App. 1

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-13980
Non-Argument Calendar

D.C. Docket No. 8:18-cv-02843-VMC-JSS

WADE STEVEN GARDNER,
MARY JOYCE STEVENS,
RANDY WHITTAKER,
In Official Capacity at Southern War Cry,
VETERANS MONUMENTS OF AMERICA, INC.,
Andy Strickland, US Army Ret., President,
PHIL WALTERS,
In his Official Capacity as 1st Lt. Commander
of the Judah P. Benjamin
Camp # 2210 Sons of Confederate Veterans,
KEN DANIEL,
In his Official Capacity as Director of Save
Southern Heritage, Inc. Florida,
RANDY WHITTAKER,
Individually,

Plaintiffs-Appellants,

versus

WILLIAM MUTZ,
In his Official Capacity as Mayor
of the City of Lakeland, Florida,
TONY DELGADO,

In his Official Capacity as Administrator
of the City of Lakeland, Florida,
DON SELVEGE,
In his Official Capacity as City of Lakeland,
Florida Commissioner,
JUSTIN TROLLER,
In his Official Capacity as City of Lakeland,
Florida Commissioner,
PHILLIP WALKER,
In his Official Capacity as City of Lakeland,
Florida Commissioner, et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(May 24, 2021)

Before MARTIN, NEWSOM, and BRANCH, Circuit Judges.

PER CURIAM:

The facts of this case are familiar to the parties and were discussed at length in this Court's earlier decision, *Gardner v. Matz*, 962 F.3d 1329 (11th Cir. 2020).

In short, the City of Lakeland, Florida, decided to relocate a Confederate monument from one public park to another. *Id.* at 1334-35. A coalition of people and groups dedicated to honoring the Confederacy sued the City. *Id.* at 1334. They argued, as relevant here, that the relocation violated their First and

Fourteenth Amendment rights. *Id.* They argued that the City's action injured them for Article III standing purposes because of their interests in preserving the history of the South, expressing their free speech, vindicating the cause of the Confederacy, and protecting and preserving memorials. *Id.* at 1341. The district court dismissed the First Amendment claim on the merits and dismissed the Fourteenth Amendment claim for lack of standing. *Id.* at 1335-36. The plaintiffs appealed but didn't seek a stay pending appeal. *Id.* at 1336. The City then relocated the monument while the case was on appeal. *Id.*

We held that the plaintiffs lacked standing to bring either federal claim. *Id.* at 1343. We reasoned that the plaintiffs' alleged injuries were insufficiently concrete and particularized to establish standing. *Id.* at 1341-43. We declined to decide whether the case had also become moot when the City moved the monument during the course of the appeal. *Id.* at 1338. We remanded to the district court with instructions to dismiss the case without prejudice for lack of jurisdiction. *Id.* at 1344.

On remand, the plaintiffs moved to amend their complaint to allege more facts about their injuries. In their proposed amended complaint, they alleged the following facts:

- Multiple organizational plaintiffs include members who visit the monument to pay their respects to those it memorializes. The members intend to continue to gather, and their

political speech is rendered less effective by the removal of the monument.

- Multiple organizational plaintiffs include members who regularly gather at the monument to engage and educate the public.
- One plaintiff's ancestors collected donations for and erected the monument. She also honors the war dead at the monument and wishes to continue to do so.
- One plaintiff gathered at the monument when it was at the old park, and spoke there.
- Multiple plaintiffs publish literature about the monument.

The plaintiffs sought an injunction against the City requiring it to return the monument to its original location. The district court denied the motion to amend. The district court explained that amendment was futile because the plaintiffs failed to allege sufficiently concrete injuries. The district court also held that even if the plaintiffs did allege sufficiently concrete injuries, it would deny the motion to amend because the facts that the plaintiffs alleged didn't amount to a meritorious First or Fourteenth Amendment claim.

The plaintiffs appealed.[1]

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[1] We review an order denying a motion to amend for futility de novo. *Hollywood Mobile Estates Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1264 (11th Cir. 2011).

I

To establish Article III standing, a plaintiff must allege (1) an "injury in fact," which means "an invasion of a legally protected interest that is both (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) a "causal connection" between the "injury and the challenged action of the defendant"; and (3) a likelihood that a favorable judgment will "redress [the] injury." *Lewis v. Governor of Ala.*, 944 F.3d 1287,1296 (11th Cir. 2019) (en banc) (quotation marks omitted); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555,560-61 (1992). Because standing implicates jurisdiction, "a court must satisfy itself that the plaintiff has standing before proceeding to consider the merits of her claim, no matter how weighty or interesting." *Lewis*, 944 F.3d at 1296.

On appeal, the City argues that the plaintiffs' injuries remain insufficiently "concrete" and "particularized." An injury is "concrete" when it is "*de facto*" and "real," rather than merely "abstract." *Gardner*, 962 F.3d at 1341. An injury may be real even when it injures only the plaintiff s interest in observing or using something. *See Lujan*, 504 U.S. at 562-63. If a plaintiff seeks injunctive relief, like here, the plaintiff must demonstrate a plan to observe or use that space in the near future that is obstructed by the challenged action. *Id.* at 563-64. An injury is "particularized" when it "affect[s] the plaintiff in a personal and individual way." *Id.* at 560 n.1. It must be distinct to the plaintiff rather than "undifferentiated." *Gardner*, 962 F.3d at 1342.

Here, some of the plaintiffs' newly alleged injuries are sufficiently "concrete" and "particularized" to meet Article III's demands. Namely, multiple plaintiffs allege that they visit the monument regularly and have concrete plans to visit the monument again in the future. They allege that their planned future use and enjoyment of the monument is obstructed by the City's relocation of it. These are the sorts of future injuries that were missing in *Lujan* and that are concrete for Article III purposes. The injuries are also particularized because they injure only those people who regularly visit the monument and plan to do so in the near future, rather than the undifferentiated public. These plaintiffs also satisfy the other two elements of standing doctrine because they allege that the City caused the injury by moving the monument and because their injury can be redressed via the requested injunction to have it returned.

II

But those plaintiffs who have standing must also demonstrate that the district court erred in holding that they failed to state a claim on the merits. And we think the district court correctly concluded that they failed to state a claim, as to both their First and Fourteenth Amendment claims.

The plaintiffs' First Amendment claim alleges that the City's relocation of the monument violated their rights under the Free Speech Clause. Monuments in public parks, even when funded by private parties,

constitute government speech. *Pleasant Grove City v. Summum*, 555 U.S. 460, 470-73 (2009). Government speech doesn't violate the Free Speech Clause of the First Amendment. *Id.* at 467. On the facts alleged, then, the City's relocation of the monument didn't violate the plaintiffs' rights under the Free Speech Clause of the First Amendment.[2]

The plaintiffs' Fourteenth Amendment claim alleges that the City's relocation deprived them of a liberty interest without due process of law. When the government doesn't deprive someone of a constitutionally protected liberty or property interest, it doesn't violate the Due Process Clause of the Fourteenth Amendment. *See AFL-CIO v. City of Miami*, 637 F.3d 1178, 1186 (11th Cir. 2011). The plaintiffs here didn't allege that the City deprived them of any constitutionally protected liberty or property interest by relocating the monument. Therefore, on the facts alleged, the City didn't violate the Due Process Clause of the Fourteenth Amendment.

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[2] The plaintiffs also invoke the First Amendment's "endorsement" test, a concept borrowed from Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668 (1984). But that test—regardless of its viability after *Town of Greece v. Galloway*, 572 U.S. 565 (2014), and *American Legion v. American Humanist Association*, 139 S. Ct. 2067 (2019)—proscribes only government speech that "endorse[s] or disapprov[es] of *religion." Lynch*, 465 U.S. at 688 (O'Connor, J., concurring) (emphasis added); *see also Cnty. of Allegheny v. ACLU Greater Pittsburgh Chapter*, 492 U.S. 573, 592-94 (1989). The plaintiffs haven't alleged that the City's relocation of the monument expressed endorsement or disapproval of any religion.

III

Because the plaintiffs' only two federal-law claims would fail on the merits, we agree with the district court that amendment was futile. Accordingly, we **AFFIRM**.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WADE STEVEN GARDNER, ET AL.,

Plaintiffs,

v.

WILLIAM MUTZ, ET AL.,

Defendants. /

Case No. 8:18-cv-2843-T-33JSS

ORDER

(Filed Sep. 22, 2020)

This matter comes before the Court upon consideration of Plaintiffs Wade Steven Gardner, Mary Joyce Stevens, Randy Whittaker (individually and in his official capacity at Southern War Cry), Phil Walters (in his official capacity as 1st Lt. Commander of the Judah P. Benjamin Camp #2210, Sons of Confederate Veterans), Ken Daniel (in his official capacity as Director of Save Southern Heritage, Inc. Florida), and Veterans Monuments of America, Inc.'s Second Motion for Leave to Amend Complaint (Doc. # 53), filed on August 12, 2020. Defendants William Mutz, Tony Delgado, Don Selvege, Justin Troller, Phillip Walker, and Antonio Padilla responded in opposition on August 25, 2020. (Doc. # 54). For the reasons that follow, the Motion is denied.

I. Background

The Court and the parties are familiar with the facts and procedural history of this case. On November 20, 2018, Plaintiffs brought this action against Defendants, asserting claims for violation of the First Amendment and their due process rights, as well as various state law claims. (Doc. # 1). Plaintiffs sought to prevent Defendants, almost all of whom are officials with the City of Lakeland, from relocating a memorial to Confederate soldiers who died during the Civil War ("the cenotaph") from the City of Lakeland's Munn Park to another park. (Id. at 5-7).

