No. _____

In The
Supreme Court of the United States

DAVID MCMAHON AND THE TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INCORPORATED, RICHARD BREWER, TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INCORPORATED,

Petitioners,

v.

PRESIDENT GREGORY L. FENVES, RON NIRENBERG, ROBERTO TREVINO, WILLIAM SHAW, REBECCA VIAGRAN, REY SALDANA, SHIRLEY GONZALES, GREG BROCKHOUSE, ANA SANDOVAL, MANUAL PALAEZ, JOHN COURAGE, CLAYTON PERRY, CITY OF SAN ANTONIO,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. With regard to Article III standing and an injury-in-fact, do the authors of protected speech have to be the original authors or can interested individuals or groups come into the speech?

2. Should this Court adopt special interest standing and allow individuals or members of a small group standing to represent the rights of a public charitable trust violated by the government when the Attorney General of a state fails or refuses to represent the public's rights?

3. Does Petitioner Brewer have federal taxpayer standing to sue a municipality for expending municipal funds in violation of his constitutional right to free speech?

PARTIES TO THE PROCEEDING

The Fifth Circuit Court of Appeals consolidated case no. 18-50710 with case no. 18-50800 in the court of appeals proceedings.

In case no. 18-50710, Petitioners David McMahon, Steven Littlefield and the Texas Division of the Sons of Confederate Veterans ("SCV") were the plaintiffs in the district court proceedings and the appellants in the court of appeals proceedings. Respondent President Gregory L. Fenves, President of the University of Texas at Austin in his Official Capacity was the defendant in the district court proceedings and the appellee in the court of appeals proceedings.

After the entry of the Fifth Circuit's judgment, but before this Petition could be filed, Petitioner Steven Littlefield passed away. The representative of Petitioner Littlefield's estate does not desire to carry on his wish in continuing with this fight. Accordingly, David McMahon and the SCV are the remaining petitioners in case no. 18-50710.

In case no. 18-50800, Petitioners Richard Brewer and the SCV were the plaintiffs in the district court proceedings and appellants in the court of appeals proceedings. Respondents Ron Nirenberg, San Antonio Mayor, in his Individual Capacity, Roberto Trevino, San Antonio City Councilman, in his Individual Capacity, William Shaw, San Antonio City Councilman, in his Individual Capacity, Rebecca Viagran, San Antonio City Councilman, in her Individual Capacity, Rey

PARTIES TO THE PROCEEDING – Continued

Saldana, San Antonio City Councilman, in his Individual Capacity, Shirley Gonzales, San Antonio City Councilman, in her Individual Capacity, Greg Brockhouse, San Antonio City Councilman, in his Individual Capacity, Ana Sandoval, San Antonio City Councilman, in her Individual Capacity, Manual Palaez, San Antonio City Councilman, in his Individual Capacity John Courage, San Antonio City Councilman, in his Individual Capacity, Clayton Perry, San Antonio City Councilman, in his Official Capacity and the City of San Antonio were the defendants in the district court proceedings and the appellees in the court of appeals proceedings.

DIRECTLY RELATED CASES

- *McMahon, et al. v. Fenves, et al.*, No. 1:17-cv-822-LY, U.S. District Court for the Western District of Texas, Austin Division, Memorandum Opinion and Order entered June 25, 2018.
- *Brewer, et al. v. Nirenberg, et al*., No. SA-17-CV-837-DAE, U.S. District Court for the Western District of Texas, Austin Division, Judgment entered September 17, 2018.
- *McMahon, et al. v. Fenves, et al.*, No. 18-50710, U.S. Court of Appeals for the Fifth Circuit, consolidated by the Fifth Circuit Court of Appeals with *Brewer, et al. v. Nirenberg, et al.*, No. 18-50800, U.S. Court of Appeals for the Fifth Circuit, Judgment entered in both cases on January 3, 2020.

