
**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. §

Civil Action No. 1:17cv822

Gregory L. Fenves, §
In His Official Capacity as §
President of §
The University of Texas at Austin, §
Defendant. §

Ex Parte

**PLAINTIFF'S ORIGINAL COMPLAINT
& APPLICATION FOR TEMPORARY RESTRAINING ORDER**

A. PARTIES

1. Plaintiff, David McMahon, is an individual and a citizen of the State of Texas.

2. Plaintiff, Steven Littlefield, is an individual and a citizen of the State of Montana.

3. Plaintiff, Texas Division, Sons of Confederate Veterans, Inc., is a non-profit corporation that is organized under the laws of the State of Texas.

4. Defendant, Gregory L. Fenves, is an officer of the University of Texas at Austin and is being sued in his official capacity. He may be served by serving the Office of the President. *See* Fed. R. Civ. P. 4(j)(2)(A).

B. JURISDICTION

5. The Court has jurisdiction over the lawsuit, because the suit arises under Amendments I and XIV, Sec. 1 of the U.S. Constitution. “Congress shall make no law . . . abridging the freedom of speech.” . . . “Nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” 28 U.S.C. § 1331. *Gunn v. Minton*, 133 S.Ct. 1059, 1064 (2013); *Exxon Mobil Corp. v. Allapattah Servs.*, 545 U.S. 546, 552 (2005).

6. The Court has jurisdiction over the lawsuit under 28 U.S.C. § 1332(a)(1), because Steven Littlefield and Gregory L. Fenves are citizens of different states and the amount in controversy exceeds \$75,000.00, excluding interest and costs. Steven Littlefield is a citizen of the State of Montana, and Gregory L. Fenves is a citizen of the State of Texas. In addition, the value of the Littlefield Monuments, including their plinths, at the time of the erection was over \$250,000.00. The current value of the entire Littlefield Statues has been estimated by an expert at the New York Landmarks Conservancy at \$500,000.00 per statue, or \$3,000,000.00 as a group, exclusive of the

Littlefield Fountain, damage to the monuments and damage to Plaintiffs' rights exceeds \$75,000.

C. VENUE

7. Venue is proper in this district under 28 U.S.C. § 1391(B)(2), because all of the events or omissions giving rise to this claim occurred in this district and because all of the property at issue is situated in this district. The Littlefield Statues at the University of Texas at Austin are located in this district, and defendant's actions occurred in this district when he ordered the unlawful and unconstitutional removal of the Littlefield Statues and has now covered the inscriptions on their plinths.

D. FACTS

8. In the early morning hours of Monday, August 21, 2017, President Fennes had four statues of famous Texans removed from the South Mall of the University of Texas at Austin and their supporting plinths covered with black plastic in order to obscure the ancient inscriptions.

9. The statues were paid for and donated to the University by Maj. George Washington Littlefield, a major donor to the University. The statues were part of a monument complex that Maj. Littlefield donated to the University, that the University received with great fanfare, and that President Fennes is now disassembling piecemeal.

10. The Bequest included the Littlefield Statues, the Littlefield Fountain, funds for an endowed chair in American history, the Littlefield

Fund for Southern History, a fund for the publication of a history of the United States from the Southern perspective, the Littlefield Dormitory for Women, the Littlefield Mansion, tracts of land that the University expanded into in the 1920s, the seed funds for six classroom buildings, and the seed money for the Texas Tower and Administration Building. The Littlefield Bequest provided the assets for the University as a major national and international university.

11. In return for Maj. Littlefield's remarkable generosity, he requested and the University agreed to promote the Southern perspective of American history.

12. President Fenves' removal of the Littlefield Statues and covering of their inscriptions was a breach of the agreement between Maj. Littlefield. The agreement was an exchange of substantial sums of money and real estate for the University's promotion of core political speech embodied in the Littlefield Statues and their inscriptions that communicated the Southern understanding of the Civil War. The University agreed to communicate political speech in perpetuity. Now, however, Pres. Fenves has breached the University's promise to communicate minority political speech.

13. In addition, Pres. Fenves' removal of the statues abridged petitioners' minority political speech. A state actor cannot prohibit political speech in a public forum under its control. *Texas v. Johnson*, 491 U.S. 397, 397-98 (1984). Further, a state actor cannot proscribe nor prescribe the

meaning of political symbols in a public forum. *Id.* at 415. “If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. *Johnson*, 491 U.S. at 415.

14. The University’s removal of the Littlefield Monuments and obscuration of the Inscriptions established a constitutional injury, because plaintiffs are descendants of the American veterans that the monuments commemorate and whose memory, acts, and political philosophy plaintiffs or plaintiffs’ forebears have protected since the placement of the monuments. The University’s removal of the monuments and inscriptions eradicated the political speech that plaintiffs have protected most of their adult lives. The University’s suppression of political speech is an on-going constitutional injury.

