byrd*, 521 U.S. 811, 818 (1997) (citations omitted). As each of the three prongs of the standing framework serve to define a “case” or “controversy,” all three should be more fully developed in the *Flast* exception, not just the first.

The traceability prong should be explored in this case. The party asserting federal jurisdiction has the burden of establishing all three standing elements. *Lujan*, 504 U.S. at 561. Although Mr. Buono devotes much of his argument in an attempt to show that he has suffered an injury sufficient for Article III standing, the arguments set forth in his briefs in the court below do not carry his burden with respect to traceability.

Even if such traceability was present at the outset of this litigation, Mr. Buono must explain why his injury continues to be fairly traceable to the defendant after Mr. Buono procured an injunction to prevent the land exchange. All standing elements must be supported in each stage of litigation by evidence, as the plaintiff bears an ongoing burden to establish standing. *Id.* at 561. Even if a viable claim exists at the outset of litigation, the suit ceases to be a justiciable case if it ceases to satisfy the Article III case-or-controversy requirement at any stage of the litigation. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997). This Court has recently applied this rule with respect to ripeness, *see id.* at 68 n.22 (citation omitted), and so this requirement must apply with equal force regarding Respondent Buono’s standing, as standing is another component of the case-or-controversy requirement. Therefore as the facts and procedural posture of a

case change, the plaintiff must successfully establish why each of the elements of the standing inquiry remain satisfied.

This Court should therefore consider traceability. Supreme Court precedent does not dictate that each of the standing elements must be taken in order. It also does not require that a given element must be satisfied for the following elements to be considered. For the reasons given below, traceability is the standing element most clearly lacking here. Also as set forth below, several judicial policy implications would be contravened by finding traceability in a case such as this where the plaintiff himself has acted to prevent the granting of the requested relief. For all these reasons, this Court should fully address the question of traceability.

**B. Respondent Buono's injury is no longer fairly traceable to the defendant's challenged action.**

The respondent's own action of obtaining an injunction to prevent the land transfer negates the possibility that his injury is fairly traceable to Secretary Salazar or any subdivision of the Interior Department. The second prong of the constitutional standing analysis requires a "causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of a third party not before the court." *Lujan*, 504 U.S. at 560 (quoting *Simon v. E. Ky. Welfare Org.*, 426 U.S. 26, 41–42 (1976)) (internal quotation and editing marks omitted). Further, this Court has held that the requisite

causal connection can turn on conduct other than the defendants'. *See id.* at 562. This is consistent with the concept that constitutional elements of standing can be defeated by the “unfettered choices” of parties other than the defendant. *See id.* at 562 (quoting *ASARCO v. Kadish*, 490 U.S. 605, 615 (1989) (plurality opinion of Kennedy, J.)).

If the actions of a third party can defeat traceability to the defendant, then *a fortiori* the actions of the complaining party must defeat traceability when those actions continue an injury that would otherwise long since have ceased to exist. The most evident reason that the actions of a third party can defeat standing would be that, even if there was still an injury and the likelihood of redressability, the complained-of injury could no longer be fairly traced to the defendant. A third party neither asserts that it has been harmed, nor is the focus for the harm done to others. If such a third party can negate traceability, then the reasoning is all the stronger that it is possible for a plaintiff to take actions that would likewise defeat traceability.

This should extend to all standing inquiries, regardless of any exception to general rules that otherwise apply to special circumstances such as the *Flast* exception. The *Flast* exception to the bar on taxpayer standing, *see Frothingham*, 262 U.S. at 488, created by *Flast v. Cohen*, 293 U.S. at 104, does nothing to diminish this Court's pronouncement that to have standing to enjoin a federal statute, a plaintiff must sustain an “injury as the result of its enforcement.” *Doremus v. Bd. of Educ.*, 342 U.S. 429, 434 (1952) (quoting *Frothingham*, *supra*, at 488). Here, the alleged injury is being perpetuated by the plaintiff's action to prevent enforcement of the

statute, rather than by its enforcement, which ironically would eliminate the alleged injury. Therefore it is not the enforcement of the statute, but rather the lack of enforcement, that is causing the injury. And the sole reason that the statute is not being enforced is that Respondent Buono obtained a court order enjoining that enforcement.