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PETITION FOR A WRIT OF CERTIORARI

David McMahon, Richard Brewer, and the Texas Division, Sons of Confederate Veterans, Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in the two underlying cases.

OPINIONS BELOW

The Fifth Circuit's Opinion is reported at *McMahon v. Fenves*, 946 F.3d 266 (5th Cir. 2020) and reproduced at App. 1-12. The Judgment of the Fifth Circuit for *Brewer v. Nirenberg*, No. 18-50800, is reproduced at App. 13-14, and *McMahon v. Fenves*, No. 18-50710, is reproduced at App. 15-16. The Judgment and Order Granting Motion for Summary Judgment; Denying as Moot Motion to Dismiss of the District Court for the Western District of Texas, Austin Division in *Brewer v. Nirenberg*, SA:17-CV-837-DAE, 2018 WL 8897851 (W.D. Tex. September 17, 2018) case are reproduced at App. 17-34. The Order and Memorandum Opinion and Order of the District Court for the Western District of Texas, Austin Division in *McMahon v. Fenves*, 323 F. Supp. 3d 874 (W.D. Tex. 2018) is reproduced at App. 35-52.

JURISDICTION

The Fifth Circuit Court of Appeals entered judgment on January 3, 2020. App. 13-16. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Article III, Section 2, Clause 1 of the United States Constitution states:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public Ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

U.S. Const. art. III, § 2, cl. 1.

INTRODUCTION AND STATEMENT OF THE CASE

"Remove not the ancient landmark, which thy fathers have set."

Proverbs 22:28

Petitioners ask this Court to review two cases dismissed by district courts which were consolidated and affirmed by the Fifth Circuit Court of Appeals. The first case involves a series of Confederate statues at the University of Texas at Austin ("Austin case") and the second case involves a war memorial to the Confederate dead in Travis Park in Downtown San Antonio ("San Antonio case"). The district court in both cases dismissed the Petitioners' First Amendment claims for a lack of standing under Article III of the Constitution and the Petitioners' state law claims based on a refusal to exercise supplemental jurisdiction.

In the Austin case, Civil War veteran George Washington Littlefield and his wife decided to make a large and generous testamentary gift to the University of Texas at Austin. He was a major in Terry's Texas Rangers of the Confederate Army, had done very well after the war in West Texas with cattle, and had no children. The purpose of the gift was to teach generations to come the history of the United States and in particular the South. The gift included grants of land, cash donations to be used to endow chairs for history and the seed money to build several campus buildings. The gift also included funds for a series of statues to be

erected on the main campus by a famous Italian sculptor, Pompeo Coppini.

The gift came to the University through Major Littlefield's will, a testamentary bequest, and the University accepted the gift and its terms. There was a debate at the time as to whether the University should accept the gift related to the statues because of the controversial nature of the Confederate cause and the Civil War, but the University eventually decided to accept the gift and display the statues as requested in the 1930s. The statues were displayed as promised from the 1930s until 2015 when the President of the University, Respondent Fenves, put together a campaign to remove the statues. Petitioner Littlefield is a collateral descendant of Major Littlefield (Littlefield had no children), who made the testamentary devise of the Confederate statues to the University and all of Petitioner SCV's members are direct or collateral descendants of Confederate soldiers. They sued Respondent Fenves and sought to enjoin the removal of the statues in the district court, which dismissed the suit for lack of federal standing.

After the entry of the Fifth Circuit's judgment but before this Petition could be filed, Petitioner Littlefield passed away. The representative of Petitioner Littlefield's estate did not desire to carry on Petitioner Littlefield's wish in continuing with this fight. Accordingly, David McMahon and the SCV are the remaining Petitioners in the Austin suit.

In the San Antonio case, a similar situation arose. In 1899, the San Antonio City Council gave the local chapter of the United Daughters of the Confederacy permission and a perpetual place in Travis Park to erect a Confederate Monument. A statue was erected of a Confederate soldier and became known as the Travis Park Monument. The statue was a generic soldier with an inscription reflecting that the statue was in memory of the Confederate soldiers who had died fighting for the South.

