App. 1

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50710

DAVID MCMAHON; STEVEN LITTLEFIELD; TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INCORPORATED,

Plaintiffs - Appellants

v.

PRESIDENT GREGORY L. FENVES, In His Official Capacity as President of the University of Texas at Austin,

Defendant - Appellee

****

Consolidated with 18-50800

RICHARD BREWER; TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INCORPORATED,

Plaintiffs - Appellants

v.

RON NIRENBERG, Mayor of the City of San Antonio, 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 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; MANUEL 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; CITY OF SAN ANTONIO,

Defendants - Appellees

No. 18-50710 c/w
No. 18-50800

Appeals from the United States District Court
for the Western District of Texas

(Filed Jan. 3, 2020)

Before CLEMENT, ELROD, and DUNCAN, Circuit Judges.

EDITH BROWN CLEMENT, Circuit Judge:

This consolidated case involves First Amendment and state-law challenges to the removal or relocation of Confederate monuments from a San Antonio park and on the University of Texas's Austin campus. In the University case, David McMahon, Steven Littlefield, and the Texas Division of the Sons of Confederate Veterans sued the University of Texas to reverse its decision to relocate several Confederate statues. In the San Antonio case, Richard Brewer and the Texas Division

of the Sons of Confederate Veterans first moved to temporarily restrain the City of San Antonio from removing a Confederate monument and two cannons from a City park and then moved to compel their reinstallation. Both district courts dismissed Plaintiffs' First Amendment claims for lack of standing and then declined to exercise supplemental jurisdiction over their state-law claims. Plaintiffs appealed. We affirm the district courts' dismissals.

I.

In the early 1900s, Major George Littlefield, a Civil War veteran, donated funds to the University of Texas to build a "massive bronze arch over the south entrance to the campus," a statue of President Woodrow Wilson, and statues of five Confederate leaders: Jefferson Davis, Robert E. Lee, Albert Sidney Johnston, and John H. Reagan. The University placed the statues on its campus in the 1930s, but never built the arch.

About a century later, University President Gregory Fenves had the statues relocated. Plaintiffs David McMahon, Steven Littlefield, and the Texas Division of the Sons of Confederate Veterans sued to enjoin the University—first in state court and then in federal court in Austin—to reverse its decision to relocate the statues. *See McMahon v. Fenves*, 323 F. Supp. 3d 874 (W.D. Tex. 2018). The Texas trial court dismissed the suit for lack of standing; the Texas court of appeals affirmed; the Texas Supreme Court denied review. *See*

Bray v. Fenves, No. 06-15-00075-CV, 2016 WL 3083539 (Tex. App.—Texarkana Mar. 24, 2016, pet. denied) (mem. op.).

Plaintiffs' federal complaint alleges First Amendment and Texas Monument Protection Act violations and claims that the Board of Regents breached the bequest agreement and exceeded its authority over the University. The Sons of Confederate Veterans are a non-profit organization, and McMahon and Littlefield claim to be "descendant[s] of Confederate veterans," with Littlefield a descendant of Major Littlefield. Fenves moved to dismiss for lack of subject-matter jurisdiction, arguing that Plaintiffs lacked standing because they did not suffer a concrete and particularized injury. The district court granted Fenves's motion, holding that Plaintiffs' familial ties to Confederate veterans did not mean that relocating Confederate statues, which allegedly silenced Plaintiffs' political viewpoint, caused them a cognizable injury. *McMahon*, 323 F. Supp. 3d at 879-81. The court, citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992), stated that "[o]ur system of governance assigns the vindication of value preferences to the democratic political process, not the judicial process." *Id.* at 880. After the court dismissed Plaintiffs' First Amendment claim, it declined to exercise supplemental jurisdiction over their remaining state-law claims. *Id.* at 881-82.

In the San Antonio case, the City Council gave the United Daughters of the Confederacy permission to erect a "Confederate Monument" in a City park in 1899. About ten years later, the City placed two

cannons next to the monument. According to meeting minutes from the Albert Sidney Johnston Camp of the United Confederate Veterans, Congress donated the cannons "for the benefit of the Confederate Camp."[1]

About a century later, the City Council passed an ordinance to remove the monument and cannons from the park. The Texas Division of the Sons of Confederate Veterans, this time with Richard Brewer, sued the City in federal court in San Antonio. *See Brewer v. Nirenberg*, No. SA:17-CV-837-DAE, 2018 WL 8897851 (W.D. Tex. Sept. 17, 2018). They moved for a temporary restraining order to prevent the City from removing the monument and cannons. The district court denied the motion, but ordered the City to remove the monument "in such a manner as to preserve [its] integrity," and further, that it "be stored in a secure location in order to protect it from damage or from being defaced[,] pending resolution of this lawsuit." *Id.* at *1. Plaintiffs then amended their complaint, adding as Defendants the City Councilmembers in their individual capacities and alleging claims for First Amendment and Texas Antiquities Code violations, for rendering impossible a charitable gift's purpose, and for conversion. The City moved for summary judgment on all Plaintiffs' claims, and the individual Defendants moved to dismiss.

The district court granted the City's summary-judgment motion on Plaintiffs' First Amendment claim,

---

[1] Presumably, "Confederate Camp" refers to the Albert Sidney Johnston Camp.

holding that Plaintiffs lacked standing because their alleged injuries were not particularized. *Id.* at *4. The San Antonio court followed the Austin court's lead, stating that, though "Plaintiffs are likely more deeply attached to the values embodied by the Monument than the average person walking through [the City park], . . . 'their identities as descendants of Confederate veterans do not transform an abstract ideological interest in preserving the Confederate legacy into a particularized injury.'" *Id.* (quoting *McMahon*, 323 F. Supp. 3d at 880).

Brewer, unlike the individual Plaintiffs in the University case, also asserted standing as a municipal taxpayer. The court held that, because the monument was removed and the funds to do so were already expended, Brewer's request to enjoin the removal and the expenditure was moot. *Id.* at *5. It also held that, because Brewer no longer sought an injunction and because taxpayers lack standing to sue for previously expended funds, he lacked taxpayer standing. *Id.* With all Plaintiffs' federal claims dismissed, the court declined to exercise supplemental jurisdiction over Plaintiffs' state-law claims and then denied the individual Defendants' motion to dismiss as moot. *Id.* at *6.

Plaintiffs in both cases appealed, and the cases were consolidated.

II.

The issue before us is whether Plaintiffs have standing to bring their First Amendment claims.[2] We review whether jurisdiction exists de novo. *Physician Hosps. of Am. v. Sebelius*, 691 F.3d 649, 652 (5th Cir. 2012). The party asserting jurisdiction has the burden of establishing it. *Id.* At the motion-to-dismiss stage, this means "alleg[ing] a plausible set of facts establishing jurisdiction." *Id.*; *see* FED. R. CIV. P. 12(b)(1).

Plaintiffs argue that they have standing under *Lujan* to bring their free-speech claims. Brewer argued in his briefing that he has municipal-taxpayer standing to bring his free-speech claim, but abandoned this ground for standing at oral argument. We therefore do not address that issue. *See, e.g.*, *In re Thalheim*, 853 F.2d 383, 386 (5th Cir. 1988) ("summarily affirm[ing]" the district court on a claim that appellant "expressly abandoned" at oral argument).