This violates the entire rationale of standing, per the standard tripartite inquiry. Even though the injury in question may have been caused in the first instance by the defendant, it is no longer fairly traceable to the defendant's challenged conduct. Instead, the continuance of the injury is now traceable to the plaintiff's own conduct. Although an injury persists, Mr. Buono's actions are an intervening force whereby the traceability to the defendant is no longer "fair." Mr. Buono's securing an injunction, therefore, results in the second prong of the standing inquiry no longer being satisfied.

The instant case also presents an unprecedented aspect of Establishment Clause standing for suits seeking injunctive relief. The scope of injunctive relief is limited by the scope of the injury the injunction is intended to address. *Lewis v. Casey*, 518 U.S. 343, 357-60 (1996). But no case considered by this Court has involved an injunction that is intended to sustain the injury in question, as is the case here.

This case even goes beyond the current divide over the reach of *Flast*, which is persuasively cited as a reason that *Flast* must be overruled. *See Hein*, 127 S. Ct. at 2573-74 (Scalia, J., dissenting). It is completely accurate to posit that injuries alleged to arise in connection with the Establishment Clause have problematically alternated between "wallet

injuries” and “psychic injuries.” *See id.* at 2574–75. But this case does not even concern that divide, as the injury which Respondent Buono cites is not fairly traceable to any expenditure of congressional funds, whether itemized in the federal budget or not. Therefore this Court is able to dispose of the instant case without revisiting the anomalies of taxpayer standing vis-à-vis the Establishment Clause. It would do nothing to call *Flast* into question if this Court were to hold that a plaintiff’s securing an injunction to prevent the elimination of his Article III injury precludes fair traceability.

While an injunction in cases that reach this Court often involve spending would have redressed an injury, *cf. DaimlerChrysler v. Cuno*, 547 U.S. 332, 348 (2006), the injunction that Mr. Buono instead sought—and received—was an injunction against an action that would have *stopped* the complained-of spending, thereby securing the very redress that Mr. Buono originally sought. This injunction was bizarrely an injunction to prevent the very relief that Mr. Buono claimed to be seeking. Since this complained-of spending was the only basis for jurisdiction *ab initio*, securing an injunction to perpetuate that very same spending pushes Mr. Buono’s already-tenuous claim of standing past the breaking point.

Mr. Buono’s injury is therefore no longer fairly traceable to government action.

- C. **The only injury alleged by Respondent Buono that can be fairly traced to government action is not one that satisfies *Flast* because it does not arise from the Taxing and Spending Clause.**

This Court has never read the *Flast* exception to the bar on taxpayer standing broadly. Indeed, if anything, this Court has narrowed the exception in the intervening years. A plurality of this Court has recently stated that “[i]t is significant that, in the four decades since its creation, the *Flast* exception has largely been confined to its facts.” *Hein*, 127 S. Ct. at 2568–69 (plurality opinion). Respondent’s case provides another such opportunity.

Key to respondent’s claim to have standing under *Flast* is that the statute he challenges that authorizes the land transfer at issue is an appropriations statute, Pub. L. No. 108–87, § 8121(a)–(e), 117 Stat. 1100. Such statutes are generally predicated upon the Tax and Spending power. *See* U.S. Const. art. I, § 8, cl. 1. Mr. Buono’s alleged injury simply cannot be fairly traced to a federal action involving the Taxing and Spending Clause. As a plurality of this Court recently said, “[c]haracterizing this case as a . . . challenge to [a] general appropriations statute[] would stretch the meaning of that term past its breaking point.” *Hein*, 127 S. Ct. at 2567 (plurality opinion) (internal quotation marks omitted). Although the context of that statement was markedly different from the facts of this case, the same reasoning holds that the relationship of the challenged act—here, the transfer of land with no financial impact—to congressional spending power is too attenuated to trigger the *Flast*

