In The
Court of Appeals
Sixth Appellate District of Texas at Texarkana

No. 06-15-00075-CV

GARY DAVID BRAY AND TEXAS DIVISION, SONS OF CONFEDERATE VETERANS, INC., AND DAVID STEVEN LITTLEFIELD, Appellants

V.

GREGORY L. FENVES, IN HIS CAPACITY AS THE PRESIDENT OF THE UNIVERSITY OF TEXAS AT AUSTIN, Appellee

On Appeal from the 53rd District Court
Travis County, Texas
Trial Court No. D-1-GN-15-003330

Before Morriss, C.J., Moseley and Burgess, JJ.
Memorandum Opinion by Justice Burgess

MEMORANDUM OPINION

This lawsuit was originally filed by the Appellants because of their fervent belief that the University of Texas at Austin (the University), as a result of a decision by its president, was trying to both escape its history and dishonor the legacies of a Confederate figure and the major benefactor who endowed a monument to his leadership. In this appeal, we do not reach the merits of their arguments, and we express no opinion on the justness of their cause. Instead, our disposition turns on the narrower, and much less passionate, question of whether the Appellants have standing to litigate that argument. Because we conclude that they do not, we affirm the trial court's judgment granting the University's plea to the jurisdiction.[1]

I. Background

George Washington Littlefield was the largest contributor to the University in the first fifty years of its existence. He was born in Mississippi, but moved to Texas as a child and grew up in Gonzales County. Littlefield served in the Terry's Texas Rangers during the Civil War and after the war was a successful rancher, real estate investor, and banker. In 1911, he was appointed to the University's Board of Regents.[2] "He believed that the survivors of the Confederacy needed to preserve their history so that future generations would remember 'these grand patriots who gave

[1]Originally appealed to the Third Court of Appeals in Austin, this case was transferred to this Court by the Texas Supreme Court pursuant to its docket equalization efforts. *See* TEX. GOV'T CODE ANN. § 73.001 (West 2013). We follow the precedent of the Third Court of Appeals in deciding this case. *See* TEX. R. APP. P. 41.3.

[2]Dolph Briscoe Center for American History, The University of Texas at Austin, *A Guide to the George Washington Littlefield Papers, 1860–1942*, U. TEX. LIBR., TEX. ARCHIVAL RESOURCES ONLINE, http://www.lib.utexas.edu/taro/utcah/00143/cah-00143.html (last visited Mar. 1, 2016).

up their lives for the cause of liberty and self-government.'"[3] In his will dated July 1, 1918, Littlefield provided for several large bequests to the University, including a bequest to establish the Littlefield Fund for Southern History and another to erect an arch and five statues at the south entrance of the campus.

The five statues identified in Littlefield's will included statues of Jefferson Davis, General Robert E. Lee, General Albert Sidney Johnston, and John Reagan, each of whom was either a Confederate officer or a governmental official, as well as a statue of James S. Hogg, a former governor of Texas. Although Littlefield's will expressed a concept for the arch and statues, he gave the trustees named in his will, and their successors, discretion to change the arrangement or design, but directed that they "giv[e] prominence . . . to the statue[s] of the men named." Littlefield died on November 10, 1920. Before his death, however, Littlefield had commissioned the noted Italian-American sculptor Pompeo Coppini to carry out his vision of the memorial arch and statues. Ultimately, instead of an arch, Littlefield commissioned Coppini to erect on the main mall of the campus the Littlefield Fountain, the statues of the five men named in Littlefield's will, and a sixth statue of President Woodrow Wilson. The inclusion of Wilson has been interpreted as evidence that "'Littlefield revised the theme of the [Confederate] memorial to become a monument of reconciliation portraying World War I as the catalyst that inspired American[s] to put aside

[3]This quotation is taken from the Task Force on Historical Representation of Statuary at UT Austin's August 10, 2015, Report to President Gregory L. Fenves, which was part of the appellate record in this matter.

differences lingering from the Civil War.'"[4] The fountain and statues were installed on the University's main mall in the 1930's.

The statues have periodically generated controversy from the time of their installation. Since 1989, however, the controversy has been more or less continuous, with calls for their removal coming from both inside and outside the University community. In the ensuing years, the University sought to quell the controversy through a number of different actions. The controversy came to full boil in the spring of 2015, when new student government leaders took office and began a social media campaign to remove the Davis statue. Then President, Bill Powers, deferred the matter to the incoming President, Gregory L. Fenves, who would begin his term on June 3, 2015. From March to June 2015, the Davis statue was vandalized three times, along with the Johnston and Lee statues.

Upon taking office, Fenves met with student leaders, then formed a task force composed of faculty, staff, alumni, and students of the University. Fenves charged the task force with (1) analyzing the artistic, social, and political intent, and the historical context of the statuary on the main mall; (2) reviewing the past and present controversies over the statues; and (3) developing alternatives for the main mall statues, particularly the Davis statue, with special attention to artistic and historical factors considering the University's role as an educational and research institution. After gathering input from the community and meeting six times over a six-week period, the task force presented Fenves with its report and recommendations on August 10, 2015. The task force

[4] *Id*. at 17 (quoting Richard Cleary and Lawrence W. Speck, *The University of Texas at Austin Campus Guide* 87 (Princeton Architectural Press, 2011).

made five alternative recommendations, one of which was relocating the Davis statue to the Briscoe Center for American History[5] where the statue could be put in full historical context.

On August 13, 2015, Fenves announced his decision to permanently relocate the Davis statue to the Briscoe Center, where Davis' unique role in the history of the American South could best be explained. At the same time, Fenves also announced that the Wilson statue[6] would also be relocated, to maintain the symmetry of the main mall, to an appropriate exterior location on the campus.