Defendants moved to dismiss, and the Court dismissed the complaint on January 28, 2019. (Doc. # 43). Specifically, the Court dismissed the First Amendment claim with prejudice, dismissed the Due Process claim without prejudice for lack of standing, and dismissed the state law claims without prejudice so they could be reasserted in state court.

Plaintiffs appealed. (Doc. # 44). During the pendency of the appeal, the City of Lakeland relocated the cenotaph from Munn Park to Veterans Park. (Doc. # 54 at 4).

On appeal, the Eleventh Circuit affirmed in part and reversed in part, holding that Plaintiffs lacked standing to bring either the First Amendment or Due Process claims. Gardner v. Mutz, 962 F.3d 1329 (11th Cir. 2020). Thus, on remand, the Court dismissed the First Amendment claim without prejudice for lack of standing.

Now, Plaintiffs move for leave to file an amended complaint, arguing that they have rectified the standing problems identified by the Eleventh Circuit. (Doc. # 53). The proposed amended complaint contains claims for violation of the First Amendment and due process, as well as state claims for breach of bailment agreement, violation of public trust, violation of Lakeland's Historic Preservation ordinance, intent and collusion to violate Florida Statute § 872.02, and violation of Florida Statute § 267.013. (Id. at 21-28). The Motion is ripe for review.

II. Discussion

As an initial matter, the Motion violates Local Rule 3.01(a) because it fails to include a memorandum of law. See Local Rule 3.01(a), M.D. Fla. ("In a motion or other application for an order, the movant shall include a concise statement of the precise relief requested, a statement of the basis for the request, and **a memorandum of legal authority in support of the request**." (emphasis added)). The Motion is little more than one page long in substance and merely mentions Federal Rule of Civil Procedure 15(a)(2) in one sentence, which falls far short of being a memorandum of law. See DeBoskey v. SunTrust Mortg., Inc., No. 8:14-cv-1778-T-35TGW, 2017 WL 10425584, at *2 (M.D. Fla. Nov. 30, 2017) (finding that a motion that was "substantively less than one page long" and "merely identifie[d] two statutes under which the defendant [sought] an award of attorney's fees" without identifying any case law violated Local Rule 3.01(a) because, "in order

to determine the merits of this motion, the court would need to research the law and make the defendant's argument for it, which is obviously improper"), report and recommendation adopted, No. 8:14-cv-1778-T-35TGW, 2018 WL 6168125 (M.D. Fla. Nov. 26, 2018).

The Court is particularly disappointed in this violation because Plaintiffs' counsel is well aware of Local Rule 3.01(a). Over a month before this Motion was filed, Judge Davis denied a motion to amend filed by Plaintiffs' counsel in another case about a Confederate monument, explaining that the motion "violate[d] Local Rule 3.01(a)" because it failed to include "any memorandum of law regarding the standards governing a request to file an amended complaint." Edgerton v. City of St. Augustine, 3:20-cv-634-J-39JBT (M.D. Fla. July 6, 2020) (Doc. # 7 at 1). Plaintiffs' failure to comply with the Local Rules alone warrants denial of the Motion. See DeBoskey v. SunTrust Mortg., Inc., 2017 WL 10425584, at *2 ("Where, as here, a motion violates Local Rule 3.01(a), the court may deny the motion."); see also Hickman v. Wal-Mart Stores, Inc., 152 F.R.D. 216, 219 (M.D. Fla. 1993) (denying the defendant's motion to dismiss for failing to comply with Local Rule 3.01(a)); Johnson v. Anderson, No. 3:17-cv-998-J34JRK, 2019 WL 3717900, at *14 (M.D. Fla. Aug. 7, 2019) ("Johnson's Motion to Amend [] is due to be denied for failure to comply with Local Rules 3.01(a) and 3.01(g)."); Belnavis v. Nicholson, No. 8:05-cv-778-T-23TGW, 2006 WL 3359684, at *8 (M.D. Fla. Nov. 20, 2006) (denying motion for leave to amend because,

among other things, the motion violated Local Rule 3.01(a)).

The Motion also fails on the merits. Federal Rule of Civil Procedure 15(a)(2) states that "a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires." Still, this Court need not "allow an amendment (1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudice to the opposing party; or (3) where amendment would be futile." Bryant v. Dupree, 252 F.3d 1161, 1163 (11th Cir. 2001).

Here, Defendants argue that the Motion should be denied because amendment would be futile. They argue that this case is moot and that Plaintiffs lack standing to assert their federal claims. (Doc. # 54 at 5-10). Even if the case were not moot and Plaintiffs had standing, Defendants argue that the two federal claims – for violation of the First Amendment and due process – would be subject to dismissal on the merits. (Id. at 10-13). The Court agrees that amendment would be futile.

The Eleventh Circuit ruled that Plaintiffs had not established standing in their original complaint because they failed to allege a concrete and particularized injury. Gardner, 962 F.3d at 1341-43. The court held that Plaintiffs' injury was not concrete because it was too abstract. Id. at 1341. The court explained that

Plaintiffs' "inchoate agreement with what they take to be the cenotaph's meaning or message – and their consequent disagreement with the monument's relocation – does not alone give rise to a concrete injury for Article III purposes." Id. And Plaintiffs' injury, as alleged in the complaint, was not particularized because their interests, including "preserving the history of the south" and "expressing their free speech from a Southern perspective," were "undifferentiated," "collective," and "not 'distinct.' " Id. at 1342. The court noted that Plaintiffs "don't allege, for example, that they (or, for the organizational plaintiffs, their members) routinely visited the monument in Munn Park or, alternatively, that they won't be able to visit the monument at its new location in Veterans Park. Rather, their allegations implicate only the generalized desires to promote Southern history and to honor Confederate soldiers." Id. at 1343.

Plaintiffs took the Eleventh Circuit's hint and now allege that members of the Plaintiff organizations "regularly participate at gathering at the Munn Park Cenotaph to engage and educate the public on Southern History" and use the cenotaph "as a memorial site to pay their respects to the confederate dead." (Doc. # 53 at 6-7). They also allege that certain Plaintiffs have "Confederate Dead in [their] family lineage," are "direct descendant[s] of UDC Members who collected donations and erected" the cenotaph, and "publish[ ] literature on Southern History including the Munn Park Cenotaph." (Doc. # 53 at 5-6).

The proposed amendments fail to establish standing. Even if Plaintiffs allege a particularized injury, they still have not alleged a concrete injury. To be concrete, "an alleged injury must be '*de facto*' and 'real' – and just as importantly, 'not "abstract."'" Gardner, 962 F.3d at 1341. "[P]urely psychic injuries arising from disagreement with government action – for instance, 'conscientious objection' and 'fear' – don't qualify." Id.

In the proposed amended complaint, Plaintiffs allege the removal of the cenotaph "establishes a constitutional injury, because some Plaintiffs are descendants of the American veterans that the statues commemorate and whose memory, acts, and political philosophy Plaintiffs or Plaintiffs' forebears have protected since the placement of the [c]enotaph in [] 1910." (Doc. # 53 at 18). They also allege that the relocation of the cenotaph "renders less effective the political speech of the members of the [Plaintiff organizations] which have inn [sic] the past assembled at the [c]enotaph, presented speeches, handed out literature, and engaged the public in debate." (Id. at 17-18). Plaintiffs argue the cenotaph is "a specific backdrop or virtual podium" for their viewpoint. (Id. at 17).

Plaintiffs' alleged injury is still too abstract. At bottom, Plaintiffs disagree with the City's decision to move the cenotaph from one park to another. They prefer that the cenotaph remain in Munn Park and are offended at its relocation. But Plaintiffs have only alleged psychic injuries in the form of their disappointment that the cenotaph no longer resides in their preferred location. See Valley Forge Christian Coll. v.

Ams. United for Separation of Church & State, Inc., 454 U.S. 464, 485-86 (1982) (holding that "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms"). Defendants have not prevented Plaintiffs from speaking about anything by moving the cenotaph. Nor have Plaintiffs alleged that they are unable to visit the cenotaph at its new location or hold meetings and hand out literature there. While Veterans Park is allegedly not in the City's historic district, Plaintiffs provide no information about the new park from which the Court could infer that the relocation has resulted in a "real" injury to Plaintiffs.

Thus, Plaintiffs have not alleged an injury-in-fact for their First Amendment and due process claims and lack standing. See Ladies Mem'l Ass'n, Inc. v. City of Pensacola, Fla., No. 3:20-CV-5681-MCR-EMT, 2020 WL 5237742, at *4 (N.D. Fla. Sept. 2, 2020) ("Plaintiffs attempt to reframe their free speech right as the right to speak about the confederacy and/or confederate soldiers at Florida Square, and they claim removal of the cenotaph will 'effectively block' or otherwise have a 'profound material impact' on this speech right. . . . There is no allegation, whatsoever, that Plaintiffs are being restricted from speaking at Florida Square or that their speech has been restricted by the City in anyway. Nor could there be. By removing the cenotaph, the City is not preventing anyone from speaking about anything. To the extent any sense could be made from

these allegations, any claimed injury is far too abstract to confer standing." (citations omitted)).