rationale of the Establishment Clause entailing an implicit spending limitation. The land transfer is sufficiently removed from any actual congressional spending that it is outside any exception to *Frothingham* that this Court could properly characterize as “narrow.” It therefore “lacks the requisite ‘logical nexis’ between taxpayer status ‘and the type of legislative enactment attacked.’” *Id.* at 2568 (quoting *Flast*, 392 U.S. at 102). Lacking such a nexus, this transfer cannot fall under the ambit of *Flast*.

Therefore the only government action that Respondent Buono’s alleged injury is fairly traceable to fails to satisfy the *Flast* exception. “*Flast* limited taxpayer standing to challenges directed only [at] exercises of congressional power under the Taxing and Spending Clause.” *Hein, supra*, at 2566 (plurality opinion of Alito, J.) (quoting *Valley Forge*, 454 U.S. at 479) (internal quotation marks omitted) (brackets in original). The challenge here is not traceable to any such invocation of the Taxing and Spending Clause. Instead, by default this transfer of property would occur through the Property Clause, U.S. Const. art. IV. § 3, cl. 2. Just as this Court found the injury in *Valley Forge* insufficient for standing because it did not arise from an exercise of the Taxing and Spending power, *see Valley Forge*, 454 U.S. at 479, so too the only injury that is fairly traceable to the defendant’s action likewise arises from a provision other than the Taxing and Spending Clause. Since the *Flast* exception does not extend to the Property Clause, it cannot confer standing.

Nor can respondent claim that there is an implicit Tax and Spending Clause element in this

transfer. Respondent could claim that the value of any property relinquished by government constitutes a loss of wealth by the government, which would be of the same net affect to the U.S. Treasury as an expenditure. This would be analogous to spending and therefore might fall under the Tax and Spending Clause. But here, the exchange of an equal value parcel of land results in a zero net-sum financial impact. Therefore even if Respondent Buono's injury would be traceable to the transfer, it would still fail under *Flast* to be sufficient for standing.

Such an understanding of the limits of *Flast* would be consistent with how lower courts have understood this Court's most recent encounter with the *Flast* exception. Circuit courts have understood this Court's decision in *Hein* to clarify that only clearly itemized congressional appropriations qualify for the *Flast* exception. *E.g., Laskowski v. Spellings*, 546 F.3d 822, 827 (7th Cir. 2008) (“[W]e read *Hein* to mean that taxpayers continue to have standing to sue for injunctive relief against specific congressional appropriations alleged to violate the Establishment Clause, but that is all.”). Since it is “a necessary concomitant of the doctrine of *stare decisis* that a precedent is not always expanded to the limit of its logic,” *Hein*, 127 S. Ct. at 2571 (Kennedy, J., concurring), this Court should apply that principle in the same manner it was applied in *Hein* to reach the same conclusion: the plaintiff lacks standing to bring this suit.

**D. The *Flast* exception does not extend to matters that raise serious separation-**

of-power concerns, as the current case does by insisting on judicial interference with a matter otherwise resolved by the coequal elected branches.

This Court has indicated that the *Flast* exception should not be applied when doing so would “raise serious separation-of-power concerns,” *Hein*, 127 S. Ct. at 2569 (plurality opinion), and that *Flast* itself “gave too little weight to these concerns.” *Id.* This case potentially presents one of the most significant such separation-of-power concerns since *Flast*. Through the four rounds of litigation over this issue, Congress has enacted statutes to eliminate the alleged injury that the Mojave cross inflicts on Mr. Buono, and the Interior Department has sought to carry out these statutory directives. Then Mr. Buono persuaded the lower courts in this case to intervene yet again, enjoining this course of action that was sanctioned by both—not merely one—of the coequal branches of government, frustrating the political solution the coordinate branches had formulated.