To establish standing, Plaintiffs must show that they have suffered an injury in fact: a personal injury that is traceable to the defendant's alleged conduct and that is likely to be redressed by a favorable decision. *Lujan*, 504 U.S. at 560-61. This injury must be both "concrete" and "particularized." *Id.* at 560. An injury is particularized if it "affect[s] the plaintiff in a personal

[2] Plaintiffs' other claims arise under state law. Both district courts declined to exercise discretionary supplemental jurisdiction over these state-law claims after dismissing Plaintiffs' free-speech claims. Plaintiffs do not challenge this holding on appeal. Thus, Plaintiffs have forfeited any argument that the district courts erred in not exercising jurisdiction over these claims.

and individual way." *Id.* at 560 n.1. That is, the plaintiff must have "a direct stake in the outcome." *See Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). To satisfy this injury-in-fact test, Plaintiffs therefore must allege more than an injury to *someone's* concrete, cognizable interest; they must "be [themselves] among the injured." *Id.* at 734-35.

Plaintiffs argue that, because they have unique ties to these Confederate monuments and to the Confederacy, these monuments express Plaintiffs' political viewpoint and, therefore, that Defendants' removal or relocation of these monuments violated Plaintiffs' First Amendment rights. That is, Plaintiffs claim to have standing because moving these monuments injured *their* free-speech rights. But even if Plaintiffs allege a concrete free-speech interest—i.e., if moving these monuments even implicates the First Amendment—they fail to show that the violation of this interest is, in fact, an injury to *their* rights. This is because, though these ties might give Plaintiffs strong reasons to care about these monuments, Plaintiffs fail to explain how these ties give Plaintiffs a First Amendment-based stake in the outcome of this litigation. They claim that these monuments are their speech, but fail to plausibly allege how these ties make that so.

The United Daughters of the Confederacy, Major Littlefield, and Congress donated these monuments or the funds to build them. Plaintiffs argue on appeal that these donors or the beneficiaries of these donations collaborated with the University or the City when erecting or placing them and, therefore, co-authored

the political speech that the monuments express. But Plaintiffs never argue that *they* donated the monuments or the funds for building them or explain how *they* "co-authored" the monuments' speech. So even if displaying these monuments was private speech, and even if moving them impermissibly abridged that speech, Plaintiffs have failed to plausibly show that these monuments are *their* speech.

To be clear, Plaintiffs do not assert these free-speech claims on another party's behalf. If they did, prudential limitations on standing would likely bar their suit. *See, e.g.*, *Warth v. Seldin*, 422 U.S. 490, 499 (1975) ("[A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). Nor do they assert that they attempted to speak but that the University or the City thwarted that attempt. *Cf., e.g.*, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) (state university denied student group funding to print student newspaper). Nor that they have been prevented from hearing speech. *C.f., e.g.*, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 576 (1980) ("Free speech carries with it some freedom to listen."). Instead, they insist that they suffered a particularized First Amendment injury because moving these monuments abridged *their* speech. But their position is based on a fundamental confusion about what makes an injury particularized.

Plaintiffs state several reasons why they are particularly invested in these monuments. They feel strongly about the message these monuments supposedly convey

about the Confederacy and the Civil War. They claim to be descendants of Confederate veterans, including one of the donors. They claim that these monuments were public charitable gifts and that Plaintiffs are among the intended beneficiaries. For example, they argue that the cannons were donated for the benefit of the United Confederate Veterans and that the Sons of Confederate Veterans, as the successor association to that group, is now that gift's intended beneficiary. Plaintiffs therefore care deeply about preserving monuments that convey a viewpoint that they support and that, they believe, their ancestors donated for their benefit. And Plaintiffs believe that these ties give them unique reasons for caring about these monuments, which means that their allegedly unconstitutional removal caused Plaintiffs a particularized injury—it is particular to them because only they have these alleged ties. But that is not how particularity works. Plaintiffs confuse having particular reasons for caring about these monuments with having a particularized injury.

Plaintiffs would of course prefer a world where the University and the City display Plaintiffs' favored monuments. Plaintiffs provide reasons—presumably strong ones—for why they are more attached to the monuments' viewpoint than the general public is. But strong reasons are no better than weak ones at giving Plaintiffs a direct and personal stake in this litigation. To be sure, we do not doubt that Plaintiffs are offended by the removal of these monuments or that they feel this offense more acutely because of their familial ties.

These ties, however, do not distinguish Plaintiffs from any other persons who might claim offense at the removal of these monuments. This is because these ties affect only the magnitude of Plaintiffs' indignation, not the nature of their injury. For Plaintiffs, their injury is the pain of believing that a certain expression of a viewpoint with which they agree has been unconstitutionally removed from public display. That is a generalized psychological injury, not a particularized free-speech one—it is felt by all who are offended by this removal. That Plaintiffs are more offended than someone who is likeminded yet lacks these ties does not make that generalized injury particularized. Nor does it morph these monuments into Plaintiffs' own speech. Plaintiffs have shown only a rooting interest in the outcome of this litigation, not a direct and personal stake in it. They are in the same position as any enthusiastic onlooker.

Moreover, Plaintiffs' contentions that they are the beneficiaries of these gifts or are the successors-in-interest to a beneficiary are red herrings. The standing this might confer is for their state-law claims—e.g., that the University breached a bequest agreement or that the City rendered a charitable gift impossible—not for their First Amendment claims. Thus, these facts are irrelevant to whether Plaintiffs have standing for their federal claims.

The fundamental and fatal flaw with Plaintiffs' argument is that they conflate agreeing with speech with authoring speech. They claim that their speech has been abridged, yet conspicuously absent from their

allegations is anything showing this to be true. Plaintiffs merely agree with the ideas that they feel these monuments express and sued in hopes of keeping them on display. They are undoubtedly passionate about these ideas and are upset that symbols of their values, like these monuments, have been removed from the public square. But what Plaintiffs seek is only to "vindicate their own value preferences," not to redress a First Amendment injury particular to them. *See Sierra Club*, 405 U.S. at 740. Their passion, however sincere, does not place them among the injured. Thus, Plaintiffs have not alleged a particularized injury.

III.

Because Plaintiffs have not alleged a particularized injury, they lack standing to bring their First Amendment claims. We AFFIRM the district courts' judgments.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 18-50800

D.C. Docket No. 5:17-CV-837

RICHARD BREWER; TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INCORPORATED,

Plaintiffs - Appellants

v.

RON NIRENBERG, Mayor of the City of San Antonio, 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 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; MANUEL 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; CITY OF SAN ANTONIO,

Defendants - Appellees

Appeal from the United States District Court for the Western District of Texas

(Filed Jan. 3, 2020)

Before CLEMENT, ELROD, and DUNCAN, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 18-50710

D.C. Docket No. 1:17-CV-822

DAVID MCMAHON; STEVEN LITTLEFIELD; TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INCORPORATED,

Plaintiffs - Appellants

v.