The next day, Appellants Gary David Bray and the Texas Division of the Sons of Confederate Veterans, Inc. (SCV), filed this suit in the 53rd Judicial District Court of Travis County against Fenves, as President of the University, seeking a declaratory judgment that the proposed action by Fenves violated Section 2166.5011 of the Texas Government Code, TEX. GOV'T CODE ANN. § 2166.5011 (West 2008), or that, under the terms of the Littlefield will, the statues were required to remain in their then-current location on the main mall, or at least in the view of the campus and community until the Briscoe Center could receive them. The Appellants also sought a temporary and permanent injunction enjoining Fenves from removing the Davis and Wilson statues from their main mall locations based on the alleged violations of Section 2166.5011(b) and the terms of Littlefield's will. On August 17, the Appellants filed their first amended petition requesting the same relief and adding Appellant David Steven Littlefield (David Littlefield) as a plaintiff.

[5]The Briscoe Center is one of the premier history centers in the nation, is the repository for both the Littlefield papers and the Coppini papers, and has the third largest collection of documents related to slavery.

[6]The Wilson statue was located directly opposite the Davis statue on the main mall.

Fenves responded with a plea to the jurisdiction, alleging that the Appellants lacked standing to bring their claims. Specifically, Fenves asserted that the Appellants had failed to plead a particularized injury, that they could not plead any injury distinct from that sustained by the public at large, that no facts were alleged that would give SVC associational standing, and that no facts were alleged that would give them standing to enforce a charitable trust.

On August 27, 2015, the district court held a hearing on Fenves' plea to the jurisdiction and the Appellants' application for a temporary injunction. After hearing evidence and the arguments of the parties, the district court entered its order denying the temporary injunction on August 28.[7] On August 31, the district court entered its order granting Fenves' plea to the jurisdiction. In this appeal, the Appellants seek to overturn the order granting the plea to the jurisdiction, maintaining that Bray and David Littlefield have individual and taxpayer standing and that SCV has associational standing to assert the claims in their petition. We find that none of the Appellants have standing, and we affirm the order of the trial court.

II. Standard of Review

Because an attack on a plaintiff's standing challenges the court's authority to decide a case, it is properly brought by a plea to the jurisdiction. *Heckman v. Williamson Cnty.*, 369 S.W.3d 137, 149 (Tex. 2012). The plaintiff has the initial burden in every case to plead and prove the trial court's jurisdiction. *Id.* at 150; *see Tex. Dep't of Parks & Wildlife v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004); *Tex. Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 737 (Tex. App.—

[7]On this same date, the Third Court of Appeals issued its memorandum opinion denying the Appellants' petition for a writ of injunction and for emergency relief.

Austin 2014, pet. dism'd). When a plea to the jurisdiction is filed, we look to the live pleadings to determine if facts have been alleged that affirmatively show the court's jurisdiction. *Miranda*, 133 S.W.3d at 226; *Tex. Ass'n of Bus. v. Tex. Air Control Bd.*, 852 S.W.2d 440, 446 (Tex. 1993); *Balquinta*, 429 S.W.3d at 737. The pleadings are construed liberally in favor of the plaintiff, looking to the plaintiff's intent. *Miranda*, 133 S.W.3d at 226; *Balquinta*, 429 S.W.3d at 737–38. "If the pleadings do not contain sufficient facts to affirmatively demonstrate the trial court[']s jurisdiction but do not affirmatively demonstrate incurable defects in jurisdiction, the issue is one of pleading sufficiency and the plaintiffs should be afforded the opportunity to amend." *Miranda*, 133 S.W.3d at 227 (citing *Cnty. of Cameron v. Brown*, 80 S.W.3d 549, 555 (Tex. 2002)); *Balquinta*, 429 S.W.3d at 738. Conversely, "[i]f the pleadings affirmatively negate the existence of jurisdiction, then a plea to the jurisdiction may be granted without allowing the plaintiffs an opportunity to amend." *Miranda*, 133 S.W.3d at 226–27 (citing *Brown*, 80 S.W.3d at 555); *Balquinta*, 429 S.W.3d at 738.

When the "plea to the jurisdiction challenges the existence of jurisdictional facts, we consider relevant evidence submitted by the parties when necessary to resolve the jurisdictional issues raised." *Miranda*, 133 S.W.3d at 227; *Univ. of Tex. v. Poindexter*, 306 S.W.3d 798, 806 (Tex. App.—Austin 2009, no pet.). The jurisdictional issues in this case involve the Appellants' individual, taxpayer, and associational standing, which do not significantly implicate the merits of their case. *See Bland Indep. Sch. Dist. v. Blue*, 34 S.W.3d 547, 554–55 (Tex. 2000) (explaining that challenge to associational standing involves "evidentiary inquiry [that] . . . does not involve a significant inquiry into the substance of the claims" and holding that challenge to taxpayer standing

does not implicate merits of lawsuit.). In such a case, the burden remains with the plaintiff "to prove facts that might be characterized as 'primarily jurisdictional.'" *Id.* at 554; *see Poindexter*, 306 S.W.3d at 806. When the jurisdictional issues do not significantly implicate the merits of the case and the facts are disputed, the trial court "make[s] the necessary fact findings to resolve the jurisdictional issue." *Poindexter*, 306 S.W.3d at 806 (citing *Miranda*, 133 S.W.3d at 226); *Vernco Constr., Inc. v. Nelson*, 460 S.W.3d 145, 149 (Tex. 2015). On review, we then presume that the trial court "implicitly found (or failed to find) them in a manner that supported its judgment." *Bacon v. Tex. Historical Comm'n*, 411 S.W.3d 161, 182 (Tex. App.—Austin 2013, no pet.). If the jurisdictional facts are undisputed, "the [trial] court should make the jurisdictional determination as a matter of law based solely on those undisputed facts." *Poindexter*, 306 S.W.3d at 806 (citing *Miranda*, 133 S.W.3d at 228).