Nothing derived from *Flast* or its progeny can save the standing question from this separation-of-powers issue. Even assuming *arguendo* that the Establishment Clause expresses a concern that conscience not be compromised by government spending in support of religion, *Hein, supra*, at 2572 (Kennedy, J., concurring), the accompanying admonition that the *Flast* exception “must be interpreted as respecting separation-of-powers principles,” *id.*, compels the conclusion that standing cannot be taken to the lengths necessary for Mr. Buono to maintain the injunctive action here at bar.

Congress and the administration have gone to extraordinary lengths to transfer the cross in the Mojave National Preserve to private hands, in an exemplary display of the political branches finding a resolution to a constitutional dispute. In response to such measures by the federal government, Mr. Buono responds by obtaining a court order to forbid this solution from being implemented. It is difficult to imagine a scenario with a clearer separation-of-powers aspect.

Were Mr. Buono to succeed, it could open the floodgates to similar litigation. To find Respondent Buono has standing to pursue this matter after he secured an injunction to prevent the granting of his originally-sought relief would set a precedent that would “lead to judicial intervention so far exceeding traditional boundaries on the judiciary that there would arise a real danger of judicial oversight” of coequal branches. *Hein, supra*, at 2573 (Kennedy, J., concurring). Courts “must be reluctant to expand their authority by requiring intrusive and unremitting judicial management of the way” coequal branches perform their duties. *Id.* Separation-of-powers concerns counsel against finding standing in cases that seek to compel coequal branches to abandon a specific course of action to fulfill their duty in favor of another approach preferred by a plaintiff. *Id.*

Yet that is precisely the case here. The actions taken by the elected branches would have given Mr. Buono the relief he claims to seek. The Mojave cross would no longer be on public land. But rather than simply allow the cross to continue existing on private land, Respondent Buono seeks to bar the elaborate and thoughtful actions of the political branches from

being enacted, and claims standing to force the courts to compel a course of action that will destroy the cross. It is therefore not an end to taxpayer support for the cross that Mr. Buono seeks, but rather to employ judicial power to compel the executive branch to destroy this war memorial. Standing doctrine should not be construed to empower plaintiffs to use the courts to convert the executive branch into a demolition crew that levels crosses to the ground.

This argument is on point here under this Court's precedents. This concern of separation-of-powers is specifically tied to traceability. *Hein, supra*, at 2573 (Kennedy, J., concurring) (citing *Allen*, 468 U.S. at 761 n.26). It should therefore follow that the *Flast* exception does not apply in the instant case. And outside the "narrow" safe harbor of *Flast*, there is no precedent that even remotely suggests Mr. Buono has standing, and a consistent body of case law to the contrary.

**II. Finding this suit to comport with Article III requirements with traceability so much in doubt would be inconsistent with this Court's precedents regarding the nature and purpose of standing doctrine and waste scarce judicial resources.**

Once any alleged injury is not fairly traceable to the defendant, seeking judicial power to order the dismantling of this memorial would merely be "predicated on the right, possessed by every citizen, to require that the Government be administered according to law." *Valley Forge*, 454 U.S. at 482–83 (quoting *Fairchild v. Hughes*, 258 U.S. 126, 129

(1922)) (internal quotation marks omitted). Such a distinction delineates a limit that even *Flast*, which stood expansively on the outermost limit of this Court's standing jurisprudence, declared beyond the constitutional scope of judicial power, as it would "employ a federal court as a forum in which to air . . . generalized grievances about the conduct of government." *Flast*, 392 U.S. at 106. Finding that Respondent Buono has standing under such circumstances violates the underlying rationales of standing doctrine.