PRESIDENT GREGORY L. FENVES, In His Official Capacity as President of the University of Texas at Austin,

Defendant – Appellee

Appeals from the United States District Court for the Western District of Texas

(Filed Jan. 3, 2020)

Before CLEMENT, ELROD, and DUNCAN, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and was argued by counsel.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

UNITED STATES DISTRICT COURT
for the
Western District of Texas

Richard Brewer, et al. *Plaintiff*	)	
v.	)	Civil Action No. SA-17-CV-837-DAE
Ron Nirenberg, et al. *Defendant*	)	

JUDGMENT IN A CIVIL ACTION

(Filed Sep. 17, 2018)

The court has ordered that *(check one)*:

☐ the plaintiff *(name)* _____ recover from the defendant *(name)* _____ the amount of _____ dollars

($ _____), which includes prejudgment interest at the rate of ____ %, plus postjudgment interest at the rate of ____ %, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant *(name)* _____ recover costs from the plaintiff *(name)* _____

☑ Other:

The Court GRANTS Defendants' Motion for Summary Judgment or, in the Alternative, Motion to Dismiss, and DENIES AS MOOT Defendants Nirenberg, et.al., Plaintiffs' federal law claims are DISMISSED for LACK

OF STANDING, Plaintiffs' state law claims are DISMISSED WITHOUT PREJUDICE.

This action was *(check one)*:

☐ tried by a jury with Judge _____ presiding, and the jury has rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision was reached.

☒ decided by Judge David Alan Ezra.

Date: 09/17/2018 *CLERK OF COURT*

Wayne Garcia
Signature of Clerk or Deputy Clerk

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

RICHARD BREWER, and TEXAS DIVISION SONS OF CONFEDERATE VETERANS, INC.,	§ No. SA:17-CV-837-DAE § § §
Plaintiffs,	§
vs.	§
RON NIRENBERG, ROBERTO TREVINO, WILLIAM SHAW, REBECCA VIAGRAN, REY SALDANA, SHIRLEY GONZALES, GREG BROCKHOUSE, ANA SANDOVAL, MANNY PALAEZ, JOHN COURAGE, CLAYTON PERRY, and the CITY OF SAN ANTONIO,	§ § § § § § § § § § § §
Defendants.	§

ORDER GRANTING MOTION FOR SUMMARY JUDGMENT; DENYING AS MOOT MOTION TO DISMISS

(Filed Sep. 17, 2018)

Before the Court are Defendants the Mayor of San Antonio, Texas, and ten members of the San Antonio City Council's Motion for Summary Judgment or Alternatively, Motion to Dismiss (Dkt. # 54), and Defendants Nirenberg, Trevino, Shaw, Viagran, Saldana,

Gonzales, Brockhouse, Sandoval, Palaez, Courage and Perry, in their individual capacities' Rule 12(b)(6) Motion to Dismiss (Dkt. # 59). Pursuant to Local Rule CV-7(h), the Court finds these matters suitable for disposition without a hearing. Upon careful consideration of the arguments asserted in the parties' memoranda, the Court, for the reasons that follow, **GRANTS** the Motion for Summary Judgment (Dkt. # 54), and **DENIES AS MOOT** the Motion to Dismiss (Dkt. # 59).

BACKGROUND

The Sons of Confederate Veterans ("Confederate Veterans) is an organization dedicated to preserving the memory of Americans who fought for the Confederacy during the Civil War.[1] (See Dkt. # 44.) According to the Confederate Veteran's website, its membership is limited to male descendants of Confederate Veterans. See http://www.scv.org/new/. Defendants are the Mayor and City Council members of the City of San Antonio. (Dkt. # 44 at 1–3.)

In August 2017, the San Antonio City Council enacted an ordinance for the removal of a Confederate Monument ("the Monument") located in Travis Park in downtown San Antonio. On August 31, 2017, the City Council voted to remove the Monument. One day before, on August 30, 2017, Plaintiffs Richard Brewer and the Texas Division of the Confederate Veterans

[1] Although not clear from Plaintiffs' filings, the individual Plaintiff is presumably a member of the Confederate Veterans. (See Dkts. ## 1, 2.)

(collectively, "Plaintiffs"), filed suit against Defendants in this Court, alleging federal claims under the First Amendment and for Due Process, as well as state law claims for attempted trespass to land and for breach of an easement. (Dkt. # 1.) Plaintiffs simultaneously filed a motion for Temporary Restraining Order ("TRO"), asking the Court to immediately restrain Defendants from removing the Monument. (Dkt. # 2.) After a hearing, the Court denied the motion for TRO, but directed that the removal of the Monument be carried out in such a manner as to preserve the integrity of the Monument, and that the Monument be stored in a secure location in order to protect it from damage or from being defaced pending resolution of this lawsuit. (Dkt. # 7 at 8-9.) On September 1 and 2, 2017, the City removed the Monument.

After several other filings in this case, Plaintiffs were granted leave to file a second amended complaint. (Dkt. # 44.) Plaintiffs' second amended complaint added a new defendant, the City of San Antonio ("the City"), and added that suit be brought against each council member in both their official and individual capacities. (Id.) The complaint alleges causes of action for violation of free speech, violation of the Texas Antiquities Code, a claim for charitable trust/gift, and a conversion claim. (Id.)

On July 16, 2018, Defendants filed the motion for summary judgment or, in the alternative, motion to dismiss. (Dkt. # 54.) On August 13, 2018, Plaintiffs filed a response in opposition. (Dkt. # 56.) Defendants filed a reply on August 27, 2018. (Dkt. # 58.) On September

4, 2018, Defendant council members, in their individual capacities, filed the motion to dismiss. (Dkt. # 59.)

LEGAL STANDARD

I. Summary Judgment

A movant is entitled to summary judgment upon showing that "there is no genuine dispute as to any material fact," and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); see also Meadaa v. K.A.P. Enters., L.L.C., 756 F.3d 875, 880 (5th Cir. 2014). A dispute is only genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party bears the initial burden of demonstrating the absence of any genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party meets this burden, the nonmoving party must come forward with specific facts that establish the existence of a genuine issue for trial. Distribuidora Mari Jose, S.A. de C.V. v. Transmaritime. Inc., 738 F.3d 703, 706 (5th Cir. 2013) (quoting Allen v. Rapides Parish Sch. Bd., 204 F.3d 619, 621 (5th Cir. 2000)). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Hillman v. Loga, 697 F.3d 299, 302 (5th Cir. 2012) (quoting Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986)).

In deciding whether a fact issue has been created, the court must draw all reasonable inferences in favor of the nonmoving party, and it "may not make credibility determinations or weigh the evidence." Tiblier v. Dlabal, 743 F.3d 1004, 1007 (5th Cir. 2014) (quoting Reeves v. Sanderson Plumbinu Prods., Inc., 530 U.S. 133, 150 (2000)). However, "[u]nsubstantiated assertions, improbable inferences, and unsupported speculation are not sufficient to defeat a motion for summary judgment." United States v. Renda Marine, Inc., 667 F.3d 651, 655 (5th Cir. 2012) (quoting Brown v. City of Hous., 337 F.3d 539, 541 (5th Cir. 2003)).