In 1908, the United States Congress provided a gift of two Civil War bronze cannons to the Confederate Camp in San Antonio of the United Confederate Veterans ("UCV"). The UCV met with the Mayor of San Antonio and the City Council, and they jointly decided to put the two cannons on either side of the statue of the Confederate soldier completing the Travis Park Monument. In 2017, the San Antonio City Council voted to remove the Travis Park Monument because they viewed the Monument as transmitting a "racist" message. Petitioner SCV is a successor in interest to the UCV. Petitioners SCV and Brewer, a San Antonio tax payer, filed suit against the Respondents City of San Antonio and the individual City Councilmen to enjoin the removal of the Monument. The district court dismissed the case for lack of standing.

Both cases were dismissed due to lack of standing. Petitioners ask this Court to revisit the standards applied to determine who has standing to bring suit to protect and defend historical monuments in this country. Monuments that were gifted in the early 1900's

have now outlived most, if not all, of the original donors that made the gifts and agreements with local governments. If standing is not expanded to include a slightly wider base of plaintiffs, the monuments erected across our country to honor American history and heroes will continue to change every 100 years or so to reflect the current political climate when the original donors are dead or the organizations dissolved. Justice Douglas eloquently described why inanimate objects need a voice in his dissent in *Sierra Club v. Morton*, 405 U.S. 727, 92 S. Ct. 1361 (1972) (Douglas, W., dissenting).

> The voice of the inanimate object, therefore, should not be stilled. That does not mean that the judiciary takes over the managerial functions from the federal agency. It merely means that before these priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake) are forever lost or are so transformed as to be reduced to the eventual rubble of our urban environment, the voice of the existing beneficiaries of these environmental wonders should be heard. Perhaps they will not win. Perhaps the bulldozers of 'progress' will plow under all the aesthetic wonders of this beautiful land. That is not the present question. The sole question is, who has standing to be heard?

Id. at 749-751 (internal page numbers omitted). While this case is about statues and not natural objects, the same logic can be applied. The monuments in this case have been standing for decades and have no voice of their own. But they have come to mean many things to

many people. Before they are cast aside, those that wish to continue their speech who are descended from the soldiers honored by the memorials or those that are members of an organization dedicated to the preservation of such monuments should have an opportunity to have their claims heard. And if all such arguments fail, taxpayers who wish to continue the speech should at least have the right to sue to question the expenditure of taxpayer funds to remove such monuments.

Respondents' removal of the Confederate statues by enactment of an ordinance or executive order was fatally overbroad and was invalid. The monuments communicated protected expression, i.e., political viewpoints. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 412 (1992) (as per White, J., concurring). The possible harm to society in permitting unprotected speech to go unpunished was outweighed by the muting of the Monuments' protected speech. *Id.* Although the ordinances reached conduct that is unprotected, they also criminalized expressive conduct that causes merely hurt feelings, offense, or resentment, and is protected by the First Amendment. *Id.* at 414. The ordinances are, therefore, fatally overbroad and invalid on their face. *Id.* The government's actions violated the free-speech rights of the donors of the Monuments. Even if the Monuments do not express solely protected speech, the political viewpoints expressed by the Monuments are protected, and the ordinances promulgated to remove them subject to strict scrutiny. Petitioners should have standing to protect these Monuments to American

veterans from the government's abridgement of the expression of their political viewpoint. *Id.*

REASONS FOR GRANTING THE PETITION

This Petition should be granted because Americans are suffering an injury to their constitutional rights across this country caused by government actors like the Respondents and currently do not have a means of being heard. Municipalities are silencing speech all over the country that they have co-authored for years, and when those that have a direct interest in continuing the speech seek to question the authority by which the government is acting, the courts are dismissing the cases on standing because those that gifted the statues to the municipalities are dead.

