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

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 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.

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[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.

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 Confederate Veterans," including "memorials, images, symbols, monuments and gravesites." The Sons also claim a First Amendment injury on behalf of its

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[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).

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

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