II. Federal Rule of Civil Procedure 12

Rule 12(c) provides that "[a]fter the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings." The standard for deciding a motion under Rule 12(c) is the same as the one for deciding a motion to dismiss under Rule 12(b)(6). See Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 313 n.8 (5th Cir. 2002) ("A number of courts have held that the standard to be applied in a Rule 12(c) motion is identical to that used in a Rule 12(b)(6) motion." (citation and internal quotation marks omitted)).

Under Rule 12(b)(6), the court evaluates the pleadings by "accept[ing] 'all well-pleaded facts as true, viewing them in the light most favorable to the plaintiff[s].'" In re Katrina Canal Breaches Litig., 495 F.3d 191, 205 (5th Cir. 2007) (quoting Martin K. Eby Constr.

Co. v. Dall. Area Rapid Transit, 369 F.3d 464, 467 (5th Cir. 2004)). To survive defendants' motions, plaintiffs' pleadings must allege enough facts "to state a claim to relief that is plausible on its face." Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "A claim has facial plausibility when the plaintiff[s] plead[ ] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." Id. (quoting Twombly, 550 U.S. at 556); see also Twombly, 550 U.S. at 555 ("Factual allegations must be enough to raise a right to relief above the speculative level[.]"). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'shown'—'that the pleader is entitled to relief.'" Iqbal, 556 U.S. at 679 (alteration omitted) (quoting Rule 8(a)(2)).

Furthermore, under Rule 8(a)(2), a pleading must contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Although "the pleading standard Rule 8 announces does not require 'detailed factual allegations,' it demands more than 'labels and conclusions.'" Iqbal, 556 U.S. at 678 (quoting Twombly, 550 U.S. at 555). And "'a formulaic recitation of the elements of a cause of action will not do.'" M. (quoting Twombly, 550 U.S. at 555).

DISCUSSION

Defendants' motion for summary judgment seeks dismissal of Plaintiffs' claims on the basis that: (1) Plaintiffs lack standing to bring some or all of the claims; (2) Plaintiffs have failed to state a claim on which relief can be granted; (3) there is no evidence to support one or more element of Plaintiffs asserted causes of action; and (4) the Court lacks jurisdiction over some of the claims. (Dkt. # 54.) The Court will first consider whether Plaintiffs have standing to bring any of their claims.

Defendants argue that Plaintiffs do not have standing to bring some or all of their claims. (Dkt. # 54.) Defendants contend that Plaintiffs have not alleged any particularized interest and therefore have not alleged a sufficient injury in fact to confer standing. Defendants also assert that Plaintiff Brewer does not have taxpayer standing nor do Plaintiffs have organizational standing.

To have standing to sue, a plaintiff must show that he personally suffered some actual or threatened injury, that the injury is fairly traceable to the defendant's challenged action, and that the relief requested will redress the injury. Doe v. Tamipahoa Parish Sch. Bd., 494 F.3d 494, 496 (5th Cir. 2007); Center for Individual Freedom v. Carmouche, 449 F.3d 655, 659 (5th Cir. 2006) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992)). In addition, the injury must be an "invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or

imminent, not conjectural or hypothetical." Lujan, 504 U.S. at 560. The Fifth Circuit strictly enforces the standing requirement as an essential element of subject matter jurisdiction. See Doe, 494 F.3d at 498 (citing Bender v. Williamsport Area Sch. Dist., 475 U.S. 534, 541–42 (1986)).

A. Concrete and Particularized

To satisfy the injury-in-fact prong, a plaintiff must allege an invasion of a "legally protected interest," that is both "concrete and particularized." Plaintiffs assert they have standing to sue on the basis that "Defendants impermissible restriction of plaintiffs' right to expression of their political viewpoint is a restriction of a legally protected interest." (Dkt. # 56 at 17–18.) In other words, Plaintiffs contend that the City engaged in viewpoint discrimination when the City removed the Monument. According to Plaintiffs, their viewpoint—glorifying a Confederate legacy—was reflected in the Monument. (Id.) Additionally, they allege they were injured "by [Defendants] rendering impossible the public charitable gift of political speech intended to benefit plaintiffs and expressed by the Monument group." (Id.)

Plaintiffs further assert that their injuries were particularized because Defendants' removal of the Monument terminated political speech that Defendants and Plaintiffs had jointly established in 1908. (Dkt. # 56 at 17.) Plaintiffs argue that "[t]his injury is particularized[ ] because no one else was involved in

the mutually joined speech act of placing the Monument ensemble, except plaintiffs and defendants." (Id. at 17–18.) According to Plaintiffs, when the Monument was removed, Defendants "terminated plaintiffs' jointly established political speech," injuring Plaintiffs alone because Plaintiffs had "directed the establishment of the speech act and defendants acted in agreement for 110 years." (Id. at 18.)

When standing is contested, the appropriate inquiry is whether the interest is cognizable in the abstract, and then, whether such interest is concrete and particularly felt by those bringing suit; if the interest alleged is both cognizable and particularly felt, it is an injury in fact. See Lujan, 504 U.S. at 563 ("[T]he injury in fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured."). Here, Plaintiffs' interest is cognizable and Plaintiffs have satisfied a concrete interest—free speech. See Pleasant Grove City, Utah v. Summum, 555 U.S. 460 (2009); Church of Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993). Concreteness, however, is not enough—the interest must also be particularized.

Notably, Plaintiffs have not complained that Defendants have taken any direct action again either Brewer or the Confederate Veterans. Instead, they complain, as stated above, that they "directed the establishment of the speech [contained in the Monument] and defendants acted in agreement for 110 years," and were thus injured by the Monument's removal. However, as our sister court in Austin recently held on

a very similar case, "[s]ubjective ideological interests—no matter how deeply felt—are not enough to confer standing." McMahon v. Fenves, No. 1:17-CV-822-LY, 2018 WL 3118692, at *4 (W.D. Tex. June 25, 2018) (citing Sierra Club v. Morton, 405 U.S. 727, 729-35 (1972)). "Our system of governance assigns the vindication of value preferences to the democratic political process, not the judicial process, see Lujan, 504 U.S. at 576, 112 S.Ct. 2130, because limiting the right to sue to those most immediately affected 'who have a direct stake in the outcome' prevents judicial review 'at the behest of organizations who seek to do no more than vindicate their own value preferences.' " Id. (quoting Sierra Club, 405 U.S. at 740). Here, Plaintiffs seek to do just that. Plaintiffs are likely more deeply attached to the values embodied by the Monument than the average person walking through Travis Park, "but their identities as descendants of Confederate veterans do not transform an abstract ideological interest in preserving the Confederate legacy into a particularized injury." See id. Thus, the alleged free-speech injury of Plaintiffs, while perhaps cognizable in the abstract, is not an injury in fact.