For a moment, forget that the underlying cases are attempts to preserve Confederate monuments. Instead, see the cases as seeking to preserve a statue of Harriet Tubman or a Vietnam War Hero already erected and displayed in a town square. Right now, the perceived majority view of our country is that statues honoring Confederate soldiers should be removed from public view. Tomorrow it could be monuments that depict a civil rights hero, a Vietnam War Veteran, a scientist that developed a vaccine, or the destruction of a historic site where enslaved Africans were housed. The majority may decide it does not want to remember the conflicts or the bad times when they are no longer relevant.

Historical revisionism in action may decide that FDR's statues throughout the country must be torn down because he interred Japanese-Americans in WWII. When this occurs and we become complacent in the everyday, who has the right to bring a suit to preserve the statue of Harriet Tubman, the scientist that saved our country from countless deaths, the Vietnam War hero, or the house where enslaved Africans were kept? Are all of our historic sites in America simply preserved right now at the pleasure of whoever has current political power to erect monuments or remove them? If no one or no group has standing to sue over the removal of historical statues that have been standing for decades, the merit of the suit aside, America's display and homage to history will only be preserved for short periods of time and at the pleasure, whim or caprice of who is in charge. In this way, history would repeat itself. We would be guilty of erasing the historical reminders we ourselves erected. This cannot be so. As a country, we must allow someone or some group with a stake in the history to question the actions of our leaders who are making war on historical memory, to determine whether they have complied with the Constitution and the law or swiftly executed their own agendas in removing the historical statues.

Those associations that have a long history dedicated to the preservation of the very speech the government seeks to silence or the members of those associations should be granted standing to question the removal of the statues. As discussed below, either Petitioners have a particularized, concrete injury

under Article III standing or a collateral theory of standing should be adopted to allow their constitutional claims to be heard in federal courts.

I. Petitioners Suffered an Injury-in-Fact in Support of Article III Standing Despite Not Being the Original Authors of the Speech

Article III of the Constitution limits federal courts to deciding "Cases" and "Controversies." U.S. Const. art. III, § 2, cl. 1. For a legal dispute to qualify as a genuine case or controversy, at least one plaintiff must have standing to sue. *Department of Commerce v. New York*, U.S., 139 S. Ct. 2551, 2565 (2019). The doctrine of standing "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong" and "confines the federal courts to a properly judicial role." *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1547 (2016). Article III Constitutional standing requires (1) an injury-in-fact, (2) a causal connection between injury and the conduct complained of and (3) the injury must be likely redressed by a favorable decision by the court. *Davis v. Federal Election Comm'n*, 554 U.S. 724, 733, 128 S. Ct. 2759 (2008); *Lujan v. Defenders. of Wildlife*, 504 U.S. 555, 560-561, 112 S. Ct. 2130 (1992).

The Fifth Circuit affirmed both district court's dismissals based on a failure to demonstrate an injury-in-fact. *McMahon v. Fenves*, 946 F.3d 266, 272 (5th Cir. 2020); App. 12. An injury-in-fact must be both concrete and particularized. *Lujan*, 504 U.S. at 560. An injury is

particularized if it "affect[s] the plaintiff in a personal and individual way." *Id*. at 560 n. 1. To satisfy this injury-in-fact test, a plaintiff must allege more than an injury to someone's concrete, cognizable interest, but be themselves among the injured. *Sierra Club*, 405 U.S. at 734-735. A plaintiff must have a personal stake in the outcome of the controversy. *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691 (1962).

The Petitioners in both cases demonstrated a concrete, particularized First Amendment injury to *themselves*. Although plaintiffs are generally limited to enforcing their own rights, standing may be broader for First Amendment challenges. *Maldonado v. Morales*, 556 F.3d 1037, 1044 (9th Cir. 2009). In the San Antonio case, the UCV and the City of San Antonio agreed to co-author a political viewpoint in 1908 when the Travis Park Monument was completed by the addition of the two bronze Civil War cannons gifted by the United States Congress. Unfortunately, organizations are made up of people who age and die. Thus, to continue an organization's purpose a successor organization is needed to carry on the purpose of the founding members. The SCV is a continuation of the UCV as the UCV's descendants, and SCV has carried on the mission of the UCV to promote and protect the memory of the Confederate soldier. The UCV transferred its existence and goods to the SCV, which is a clearly defined successor organization to the UCV.