Plaintiffs also suggest that Gardner has taxpayer standing based on the same allegations contained in the original complaint. (Doc. # 53 at 5). Like they did in the original complaint, Plaintiffs allege that mailings sent by Mutz to Lakeland citizens soliciting private donations to move the cenotaph "constitute[ ] Misappropriation of taxpayer funds." (Id. at 21). Plaintiffs maintain the fundraising letter "was printed on City of Lakeland Stationary[,] [ ] was mailed in the US Mail with postage paid for by the City of Lakeland, and it was no doubt printed on city printers, and letters were most likely signed, folded, and envelopes addressed and letters inserted by city staff, all using City of Lakeland resources and funds, not Private Donations." (Id.). Yet, they also concede that the City's response to a public records request "stated that no public funds were used for this letter." (Id.). They also allege that, although the City's Red Light Camera Program is not funded with tax dollars, the use of funds from the Red Light Camera Program to remove the cenotaph "divert[ed] funds from traffic safety to other purposes." (Id. at 16).

"A municipal taxpayer has standing 'when the taxpayer is a resident who can establish that tax expenditures were used for the offensive practice.' " Gagliardi v. City of Boca Raton, 197 F. Supp. 3d 1359, 1366 (S.D. Fla. 2016) (quoting Pelphrey v. Cobb Cty., 547 F.3d 1263, 1280 (11th Cir. 2008)). Just as with the original complaint, the allegations about the Red Light Camera

Program and fundraising letter are insufficient to establish taxpayer standing because these funds did not come from tax dollars. See Ladies Mem'l Ass'n, Inc., 2020 WL 5237742, at *6 ("[I]f no tax money is spent on the allegedly illegal activity,' then the 'plaintiff's status as a municipal taxpayer is irrelevant' for purposes of standing." (citation omitted)). Indeed, the Eleventh Circuit wrote that "[a]ny attempt to establish taxpayer standing, therefore, is unavailing." Gardner, 962 F.3d at 1343 n.12.

Regardless, amendment is also futile because the First Amendment and due process claims would be subject to dismissal on the merits. See Patel v. Ga. Dep't BHDD, 485 F. App'x 982, 982 (11th Cir. 2012) ("Futility justifies the denial of leave to amend where the complaint, as amended, would still be subject to dismissal."). The cenotaph and its removal are government speech – not Plaintiffs' speech – so Plaintiffs' First Amendment claim fails as a matter of law. See Pleasant Grove City v. Summum, 555 U.S. 460, 472 (2009) ("In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park."). And Plaintiffs cannot establish the deprivation of a constitutionally protected liberty or property interest because the cenotaph is government speech. See AFL-CIO v. City of Miami, 637 F.3d 1178, 1186 (11th Cir. 2011) (internal citations omitted) (explaining

that, to state a claim for denial of procedural due process, a plaintiff must allege "(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process").

The other remaining claims are brought under state law and would only properly be before the Court pursuant to supplemental jurisdiction because there is not complete diversity between Plaintiffs and Defendants. As the federal claims would be dismissed, so too would the state law claims be subject to dismissal. See Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 (1988) ("[W]hen the federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of jurisdiction."); Raney v. Allstate Ins. Co., 370 F.3d 1086, 1089 (11th Cir. 2004) ("encourage[ing] district courts to dismiss any remaining state claims when, as here, the federal claims have been dismissed prior to trial").

Accordingly, it is now

ORDERED, ADJUDGED, and **DECREED**:

Plaintiffs' Second Motion for Leave to Amend Complaint (Doc. # 53) is **DENIED**. The case remains closed.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 22nd day of September, 2020.

/s/ Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-10461

D.C. Docket No. 8:18-cv-02843-VMC-JSS

WADE STEVEN GARDNER,
MARY JOYCE STEVENS,
RANDY WHITTAKER,
In Official Capacity at Southern War Cry,
VETERANS MONUMENTS OF AMERICA, INC.,
Andy Strickland, US Army Ret, President,
PHIL WALTERS,
In his Official Capacity as 1st Lt. Commander of the Judah P. Benjamin Camp # 2210 Sons of Confederate Veterans,
KEN DANIEL,
In his Official Capacity as Director of
Save Southern Heritage, Inc. Florida,
RANDY WHITTAKER, Individually,

Plaintiffs - Appellants,

versus

WILLIAM MUTZ,
In his Official Capacity as Mayor
of the City of Lakeland, Florida,
TONY DELGADO,
In his Official Capacity as Administrator
of the City of Lakeland, Florida,
DON SELVEGE,

In his Official Capacity as City of Lakeland, Florida Commissioner,
JUSTIN TROLLER,
In his Official Capacity as City of Lakeland, Florida Commissioner,
PHILLIP WALKER,
In his Official Capacity as City of Lakeland, Florida Commissioner,
FLORIDA SECRETARY OF STATE, et al.,

Defendants - Appellees.

Appeal from the United States District Court
for the Middle District of Florida

(June 22, 2020)

Before MARTIN, NEWSOM, and O'SCANNLAIN,* Circuit Judges.

NEWSOM, Circuit Judge:

This appeal arises from a lawsuit filed by a group of individuals and organizations who object to the City of Lakeland's decision to relocate a Confederate monument from one city park to another. As relevant here, the plaintiffs contend that the relocation violates their rights under the First Amendment's Free Speech Clause and the Fourteenth Amendment's Due Process Clause. The district court rejected the plaintiffs' First Amendment claim on the merits and dismissed it with

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* Honorable Diarmuid F. O'Scannlain, United States Circuit Judge for the Ninth Circuit, sitting by designation.

prejudice; the court dismissed the plaintiffs' due process claim without prejudice on the ground that they lacked the requisite standing to pursue it.

Following the district court's decision, the plaintiffs failed to obtain (or even seek) a stay, and, by the time the case reached us the City had proceeded to relocate the monument. On appeal, the plaintiffs challenge the dismissal of their complaint, and the defendants respond by contesting the plaintiffs' standing to sue, defending the district court's decision on the merits, and contending that the monument's relocation has rendered the case moot. We hold that the plaintiffs lack standing to pursue either their First Amendment claim or their due process claim. Accordingly, we will vacate and remand the with-prejudice dismissal of the plaintiffs' First Amendment claim, with instructions that the district court should dismiss without prejudice for lack of jurisdiction, and we will affirm the district court's without-prejudice dismissal of the plaintiffs' due process claim.

I

A

The plaintiffs in this case are Wade Steven Gardner, a citizen-taxpayer of Lakeland; Randy Whittaker, a citizen-taxpayer of Polk County who has, he says, "Confederate Dead in his family lineage"; Southern War Cry, an organization that Whittaker administers; the Judah P. Benjamin Camp #2210 Sons of Confederate Veterans, a subdivision of the nonprofit Florida

Division Sons of Confederate Veterans, Inc., whose self-described purpose is to "'vindicate the cause' for which the Confederate Veteran fought"; Veterans Monuments of America, Inc., a nonprofit entity dedicated to protecting and preserving war memorials; Mary Joyce Stevens, a Georgia resident and a current member and past president of a chapter of the United Daughters of the Confederacy; and Save Southern Heritage, Inc., a South Carolina nonprofit formed to "preserve the history of the south for future generations."

Most of the defendants in this case are affiliated either with the City of Lakeland or the State of Florida. The City-related defendants are William Mutz, Lakeland's Mayor; Don Selvage, Justin Troller, and Phillip Walker, Lakeland City Commissioners; and Tony Delgado, the City Manager. The plaintiffs also sued Michael Ertel, the Florida Secretary of State,[1] and Antonio Padilla, the President of Energy Services & Products Corporation, which had submitted a proposal for relocating the monument.

This case centers on a memorial "cenotaph"[2] that is dedicated to Confederate soldiers who died during the Civil War and is—or more accurately, was—located in Lakeland's Munn Park, which is a part of a nationally registered historic district. In 1908, the City granted the United Daughters of the Confederacy's

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[1] Ertel replaced his predecessor in office, Kenneth Detzner.

[2] A cenotaph is lain empty tomb or a monument erected in honor of a person who is buried elsewhere." *Webster's Second New International Dictionary* 433 (1934).

petition to erect the monument in Munn Park. The cenotaph is 26 feet tall, weighs about 14 tons, and is engraved with the words "Confederate Dead," a poem, and images of Confederate flags. More recently, the City began to receive complaints about the monument, and in December 2017 the City Commission agreed to start the process of removing it. In May 2018, the Commission voted to relocate the cenotaph from Munn Park to Veterans Park, which is located outside Lakeland's historic district. The Commission initially directed that all relocation costs be paid by private donations, but it later agreed to permit the use of funds from Lakeland's red-light-camera program to complete the project.

B

In November 2018, the plaintiffs sued to prevent the cenotaph's relocation. Of their complaint's seven counts, only two are at issue here: Count 1 alleged a violation of the plaintiffs' First Amendment rights—in particular, the plaintiffs complained, the City "ha[d] abridged [their] right to free speech . . . by deciding to remove the [c]enotaph which communicated minority political speech in a public forum." Count 4 alleged a violation of the Due Process Clause—specifically, the plaintiffs asserted that the City failed "to provide [them] and other like-minded Florida and American citizens due process, including reasonable notice, an opportunity to be heard and a hearing before a neutral arbiter, before removing the Historic Munn Park

Cenotaph."[3] The plaintiffs requested both a declaration that the City's actions violated the Constitution and an injunction to prevent the monument's relocation.