B. Taxpayer Standing

Still, Plaintiff Brewer asserts that he has taxpayer standing to bring his claims. (Dkt. # 44.) Taxpayer standing is an exception to the general rule that the plaintiff must show a particularized injury distinct from that suffered by the public. See Bland Indep. Sch. Dist. v. Blue, 34 S.W.3d 547, 555-56 (Tex. 2000); Hendee

v. Dewhurst, 228 S.W.3d 354, 373-74 (Tex. App.—Austin 2007, pet. denied). A plaintiff relying on taxpayer standing can seek to enjoin *prospective* expenditures of public funds, but cannot recover funds *already expended*. Williams v. Huff, 52 S.W.3d 171, 180 (Tex. 2001) (emphasis added). To establish taxpayer standing, a plaintiff must show that (1) he is a taxpayer, and (2) public funds *are to be* expended on the allegedly illegal activity. Id. at 179; Ehm v. San Antonio City Council, 269 F. App'x 375, 377 (5th Cir. 2008) (per curiam).

The "illegal expenditure" exception is a long-recognized, but narrowly limited, exception to the general prohibition against recognizing taxpayer standing. See Williams, 52 S.W.3d at 180; Bland Indep. Sch. Dist., 34 S.W.3d at 555 (both quoting Osborne v. Keith, 177 S.W.3d 198, 200 (Tex. 1944)). The limited standing permitted a taxpayer under this exception applies only when the taxpayer seeks (1) to challenge a proposed, allegedly illegal, expenditure and (2) to enjoin the expenditure. See Williams, 52 S.W.3d at 181; Bland Indep. Sch. Dist., 34 S.W.3d at 556 (both citing Hoffman v. Davis, 100 S.W.2d 94, 96 (1937)).

Brewer asserts that he has taxpayer standing because he is a resident taxpayer of San Antonio and he has contested the removal of the Monument as unconstitutional. (Dkt. # 44 at 11.) He further argues that Defendants expended taxpayer funds in the illegal removal. (Id.) In response, Defendants contend that Plaintiffs have no evidence that the City is *currently* spending taxpayer funds in relation to the Monument,

nor any evidence that taxpayer funds will be spent in the future. (Dkt. # 54 at 12.) Defendants further argue that Brewer cannot maintain taxpayer standing because Plaintiffs' second amended complaint fails to plead any request for injunctive relief. (Id.)

Here, the Court must consider the issue of Brewer's standing as a taxpayer in context. Plaintiffs filed suit in this case just prior to the removal of the Monument, and thus it would seem likely, at that time, Brewer had taxpayer standing to challenge and enjoin the removal of the Monument since taxpayer funds were proposed to be prospectively spent on its removal. (See Dkt. # 56-1.) Thus, the Court proceeded to consider the merits of Plaintiffs' challenge in its Order on Plaintiffs' Motion for Temporary Restraining Order. (Dkt. # 7.) While the Court noted in its Order that Plaintiffs had not alleged how they had standing to challenge the removal, the Court nonetheless proceeded to review Plaintiffs' motion, stating that "even if Plaintiffs can demonstrate standing, they have not established the elements necessary for the Court's issuance of a TRO." (Id. at 4.) Thus, even though Plaintiffs had not yet pled or demonstrated standing, given the sensitive timing of the request, the Court assumed that Plaintiffs had, or could at least demonstrate, taxpayer standing.

Since that time, the Monument was removed and the taxpayer funds used on its removal were previously expended. As a result, there is nothing left to enjoin from Plaintiffs' original complaint. Indeed, Plaintiffs' second amended petition no longer seeks injunctive relief. (See Dkt. # 44.) Accordingly, the original

issue for which Plaintiffs filed suit is moot. See Envtl. Conserv. Org. v. City of Dall., 529 F.3d 519, 524–25 (5th Cir. 2008) ("'Mootness is the doctrine of standing in a time frame. The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness).'" (quoting U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 397 (1980))). Given this, the Court does not see how Plaintiffs can now maintain taxpayer standing to assert the claims alleged in their second amended complaint. The taxpayer funds have already been spent to remove the Monument, and Plaintiffs' second amended complaint no longer seeks to enjoin future, allegedly illegal expenditures of public funds. The second amended complaint alleges only that "Defendants *expended* taxpayer funds in the illegal removal." (Dkt. # 44 at 11.)

While not binding on this Court, the Texas Supreme Court has determined that a taxpayer may maintain an action solely to challenge *proposed* illegal expenditures; he or she may not sue to recover funds *previously* expended or challenge expenditures that are merely "unwise or indiscreet." Williams, 52 S.W.3d at 180 (citing Hoffman, 100 S.W.2d at 96; Osborne, 177 S.W.2d at 200). Only the public entity affected by an allegedly illegal expenditure has standing to sue to recover already expended funds. See Bland Indep. Sch. Dist., 34 S.W.3d at 556 (quoting Hoffman, 100 S.W.2d at 96). Accordingly, because Plaintiffs no longer seek to enjoin the prospective expenditure of taxpayer funds on allegedly illegal activity, the Court finds that Brewer

lacks taxpayer standing to bring the claims alleged in Plaintiffs' second amended complaint.

C. Organizational Standing

To the extent the Confederate Veterans rely on associational or organizational standing to bring their claims, this too fails. An association seeking to "bring suit on behalf of its members" has standing only if "its members would otherwise have standing to sue in their own right." Hunt v. Washington State Apple Advert. Comm'n, 432 U.S. 333, 343 (1977).

Here, the Confederate Veterans have not alleged any injury different from that of Brewer. Though the Confederate Veterans argue the injury is unique to its members, it is the same injury alleged by Brewer and is not sufficient to confer standing. Because the Confederate Veterans plead no injury to its members other than an injury rejected by this Court, as stated above, it has not pleaded that "its members would otherwise have standing to sue in their own right." Accordingly, the Confederate Veterans lack associational standing to bring this lawsuit.

An "organization can establish standing in its own name if it meets the same standing test that applies to individuals." OCA-Greater Houston v. Texas, 867 F.3d 604, 610 (5th Cir. 2017). Plaintiffs' response to Defendants' motion for summary judgment fails to produce any argument or evidence in support of organizational standing. In any case, as addressed above, Plaintiffs have failed to allege a concrete, particularized, and

imminent injury; therefore, Plaintiffs have not demonstrated that they have organizational standing.

D. State-Law Claims and Supplemental Jurisdiction

To the extent Plaintiffs have standing to bring any state-law causes of action, the Court will decline to exercise supplemental jurisdiction over them. A court may decline to exercise supplemental jurisdiction over state-law claims when it has "dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c)(3); see also Artis v. District of Columbia, ___ U.S. ___, 138 S. Ct. 594, 597-98 (2018) ("When district courts dismiss all claims independently qualifying for the exercise of federal jurisdiction, they ordinarily dismiss as well all related state claims."); accord Heggemeier v. Caldwell Cty., Texas, 826 F.3d 861, 872-73 (5th Cir. 2016). The Sixth Court of Appeals of Texas considered and rejected similar state-law claims brought by some of these Plaintiffs. See Bray v. Femes, No. 6-15-00075-CV, 2016 WL 3083539 (Tex. App.—Texarkana Mar. 24, 2016, pet. denied). Since all federal law claims have been dismissed for lack of standing,[2] this Court will not exercise its supplemental jurisdiction over any remaining state-law claims.