**A. The nature and purpose of the case-or-controversy requirement, as represented in the standing inquiry, would be contravened by a finding that Mr. Buono retains standing to continue this case.**

The constitutional scheme of our tripartite government denotes a role for the judiciary that is limited in certain respects. "The judicial power of the United States . . . is not an unconditioned authority to determine the constitutionality of legislative or executive acts." *Valley Forge, supra*, at 471. The Article III elements limit judicial power "to those disputes which confine federal courts to a role consistent with a system of separated powers and which are traditionally thought capable of resolution through the judicial process." *Id.* at 472 (quoting *Flast*, 392 U.S. at 97).

This Court must also be cognizant of how the exercise of judicial power can impact interbranch relations with the coequal political branches of our tripartite government. *Id.* 473. The Constitution

narrowly confines judicial power to what the proper role of the courts is in a democratic system. *See Lujan*, 504 U.S. at 560 (quoting *The Federalist* No. 48 (J. Madison)). Cases such as the instant case are particularly problematic. One private individual sought a particular relief. During multiple rounds of litigation the federal government cooperated both between the branches and with the private sector (the Veterans of Foreign Wars) to enact and administer legislation to provide this result that only Mr. Buono sought, regarding whether the title of a plot of desert ground upon which a multi-generational war memorial stood was held by a public, versus private, entity. Having accomplished all this, a district court then asserts that these elaborate measures are somehow inadequate, and a circuit court affirms. Such an injunction seems sufficient to aggravate relations between the coequal branches.

The question of standing is even more significant when, as here, a plaintiff seeks “to challenge laws of general application where their own injury is not distinct from that suffered in general by other taxpayers or citizens.” *ASARCO*, 490 U.S. at 613 (plurality opinion of Kennedy, J.). Any observer of the Mojave cross suffers the same “injury” as Mr. Buono. This has nothing to do with an activity occurring at respondent’s child’s school, or the graduation ceremony at a particular high school, or a specific group on a college campus being denied access to facilities or a particular after-school group being denied recognition. This is simply a passive monument sitting on a rock in the desert, as it has for decades, silently standing as a memorial to those who sacrificed for this nation almost a century

ago. Such facts call for an especially searching inquiry to determine whether that single, unaffected citizen can invoke the power of this Court to override the judgment of Congress and the president in fashioning a way to remove the offence without dismantling this monument.

It is for precisely such facts that the Article III standing requirement exists. The constitutional “doctrine of standing serves to identify those disputes which are appropriately resolved through the judicial process.” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (citations omitted). Suffering an injury that is fairly traceable to a given defendant is an essential part of that identification, a task that the plaintiff must perform. Plaintiffs bear the “burden to establish standing by demonstrating that, if unchecked by litigation, the defendant’s allegedly wrongful behavior will likely . . . continue.” *Friends of Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000) (opinion of Ginsburg, J.). But in this case the exact opposite is true. Without standing, this “wrongful behavior,” if that is what this memorial sitting in the Mojave National Preserve is by continuing to passively sit there, would cease to sit on public land. Far from this behavior likely continuing, it would instead certainly cease.

**B. Judicial resolution is entirely unnecessary in this case because, but for Mr. Buono’s obtaining an injunction**

**to prevent the land transfer, this case would already be moot.**

Mr. Buono's actions in obtaining an injunction are now the proximate case that the instant case is before this Court. Respondent Buono attempts to retain standing by preventing the case from becoming moot. If the transfer had not been enjoined, then this case would already be moot.

Mootness and standing serve related functions in this case. Although it is true that a defendant's voluntary cessation of challenged behavior does not necessarily render a case moot, *Friends of Earth*, 528 U.S. at 189 (citation omitted), because such a cessation can be a ploy to evade judicial resolution, *see id.* (citations omitted), the termination of such behavior can render a case moot if the defendant demonstrates that it is "absolutely clear" the challenged action is unlikely to recur. *Id.* (citation omitted). It is undisputed that if the injunction issued by the district court were dissolved due to the case being dismissed, then the Mojave cross would soon cease to be on public land. The case would then be doubly nonjusticiable in that the plaintiff would have no standing and the case would be moot. Both doctrines would resolve this controversy, and do so in a manner that is less disruptive than continuing to adjudicate the matter.