Before a court may exercise subject-matter jurisdiction over a lawsuit, the plaintiff must have standing to bring the lawsuit. *See Abbott v. G.G.E.*, 463 S.W.3d 633, 646 (Tex. App.—Austin 2015, pet. filed) (citing *Balquinta*, 429 S.W.3d at 739). If a plaintiff lacks standing to assert a claim, then a court has no jurisdiction to hear it.[8] *Heckman*, 369 S.W.3d at 150; *DaimlerChrysler*

[8]In other words, standing is a prerequisite to a court's exercise of jurisdiction. In their reply brief, the Appellants assert that *Sweeney v. Jefferson* is dispositive of this case. *Sweeney v. Jefferson*, 212 S.W.3d 556 (Tex. App.—Austin 2006, no pet.). We disagree. First, the facts in *Sweeney* are distinguishable from this case. As relevant to this case, *Sweeney* only addressed the question of whether the trial court generally had subject-matter jurisdiction to hear a case alleging a violation of Sections 2166.501 and 2166.5011 of the Texas Government Code and never addressed whether the plaintiff had standing to assert the cause of action. *Id.* at 563–64. We agree that "'a court, *once having obtained jurisdiction* of a cause of action as incidental to its general jurisdiction, may exercise any power . . . necessary to administer justice between the parties.'" *Id.* at 564 (quoting *City of Dallas v. Wright*, 36 S.W.2d 973, 975 (Tex. 1931) (emphasis added)). However, unlike *Sweeney*, the question in this case is whether the Appellants have standing to assert their claims, which is a prerequisite to the court's exercise of jurisdiction.

Yet, the Appellants also assert *Sweeney* in support of their argument that the trial court's order denying their relief constituted an implicit finding that the trial court had jurisdiction. The Appellants first note that, even though the trial court granted Fenves' plea to the jurisdiction, it nevertheless issued an order denying the Appellants' claims.

Corp. v. Inman, 252 S.W.3d 299, 304 (Tex. 2008). A court must dismiss a claim if the plaintiff lacks standing to assert it, and it must dismiss the entire action for want of jurisdiction if the plaintiff lacks standing to assert any of its claims. *Heckman*, 369 S.W.3d at 150–51. Whether a plaintiff has standing is a question of law that we review de novo. *Id.* at 149–50.

"Standing is a constitutional prerequisite to maintaining suit." *Williams v. Lara*, 52 S.W.3d 171, 178 (Tex. 2001); *Heckman*, 369 S.W.3d at 150. In Texas, standing is derived from the separation of powers and the open courts provisions of the Texas Constitution. *Tex. Ass'n of Bus.*, 852 S.W.2d at 443–45; *see* TEX. CONST. arts. I, § 13, II, § 1. Standing "'identif[ies] appropriate occasions for judicial action' and thus maintain[s] the proper separation of governmental powers." *Fin. Comm'n of Tx. v. Norwood*, 418 S.W.3d 566, 580 (Tex. 2013) (citing 13 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE & PROCEDURE § 3529 (3d ed. 2008)). At the same time, the open courts provision of the Texas Constitution[9] "contemplates access to the courts only for those litigants suffering an injury." *Tex. Ass'n of Bus.*, 852 S.W.2d at 444. Thus, standing "requires a concrete injury to the plaintiff and a real controversy between the parties that will be resolved by the court." *Heckman*, 369 S.W.3d at 154 (citing *Inman*, 252 S.W.3d at 304, 307).

Based on this fact and the holding in *Sweeney* that trial courts are presumed to have subject-matter jurisdiction, the Appellants argue that the trial court's order denying their relief constitutes an implicit finding that it had subject matter jurisdiction over this case. Appellants extrapolate from this assumption that, because standing is a component of subject-matter jurisdiction, the trial court's denial order is tantamount to a finding that Appellants have standing. Nevertheless, the reasoning goes too far. Rather than implying the existence of standing, the trial court's order denying the Appellants' requested relief is merely a void order. *See Browning v. Prostok*, 165 S.W.3d 336, 346 (Tex. 2005) (holding that any judgment or order issued by a trial court that lacks subject-matter jurisdiction is simply void). A trial court cannot obtain the jurisdiction it otherwise lacks by issuing a void order. Therefore, *Sweeney* does not support the Appellants' standing arguments.

[9]The open courts provision states, "All courts shall be open, and every person for an injury done him, in his lands, goods, person or reputation, shall have remedy by due course of law." TEX. CONST. art. I, § 13.

This standard "parallels the federal test for Article III standing: 'A plaintiff must allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief.'" *Id.* (quoting *Allen v. Wright*, 468 U.S. 737, 751 (1984), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc*., 134 S.Ct. 1377, 1388 (2014)). Likewise, the Texas Supreme Court has likened Texas' standing elements to the federal elements:

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical.'" Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly . . . trace[able] to the challenged action of the defendant, and not . . . th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

See id. at 154–55 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992) (citations omitted); *Balquinta*, 429 S.W.3d at 739.

With these general principles in mind, we turn to the Appellants' asserted bases of standing.[10]

III. Analysis

A. Bray and David Littlefield Do Not Have Individual Standing

"Generally, 'a citizen lacks standing to bring a lawsuit challenging the lawfulness of governmental acts.'" *Andrade v. Venable*, 372 S.W.3d 134, 136 (Tex. 2012) (quoting *Andrade v.*

[10]In their reply brief, the Appellants assert additional bases of standing under federal law that were addressed in neither their opening brief nor the Appellee's brief. Under our rules of appellate procedure, a reply brief may only address "any matter in the appellee's brief." TEX. R. APP. P. 38.3. Therefore, we need not consider these additional bases for standing.