---

[2] The Court takes no position on whether Plaintiffs' alleged injuries finds support in First Amendment case law or would ultimately be successful on the merits. See Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (refusing to decide merits before resolving Article III jurisdictional questions "because it carries the courts beyond the bounds of authorized judicial action").

CONCLUSION

For the foregoing reasons, the Court **GRANTS** Defendants' Motion for Summary Judgment or, in the Alternative, Motion to Dismiss (Dkt. # 54), and **DENIES AS MOOT** Defendants Nirenberg, Trevino, Shaw, Viagran, Saldana, Gonzales, Brockhouse, Sandoval, Palaez, Courage and Perry, in their individual capacities' Rule 12(b)(6) Motion to Dismiss (Dkt. # 59). Plaintiffs' federal law claims are **DISMISSED for LACK OF STANDING**; Plaintiffs' state law claims are **DISMISSED WITHOUT PREJUDICE**. The Clerk's Office is **INSTRUCTED to CLOSE THE CASE**.

IT IS SO ORDERED.

DATED: San Antonio, Texas, September 17, 2018.

/s/ David Alan Ezra
David Alan Ezra
Senior United States
Distict Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DAVID MCMAHON, STEVEN LITTLEFIELD, AND THE TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC.,	§	
PLAINTIFFS,	§	
V.	§	CAUSE NO. 1:17-CV-822-LY
GREGORY L. FENVES, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN,	§	
DEFENDANT	§	

ORDER

(Filed Aug. 2, 2018)

Before the court are Plaintiffs' Motion for Leave to Amend Complaint filed July 10, 2018 (Dkt. No. 18), Plaintiffs' Motion to Reconsider Dismissal filed July 10, 2018 (Dkt. No. 19), Defendant's Response in Opposition to Plaintiffs' Motion to Reconsider Dismissal and Plaintiffs' Motion for Leave to Amend Complaint filed July 17, 2018 (Dkt. No. 20), and Plaintiffs' Reply to Defendant's Response in Opposition to Plaintiffs' Motion to Reconsider Dismissal filed July 22, 2018 (Dkt. No. 21).

On June 25, 2018, this court rendered an order dismissing this cause of action because Plaintiffs David McMahon, Steven Littlefield, and Texas Division, Sons of Confederate Veterans, Inc.[1] lack standing to sue. (Dkt. No. 14). Final judgment was rendered on that same day. (Dkt. No. 15). McMahon now asks this court to reconsider its dismissal of the suit and seeks leave to file an amended complaint.

Federal Rule of Civil Procedure 60(b) allows the court to grant relief from an order based on mistake, inadvertence, surprise, excusable neglect, newly discovered evidence, or fraud. Motions to alter an order must "clearly establish either a manifest error of law or fact or must present newly discovered evidence." *Dial One of the Mid-S., Inc. v. BellSouth Telecomms., Inc.*, 401 F.3d 603, 606 (5th Cir. 2005). A motion for reconsideration is not the proper vehicle for rehashing evidence, legal theories, or arguments that could have been offered or raised before the entry of the court's order. *See Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990). Reconsideration of an order is an extraordinary remedy that should be used sparingly. *See Templet v. HydroChem, Inc.*, 367 F.3d 473, 479 (5th Cir. 2004).

McMahon does not identify any basis for seeking reconsideration under the Federal Rules of Civil Procedure. Instead, McMahon seeks reconsideration

---

[1] As the interests of Plaintiffs do not diverge, the court will refer to them collectively as "McMahon," unless otherwise noted or as needed for context.

because he "had been drafting an amended complaint addressing standing and presenting two new [state law] claims." To that end, McMahon also seeks leave to file an amended complaint, which he claims will remedy this court's conclusion on standing.

Having reviewed the motions and applicable law, the court concludes that there has been no showing that the court's order of June 25, 2018 (Dkt. No. 14) included any manifest errors of law or fact; nor has McMahon presented newly discovered evidence. Instead McMahon claims that this court should consider his right to free speech in light of the Supreme Court's recent decision in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n, U.S.*, 138 S. Ct. 1719 (Jun. 4, 2018). McMahon's reliance on this case is misplaced for several reasons. While the facts of *Masterpiece Cakeshop* implicated questions about a cake artist's free speech rights, the Court's holding was ultimately based on the Free Exercise Clause and not the Free Speech Clause. *See id.* at 1723 ("Whatever the confluence of speech and free exercise principles might be in some cases, the Colorado Civil Rights Commission's consideration of this case was inconsistent with the State's obligation of religious neutrality."). The Court did not express an opinion on the parties' standing to sue. Perhaps most importantly, McMahon's invocation of *Masterpiece Cakeshop* does nothing to remedy the fundamental defect prompting dismissal of suit in the first instance—McMahon cannot transform a subjective ideological interest in the Confederate cause into a particularized injury sufficient to support standing.

Accordingly,

IT IS ORDERED that Plaintiffs' Motion for Leave to Amend Complaint filed July 10, 2018 (Dkt. No. 18) is **DENIED**.

IT IS FURTHER ORDERED that Plaintiffs' Motion to Reconsider Dismissal filed July 10, 2018 (Dkt. No. 19) is **DENIED**.

SIGNED this 1st day of August, 2018.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

DAVID MCMAHON, STEVEN LITTLEFIELD, AND THE TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC.,	§	
PLAINTIFFS,	§	
V.	§	CAUSE NO. 1:17-CV-822-LY
GREGORY L. FENVES, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN,	§	
DEFENDANT.	§	

MEMORANDUM OPINION AND ORDER

(Filed Jun. 25, 2018)

Before the court are Defendant's Motion to Dismiss filed November 20, 2017 (Dkt. No. 12), Plaintiffs' Response to Defendant's Motion to Dismiss filed December 4, 2017 (Dkt. No. 13), and Defendant's Reply in Support of Motion to Dismiss filed December 11, 2017 (Dkt. No. 14). Having carefully considered the briefing, applicable law, and the entire case file, the court will grant the motion to dismiss for the reasons that follow.

I. BACKGROUND

George Littlefield was an early and prominent benefactor to the University of Texas ("the University"). He served in Terry's Texas Rangers during the Civil War and believed that Confederate history should be preserved and celebrated so that "future generations would remember those grand patriots who gave up their lives for the cause of liberty and self-government." To that end, he commissioned a sculptor to create statues of Jefferson Davis, Robert E. Lee, Albert Sidney Johnston, John Reagan, James Hogg, and President Woodrow Wilson "during a period of resurgent white Southern nostalgia for the social order of the old South embodied by the Confederacy."[1] Littlefield's will provided a bequest to the University to establish the Littlefield Fund for Southern History and another fund to erect the commissioned statues "in places of prominence" on campus. The statues were installed along the main mall of the University's Austin, Texas campus in the 1930s.