The defendants moved to dismiss the plaintiffs' suit. In their motion, Mutz, Delgado, Selvage, Troller, and Walker argued that the plaintiffs lacked standing, that they had failed to state a claim for which relief could be granted, and that, in any event, their claims were barred by legislative and/or qualified immunity. In particular, the defendants contended that the plaintiffs hadn't suffered an "injury in fact" because they didn't have a "cognizable claim arising out of the City's relocation or removal of a monument on City property." More particularly still, they argued that the cenotaph was a form of government speech and that, accordingly, the plaintiffs didn't have a "Free Speech claim with respect to [it] or any due process rights premised on [its] removal." Ertel and Padilla moved to dismiss on similar grounds.

The district court granted the defendants' motions. With respect to the plaintiffs' First Amendment claim, the court opted to treat the City officials' motion to dismiss for lack of subject-matter jurisdiction as a motion to dismiss for failure to state a claim; for support, the court invoked the proposition that when a

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[3] The counts not relevant to this appeal are as follows: Count 2 alleged a breach of a bailment agreement between the city and the United Daughters of the Confederacy; Count 3 alleged various "[v]iolation[s] of public trust"; Count 5 alleged a violation of Lakeland's Historic Preservation Ordinance; and Counts 6 and 7 alleged intent and collusion to violate two Florida statutes.

defendant's jurisdictional challenge "implicates an element of the cause of action, courts are to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." Dist. Ct. Order at 9 (internal quotation marks omitted) (quoting *Scarfo v. Ginsberg*, 175 F.3d 957, 965 (11th Cir. 1999) (Barkett, J., dissenting)). Having refocused the inquiry from the plaintiffs' standing to the merits of their claim, the district court held that the cenotaph is not private expression but rather a form of government speech and, accordingly, that the "[p]laintiffs d[id] not have a legally protected interest in that speech" and that "their First Amendment claim fail[ed] as a matter of law." *Id.* at 9-11. The court rejected the plaintiffs' due process claim on standing grounds, holding that "[e]ven if [p]laintiffs had a protected liberty or property interest in the [c]enotaph's placement in Munn Park," their alleged injuries were "not sufficiently particularized" for Article III purposes. *Id.* at 12-13 (internal quotation marks and citation omitted).[4] The district court alternatively held that the plaintiffs had failed to state a cognizable due process claim because they "lack[ed] a liberty interest in the [c]enotaph and thus [could not] state a procedural due process claim based on the memorial's relocation." *Id.* at 15.[5]

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[4] The court separately rejected the plaintiffs' contention that Gardner had standing as a municipal taxpayer on the ground that no tax dollars had been spent on the relocation.

[5] Because it dismissed all of the plaintiffs' federal claims, the district court declined to exercise supplemental jurisdiction over the remaining state-law claims. Although they referenced their state-law claim against the Secretary of State in their notice of

The plaintiffs promptly appealed the district court's dismissal order to this Court. For whatever reason, though, they failed to seek a stay pending appeal to prevent the relocation of the cenotaph while the case wound its way to us, and, in the meantime, the City of Lakeland proceeded to move the monument from Munn Park to Veterans Park. In light of the cenotaph's relocation, the defendants argue that because "the action [the plaintiffs] sought to prevent has come to pass, the case is now moot." Br. of Appellees at 12.

II

"Federal courts are courts of limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). Accordingly, we have "a special obligation to satisfy [ourselves] . . . of [our] own jurisdiction" before proceeding to the merits of an appeal. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 95 (1998) (internal quotation marks and citation omitted). The most notable—and most fundamental—limits on the federal "judicial Power" are specified in Article III of the Constitution, which grants federal courts jurisdiction only over enumerated categories of "Cases" and "Controversies." U.S. Const. art. III, § 2. This case-or-controversy requirement comprises three familiar "strands": (1) standing, (2) ripeness, and (3) mootness.

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appeal, the plaintiffs have offered no challenge to the district court's decision to decline supplemental jurisdiction. Because the plaintiffs haven't contested the issue in their briefs, it is abandoned. *See United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001).

Christian Coal. of Fla., Inc. v. United States, 662 F.3d 1182, 1189 (11th Cir. 2011).[6]

Two case-or-controversy requirements—standing and mootness—are at issue in this case: The district court held that the plaintiffs lacked standing to pursue their due process claims, and the same basic considerations that animated its decision call into question the plaintiffs' standing to litigate their First Amendment claims. And separately, in light of the cenotaph's removal from Munn Park during the pendency of the appeal, the defendants contend that the case is now moot.

So, a threshold question about threshold questions: Which to assess first? The Supreme Court has clarified that a reviewing court can "choose among threshold grounds for denying audience to a case on the merits," *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 585 (1999), and we have routinely availed ourselves of that flexibility, *see, e.g.*, *Cook v. Bennett*, 792 F.3d 1294, 1298-99 (11th Cir. 2015) (addressing standing, then mootness); *KH Outdoor, L.L.C. v. Clay County*, 482 F.3d 1299, 1302 (11th Cir. 2007) (addressing mootness, then standing); *Tanner Advert. Grp., L.L.C. v. Fayette County*, 451 F.3d 777, 785 (11th Cir. 2006) (same); *Fla. Pub. Interest Research Grp. Citizen Lobby, Inc. v. EPA*, 386 F.3d 1070, 1082-88 (11th Cir. 2004)

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[6] Or perhaps four. *Cf. Made in the USA Found. v. United States*, 242 F.3d 1300, 1312 (11th Cir. 2001) ("The political question doctrine emerges out of Article III's case or controversy requirement and has its roots in separation of powers concerns.").

(addressing standing, then mootness). Here, for several reasons, we think it best to start with standing.

First, and perhaps most obviously, standing was—at least in part, anyway—the basis of the district court's decision below. As we'll explain shortly, in addressing the plaintiffs' First Amendment claim, the district court improperly conflated the standing and merits inquiries. But even so, that court perceived and addressed potential problems with the plaintiffs' standing to sue, and it makes sense for us to pick up that thread. Mootness issues, by contrast, arose only during the pendency of this appeal, when the plaintiffs failed to seek a stay and the defendants proceeded to relocate the cenotaph. *Cf. KH Outdoor, L.L.C.*, 482 F.3d at 1301-02 (exercising discretion to address mootness before standing where mootness had been at issue below).

Second, as we have observed before, standing is "perhaps the most important," *Fla. Pub. Interest*, 386 F.3d at 1083 (internal quotation marks and citation omitted)—or, alternatively, the "most central," *Kelly v. Harris*, 331 F.3d 817, 819 (11th Cir. 2003)—of Article III's jurisdictional prerequisites. Why so? One reason, which distinguishes standing from its Article III running buddies, is that whereas ripeness and mootness are fundamentally temporal—ripeness asks whether it's too soon, mootness whether it's too late—standing doesn't arise and evanesce; rather, it "limits the category of litigants empowered to maintain a lawsuit in federal court to seek redress for a legal wrong." *Spoken, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). Standing

asks, in short, whether a particular plaintiff even has the requisite stake in the litigation to invoke the federal "judicial Power" in the first place. U.S. Const. art. III, § 2. So, to compare the doctrines at issue here, the plaintiff whose suit goes moot once had a "Case" but lost it due to the march of time or intervening events, whereas the plaintiff who lacks standing never had a "Case" to begin with.

Finally—and as a purely practical matter—at least in this case the standing inquiry is more straightforward than the mootness inquiry. Assessing the plaintiffs' standing simply requires us to determine whether their alleged injuries—violations of their interests in "preserv[ing] the history of the south," "expressing their free speech[] from a Southern perspective," "'vindicat[ing] the cause' for which the Confederate Veteran fought," and "protect[ing] and preserv[ing] Memorials to American veterans"—constitute Article-III-cognizable harms. Assessing mootness, by contrast, could get messy. Very briefly, the defendants contend that the cenotaph's removal from Munn Park moots the case, because the very thing that the plaintiffs sought to prevent has now occurred—and in large part, they add, because the plaintiffs failed to obtain (or even seek) a stay pending appeal. Seems right. But, the plaintiffs respond—not without some force—this isn't a situation that "no longer presents a live controversy with respect to which the court can give meaningful relief," *Friends of Everglades v. S. Fla. Water Mgmt. Dist.*, 570 F.3d 1210, 1216 (11th Cir. 2009) (internal quotation marks and citation omitted),

because even now a court could grant them exactly what they want just by ordering the cenotaph moved *back* to Munn Park.[7] Makes sense. But alas, it's not quite that simple, either—we have deemed cases moot despite the theoretical availability of relief where (as here) the requested remedy would be impracticable or exceedingly expensive, and especially where (as here) the appealing party failed to seek a stay. *See, e.g.*, *Fla. Wildlife Fed. v. Goldschmidt*, 611 F.2d 547, 549 (5th Cir. 1980). *But see, e.g.*, *Chafin v. Chafin*, 568 U.S. 165, 175 (2013) (holding that a case was not moot because "[n]o law of physics prevent[ed]" the plaintiff from receiving the relief requested, even if it seemed unlikely).