NAACP of Austin, 345 S.W.3d 1, 6 (Tex. 2011)). "This is because '[g]overnments cannot operate if every citizen who concludes that a public official has abused his discretion is granted the right to come into court and bring such official's public acts under judicial review." *Id.* (quoting *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555 (alteration in original)). "Unless standing is conferred by statute, a plaintiff must show that he has suffered a particularized injury distinct from the general public." *Id.* (citing *Williams*, 52 S.W.3d at 179; *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555–56). Further,

> [w]ith regard to suits challenging governmental action, the Texas Supreme Court has also observed that "the line between a generalized grievance and a particularized harm . . . varies with the claims made" and that "the proper inquiry" boils down to "whether the plaintiffs sue solely as citizens to insist that the government follow the law."

Balquinta, 429 S.W.3d at 740 (quoting *Norwood*, 418 S.W.3d at 580 (quoting *NAACP of Austin*, 345 S.W.3d at 7–8)).

In their response to Fenves' plea to the jurisdiction, the Appellants argued that they were in imminent threat of injury because of Fenves' announcement that he, on behalf of the University, intended to remove the Davis and Wilson statues and because the statues were likely to suffer irreparable damage as a result of the removal process. They also argued that, since Bray and David Littlefield are descendants of Confederate veterans who are proud of their heritage, they would be insulted by the removal of the statues and that such insult would result in an injury different in both kind and magnitude from that suffered by the general public. Although they admitted that both they and the public at large are injured by the University's alleged "disregard for the history of this state and the mandates of the Texas Constitution," they asserted that the "removal [would]

likely cause . . . a specific injury to Bray and [David] Littlefield, given their status as a descendant of the Confederate[] veterans dishonored by the [University's] actions."

In their appellate brief, the Appellants allege that Bray's and David Littlefield's threatened injury has now become actual injury since the statues have been moved. Regarding their injuries they state,

> Bray's and [David] Littlefield's injuries arise from their identity as a descendant of Confederate veterans and Bray's and [David] Littlefield's public affirmation of the values of the military service of their ancestors in the Civil War, in the restoration and reconciliation of the Nation following the war, and World War I, the same principles to which the monuments were dedicated. [David] Littlefield's injury also includes his status as a Littlefield collateral descendant. The removal of the statues destroys the University's and Texas' efforts to recognize and honor the military dead of the Civil War, World War I, and indeed American veterans of all wars, since the monument of George Washington, Commander-in-Chief of the American Revolutionary armies, is included among the monuments on the University's South Mall. Bray and [David] Littlefield have personally suffered injuries from the removal of the monuments, because, unlike most people, they have publicly affirmed their commitment to the same American ideals expressed and commemorated in the desecrated monuments.[11]

Initially, we note that the Appellants have made no citations to their pleadings, or to the testimony or evidence offered at the hearing on the plea to the jurisdiction, that support the contentions in their briefs that Bray is a descendant of Confederate veterans, or that Bray and David Littlefield have made public affirmations of the values of the military service of their ancestors in the Civil War, in the restoration and reconciliation of the Nation, and World War I, thereby affirming the same American ideals expressed and commemorated in the statues. Nor have they cited to any place in their pleadings, or to any testimony or other evidence at the hearing,

[11]The Appellants reassert these claims, with additional detail, in their reply brief.

that supports their contentions that they have suffered particularized injuries because of these public affirmations or their status as descendants of Confederate veterans.

We have carefully reviewed the Appellants' first amended petition and find that Bray is alleged to be the Commander of the SCV and to reside in Texas. David Littlefield is alleged to be the third cousin of Littlefield and to reside in Kalispell, Montana. The amended petition goes on to allege that the University intends to relocate the Davis and Wilson statues, that there is the possibility of damage to the statues, and that the statues were given to the University by Littlefield under his will. The amended petition then requests a declaratory judgment that removing the Davis and Wilson statues is contrary to law, or that under the terms of the Littlefield will, they must remain in place until their future locations are prepared.

Next, the amended petition requests a temporary restraining order and a temporary injunction and alleges facts the Appellants claim support the issuance of the injunction. Regarding the imminent harm sought to be avoided by the injunction, the Appellants allege,

> The harm to [the Appellants] is imminent because the [University] has already publically announced the removal of [the Davis and Wilson] statues this week. Further, this imminent harm will cause [the Appellants] irreparable injury in that if the removal of the statues is allowed to go forward, the status quo will be lost and reinstalling the statues in their current location likely impossible. There is the further real threat of irreparable damage in moving 82 year old bronze statues.

Nowhere in the amended pleading did the Appellants allege that Bray and David Littlefield were descendants of Confederate veterans or that they have made public affirmations of the values of the military service of their ancestors in the Civil War, in the restoration and reconciliation of the Nation, and World War I, thereby affirming the same American ideals expressed and commemorated in the statues, or that they have suffered particularized injuries because of these

public affirmations or their status as descendants of Confederate veterans. In fact, the only injuries alleged in the amended petition were to the "status quo" and, speculatively, to the statues.

We have also carefully reviewed the hearing transcript. In their opening statement, the Appellants argued, *inter alia*, that the SCV and its members have standing because of the oath taken by each SCV member to "see that the true history of the south is presented to future generations." However, even assuming, without deciding, that such an oath would invest Appellants with standing, no testimony or other evidence was offered regarding the SCV oath or any of its members. Bray was not called as a witness, and no evidence was offered regarding his ancestry, his public affirmations, his membership in SCV, any SCV oaths, or any particularized injuries he may have suffered. David Littlefield testified that he currently lives in Montana and that his great-grandfather and Littlefield were first cousins. He also testified that the Littlefield name and history were important to his family, that Littlefield was the largest contributor to the University at the time of his death, and that Littlefield requested the statues be built and placed in a prominent place.