The general society of the War of 1812, the Daughters of the American Revolution, Sons of Union Veterans of the Civil War, and SCV are all authorized by the

Department of Veterans Affairs to maintain Civil War Veterans' graves and they do so. There is no question that Confederate Veterans were American Veterans. The SCV, whose membership includes a large number of direct descendants of the Confederate Army, has a lengthy history of protecting and communicating Confederate veterans' political beliefs through memorials and graves since 1896. Members of the SCV still go out and maintain monuments to the Confederate dead, to the Union dead, and to other American Veterans. The SCV is recognized by the Department of Veterans Affairs as a "lineage society" that has a direct interest in veterans. Applicants for VA Memorialization Benefits, 81 FR 10765-01. The SCV collaborates with federal and state governments to maintain Civil War graves and cenotaphs across the country. Speech originates from someone, but it may be continued to be spoken by others with the same belief.

In the Austin case, McMahon and the SCV suffered a nearly identical injury-in-fact as the San Antonio case Petitioners. Major Littlefield sought by his devise to the University of Texas at Austin to have the Confederate statues displayed on the campus for perpetuity to educate the public, and the University accepted the gift with its terms. A few generations later, Respondent Fenves, the current President of the University, campaigned for the removal of the statues, which Fenves unilaterally removed in 2017. Who has the right to defend the speech that the statues expressed? The original speaker, Major Littlefield died in 1920. In fact, he was dead when the University

accepted his gift. Petitioner Littlefield, as a collateral descendant of Major Littlefield, has also now died. His unfortunate demise during the pendency of this appeal is yet another example of why direct (or collateral) descendants should not be the only people with standing to bring suit. The SCV as a lineage society with members like Petitioner McMahon who are direct descendants of Confederate soldiers, has a particular interest in the continuation of the speech and has been injured by the removal of the statues.

To say, as the Fifth Circuit has in its opinion, that the original person the government actor agreed to coauthor the speech with can be the only speaker and thus, the only injured party when the speech is removed defies the purpose of erecting monuments. Monuments are erected to last beyond the original speaker's lifetime. Monuments are expensive because they are erected to withstand time and the elements. People may tell our history, but people are temporary. Monuments are erected to tell our history into perpetuity. The descendants of the people who erected the monument, the descendants of the people honored by the monuments, the people who maintain the monument over time or even the people who will be harmed by the absence of the message should be granted standing to protect it.

It is the same as saying the author of a book is the only person who is aggrieved if the book is removed from a library. If the author is dead, then no one can sue to keep the book in the library. In *Board of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457

U.S. 853, 102 S. Ct. 2799 (1982), this Court held local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." *Pico*, 457 U.S. at 872 (citing *West Virginia State Board. of Education v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178 (1943)). In *Pico*, the plaintiffs were students who sued the school board that removed books from the school library and had standing to bring their claims. *Pico*, 457 U.S. at 855. The students were not the authors of the books. They were not the school employees that added the books to the library. But they were people who were affected by the removal of the books. "Our Constitution does not permit the official suppression of ideas." *Grove v. Mead Sch. Dist. No. 354*, 753 F.2d 1528, 1543 (9th Cir. 1985) (citing *Pico*, 457 U.S. at 871 (Brennan, J., plurality opinion)).