As our tennis-match-ish recitation demonstrates, the mootness question here is hardly cut and dried. All the more reason, we think, to proceed directly to the simpler and more straightforward standing issue. *See Sinochem Int'l Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007) (expressing approval of taking "the less burdensome course" when faced with competing grounds for dismissal).[8]

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[7] This case is different from the usual monument-related dispute, which is brought by a plaintiff who wants a monument moved—rather than, as here, plaintiffs who want to prevent removal. *See, e.g.*, *Am. Legion v. Am. Humanist Ass'n*, 139 S. Ct. 2067, 2074 (2019); *Kondrat'yev v. City of Pensacola*, 949 F.3d 1319, 1321-22 (11th Cir. 2020). In that more typical scenario, removal moots the case because the plaintiff has gotten exactly what he sought. *See, e.g.*, *Staley v. Harris County*, 485 F.3d 305, 309 (5th Cir. 2007).

[8] *Fla. Wildlife Fed'n, Inc. v. U.S. Army Corps of Eng'rs*, 859 F.3d 1306, 1324 (11th Cir. 2017) (Tjoflat, J., concurring) ("The

* * *

For the reasons explained below, we conclude that the plaintiffs have not established Article III standing to pursue their First Amendment or due process claims, which we'll discuss in turn. Because we can dispose of this case on standing grounds alone, we needn't—and won't—address either mootness or the merits.[9]

III

Sitting en banc, we recently had occasion to clarify and reiterate a few foundational principles regarding plaintiffs' standing to sue. First, we observed that "Article III of the United States Constitution limits the 'judicial Power'—and thus the jurisdiction of the federal courts—to 'Cases' and 'Controversies,'" *Lewis v. Governor of Ala.*, 944 F.3d 1287, 1296 (11th Cir. 2019) (en banc) (quoting U.S. Const. art. III, § 2), and that "[t]he 'standing' doctrine is 'an essential and unchanging part of the case-or-controversy requirement,'" *id.* (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). Second, we echoed the Supreme Court's

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necessary inquiry courts must make when deciding between available nonmerits grounds for dismissal is guided by a non-exhaustive and case-specific set of considerations. Those considerations may include convenience, fairness, the interests served by structural principles such as federalism and comity, and judicial economy and efficiency.").

[9] We review a district court's order granting a motion to dismiss de novo. *Mulhall v. Unite Here Local 355*, 667 F.3d 1211, 1213-14 (11th Cir. 2012).

definitive recitation of the standing doctrine's three necessary prerequisites: (1) "an 'injury in fact'—an invasion of a legally protected interest that is both (a) 'concrete and particularized' and (b) 'actual or imminent, not conjectural or hypothetical"; (2) "a 'causal connection' between [the plaintiff's] injury and the challenged action of the defendant"; and (3) a "likel[ihood], not merely speculati[on], that a favorable judgment will redress [the] injury." *Id.* (quoting *Lujan*, 504 U.S. at 560-61). Finally, we underscored the fundamental point that "[b]ecause standing to sue implicates jurisdiction, a court must satisfy itself that the plaintiff has standing before proceeding to consider the merits of her claim, no matter how weighty or interesting." *Id.*

For the reasons that follow, we conclude that the plaintiffs here lack standing to sue and, accordingly, that the federal courts lack jurisdiction to consider their claims.

A

We'll start with the plaintiffs' First Amendment claim. First, though, a brief—but we think important—detour. In particular, before addressing the plaintiffs' standing, we must pause to correct a methodological error in the district court's analysis. From the premises (1) that the defendants here had contended that the plaintiffs "lack[ed] standing to assert their First Amendment claim because the [c]enotaph is government speech" and (2) that the defendants' argument in

that respect also went "to the merits of the First Amendment claim," the district court concluded that it should, in essence, sidestep the standing issue and proceed directly to the merits. Having done so, the court held that under *Pleasant Grove City v. Summum, 555* U.S. 460 (2009), the cenotaph was indeed a form of government speech that didn't trigger First Amendment protection, and it accordingly dismissed the plaintiffs' claims on the merits and with prejudice.

In bypassing standing to address the merits, the district court erred. To repeat what we said recently in Lewis—repeating there what we had said many times before—"[b]ecause standing to sue implicates jurisdiction, a court *must* satisfy itself that the plaintiff has standing before proceeding to consider the merits of her claim, no matter how weighty or interesting." 944 F.3d at 1296 (emphasis added); *accord, e.g.*, *Swann v. Secretary*, 668 F.3d 1285, 1288 (11th Cir. 2012) ("[S]tanding is a threshold jurisdictional question which must be addressed prior to and independent of the merits of a party's claims." (quotation omitted)). Indeed, the Supreme Court has expressly condemned the exercise of a so-called " 'hypothetical jurisdiction' that enables a court to resolve contested questions of law when its jurisdiction is in doubt." *Steel Co.*, 523 U.S. at 101. "Hypothetical jurisdiction," the Court explained, "produces nothing more than a hypothetical judgment—which comes to the same thing as an advisory opinion." *Id.*

The district court here seems to have gotten tripped up by language in some of our cases to the

effect that if a defendant's jurisdictional challenge "implicates an element of the cause of action, courts are to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." Dist. Ct. Order at 9 (internal quotation marks omitted) (quoting *Scarfo v. Ginsberg*, 175 F.3d 957, 965 (11th Cir. 1999) (Barkett, J., dissenting)). Two problems: First, although the district court cited *Scarfo*, the language it quoted actually comes from Judge Barkett's *dissent* in that case. (The majority there affirmed the dismissal of a case solely on subject-matter-jurisdiction grounds, refusing to look through to the merits. *See* 175 F.3d at 958.) That error, though—easy enough to make in the Westlaw age—was essentially harmless, as the same language appears in majority opinions that both predate and postdate *Scarfo. See, e.g.*, *Morrison v. Amway Corp.*, 323 F.3d 920, 925, 929-30 (11th Cir. 2003); *Garcia v. Copenhaver, Bell & Assocs., M.D.'s*, 104 F.3d 1256, 1261 (11th Cir. 1997).

The second problem with the district court's analysis isn't so easily shrugged off. The principle embodied in the language that the district court quoted does not, as that court seemed to assume, create a broad-ranging exception to the *Steel Co.* rule—namely, that jurisdiction should be evaluated before, and separately from, the merits. Rather, it applies only in a particular circumstance, not presented here. We have distinguished between "facial" and "factual" attacks on subject-matter jurisdiction. *See Morrison*, 323 F.3d at 924 n.5. "Facial attacks challenge subject matter jurisdiction based on the allegations in the complaint," whereas

"[f]actual attacks challenge subject matter jurisdiction in fact, irrespective of the pleadings." *Id.* at 925 n.5. In adjudicating a facial attack, "the district court takes the allegations as true in deciding whether to grant the motion." *Id.* By contrast, when a court confronts a "factual" attack, it needn't accept the plaintiff's facts as true; rather, "the district court is free to independently weigh facts" and make the necessary findings. *Id.* at 925.

However—and now we're getting to the root of the district court's error—even in the context of a factual attack, an exception applies, thereby requiring the district court to accept the plaintiff's allegations as true, where a factual question underlying a challenge to the court's statutory jurisdiction also "implicate[s] the merits of the underlying claim." *Id.* That sort of "intertwine[ment]" occurs, we have said, "when 'a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief'"—for instance, as in *Morrison*, where the defendant disputed the plaintiff's contention that he was an "eligible employee" within the meaning of the FMLA, a necessary prerequisite (under then-prevailing law) to both the court's statutory jurisdiction and the merits of the plaintiff's cause of action. *Id.* at 923, 926 (quoting *Garcia*, 104 F.3d at 1262); *accord Garcia*, 104 F.3d at 1258-62 (questioning whether the defendant was a covered "employer" within the meaning of the ADEA). It is in *those* unique instances, we have clarified—using the language the district court quoted here—that "[t]he proper course of action . . . is

to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." *Morrison*, 323 F.3d at 925 (quoting *Garcia*, 104 F.3d at 1261).

This case, it seems to us, is (at least) thrice removed from that scenario. First, as the district court itself observed, here the defendants' "jurisdictional attack [wa]s based on the face of the pleadings"; they took "the allegations in the plaintiff's] complaint . . . as true for purposes of the motion" to dismiss and argued that the plaintiffs nonetheless lacked standing—and therefore that the federal courts lacked jurisdiction—as a matter of law. Dist. Ct. Order at 6. Second, the issue here is not *statutory* jurisdiction or standing, but rather whether the plaintiffs have satisfied the "irreducible constitutional minimum" standing requirements that emerge from Article III. *Lujan*, 504 U.S. at 560; *cf. Steel Co.*, 523 U.S. at 97 n.2 (distinguishing statutory-standing cases, in which the merits and jurisdictional inquiries may "overlap," from Article-III-standing cases, in which the jurisdictional question typically "has nothing to do with the text of [a] statute" (quotation omitted)). Finally, and in any event, there is—for reasons we will explain in greater detail below—no necessary overlap or "intertwine[ment]" here between the merits of the plaintiffs' constitutional claims and their standing to sue. *Morrison*, 323 F.3d at 926.

Long story short: When the district court here bypassed standing issues and proceeded directly to the merits of the plaintiffs' First Amendment claim, it

assumed its own jurisdiction in precisely the way that *Steel Co.* forbids. There were, we will see, independent and dispositive threshold standing issues that could (and should) have been decided first.