Regarding the University's plan to move the Davis and Wilson statues, he testified, "I think it's just absolutely silly for them to move those statues based on someone being offended." On cross-examination, he testified that he was not named as a trustee under the Littlefield will, that he was not a beneficiary, and that he did not have a financial interest under the will. Rather, he stated he had a family interest. He also acknowledged that he was not speaking on behalf of all the descendants of Littlefield. No other evidence was presented regarding David Littlefield's ancestry,

his public affirmations, his membership in SCV, any SCV oaths, or any particularized injuries he may have suffered.

The Appellants had the burden to plead and, when challenged, to prove facts that affirmatively showed their standing to bring this suit. *See Heckman*, 369 S.W.3d at 150; *Bland Indep. Sch. Dist.*, 34 S.W.3d at 554; *Poindexter*, 306 S.W.3d at 806. Since their standing is not conferred by statute, Bray and David Littlefield were required to plead and prove "that [they have] suffered a particularized injury distinct from the general public." *See Venable*, 372 S.W.3d at 137. Based on this record, we find that they have failed to either plead or prove a particularized injury that is different from the general public.

Further, even if the Appellants had pled and proved that Bray and David Littlefield were descendants of Confederate veterans and had made public affirmations of the values of the military service of their ancestors in the Civil War, in the restoration and reconciliation of the Nation, and World War I, thereby affirming the same American ideals expressed and commemorated in the statues, these facts would not be sufficient to state a particularized injury distinct from that of the general public. *See Bacon*, 411 S.W.3d at 176 (plaintiff's deep commitment and sense of duty to defend what he views as recognition and honor properly owed to fellow soldier, West Point graduate, and military hero, did not state an interest distinct from that of the general public in suit challenging Texas Historical Society's allegedly incorrect identification of individual on historical marker); *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 878 (Tex. App.—Austin 2010, pet. denied) (holding that members of advocacy group who claimed "environmental," "scientific," and "recreational" interests in preventing alleged pollution of a

public spring-fed pool, without more, did not establish an interest distinct from that of general public). "To the contrary, they merely signal an impetus for the democratic political participation in which [the Appellants], like other members of the public, are free to engage through the Legislative and Executive branches." *Bacon*, 411 S.W.3d at 176.

Therefore, we find that Appellants Bray and David Littlefield do not have individual standing and overrule this point of error.

B. Appellants Do Not Have Standing to Enforce the Bequest from Littlefield

In a related point, the Appellants assert that they have standing as third party donee beneficiaries of the bequest under the Littlefield will.[12] Under their theory, the University's acceptance of the bequests made under the Littlefield will burdened it with certain conditions, including displaying the statues in a place of prominence on the main mall. They argue that under the terms of the will, Littlefield intended the beneficiaries of his several gifts to the University to be the "children of the south" and the citizens of Texas, thereby giving any Texas citizen standing to enforce the terms of the bequest. Somewhat contradictorily, they also argue that the bequest for the erection of the statues did not create a public charitable trust, maintaining that Littlefield did not name a certain intended beneficiary. Fenves responds that the terms of the Littlefield will created a public charitable trust, which is generally only enforceable by the trustees and the

[12]The Appellants also assert for the first time on appeal that the open courts provision of the Texas Constitution confers standing on them to enforce the terms of the bequest under the Littlefield will. *See* TEX. CONST. art. I, § 13. Appellants do not cite any apposite authority for this proposition. Further, as previously noted, the open courts provision, rather than conferring standing, limits access to the courts to those plaintiffs that have suffered an injury. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 444. In other words, it requires that a plaintiff plead and prove that he has suffered an injury in order to have standing to have his cause of action heard by the court.

attorney general. While Fenves concedes that a public charitable trust may also be enforced by persons with a special interest different from the general public, he asserts that the Appellants have not shown the requisite special interest.

In his will, Littlefield made the following bequest relating to the statues:

> 6. I give and direct my executors hereinafter named to pay to Will C. Hogg of Houston, Texas, H.A. Wroe,[13] of Austin, Texas, and the person who occupies the position of President of the University of Texas as trustees the sum of two hundred thousand dollars ($200,000.00) said committee to use said sum or so much thereof as may be necessary to erect a massive bronze arch over the south entrance to the campus of the University of Texas, in Austin, Texas. On the top of the arch I wish them to place a life size statue of Jefferson Davis, the President of the Southern Confederacy, to his right and below him I wish them to place a life size statue of General Robert E. Lee, Commander of the Army of Virginia, to the left of President Davis and below him and opposite the statue of General Lee, I wish them to place a life size statue of General Albert Sidney Johnston, Commander of the Army of Tennessee. Under General Lee I wish them to place a statue of John . . . Reagan, Postmaster General of the Confederacy, and below the statue of General Johnston a statue of James S. Hogg, the peoples' Governor of Texas. The space in the center between the two drive-ways can be filled as the committee deems best. I desire the arch lettered as follows: Under the statue of Jefferson Davis, the following: "President of the Confederate States of America; under the statue of General Lee, "Commander of the Army of Virginia"; under the statue of General Johnston "Commander of the Army of Tennessee"; under the statue of Mr. Reagan: "Postmaster General of the Confederacy" under the statue of Governor Hogg: "The Peoples' Governor of Texas" and at some prominent place the following "This arch built and donated to the University of Texas by George W. Littlefield." The arrangement given here is suggested to the committee as being the best; However, they are authorized to change it or the design suggested if they wish, giving prominence however to the statue of the men named above.