In 2015, University President Gregory L. Fenves ("Fenves") formed a taskforce with students, faculty, and alumni "to study the artistic, social, political intent, and historical context" of the statues, to "review the past and present controversies over the statues," and to "develop[ ] alternatives for the for the relocation of the statues." The taskforce suggested several

---

[1] *Task Force on Historical Representation of Statuary at UT Austin*, Report to President Gregory L. Fenves (Aug. 10, 2015), http://diversity.utexas.edu/statues/wp-content/uploads/2016/01/Task-Force-Report-FINAL-08_09_15.pdf.

solutions, including relocating the statues to the Briscoe Center for American History to be displayed in full historical context with one of the largest collections of resources on American slavery in the country as well as in full artistic context alongside the papers of Littlefield and the sculptor of the statues. After a white supremacist shot and killed nine individuals at a church in Charleston, South Carolina, Fenves accepted the recommendation of the task force and announced his decision to move the Jefferson Davis and Woodrow Wilson statues. David Bray and Texas Division of the Sons of Confederate Veterans filed suit in state court the next day seeking a permanent injunction to prevent Fenves from removing the statues. The suit was based on state-law claims similar to those brought by the current plaintiffs. The state court denied the motion for an injunction on the basis that the plaintiffs did not have standing to bring the claims. The Texas Sixth Court of Appeals affirmed. *See Bray v. Fenves*, No. 06-15-75-CV, 2016 WL 3083539 (Tex. App.—Texarkana 2016, pet. denied). The Wilson and Davis statues were subsequently removed, but the other Confederate statues remained on the mall.

In 2017, Fenves caused the removal of the Robert E. Lee, Albert Sidney Johnston, John Reagan, and James Hogg statues from the main mall, after a neo-Nazi killed a young woman who was counter-protesting a white-supremacist demonstration in Charlottesville, Virginia. Fenves determined that "Confederate

monuments have become symbols of modern white supremacy and neo-Nazism."[2]

Plaintiffs David McMahon, Steven Littlefield, and Texas Division, Sons of Confederate Veterans, Inc.[3] filed this suit against Fenves on August 23, 2017. McMahon filed his First Amended Complaint, Application for Injunctive Relief, & Motion for Declaratory Judgment on September 20, 2017 (Dkt. No. 7).[4] The parties agreed that the University would maintain the *status quo* until the court ruled on the motion to dismiss.

McMahon and Littlefield are both descendants of Confederate veterans, and Littlefield is a descendant of George Littlefield. McMahon claims that the University's removal of the statues and impending obscuration of the plinths of the statues violates his right to free speech under the First Amendment. In "abridging the political speech of the monument," McMahon claims that the University abridged his own right to hold a dissenting political viewpoint.

The Texas Division, Sons of Confederate Veterans (the "Sons") seek to "protect the memory of our beloved

---

[2] Gregory L. Fenves, *Confederate Statues on Campus*, (Aug. 20, 2017), https://president.utexas.edu/messages/confederate-statues-on-campus.

[3] As the interests of Plaintiffs do not diverge, the court will refer to them collectively as "McMahon," unless otherwise noted or as needed for context.

[4] McMahon filed an unopposed motion to withdraw his motion for preliminary injunction on September 27, 2017 (Dkt. No. 10), which this court granted on October 2, 2017 (Dkt. No. 11).

Confederate Veterans," including "memorials, images, symbols, monuments and gravesites." The Sons also claim a First Amendment injury on behalf of its members because its members "dissenting political viewpoint [] was communicated by the Littlefield statues."

Invoking the supplemental jurisdiction of this court, McMahon brings several additional state-law claims, including breach of the bequest agreement between Littlefield and the University, violation of Texas Government Code Section 2166.501 and .5011, and violation of the Board of Regents' authority over the University campus. Fenves moved to dismiss for lack of standing and for failure to state a claim.

II. STANDING

The judicial power may be invoked to adjudicate a disagreement between litigants only if the party bringing suit has standing to bring its claims. Article III of the Constitution limits the exercise of the judicial power to the "resolution of 'cases' and 'controversies.'" *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982). Standing to bring suit is an "essential and unchanging part of the case-or-controversy requirement." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Standing "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong," *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540, 1547 (2016), *as revised* (May 24, 2016), in order to ensure that the judicial power is invoked

only to "redress or prevent actual or imminently threatened injury" particular to the plaintiff *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009).

The elements of standing are familiar: a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision. *See Lujan*, 504 U.S. at 560–61. The plaintiff bears the burden of establishing each of these elements "with the manner and degree of evidence required at the successive stages of the litigation." *Id* at 561. At the motion-to-dismiss stage "the plaintiff must clearly allege facts demonstrating each element." *Spokeo*, 136 S. Ct. at 1547 (internal punctuation and citation omitted). The court may not "create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore v. Arkansas*, 495 U.S. 149, 155–56 (1990).

To demonstrate an injury in fact, a plaintiff must show "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo*, 136 S. Ct. at 1548 (citing *Lujan*, 504 U.S. at 560). A particularized injury "must affect the plaintiff in a personal and individual way." *Id.* Unlike when one is challenging the legality of an action taken directly against the plaintiff, when "a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of someone else, much more is needed." *Lujan*, 504 U.S. at 562.

1. Legally Protected Interest

To satisfy the injury-in-fact prong, a plaintiff must allege an invasion of a "legally protected interest," that is both "concrete and particularized." The legally protected interest McMahon seeks to protect is the right to hold a politically unpopular viewpoint. Put simply, McMahon argues that the University engaged in viewpoint discrimination against his dissenting viewpoint—that which celebrates the Confederate legacy—when the University removed the Confederate statues from its grounds. Because McMahon shares this dissenting viewpoint, he believes that the University's removal of the statues amounts to viewpoint discrimination against him personally. When standing is contested, the appropriate inquiry is whether the interest is cognizable in the abstract, and then, whether such interest is concrete and particularly felt by those bringing suit; if the interest alleged is both cognizable and particularly felt it is an injury in fact. *See Lujan*, 504 U.S. at 563 ("[T]he injury in fact test requires more than an injury to a cognizable interest. It requires that the party seeking review be himself among the injured.").

An intangible interest, such as that of free speech, satisfies the concreteness requirement. *See Spokeo*, 136 S. Ct. at 1549 (citing *Pleasant Grove City, Utah v. Summum, 555* U.S. 460 (2009); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993)). Concreteness, however, is not enough—the interest must also be particularized.

2. Particularized Interest

Construed charitably, McMahon's clearest claim of a particularized injury seems to be that the University discriminated against his dissenting political viewpoint when it removed the statues simply because the statues represented his political viewpoint. Although the University has not taken a direct action against McMahon or prevented McMahon from speaking, McMahon argues that his "injury is distinct from any effect on the general public" because of the McMahon's "unique ties through familial veterans' service to the dissenting political viewpoint expressed in the [s]tatues."[5]

Subjective ideological interests—no matter how deeply felt—are not enough to confer standing. *See Sierra Club v. Morton*, 405 U.S. 727, 729–35 (1972).[6]

---

[5] McMahon argues that "[i]n order for an injury to be particularized, it must effect [sic] a small, easily identifiable group, as distinguished from the public generally." McMahon relies on decisions holding that beneficiaries of a charitable trust have standing to enforce the terms of that trust and bases his analysis on these cases. However, neither McMahon, Littlefield, nor the Sons are beneficiaries, trustees, or executors of the George Littlefield will. And no matter how "sharply defined" or "small" the membership, the Sons may not police the terms of the will.