**C. Finding standing under these circumstances would permit a private party to misappropriate judicial power.**

By seeking and procuring an injunction to prevent the transfer of the memorial into private hands where it would no longer receive even *de minimis* taxpayer support, and thereby force the hand of the executive branch to dismantle (*i.e.*, destroy) the Mojave cross, Respondent Buono is essentially asserting a personal right to have the government act in accordance with his views of the Constitution. On at least three occasions, this Court has expressly rejected the existence of, or attempt to assert, any such “right.” *See, e.g., Valley Forge*, 454 U.S. at 484 (citations omitted). The federal courts do not exist to become any person’s wrecking ball to impose a particular agenda, which would be the outcome if Mr. Buono is found to have standing to continue this case.

This Court has stated the importance of rejecting attempts to misappropriate judicial power to be a vehicle to advance the interests of parties that lack standing. *Valley Forge, supra*, at 473. Such is the case here, where the matter has all but been resolved. The current facts of this case demonstrate the purpose of the traceability aspect of standing. As explained above, the injury, if injury it is, is no longer traceable to the government. Judicial exertions are thus constitutionally improper at this point to force a particular outcome, because the complained-of government has now acted to accommodate the plaintiff’s wishes. To treat this matter as worthy of additional court proceedings at this point would be troubling to the concept of the proper application of judicial power as this Court’s standing case law explains that concept.

This suit, arising from Mr. Buono’s “purely psychological displeasure,” *see Hein*, 127 S. Ct. at

2582 (Scalia, J., dissenting), that this Latin cross sits atop government land, takes an astounding turn when Mr. Buono sought and obtained the injunction barring the land transfer. Although Respondent Buono originally sought the balm of judicial relief to salve his “injury” of observing this cross on public land, he evidently then falls prey to an acute onset of masochism when, standing on the very brink of receiving his relief by the transfer of this memorial off the public dole and into private hands, he rushes to the courthouse to secure an injunction that prevents the granting of the very same long-sought remedy which he claims is commanded by the Constitution. One must ask whether Mr. Buono might then be seeking something other than the relief of having this cross no longer held in public hands. Should that be the case, it would seem that the only alternative is that the respondent instead seeks to have this faith-implicating memorial destroyed.

Assuming *arguendo* that the latter is correct, this Court must then confront whether it wishes to allow the *Flast* exception to facilitate private persons using the power of the federal judiciary to advance their own private, anti-religious passions when so much has been done to provide them with the relief they originally claimed to be seeking in good faith. This Court has warned and guarded against being thus manipulated. And as well this Court should, because such “accusations of manipulation . . . only weaken this Court’s efficacy . . .” Elliot, *supra*, at 501. In the same manner in which this Court has commented on the injury prong of the standing inquiry, finding Mr. Buono’s “injury” fairly traceable to the government here “would create the potential

for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing ‘government by injunction.’” *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 222 (1974).

To do so in the context of this case would also be inconsistent with what this Court has long said about the place of faith in our nation: “We are a religious people whose institutions presuppose a Supreme Being. . . . [Therefore] we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the scope of religious influence.” *Zorach v. Clauson*, 343 U.S. 306, 313–14 (1952). If the Constitution does not task this Court with throwing its formidable weight against even *widening* the scope of religious influence, then surely it follows *a fortiori* that this Court need not find the respondent has standing to procure the destruction of this memorial to diminish any religious influence, and in so doing impede the extraordinary efforts of the elected branches in transferring this memorial, dedicated to our fallen heroes and quietly acknowledging the faith of many of them, to a private organization devoted to giving our servicemen the honor their memory is due.

- D. To allow cases such as the instant case to proceed under these circumstances wastes scarce judicial resources.**

The final judicial policy violated by finding standing here would be the waste of judicial resources. Holding that Respondent Buono lacks standing will help discourage the improper use of judicial power to push a generically anti-religion agenda, conserving scarce judicial resources.