By codicil dated November 9, 1920, Littlefield made the following pertinent changes:

> 1. I direct and it is my will that the gift of two hundred thousand dollars to Will C. Hogg, H.A. Wroe and the person who occupies the position of president of

[13]Will C. Hogg was a member of the University's Board of Regents when Littlefield executed his will, but not when he executed his codicil. Neither of the men were members of the University's Board of Regents in the 1930's when the statues were erected on the University's main mall. *See Former Regents of the University of Texas System, Regents by Decade*, U. TEX. SYS., http://www.utsystem.edu/bor/former_regents/decade.htm (last visited Mar. 11, 2016).

> the University of Texas as trustees to erect a bronze arch provided for in paragraph six (6) of said will shall be increased to the sum of two hundred and fifty thousand dollars ($250,000.00), the other provisions of said paragraph to remain unaffected. It appears that it will take several years to plan and erect this arch, and I am now contemplating making a contract for the commencement of the work before my death. Should I do this, and should I die before this arch is completed it is my desire and I direct that the trustees shall proceed to carry out the said contract and this whether there are different persons acting as trustees or not. I direct that all payments that have been made by me before my death shall be deducted from said sum of two hundred and fifty thousand dollars ($250,000.00), and the balance paid by my executors to said trustees under said paragraph.

It is uncontested that the statues named in the will, as well as the Wilson statue, were built and erected in a place of prominence, on the University's main mall, and that they remained there for over eighty years. It is also uncontested that the arch was never built and that the actual location and configuration of the statues differed markedly from that suggested in the will. The Appellants admit that these modifications were allowed under the will. Rather, as we understand it, the Appellants assert that, since the University accepted the gift of the statues, it is permanently bound by the condition that the statues remain displayed on the main mall,[14] either under a theory of election of benefits or quasi-estoppel. Assuming, without deciding, that such a condition exists, a preliminary question, then, is whether the University may be permanently prevented from removing or relocating these statues.

To answer this question, we first take judicial notice of those portions of the Texas Constitution and statutes relating to the establishment and location of the University. *University of Tex. v. Booker*, 282 S.W.2d 740, 742 (Tex. Civ. App.—Texarkana 1955, no writ); *see Splawn v. Woodard*, 287 S.W. 677, 678–79 (Tex. Civ. App.—Austin 1926, no writ); Tex. Const. art. VII,

[14]We note that there is no express requirement in the Littlefield will that the statues remain permanently on the mall.

§ 10; Act approved March 30, 1881, 17th Leg., R.S., Ch. LXXV, 1881 Tex. Gen. Laws 79, *reprinted in* 9 H.P.N. Gammel, *The Laws of Texas 1822–1897*, at 171 (Austin, Gammel Book Co. 1898), *available at* http://texashistory.unt.edu/ark:/67531/metapth6729/m1/173/. This is significant since, as the Austin Court of Appeals has explained, the original forty acres upon which the University was established was set aside by the State for the University's campus. *Splawn*, 287 S.W. at 678–79. The Court of Appeals further noted that, in 1881, the Texas Legislature, by Chapter 75 of the Acts of the 17th Legislature,

> establish[ed] the University, provided for location of the main branch and the medical department by popular vote, by which the main branch was located at Austin, and from that time the tract in question has been used for campus purposes. By section 5 of that act the government of the University was vested in a board of regents, whose duties were set forth in sections 15 and following of the act. Among the duties thus imposed were: To establish the departments of the University; to define the general plan of University buildings; advertise for bids; and proceed as soon as practicable to the erection of the buildings.

Id. The court went on to hold that the statutes establishing the University and vesting its government in the board of regents also limited the board of regents' authority to impress any part of the forty acres[15] set aside for the campus "with a trust or restrictions, the effect of which might be to hamper them or their successors in the proper administration of the institution as they may determine wise and expedient to meet changes in conditions from time to time." *Id.* at 681.

In *Splawn*, the appellees, male students at the University, claimed that a gift to the University of the fund from which B Hall, a men's dormitory, was originally constructed created

[15]We take judicial notice that the main mall of the University is located within the original forty acres set aside for the campus. *See* TEX. R. EVID. 201(b).

a trust, or at least a limitation on the use of the building, that required it to be used as a dormitory for students of limited means. *Id.* at 678. The evidence at trial showed that Colonel George W. Brackenridge had contributed money for the dormitory in 1890 to help poor young men and to provide shelter and board as cheaply as possible, but that he had not placed any express restrictions on the endowment since everyone understood his purpose.[16] *Id.* at 679–81. It also showed that, after the board of regents initially approved a plan to convert B Hall to an office and seminar building in 1920, the approval was rescinded after a protest from Brackenridge. *Id.* at 680–81. After his death, the University's Board of Regents, in 1926, approved a recommendation to convert B Hall to accommodate classrooms and offices and to return the deposits of applicants for rooms at B Hall for the 1926–1927 school year. *Id.* at 680. The appellees who had made reservations for lodging in B Hall for that school year obtained a temporary injunction against the planned actions of the regents. *Id.* at 678.

In dissolving the temporary injunction, the Court of Appeals, after discussing the statutes establishing the University and creating the University's Board of Regents to govern it, held that:

> The regents are clearly officers of the state charged with the duty of management and control of the University and its property. The campus tract was set aside for general uses in connection with the main branch of the University. There is nothing in the statutes which, either expressly or by implication, invest the regents with power to attach any trusts, limitations, or conditions to the title to that property or in any way to hamper or restrict its free use for campus purposes. Such power should not be presumed, in the absence of an express grant, unless necessarily incident to a power expressly granted. The property has been set aside as the seat of main branch of the University. The regents clearly would have no power to abandon it as such, dispose of it, or exchange it for another site; nor could they impress it, or any part of it, with a trust or restrictions, the effect of which might be to hamper them or their successors in the proper administration of the institution as

[16]At the time, Brackenridge was a member of the University's Board of Regents. *Splawn*, 287 S.W. at 680.