B

The "'[f]irst and foremost' of standing's three elements" is injury in fact. *Spoken*, 136 S. Ct. at 1547 (alteration in original) (quoting *Steel Co.*, 523 U.S. at 103). And as already noted, to establish an injury in fact, a plaintiff must demonstrate, among other things, that he or she has suffered "an invasion of a legally protected interest that is both . . . 'concrete and particularized.'" *Lewis*, 944 F.3d at 1296 (quoting *Lujan*, 504 U.S. at 560). While they may be related concepts, concreteness and particularity are in fact "quite different." *Spoken*, 136 S. Ct. at 1548. To pass Article III muster, a plaintiff's alleged injury must be *both* concrete and particularized. *See id.* As we will explain, the plaintiffs' injuries here are neither.

1

First, concreteness. The Supreme Court recently clarified that to be concrete, an alleged injury must be "*de facto*" and "real"—and just as importantly, "not 'abstract.'" *Id.* (quotations omitted). And while a concrete injury needn't necessarily be "tangible," *id.* at 1549, the Court has consistently held that purely psychic injuries arising from disagreement with government action—for instance, "conscientious objection" and

"fear"—don't qualify. *See Diamond v. Charles*, 476 U.S. 54, 67 (1986); *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 417-18 (2013).

The plaintiffs' alleged injuries here are simply too "abstract" to implicate Article III. Most generally, the plaintiffs assert that the City "abridged [their] right to free speech . . . by deciding to remove the [c]enotaph which communicated minority political speech in a public forum." But surely the naked recitation of a constitutional claim isn't sufficient; if it were, every § 1983 plaintiff would, by definition, have standing to sue. Somewhat (but not much) more specifically, the plaintiffs assert that the monument's relocation infringes their interests in "preserv[ing] the history of the south," "expressing their free speech[] from a Southern perspective," "'vindicat[ing] the cause' for which the Confederate Veteran fought," and "protect[ing] and preserv[ing] Memorials to American veterans." But those injuries, too, are pretty amorphous. What exactly is the (or a) "Southern perspective"? What exactly was "the cause for which the Confederate veteran fought," and what exactly does it mean to "vindicate" it?

At bottom, it seems to us, the plaintiffs endorse some meaning that they ascribe to the monument; they agree with what they take to be the cenotaph's message because it aligns with their values. And because they agree with that message, they disagree with—object to—the monument's removal from Munn Park. But the plaintiffs' inchoate agreement with what they take to be the cenotaph's meaning or message—and their consequent disagreement with the monument's

relocation—does not alone give rise to a concrete injury for Article III purposes. *Cf. Diamond*, 476 U.S. at 62 ("The presence of a disagreement, however sharp and acrimonious it may be, is insufficient by itself to meet Art. III's requirements."); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982) (holding that "the psychological consequence presumably produced by observation of conduct with which one disagrees . . . is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms").

2

Even if the plaintiffs had articulated a concrete injury, they couldn't meet the standing doctrine's separate particularity requirement. For an alleged injury to be sufficiently particularized to confer Article III standing, it must "affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. Put slightly differently, the injury cannot be "undifferentiated," but rather must be "distinct" to the plaintiff. *Spoken*, 136 S. Ct. at 1548 (quotations omitted). Accordingly, we have held, a plaintiff must show that she has been "directly affected apart from her special interest in the subject" at issue. *Koziara v. City of Casselberry*, 392 F.3d 1302, 1305 (11th Cir. 2004) (internal quotation marks and citation omitted). If, instead, "the plaintiff is merely a 'concerned bystander,' then an injury in fact has not occurred." *Id.* (quotation omitted). "Article III standing," the Supreme Court has emphasized, "is not

to be placed in the hands of concerned bystanders," because they "will use it simply as a vehicle for the vindication of value interests." *Hollingsworth v. Perry*, 570 U.S. 693, 707 (2013) (internal quotation marks and citation omitted).

So again, back to the plaintiffs' allegations here. They claim interests in "preserv[ing] the history of the south," "expressing their free speech[ ] from a Southern perspective," "'vindicat[ing] the cause' for which the Confederate Veteran fought," and "protect[ing] and preserv[ing] Memorials to American veterans." But those interests are "undifferentiated," collective—not "distinct" to any of the plaintiffs. *Spokeo*, 136 S. Ct. at 1548 (quotations omitted). As the Supreme Court emphasized in *Sierra Club v. Morton*, "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified [an] organization is in evaluating the problem, is not sufficient by itself." 405 U.S. 727, 739 (1972). Rather, "a party seeking review must allege facts showing that he is himself adversely affected." *Id.* at 740.

In *Sierra Club*, for example, an environmental organization sued under the Administrative Procedure Act to challenge development plans that would impact a national forest and park—it did so based on its "special interest in the conservation and the sound maintenance of the national parks, game refuges and forests of the country." *Id.* at 729-30 (internal quotation marks omitted). The Supreme Court acknowledged that "[a]esthetic and environmental well-being . . . are important ingredients of the quality of life in our

society," and it observed that the mere "fact that particular environmental interests are shared by the many rather than the few does not make them less deserving of legal protection through the judicial process." *Id.* at 734. But, the Court clarified, a plaintiff must establish more than just "an injury to a cognizable interest." *Id.* at 734-35. Instead, "the party seeking review [must] be himself among the injured." *Id.* at 735. The Court went on to hold that the organization's alleged injuries were insufficiently personal because it hadn't pleaded "that its members use[d the impacted land] for any purpose, much less that they use[d] it in any way that would be significantly affected by the proposed actions."[10] *Id.*

Just so here—aside from their "special interest in the subject[s]" of Confederate history, veterans memorials, and the so-called "Southern perspective," *Koziara*, 392 F.3d at 1305, the plaintiffs haven't shown that they have suffered a particularized Article III injury of the sort that distinguishes them from other interested observers and thus qualifies them, specifically, to invoke federal-court jurisdiction. They don't allege, for example, that they (or, for the organizational plaintiffs, their members) routinely visited the monument in Munn Park or, alternatively, that they won't be able to visit the monument at its new location in Veterans

[10] Perhaps sensing that their injuries as alleged in the complaint don't cut it, the plaintiffs on appeal articulated a different theory—namely, that we should adopt the reasoning underlying Justice Douglas's solo dissent in *Sierra Club*, and grant them standing to speak for inanimate objects like the cenotaph at issue here. Needless to say, we can't do that.

Park. Rather, their allegations implicate only the generalized desires to promote Southern history and to honor Confederate soldiers. Accordingly, just as in *Sierra Club*, they haven't shown themselves—in particular—to be "among the injured," 405 U.S. at 735—or, in the words of *Hollingsworth*, that they are more than "concerned bystanders" attempting to vindicate their "value interests," 570 U.S. at 707 (internal quotation marks and citation omitted).

* * *

We conclude, therefore, that the plaintiffs have not established Article III standing to pursue their First Amendment claim. Accordingly, we may not and do not proceed to the merits.[11]

IV

The plaintiffs separately (and summarily) assert a violation of their rights under the Due Process Clause. The gist of their one-paragraph allegation is that the City failed "to provide [them] and other like-minded Florida and American citizens due process, including

[11] A brief procedural note: Because the district court rejected the plaintiffs' First Amendment claim on the merits, it dismissed that claim with prejudice. That was error; the court should have dismissed the claim on standing—i.e., jurisdictional—grounds, and thus *without* prejudice. *See Stalley ex rel. United States v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (holding that the plaintiff lacked standing and remanding for reentry of dismissal order without prejudice in a case where a complaint was erroneously dismissed with prejudice).

reasonable notice, an opportunity to be heard and a hearing before a neutral arbiter, before removing the Historic Munn Park Cenotaph."

Once again, we conclude that we are precluded from reaching the merits. The same standing deficiencies that sunk the plaintiffs' First Amendment claim—namely, that their alleged injuries are neither concrete nor particularized—doom their due process claim as well. As already explained, the plaintiffs assert interests in "preserv[ing] the history of the south," "'vindicat[ing] the cause' for which the Confederate Veteran fought," "protect[ing] and preserv[ing] Memorials to American veterans," and "expressing their free speech[ ] from a Southern perspective." Those interests are simply too vague, inchoate, and undifferentiated to implicate Article III.[12]

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[12] There are two loose ends, both of which pertain to Gardner's alleged standing as a Lakeland taxpayer. First, as the district court explained, "[t]he Complaint alleges that the City is using private donations as well as revenue from the City's red light camera program to fund the relocation of the [c]enotaph." So, according to the plaintiffs' own complaint, no tax money was actually used to relocate the monument. The plaintiffs separately asserted in their complaint that "Mayor Mutz reportedly used City Taxpayer funds to pay for the postage for a fundraising letter" aimed at raising private donations to move the cenotaph. They admit, though, that in response to a public-records request seeking information about these fundraising letters, the City clarified "that no public funds were used" to distribute them. Any attempt to establish taxpayer standing, therefore, is unavailing.

In their brief to us, the plaintiffs separately (but relatedly?) contend that the government defendants "use[d] a subterfuge to prevent assertion of taxpayer standing." We needn't address this issue, as it wasn't raised in the district court. *See, e.g.*, *Access*

V

We hold that the plaintiffs have not alleged a concrete, particularized injury and that they therefore lack Article III standing. Accordingly, we lack jurisdiction to consider the merits of their claims.

With respect to the plaintiffs' First Amendment claim, we **VACATE AND REMAND** with instructions that the district court should dismiss without prejudice for lack of jurisdiction. We **AFFIRM** the district court's without-prejudice dismissal of the plaintiffs' due process claim.