[6] In *Sierra Club*, the Sierra Club sought to enjoin the government from developing a national park. *Id.* at 729–31. It claimed a special interest in the "conservation and sound maintenance of the national parks." *Id.* at 730. The Sierra Club claimed it was injured by "a change in the aesthetics and ecology" of particular national parks. *Id.* at 734. The Court did not question that this type of harm "may amount to an 'injury in fact,' " but noted "the 'injury in fact' test requires more than an injury to a cognizable

Our system of governance assigns the vindication of value preferences to the democratic political process, not the judicial process, *see Lujan*, 504 U.S. at 576, because limiting the right to sue to those most immediately affected "who have a direct stake in the outcome" prevents judicial review "at the behest of organizations who seek to do no more than vindicate their own value preferences." *Sierra Club*, 405 U.S. at 740. McMahon and Littlefield seek to do just that. McMahon and Littlefield may be more deeply attached to the values embodied by the Confederate monuments than the average student rushing to class on the mall, but their identities as descendants of Confederate veterans do not transform an abstract ideological interest in preserving the Confederate legacy into a particularized injury. The alleged free-speech injury of McMahon and Littlefield, while perhaps cognizable in the abstract, is not an *injury in fact*.

McMahon also relies on several cases for the proposition that alleging a First Amendment violation is all that is needed to confer standing. McMahon's reliance on these cases is misplaced. The Court did not express an opinion on the parties' standing to sue—only on the merits of their First Amendment claims. In fact, none of the cases cited by McMahon discussed standing. Nonetheless, these cases illustrate the same principles as *Sierra Club* and *Lujan:* an injury to a cognizable First Amendment interest must be concrete and particularly felt by the plaintiff bringing suit. In each of

---

interest. It requires that the party seeking review be himself among the injured." *Id.* at 734–35.

the cases relied on by McMahon, the interest was the right to free speech; however, that interest was still particular to each of the plaintiffs bringing suit because the government acted directly against the plaintiffs, *inter alia*, in denying a license, denying a grant or funding, and denying the opportunity to erect a new statue.

In *Walker v. Texas Division, Sons of Confederate Veterans, Inc.*, the same organization bringing suit today unsuccessfully sought state approval for a specialty license plate featuring the Confederate Flag. ___ U.S. ___, 135 S. Ct. 2239 (2015). In *Summum*, a religious organization brought suit for a violation of the First Amendment after it was twice denied a request to erect a stone monument in a park with other permanent displays. 555 U.S. 460, 464 (2009). Likewise, in *National Endowment for the Arts v. Finley*, artists sued on a theory of viewpoint discrimination when they were denied grant funding by the National Endowment for the Arts. 524 U.S. 569, 577 (1998). Finally, in *Rosenberger v. Rector & Visitors of Univ. of Virginia*, a religious student organization was denied funding by a state university to publish a religious magazine. 515 U.S. 819, 827 (1995). These cases bear out what the court concluded in *Lujan*: when "the plaintiff himself is an object of the [government's] action . . . there is ordinarily little question that the action or inaction has caused him injury." 504 U.S. at 561–62.

McMahon does not "clearly allege" with specificity how the display or non-display of a statue, representing a viewpoint with which he agrees, equates to an

exercise of his First Amendment rights. McMahon did not fund the original statues; nor was he denied permission to erect new statues. *Cf. Summum*, 555 U.S. at 464. In fact, McMahon does not allege that he was prevented from speaking at all. Far from bolstering his argument, these cases illustrate the fundamental defect in this case—a general action taken by the University to remove an inanimate object, which bears no relation to McMahon other than a shared ideological interest, is not an action taken against McMahon.[7] McMahon and Littlefield have not alleged a sufficient injury in fact, and as such, lack standing to bring this lawsuit.

3. Associational Standing

An association seeking to "bring suit on behalf of its members" has standing only if "its members would otherwise have standing to sue in their own right." *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977).

The Sons seeks to "protect the memory of our beloved Confederate Veterans," including "memorials, images, symbols, monuments and gravesites." According to the Sons, these memorials communicate "the political viewpoint that Confederate American Heroes sacrificed for a noble cause that the victors in the war

---

[7] This much is revealed by the pleadings themselves, in which McMahon alleges that the removal of the Confederate monuments and obscured inscriptions "directly abridges the political speech *of the monuments*," which he claims irreparably injures McMahon.

have almost uniformly whitewashed from history." It argues that "[the Sons] and [the Sons'] members were uniquely injured" because their "dissenting political viewpoint [] was communicated by the Littlefield statues." Though the Sons argues the injury is unique to its members, it is the same injury alleged by McMahon and Littlefield and is not sufficient to confer standing. Because the Sons pleads no injury to its members other than an injury rejected by this court, it has not pleaded that "its members would otherwise have standing to sue in their own right." Accordingly, the Sons lacks standing to bring this lawsuit.

III. STATE-LAW CLAIMS AND SUPPLEMENTAL JURISDICTION

In addition to the federal-law claim, McMahon asserts three state-law causes of action, including breach of the George Littlefield bequest, breach of Texas Monument Protection Act, and breach of the Board of Regents authority by the University. McMahon invokes the supplemental jurisdiction of this court to adjudicate his state-law claims.

A court may decline to exercise supplemental jurisdiction over state-law claims when it has "dismissed all claims over which it has original jurisdiction." 28 U.S.C. §1367(c)(3); *see also Artis v. District of Columbia*, ___ U.S. ___, 138 S. Ct. 594, 597–98 (Jan. 22, 2018) ("When district courts dismiss all claims independently qualifying for the exercise of federal jurisdiction, they ordinarily dismiss as well all related state

claims."); *accord Heggemeier v. Caldwell Cty., Texas*, 826 F.3d 861, 872-73 (5th Cir. 2016). The Sixth Court of Appeals considered and rejected similar state-law claims brought by some of these Plaintiffs. *See Bray v. Fenves*, No. 6–15-00075–CV, 2016 WL 3083539 (Tex. App.—Texarkana Mar. 24, 2016, pet. denied). Since the only federal-law claim has been dismissed, this court will not exercise its supplemental jurisdiction over the remaining state-law claims.

IV. CONCLUSION

The court concludes that McMahon, Littlefield, and the Texas Division, Sons of Confederate Veterans lack standing to bring this suit. Defendant additionally moves to dismiss this suit on the grounds that the Sons' Complaint fails to state a claim upon which relief can be granted. The court takes no position on whether the Sons' alleged injury finds support in First Amendment case law or would ultimately be successful on the merits. *See Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (refusing to decide merits before resolving Article III jurisdictional questions "because it carries the courts beyond the bounds of authorized judicial action"). Accordingly,

IT IS ORDERED that Defendant's Motion to Dismiss filed November 20, 2017 (Dkt. No. 12) is **GRANTED**.

IT IS FURTHER ORDERED that this case is **DISMISSED** without prejudice.

SIGNED this 25th day of June, 2018.

/s/ Lee Yeakel
LEE YEAKEL
UNITED STATES
DISTRICT JUDGE