> they may determine wise and expedient to meet changes in conditions from time to time.

Id. at 681. The Austin court went on to note that the University's Board of Regents clearly had the power to erect improvements on the forty-acre tract and to "make needed changes in their construction, location, and use" under the 1881 act, as well as under subsequent statutes. *Id.*; *see* Act approved Apr. 3, 1925, 39th Leg., R.S., ch. 175, §§ 1–2, 1925 Tex. Gen. Laws 415, 415–16, *repealed by* Act of May 22, 1971, 62d Leg., R.S., ch. 1024, § 3, 1971 Tex. Gen. Laws 3072, 3320. The court held that by these statutes, which charged the University's Board of Regents with making permanent improvements to the campus,

> the Legislature has delegated to the regents full discretionary powers over the buildings on the University campus, subject only to legislative review, and that their discretion in this regard is not a subject of court control, except, perhaps, in case of palpable abuse, of which there is no suggestion in the present record.

Id. at 681–82; *see also Foley v. Benedict*, 55 S.W.2d 805, 808 (Tex. 1932) (orig. proceeding) (holding that court will not interfere with decisions of the University's Board of Regents in those matter legislatively consigned to its discretion "in the absence of a clear showing that they have acted arbitrarily or have abused the authority vested in them").

Thus, the law at the time the will and codicil were executed, as well as when the statues were erected, was that the University's Board of Regents, in its discretion, could accept gifts and apply them to the purposes intended by the donor, as was done both in *Splawn* and this case. However, at least in regard to improvements placed on the original forty-acre tract, the University's Board of Regents lacked the authority to accept gifts with conditions that would prevent it, or a future board, from making such changes to the improvements, including their removal, as it may

determine to be "wise and expedient." *Id.* at 681. Therefore, even if Littlefield had intended that the Davis statue permanently remain on the main mall, as the Appellants contend, this would not be a condition binding on either the board of regents that accepted the gift or subsequent boards.

Since there are no binding conditions under the will that can be enforced by Appellants, they have not shown "a real controversy between the parties that will be resolved by the court." *See Heckman*, 369 S.W.3d at 154. Therefore, we find that the Appellants do not have standing to enforce the bequest from Littlefield and overrule this point of error.

C. Appellants Have Not Shown Standing to Enforce the Board of Regents' Rules

Although not asserted at the trial court, in their brief in this Court the Appellants assert that Fenves' actions were *ultra vires* in that he acted without consulting the University's Vice Chancellor for External Affairs (the Vice Chancellor) or the Office of Development and Gift Planning Services (the ODGPS). According to the Appellants, the University's Board of Regents promulgated rules vesting the administration of gifts, including bequests, in the Vice Chancellor, who in turn has vested the ODGPS with the authority to accept and administer gifts. The Appellants allege that Fenves violated these rules by bypassing the Vice Chancellor and the ODGPS and ordering the removal of the Davis and Wilson statues. Even assuming that the Appellants' allegations in their brief are true, the Appellants only contend that the injury suffered by them is the removal of the Davis and Wilson statues. However, this is not a particularized injury distinct from that suffered by the public in general as a result of the alleged violations.[17]

[17]Appellants assert that this alleged violation and their injury would likely be redressed by a declaratory judgment. However, the Declaratory Judgment Act "does not extend a trial court's jurisdiction, and a litigant's request for declaratory relief does not confer jurisdiction on a court or change a suit's underlying nature." *Tex. Natural Resource Conservation Comm'n v. IT-Davy*, 74 S.W.3d 849, 855 (Tex. 2002) (citing *State v. Morales*, 869 S.W.2d 941, 947

Therefore, the Appellants lack standing to complain of these alleged violations of the University's Board of Regents' rules.

D. No Taxpayer Standing Was Pled or Shown

The Appellants also assert that they have taxpayer standing. Although a taxpayer generally must show a particularized injury distinct from the general public, there is a narrow exception to this requirement. *Bland Indep. Sch. Dist.*, 34 S.W.3d at 555–56. In Texas, "a taxpayer has standing to sue in equity to enjoin the illegal expenditure of public funds, even without showing a distinct injury." *Id.* at 556; *Williams*, 52 S.W.3d at 179. This cause of action is limited to only those cases in which the funds have not yet been spent, or in which full performance under a contract has not been obtained.[18] *See Bland Indep. Sch. Dist.*, 34 S.W.3d at 556–58. Further, the proposed expenditure must be illegal, not "merely 'unwise or indiscreet.'" *Williams*, 52 S.W.3d at 180 (quoting *Osborne v. Keith*, 177 S.W.2d 198, 200 (Tex. 1944)).

This rule requires "(1) that the plaintiff is a taxpayer; and (2) that public funds are expended on allegedly illegal activity." *Williams*, 52 S.W.3d at 179. Thus, the Appellants were required to

(Tex. 1994)). Further, "[a] declaratory judgment is appropriate only if a justiciable controversy exists as to the rights and status of the parties and the controversy will be resolved by the declaration sought." *Bonham State Bank v. Beadle*, 907 S.W.2d 465, 467 (Tex. 1995) (citing *Tex. Ass'n of Bus.*, 852 S.W.2d at 446); *see also City of Dallas v. VSC, LLC*, 347 S.W.3d 231 (Tex. 2011). Since Appellants have not asserted a particularized injury distinct from that suffered by the public, no justiciable controversy exists between the parties.