Now, Inc. v. Sw. Airlines Co., 385 F.3d 1324, 1331 (11th Cir. 2004) (holding that "[t]his Court has repeatedly held that an issue not raised in the district court and raised for the first time in an appeal will not be considered by this court" (internal quotation marks and citation omitted)).

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

WADE STEVEN GARDNER, ET AL.,

Plaintiffs,

v.

WILLIAM MUTZ, ET AL.,

Defendants.
/

Case No. 8:18-cv-2843-T-33JSS

ORDER

(Filed Jan. 28, 2019)

This matter comes before the Court upon consideration of Defendants William Mutz, Tony Delgado, Don Selvage, Justin Troller, and Phillip Walker's Motion to Dismiss the Complaint and Defendant Antonio Padilla's Motion to Dismiss the Complaint, both filed on December 20, 2018. (Doc. ## 12, 13). Plaintiffs Wade Steven Gardner, Mary Joyce Stevens, Randy Whittaker (individually and in his official capacity at Southern War Cry), Phil Walters (in his official capacity as 1st Lt. Commander of the Judah P. Benjamin Camp #2210, Sons of Confederate Veterans), Ken Daniel (in his official capacity as Director of Save Southern Heritage, Inc. Florida), and Veterans Monuments of America, Inc. responded on January 24, 2019. (Doc. ## 38, 39). For the reasons that follow, the Motions are granted.

I. Background

Plaintiffs are united by their shared concerned for the preservation of history "from a Southern perspective." (Doc. # 1 at 17, 18, 25). Gardner is a taxpayer in the City of Lakeland. (Id. at 2). Whittaker "is a citizen taxpayer of Polk County, Florida with Confederate Dead in his family lineage" and administers the organization Southern War Cry. (Id.). Stevens is a descendant of "Confederate Dead" and is a member of the United Daughters of the Confederacy ("UDC"). (Id. at 3). The Judah P. Benjamin Camp #2210 of the Sons of Confederate Veterans, as represented by Walters, is a "Florida non-profit corporation whose purpose is to 'vindicate the cause' for which the Confederate Veteran fought." (Id. at 2). Save Southern Heritage, as represented by Daniel, is a "South Carolina non-profit corporation whose purpose is to preserve the history of the south for future generations." (Id. at 3). Veterans Monuments of America "is a non-profit corporation that is organized under the laws of the State of Florida whose purpose is to protect and preserve Memorials to American veterans." (Id.).

On November 20, 2018, Plaintiffs brought this action against Mutz, Delgado, Selvage, Troller, and Walker (collectively, the "City Defendants") – all of whom are involved in Lakeland's government in various roles, such as City Commissioner, City Manager, or Mayor – as well as against Padilla, who is President of Energy Services & Products Corporation, and Kenneth Detzner, who was the Florida Secretary of State at the time. (Id. at 1). Detzner has since been replaced as a

party by Michael Ertel, who is the current Florida Secretary of State. (Doc. # 30).

This action concerns a memorial – a "Cenotaph" dedicated to Confederate soldiers who died during the Civil War that stands in Lakeland's Munn Park. (Doc. # 1 at 5-7). The memorial was erected by the UDC with the approval of the Lakeland City Commission in 1910. (Id. at 7). The memorial is a "massive 26' foot 2 1/2 story, approximately 14 ton Cenotaph, with base dimensions of 9' by 9.'" (Id.). The memorial is engraved with the words "Confederate Dead," as well as a poem and images of Confederate flags. (Id. at 9).

Over a century later, the City of Lakeland began receiving complaints about the landmarked memorial. (Id. at 14-15). On December 4, 2017, the Lakeland City Commission voted at a City Council meeting to "start the process" of removing the memorial. (Id. at 15). Plaintiffs maintain this vote was "a violation of the City's own Historic Preservation Ordinance." (Id.). Then, "[o]n May 7, 2018 the Lakeland City Commission voted to relocate the Cenotaph from Historic Munn Park to another site out of the historic district, 'provided private donations paid for the full costs.'" (Id.).

In October of 2018, some Defendants voted to remove the memorial using the City's funds from the red light camera program. (Id. at 16). A Lakeland City Commission meeting was scheduled for November 19, 2018, to discuss, among other things, using revenue from the red light camera program to remove the

memorial. (Id. at 17). The Complaint does not describe the result of the November 19 meeting.

Plaintiffs assert seven counts against the various Defendants. (Id. at 22-29). They allege that the City Defendants have violated the First and Fourteenth Amendments of the United States Constitution by "deciding to remove the Cenotaph which communicated minority political speech in a public forum." (Id. at 22). They seek a declaration that Defendants' actions violate their due process rights. (Id. at 26). Furthermore, Plaintiffs claim that Defendants violated (i) the City of Lakeland's Historic Preservation Ordinance, (ii) Section 267.013, Florida Statutes, (iii) violated the public trust, and (iv) breached a bailment agreement. (Id. at 24-29).

The City Defendants and Padilla have moved to dismiss the Complaint on various grounds, including that Plaintiffs lack standing to bring their federal and state claims. (Doc. ## 12, 13). Plaintiffs have responded (Doc. ## 38-39), and the Motions are ripe for review.

II. Legal Standard

On a motion to dismiss pursuant to Rule 12(b)(6), this Court accepts as true all the allegations in the complaint and construes them in the light most favorable to the plaintiff. Jackson v. Bellsouth Telecomms., 372 F.3d 1250, 1262 (11th Cir. 2004). Further, this Court favors the plaintiff with all reasonable inferences from the allegations in the complaint. Stephens

v. Dep't of Health & Human Servs., 901 F.2d 1571, 1573 (11th Cir. 1990). But,

> [w]hile a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level.

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007) (internal citations omitted). Courts are not "bound to accept as true a legal conclusion couched as a factual allegation." Papasan v. Allain, 478 U.S. 265, 286 (1986). The Court must limit its consideration to well-pleaded factual allegations, documents central to or referenced in the complaint, and matters judicially noticed. La Grasta v. First Union Sec., Inc., 358 F.3d 840, 845 (11th Cir. 2004).

Additionally, motions to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) may attack jurisdiction facially or factually. Morrison v. Amway Corp., 323 F.3d 920, 924 n.5 (11th Cir. 2003). Where, as here, the jurisdictional attack is based on the face of the pleadings, the Court merely looks to determine whether the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in the plaintiff's complaint are taken as true for purposes of the motion. Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990).

III. Analysis

First, Defendants challenge the Plaintiffs' standing to bring their First Amendment and due process claims. (Doc. # 12 at 9-17). Next, Defendants argue that Plaintiffs lack standing to bring their state law claims. (Id. at 17-23; Doc. # 13 at 2-3). Even if Plaintiffs have standing, Defendants insist that the City Defendants have either qualified or legislative immunity, and that Plaintiffs have failed to state claims for relief. (Doc. # 12 at 23-25; Doc. # 13 at 3-4).

The Court will address the federal and state claims separately.

A. Article III Standing

"A plaintiff's standing to bring and maintain her lawsuit is a fundamental component of a federal court's subject matter jurisdiction." Baez v. LTD Fin. Servs., L.P., No. 6:15-cv-1043-Orl-40TBS, 2016 WL 3189133, at *2 (M.D. Fla. June 8, 2016) (citing Clapper v. Amnesty Int'l USA, 133 S. Ct. 1138, 1146 (2013)). The doctrine of 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, 136 S. Ct. 1540, 1547 (2016).

To establish standing, "[t]he 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." Id. "'The party invoking federal jurisdiction

bears the burden of establishing' standing." Clapper, 133 S. Ct. at 1148 (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 561 (1992)).

Injury-in-fact is the most important element. Spokeo, 136 S. Ct. at 1547. An injury-in-fact is "'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" Id. at 1548 (quoting Lujan, 504 U.S. at 560). The injury must be "particularized," meaning it "must affect the plaintiff in a personal and individual way." Id. (quoting Lujan, 504 U.S. at 560 n.1). Additionally, the injury must be "concrete," meaning "it must actually exist." Id. A plaintiff cannot "allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III." Id. at 1549.

B. First Amendment Claim

In Count I, Plaintiffs maintain that the City Defendants violated their First Amendment right to free speech by voting to remove the Confederate memorial. (Doc. # 1 at 22-24). The Complaint alleges that the City Defendants "abridged Plaintiffs' right to free speech and equal protection by deciding to remove the Cenotaph which communicated minority political speech in a public forum." (Id. at 22). "Removal of the Cenotaph is an injury to Compelled and Symbolic speech." (Id. at 24).

Defendants argue that Plaintiffs lack standing to assert their First Amendment claim because the

Cenotaph is government speech. (Doc. # 12 at 10-15). This argument goes to the merits of the First Amendment claim and, indeed, Defendants also argue that this claim fails as a matter of law because the Cenotaph is government speech. (Id. at 13).

It is well settled that "the absence of a valid (as opposed to arguable) cause of action does not implicate subject-matter jurisdiction, i.e., the courts' statutory or constitutional power to adjudicate the case." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 89 (1998). For this reason, "if the attack implicates an element of the cause of action, courts are to find that jurisdiction exists and deal with the objection as a direct attack on the merits of the plaintiff's case." Scarfo v. Ginsberg, 175 F.3d 957, 965 (11th Cir. 1999) (citation and quotation marks omitted). "In such a case, a district court is to evaluate a defendant's assertion of lack of subject matter jurisdiction as a Rule 12(b)(6) motion or a motion for summary judgment, and send the case to the jury if there are disputed issues of material fact." Id. Given that Defendants also challenge this claim on the merits, the Court treats the Motion as brought under Rule 12(b)(6).