A monument speaks the day it is erected and for perpetuity until removed. It is not only the person who erected it who has spoken but descendants of those that erected it and all those that feel the same way or that join an association to protect the very speech the monument represents. Moreover, the people who will not see the monument are also affected by its removal as a part of history has been removed. Accordingly, Petitioners have suffered an injury-in-fact by the removal of the statues from the University of Texas campus and San Antonio's Travis Park Monument. They deserve to have their case heard on the merits to determine if the

Respondents complied with the Constitution in their removal of core political speech. They ask the Court to grant their writ.

II. If Article III Standing is Not Broad Enough to Encompass Those Who Continue the Speech, Then Collateral Standing Based on a Special Interest or Public Interest Should be Adopted

While standing to bring federal claims is based on Article III of the Constitution, there are other narrow, collateral options recognized by some states that support standing in this case. Special interest standing arises from the well-known history of attorney-general neglect in the enforcement of public charitable trusts and gifts. An alternative means of standing is sometimes necessary because "[s]tanding is not a technical rule intended to keep aggrieved parties out of court . . . [but][r]ather . . . is a practical concept designed to ensure that courts and parties are not vexed by suits brought to vindicate non-justiciable interests" *Grabowski v. City of Bristol*, CV950468889S, 1997 WL 375596, at *6 (Conn. Super. Ct. June 3, 1997), *aff'd*, 64 Conn. App. 448, 780 A.2d 953 (2001).

A. Some States Have Adopted Third Party Special Interest Standing to Enforce a Charitable Trust

The majority view for special interest standing to enforce a charitable trust is set forth in *Hooker v. Edes*

Home, 579 A.2d 608, 611 (D.C. 1990). In *Edes Home*, the District of Columbia Court of Appeals recognized a particular class of potential beneficiaries has a special interest in enforcing a public charitable trust if the class is sharply defined and its members are limited in number. *Id*. at 611. In order to limit the number of people who qualify for standing, the plaintiffs must show (1) they are sharply defined and a limited number of beneficiaries; and (2) the trustees or donees are proposing an extraordinary measure, threatening a trust's existence. *Id.* at 614.

In another case where special interest standing was recently examined, *In re Trust of Mary Baker Eddy*, 172 N.H. 266, 271, 212 A.3d 414, 419 (2019), the New Hampshire Supreme Court adopted a five-factor test to determine whether special interest standing exists. *Trust of Mary Baker Eddy*, 172 N.H. at 271, 212 A.3d at 419. The factors are: (1) the extraordinary nature of the acts complained of and the remedies sought; (2) the presence of bad faith; (3) the attorney general's availability and effectiveness; (4) the nature of the benefitted class and its relationship to the charity; and (5) the social desirability of conferring standing. *Id.* The Arizona Court of Appeals has adopted a modified version of the five-factor balancing test described above, giving special emphasis to the nature of the benefitted class and its relationship to the trust, the nature of the remedy requested, and the effectiveness of attorney general enforcement of the trust. *Schalkenbach Foundation v. Lincoln*, 208 Ariz. 176, 91 P.3d 1019, 1026 (Ariz. Ct. App. 2004). In *Alco Gravure, Inc. v. Knapp*

Found., 64 N.Y.2d 458, 479 N.E.2d 752 (1985), the New York Court of Appeals considered similar, albeit fewer, factors to determine whether the plaintiffs had a "special interest" in charitable funds and could maintain a suit. *Alco Gravure*, 490 N.Y.S.2d 116, 479 N.E.2d at 755-756. There, the court focused on the well-defined class of beneficiaries and the fact that they were challenging the dissolution of the charitable corporation, as opposed to the ongoing administration of the corporation, to conclude that the plaintiffs had standing. *Id.*

Here, the Petitioners met the standard set forth in *Edes Home* because McMahon has Confederate ancestry, the SCV is a well-defined group made up of descendants of Confederate soldiers and recognized by the Department of Veteran Affairs as a "lineage society" that maintains Civil War graves and cenotaphs and the SCV is also the successor in interest organization to the UCV. They qualify as a sharply defined and limited in number group. Black's Law Dictionary defines a successor in interest as "someone who follows another in ownership or control of property. A successor in interest retains the same rights as the original owner with no change in substance." Black's Law Dictionary 1660 (10th ed. 2014).