[18]"For a plaintiff to have standing, a controversy must exist between the parties at every stage of the legal proceedings, including the appeal. If a controversy ceases to exist[,] . . . the case becomes moot." *Williams*, 52 S.W.3d at 184 (citation omitted). Although the Appellants advised this Court that the Davis and Wilson statues were removed on August 30, 2015, the evidence shows that additional funds will be expended in preparing the Briscoe Center for an appropriate display of the Davis statue, in preparing an appropriate place for the Wilson statue, and for their final relocation. Therefore, this case has not become moot.

plead and prove facts that affirmatively show (1) that they are taxpayers and (2) that the University is expending funds on an illegal activity.

The amended petition contains no allegations that any of the Appellants are taxpayers or that the suit is being brought to prevent the University from expending funds on an illegal activity. Nor did the Appellants assert taxpayer standing in their response to Fenves' plea to the jurisdiction. Rather, the Appellants first asserted that they had taxpayer standing in their opening statement at the hearing on the plea to the jurisdiction. Nevertheless, we must first determine whether their pleadings support their assertions.

The amended petition does not plead facts that affirmatively show that any of the Appellants are taxpayers.[19] The amended petition alleges that Bray is a resident of Texas, that David Littlefield is a resident of Montana, and that SCV has its principal offices in Forney, Texas. However, alleging residency in Texas is not sufficient to demonstrate one's standing as a taxpayer. In *Williams*, one of the plaintiffs, Lara, alleged that her payment of rent on her Tarrant County residence and her payment of sales tax gave her taxpayer standing. *Id.* at 179. However, the Texas Supreme Court held that, since she was "not liable to Tarrant County for the tax on the property she rents, even if . . . her landlord use[d] her rent to pay the tax, the connection between paying rent and her status as a taxpayer [was] too attenuated to confer taxpayer standing on her." *Id.* The court also held that paying sales tax is not sufficient to obtain taxpayer standing. *Id.* at 180. Here,

[19]Although Fenves states in his brief that Bray and David Littlefield "are likely able to demonstrate their status as taxpayers," standing may not be waived by the parties and may be raised at any time by the parties or by the court on its own motion. *See Tex. Ass'n of Bus.*, 852 S.W.2d at 443, 445–46 (Supreme Court raised issue of standing for first time even though parties argued it had been waived); *In re Fort Worth Star Telegram*, 441 S.W.3d 847, 850 (Tex. App.—Fort Worth 2014, orig. proceeding).

the Appellants' pleadings contain no allegation of facts that would affirmatively show any of them had taxpayer standing.

In addition, although the Appellants asserted taxpayer standing at the hearing, they did not offer any evidence regarding Bray's or SCV's residency, any evidence showing that Bray, SCV, or David Littlefield own any real property in Texas on which they pay property tax, or any other evidence that might support a finding that any of them are taxpayers.[20] *See id.* Based on this record, we find that the Appellants have failed to either plead or prove facts showing that any of them have taxpayer standing.[21] Therefore, we overrule this point of error.

E. SCV Does Not Have Associational Standing

The Appellants also assert that SCV has associational standing. They argue that the purposes of SCV are the same as those of Bray and David Littlefield, that is, to preserve the history and legacy of Davis and other Southern heroes on behalf of future generations. Appellants argue, citing *Texas Association of Business*, that the proper test to determine associational standing is that there "(a) shall be a real controversy between the parties, which (b) will be actually determined by the judicial declaration sought."[22] *Tex. Assoc. of Bus.*, 852 S.W.2d at 446 (citing *Bd. of Water*

[20]Although David Littlefield testified that he had previously worked at the University and at two high schools in Texas, none of his testimony gives factual support to the Appellants' conclusory statement that he has been a Texas taxpayer all of his life.

[21]Since the Appellants have not established that they are taxpayers, we need not consider whether the University's actions violated Section 2166.5011(b) of the Texas Government Code or whether, in this case, the University was exempt from that section's requirements under Section 2166.003(a)(2) of the Texas Government Code. *See* TEX. GOV'T CODE ANN. § 2166.003(a)(2) (West Supp. 2015), § 2166.5011(b) (West 2008).

[22]As seen above, the Texas Supreme Court has refined the general test for standing since its 1993 decision in *Texas Association of Business. See Heckman*, 369 S.W.3d at 154–56.

Eng'rs v. City of San Antonio, 283 S.W.2d 722, 724 (Tex. 1955)). They then base their analysis on this test.

However, in *Texas Association of Business*, the Supreme Court, after setting out the general test for standing expressed in *Board of Water Engineers*, noted that "Texas . . . has no particular test for determining the standing of an organization." *Id.* It went on to note the difficulties, *inter alia*, in relying solely on this test to determine the standing of an organization that sues on behalf of its members when the members' interest might conflict with those of the organization. *Id.* at 447. However, for an association that seeks to protect the same interests as its individual members, as the Appellants assert in this case, the Texas Supreme Court adopted the following test:

> an association has standing to sue on behalf of its members when "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."

Id. (quoting *Hunt v. Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)). In fact, this is the same test urged by the Appellants in the trial court in their response to Fenves' plea to the jurisdiction, without citing *Texas Association of Business*. Since we have determined that Bray[23] does not have individual standing to sue in his own right, SCV does not have associational standing to sue.[24] We overrule this point of error

[23]The Appellants neither pled nor offered evidence that David Littlefield was a member of SCV.

[24]The Appellants' pleadings, evidence, and arguments regarding any injury to SCV are identical to those asserted for Bray and David Littlefield. Even if we were to apply the current general test for standing set forth in *Heckman*, SCV would not have standing for the reasons stated in Section III, subsection A, above.

We affirm the trial court's order granting Fenves' plea to the jurisdiction.

Ralph K. Burgess
Justice

Date Submitted: January 7, 2016
Date Decided: March 24, 2016