"[G]overnment speech is not restricted by the Free Speech Clause." Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009). And "[p]ermanent monuments displayed on public property typically represent government speech." Id. at 470. In making this ruling, the Supreme Court recognized that "[g]overnments have long used monuments to speak to the public." Id. "When a government entity arranges for the

construction of a monument, it does so because it wishes to convey some thought or instill some feeling in those who see the structure." Id.

A monument in a public park is government speech even when the monument was privately funded. "Just as government-commissioned and government-financed monuments speak for the government, so do privately financed and donated monuments that the government accepts and displays to the public on government land." Id. at 470-71.

Here, although a private organization funded the Cenotaph, the City approved the monument's placement in Munn Park. Thus, the Cenotaph is government speech. See Id. at 472 ("In this case, it is clear that the monuments in Pleasant Grove's Pioneer Park represent government speech. Although many of the monuments were not designed or built by the City and were donated in completed form by private entities, the City decided to accept those donations and to display them in the Park.").

Plaintiffs' attempt to distinguish this case from Summum is unavailing. (Doc. # 38 at 6-7). True, Summum involved the erection of a new religious monument in a park, 555 U.S. at 464-65, while this case involves a non-religious monument installed in a park over one hundred years ago. But these distinctions make no difference here. The rule of Summum – that a privately donated monument erected in a public park is government speech – applies equally to parks old

and new and all monuments, regardless of their content.

The City's decision to remove the Cenotaph is also government speech. The government's freedom to speak for itself "includes 'choosing not to speak' and 'speaking through the . . . removal' of speech that the government disapproves." Mech v. Sch. Bd. of Palm Beach Cty., 806 F.3d 1070, 1074 (11th Cir. 2015) (quoting Downs v. L.A. Unified Sch. Dist., 228 F.3d 1003, 1012 (9th Cir. 2000)).

Because the Cenotaph and its removal are government speech, Plaintiffs do not have a legally protected interest in that speech and their First Amendment claim fails as a matter of law. Count I is dismissed with prejudice.

C. Due Process Claim

Count IV, which is labelled "Breach of Due Process under 28 U.S.C. § 2201," reads in its entirety:

> The City is obligated to provide Plaintiffs and other like-minded Florida and American citizens due process, including reasonable notice, an opportunity to be heard and a hearing before a neutral arbiter, before removing the Historic Munn Park Cenotaph. In this case, due process additionally includes review by the Historic Preservation Board. This declaration is sought pursuant to 28 U.S.C. § 2201. Plaintiffs also seek attorney's fees and costs in

> conjunction with their declaratory judgment claim.

(Doc. # 1 at 26).

"The Due Process Clause of the Fourteenth Amendment provides: '[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . .'" Carey v. Piphus, 435 U.S. 247, 259 (1978) (citation omitted). "Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." Id. To state a claim for denial of procedural due process, a plaintiff must allege "(1) a deprivation of a constitutionally-protected liberty or property interest; (2) state action; and (3) constitutionally-inadequate process." AFL-CIO v. City of Miami, 637 F.3d 1178, 1186 (11th Cir. 2011) (internal citations omitted).

Defendants again argue that Plaintiffs lack standing to bring this claim. (Doc. # 12 at 15-17). Even if Plaintiffs had a protected liberty or property interest in the Cenotaph's placement in Munn Park (Defendants also challenge this), Defendants insist that Plaintiffs lack a particularized interest sufficient to establish standing. (Id. at 16). Plaintiffs claim they are interested parties because of their beliefs – either in support of the Confederacy or merely the historical preservation of Confederate memorials as vestiges of "the history of the South" – as well as their status as descendants of the "Confederate Dead." (Doc. # 1 at 2-3). Indeed, in their response, Plaintiffs insist that they

have sufficiently particularized interests in the Cenotaph, including "genealogical relationships and membership in associations for particular historical and cultural foci." (Doc. # 38 at 9).

The Court agrees with Defendants that Plaintiffs – whether bringing their claims as individuals or representatives of an organization – cannot base their standing on their preferences for the preservation of Confederate memorials or the "Southern perspective." As Defendants explained, "Plaintiffs' value preferences are not sufficiently particularized, but are general, public-interest grievances, and '[v]indicating the public interest . . . is the function of [the legislative and executive branches],' not the judicial branch." (Doc. # 12 at 17) (quoting Lujan, 504 U.S. at 576).

However, one Plaintiff – Gardner – also bases his standing on his status as a Lakeland taxpayer. (Doc. # 1 at 2). Defendants argue that Gardner does not have taxpayer standing to challenge removal of the Cenotaph. (Doc. # 12 at 16). "A municipal taxpayer has standing 'when the taxpayer is a resident who can establish that tax expenditures were used for the offensive practice.'" Gagliardi v. City of Boca Raton, 197 F. Supp. 3d 1359, 1366 (S.D. Fla. 2016) (quoting Pelphrey v. Cobb Cty., 547 F.3d 1263, 1280 (11th Cir. 2008)).

The Complaint alleges that the City is using private donations as well as revenue from the City's red light camera program to fund the relocation of the Cenotaph. (Doc. # 1 at 17, 21). The revenue from the red

light camera program comes from citations to those who run red lights – not from taxes. So, Defendants persuasively reason, "[b]ecause Plaintiffs do not complain about the expenditure of tax dollars, Gardner cannot establish taxpayer standing." (Doc. # 12 at 16). Notably, Plaintiffs fail to address this argument in their response. The Court finds that Gardner lacks taxpayer standing to challenge the relocation of the Cenotaph.

Therefore, all Plaintiffs lack standing to assert the declaratory judgment claim regarding an alleged breach of procedural due process. Count IV is dismissed without prejudice.

Alternatively, even if Plaintiffs had standing, Defendants argue that Plaintiffs cannot establish the deprivation of a constitutionally-protected liberty or property interest because the Cenotaph is government speech. (Id. at 15-16). According to Defendants, "[t]he City's decision to relocate the Confederate Monument from one park to another is a legislative decision that does not deprive Plaintiffs of any constitutionally-protected liberty or property interest." (Id. at 16). Therefore, they argue this claim should alternatively be dismissed on the merits. The Court agrees. Because the Cenotaph is government speech and not Plaintiffs' speech, Plaintiffs lack a liberty interest in the Cenotaph and thus cannot state a procedural due process claim based on the memorial's relocation. Therefore, Count IV is also subject to dismissal on this ground.

D. State Law Claims

All the federal claims have now been dismissed. The remaining claims – Count II for breach of bailment agreement, Count III for violation of public trust, Count V for violation of the City's historic preservation ordinance, Count VI for intent and collusion to violate Fla. Stat. § 872.02, and Count VII for violation of Fla. Stat. § 267.013 – are governed by state law. Because certain Plaintiffs and Defendants are both citizens of Florida, the Court does not have diversity jurisdiction over the remaining claims. Therefore, the only basis for the Court's jurisdiction over the remaining claims is its exercise of supplemental jurisdiction.

"The dismissal of [a plaintiff's] underlying federal question claim does not deprive the [c]ourt of supplemental jurisdiction over the remaining state law claims." Baggett v. First Nat. Bank of Gainesville, 117 F.3d 1342, 1352 (11th Cir. 1997). "Indeed, under 28 U.S.C. § 1367(c), the Court has the discretion to decline to exercise supplemental jurisdiction over non-diverse state law claims, where the [c]ourt has dismissed all claims over which it had original jurisdiction, but [the court] is not required to dismiss the case." Id. Nevertheless, the Eleventh Circuit has "encouraged district courts to dismiss any remaining state claims when, as here, the federal claims have been dismissed prior to trial." Raney v. Allstate Ins. Co., 370 F.3d 1086, 1089 (11th Cir. 2004). And the Supreme Court has advised that "when federal-law claims have dropped out of the lawsuit in its early stages and only state-law claims remain, the federal court should decline the exercise of

jurisdiction." Carnegie-Mellon Univ. v. Cohill, 484 U.S. 343, 350 n.7 (1988).

Here, the Court determines it is appropriate to decline the exercise of supplemental jurisdiction over the remaining state claims. Therefore, those claims are dismissed without prejudice so that Plaintiffs may refile them in state court, if they wish.

Accordingly, it is now

ORDERED, ADJUDGED, and **DECREED:**

(1) Defendants William Mutz, Tony Delgado, Don Selvage, Justin Troller, and Phillip Walker's Motion to Dismiss the Complaint (Doc. # 12) is **GRANTED** as set forth herein.

(2) Defendant Antonio Padilla's Motion to Dismiss the Complaint (Doc. # 13) is **GRANTED** as set forth herein.

(3) Count I, for violation of the First Amendment of the United States Constitution, is **DISMISSED** with prejudice. Count IV, for declaratory judgment regarding alleged breaches of due process, is **DISMISSED** for lack of standing.

(4) Because the Court declines to exercise supplemental jurisdiction over the remaining state law claims, Count II, Count III, Count V, Count VI, and Count VII are **DISMISSED** without prejudice.

(5) The Clerk is directed to **CLOSE** the case.

DONE and **ORDERED** in Chambers in Tampa, Florida, this 28th day of January, 2019.

/s/ Virginia M. Hernandez Covington
VIRGINIA M. HERNANDEZ COVINGTON
UNITED STATES DISTRICT JUDGE