Standing doctrine functions to ensure that scarce judicial resources are reserved for cases wherein the plaintiff has a concrete stake. *Friends of Earth*, 528 U.S. at 191. The federal docket is already burdened, and the judicial power is not designed to invite every conceivable dispute. The judicial power of Article III “is legitimate only in the last resort, and as a necessity in the determination of [a] real, earnest and vital controversy.” *Valley Forge*, 454 U.S. at 471 (citation omitted).

That is especially the case where a plaintiff seeks to have the courts supersede the actions of the elected branches. Invalidating an Act of Congress is to be only a “tool of last resort” for federal courts. *Id.* at 473–74 (referencing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803)). A statutory provision being enacted specifically to resolve an issue is the epitome of political responsiveness. Far from judicial power being the “last resort” for Mr. Buono to secure relief, it is instead utterly unnecessary. Standing doctrine should recognize this reality in a case such as this.

The standing question becomes even more problematic for Respondent Buono because this suit seeks injunctive relief. If this were a suit for damages, respondent might continue to have standing to seek redress (assuming *arguendo* that certain other standing requirements are met). However, in this suit for injunctive relief, the government has already acted to grant Mr. Buono

the relief he claims to seek. It is Mr. Buono who has affirmatively acted to block that relief, suggesting that the injury whereby respondent claims offense is not what motivates this suit. What Mr. Buono seeks is not simply that the Mojave war memorial should no longer stand on land that is public or be under the maintaining care of National Park Service employees. As already noted, that result would have been achieved but for respondent's actions and this case would have become moot.

Rather, if Mr. Buono succeeds before this Court it would set a precedent by which federal courts continue to hold cases for further proceedings even though all actions have been taken to eliminate any injury whereby the plaintiff could even claim standing, cases which only continue because the plaintiff seeks court orders to enjoin plaintiff's originally-requested relief from being granted. To allow such a plaintiff to continue to have standing when the only reason that the plaintiff can claim a continuing injury is due to the plaintiff stopping the *elimination* of the injury unnecessarily wastes scarce judicial resources in violation of the rationale set forth by Justice Ginsburg in *Friends of Earth*, 528 U.S. at 191. Indeed, such a finding of standing would seem perverse.

The injury in the instant case is essentially now one of the Mr. Buono's own making, self-inflicted by his actions to prevent the government from complying with his original demand. This Court can grant Mr. Buono the ultimate relief he originally sought by denying standing, thereby dissolving the district court's injunction and allowing the transfer of the memorial to the VFW.

Such an outcome would conserve judicial resources. An injunction is not only intrusive to the parties; it is burdensome to the judiciary because it requires a court's continuing superintendence of a matter. *Id.* at 193. In other words, it consumes scarce judicial resources, and should therefore be allowed only when necessary.

Respondent may argue that abandoning a case at an advanced stage to conserve judicial resources may prove more wasteful than frugal. *See id.* at 192. However, the opposite is true here. Allowing suits to proceed under circumstances where the plaintiff seeks to force the judiciary to continue with a suit when a resolution has already been secured that fully redresses plaintiff's alleged injury, and the plaintiff enjoins the granting of such complete relief for whatever purposes not set forth in the pleadings, invites the unnecessary waste of judicial resources in multitudinous lawsuits that could then be brought in lower courts under such a precedent by this Court. Conversely, should this Court hold that such a plaintiff no longer has standing when the only remaining injury is one that the plaintiff insists on continuing to suffer to unnecessarily prolong judicial proceedings, such a holding would not only conserve judicial resources in this case but would set a precedent that could likewise conserve resources in future cases.

## CONCLUSION

For the foregoing reasons, the judgment of the U.S. Court of Appeals for the Ninth Circuit should be

vacated and the case should be ordered dismissed for lack of jurisdiction.

Respectfully submitted,

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