Further, the trustees or donees, the University and the City of San Antonio, have taken extraordinary measures that have negated the purpose of the gifts. The Texas Attorney General's availability and effectiveness is non-existent in this case, and the Attorney General's office has actually taken the side of the Respondents. Notably, two attorneys representing

Respondent Fenves, Heather Hacker and Henry Carl Myers, are with the Texas Attorney General's Office. Although all of the five factors may not be present as set forth in *Trust of Mary Baker Eddy*, the majority of factors weigh in favor of standing here. The Petitioners qualify for special interest standing and equity, and justice supports giving groups with a special interest the opportunity to challenge whether the Respondents violated the First Amendment in their haste to remove the statues and monument.

B. Other States Have Adopted Third Party Public Interest Standing to Allow for Enforcement of a Breach of Trust to the Public

The minority view of this sub-category of standing is more properly called public interest standing because it encompasses a broader group of people with standing to sue. With public interest standing, members of the public where a serious breach of a trust or gift to the public is threatened and the attorney general declines to bring suit or the attorney general sides against enforcement of the public charitable trust or gift may sue to enforce the trust or gift. In *Kapiolani Park Preservation Society v. City and County of Honolulu*, 751 P.2d 1022 (Haw. 1988), the Hawaii Supreme Court recognized this minority view by holding a citizens group had standing to sue the City of Honolulu to prevent the construction of a restaurant in Kapiolani Park contrary to the original intent of the gift of the land by Hawaiian royalty. *Id.* at 1025; *see also*

Grabowski, CV950468889S, 1997 WL 375596, at *6 (conferring standing on members of the public to enforce charitable trust provisions involving the creation, maintenance or preservation of public park property.); *Fitzgerald v. Baxter State Park Auth.*, 385 A.2d 189, 196 (Me. 1978) (held five plaintiffs, who were Maine citizens and used the state park in question, alleged sufficient direct and personal injury to give them standing to question the state's proposed activity in a state park, whether conceived in terms of "injury in fact," or "particularized injury."); *Schaeffer v. Newberry*, 227 Minn. 259, 260, 35 N.W.2d 287 (1948) (leaving open question of who would be authorized to participate in an action involving charitable trust if attorney general failed to do so).

The Hawaii Attorney General sided with the City of Honolulu, and the Hawaii Supreme Court ruled that the citizens had special interest standing because without it the citizens would be left without protection or a remedy. *Kapiolani Park Preservation Society*, 751 P.2d at 1025. If the citizens were not allowed to bring the suit to the attention of the court, the city would be free to dispose of parts of the trust as it chose without the citizens having any recourse to the courts. *Id.* Such a result would be contrary to all principles of equity and shocking to the conscience of the court. *Id*. Major Littlefield expressly stated in his testamentary devise that the gift was made to the benefit of the citizens of Texas, especially those born after 1860. Further, Petitioners McMahon and Brewer are both citizens of Texas, and have a public interest standing under

Kapiolani Park Preservation Society to bring suit. With the adoption of either special interest or public interest standing, Petitioners would have standing to bring their First Amendment claim against the Respondents.

III. Petitioner Brewer Met the Standard for Taxpayer Standing

Lastly, Petitioners ask this Court to grant a writ of certiorari to review the dismissal of Petitioner Brewer's claims despite taxpayer standing. Petitioner Brewer satisfies federal taxpayer standing. The Fifth Circuit held Petitioner Brewer abandoned his taxpayer standing argument by not raising it in oral argument citing *In re Thalheim*, 853 F.2d 383, 386 (5th Cir. 1988). *McMahon v. Fenves*, 946 F.3d 266, 270 (5th Cir. 2020); App. 7. However, in *Thalheim* the only reference the Court made to the argument abandoned in oral argument was:

> Appellant on oral argument *expressly* abandoned his appeal of his three-month suspension from practice before the district court that was based upon incidents giving rise to disciplinary action by the Louisiana Supreme Court. We summarily affirm the three-month suspension.

Thalheim, 853 F.2d at 386 (emphasis added). Brewer did not expressly abandon his taxpayer standing argument in oral argument. Further, an argument is considered abandoned where the appellant does not refer

to the contention either in his brief or on oral argument. *O'Neal v. Union Producing Co*., 153 F.2d 157, 158 (5th Cir. 1946) (emphasis added). Federal Rule of Appellate Procedure 34(c) governing oral argument does not require all arguments stated in a party's brief be made during oral argument. Thus, by including the argument in the appellants' brief, Brewer did not expressly abandon it.

Second, the district court applied the wrong standard to Brewer to determine whether he had federal taxpayer standing. This Court has ruled that resident taxpayers of a municipality have standing to challenge the municipality's illegal expenditure of funds. "Resident taxpayers may sue to enjoin an illegal use of the moneys of a municipal corporation." *Commonwealth of Massachusetts v. Mellon*, 262 U.S. 447, 486, 43 S. Ct. 597 (1923) (citing *Roberts v. Bradfield*, 12 App. D.C. 453, 458-459 (D.C. Cir. 1898), *aff'd*, 175 U.S. 291, 20 S. Ct. 121 (1899)). "The Interest of a taxpayer of a municipality in the application of its money is direct and immediate and the remedy by injunction to prevent their misuse is not inappropriate. It is upheld by a large number of state cases and is the rule of this court." *Mellon*, 262 U.S. at 486 (citing *Crampton v. Zabriskie*, 101 U.S. 601, 609, 25 L. Ed. 1070 (1879)); *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 349, 126 S. Ct. 1854 (2006) (recognizing *Mellon* for approving of standing of municipal residents to enjoin the "illegal use of the moneys of a municipal corporation," relying on "the peculiar relation of the corporate

taxpayer to the corporation" to distinguish such a case from the general bar on taxpayer suits).

Petitioner Brewer is a resident citizen of the City of San Antonio and has been a taxpayer there since 2002. The Respondents did not dispute this point. Thus, Petitioner Brewer has federal taxpayer standing under *Mellon* as set forth above to challenge the expenditure of taxpayer funds to remove the Travis Park Monument as it was unconstitutional.

This case presents this Court with the opportunity to broaden constitutional or common law standing to allow certain additional people or groups to defend and protect threatened historical monuments. This Court recently decided *American Legion v. American Humanist Ass'n*, U.S., 139 S. Ct. 2067, (2019) wherein the Court examined the display of a cross memorial to WWI veterans erected in 1925 to determine whether it violated the Establishment Clause. Justice Alito delivered the following concluding paragraph of the opinion:

> The cross is undoubtedly a Christian symbol, but that should not blind us to everything else that the Bladensburg Cross has come to represent. For some, that monument is a symbolic resting place for ancestors who never returned home. For others, it is a place for the community to gather and honor all veterans and their sacrifices for our Nation. For others still, it is a historical landmark. For many of these people, destroying or defacing the Cross that has stood undisturbed for nearly a

> century would not be neutral and would not further the ideals of respect and tolerance embodied in the First Amendment.

Id. at 2090. Removing monuments that have been standing for decades erases an opportunity for Americans to learn history and understand those that sacrificed their lives for what they believed in. Monuments are visible manifestations of history. They provide an opportunity for the public to briefly experience and learn about a historical event or a person or group remembered for something that they did. For the government to eliminate certain monuments because of the way they are now interpreted and then for courts to say no one has the right to challenge the removal is revisionist history of the worst sort. All Petitioners ask is this Court to give them an opportunity to protect and defend these historical and artistic treasures in a court of law.

CONCLUSION

For the foregoing reasons, the Court should grant a writ of certiorari.

Respectfully submitted,

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