E. COUNT 1 – BREACH OF BEQUEST AGREEMENT

15. Defendant has breached the University’s agreement with Maj. George Washington Littlefield and the Littlefield estate to communicate the Southern understanding of American history and the Civil War.

F. COUNT 2 – ABRIDGEMENT OF FREE SPEECH AND DUE PROCESS

16. Defendant has abridged plaintiffs’ right to free speech and due process by removing the Littlefield Statues and obscuring the inscriptions on the statues’ plinths that communicated minority political speech in a public

forum. The University agreed to communicate this minority political speech and now should be enjoined from removing or obscuring the artifacts that communicate political speech, i.e. the Littlefield Statues and their inscriptions.

**G. COUNT 3 – VIOLATION OF THE
TEXAS MONUMENT PROTECTION ACT**

17. Defendant has violated the Texas Monument Protection Act. Tex. Gov't Code §§ 2166.501 and .5011. Defendant removed the statues of Albert Sidney Johnston and John H. Reagan. Johnston served as Adjutant General of the Republic of Texas, in the U.S. Army, and in the Confederate Army. Reagan served in war-related service in the Confederate government. Both are military veterans protected under the act. The Texas Monument Protection Act vests authority in the removal, relocation or alteration of a monument on state land to a Texas military veteran in the Texas Legislature, the Texas Historical Commission, or the State Preservation Board only. Authority does not lie with any other government entity, including the University of Texas. Since the monuments to Johnston and Reagan are on state land, both men were Texas citizens protected under the act, and the University was vested with the statutory authority to remove these monuments, Pres. Fennes violated the Texas Monument Protection Act.

H. COUNT 4 – VIOLATION OF THE BOARD OF REGENTS' AUTHORITY OVER THE UNIVERSITY CAMPUS

18. Texas case law provides that the President of the University of Texas does not have authority over the campus; the Board of Regents does. *Splawn v. Woodward*, 287 S.W. 667, 681 (Tex. App. — Austin, 1926) (rehearing denied). Because Pres. Fenves acted without the authority of the Board of Regents and without attempting to consult with the Board,¹ Pres. Fenves acted ultra vires.

I. REQUEST FOR TEMPORARY RESTRAINING ORDER

19. Affidavits that prove the allegations in the application for injunctive relief are attached and incorporated by reference.

20. Plaintiffs will likely suffer imminent irreparable injury, if the defendant is not immediately restrained from removing the plinths to the Littlefield Statues and the Littlefield Fountain. Fed. R. Civ. P. 65(b)(1); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). Pres. Fenves has already removed four statues and the large inscription to the Littlefield Monument complex without notice and in the dead of night. Pres. Fenves removed these monuments to Texans after expressly promising in the press that he would not alter these monuments in any way. Plaintiffs believe that Pres. Fenves will continue to disassemble the Littlefield Monument to

¹ Fenves reports that he did not seek guidance from anyone with authority over the University's campus. Gregory L. Fenves, *Message from the President [R]egarding Confederate Statues on Campus*, (August 21, 2017), <http://president.utexas.edu/messages/confederate-statues-on-campus>.

American veterans and disavow the sacrifices of their families without notice, because this is his pattern of conduct.

21. Plaintiffs are currently suffering on-going irreparable injury, because the defendant has obscured the inscriptions on the plinths to the Littlefield Statues with black plastic to render the inscriptions unviewable. Fed. R. Civ. P. 65(b)(1); *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). “The loss of First Amendment interests were either threatened or in fact being impaired at the time relief was sought. The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.” *Elrod v. Burns*, 427 U.S. 347, 373 (1976).

22. Pres. Fenves’ covering of the Littlefield Statues’ inscriptions directly abridges the political speech of the monuments. Pres. Fenves argues in his message regarding Confederate statues on campus that the Littlefield monuments symbolize “hatred and bigotry.” Gregory L. Fenves, *Message from the President [R]egarding Confederate Statues on Campus*, (August 21, 2017), <http://president.utexas.edu/messages/confederate-statues-on-campus>.² Pres. Fenves is a state actor who is ordaining the political meaning of political symbols in a public forum. This government determination of political symbols in a public forum without a showing of any compelling interest in making the determination and without due process is a continuing

² Pres. Fenves removed the statue of Gov. Jim Hogg, who never served in the Confederacy.

irreparable harm, as contemplated under *Texas v. Johnson* and *Elrod v. Burns*.

23. There is no adequate remedy at law, because any legal remedy would be merely illusory. *Northern Cal. Power Agency v. Grace Geothermal Corp.*, 469 U.S. 1306, 1306 (1984). The denial of free speech and due process on a continuing basis cannot be readily reduced to monetary damages. The only adequate remedy to the abridgment of free speech is the injunctive demand to resume the abridged free speech and to provide the denied due process.

24. There is a substantial likelihood that the plaintiffs will prevail on the merits. *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 931 (1975). Pres. Fenves has expressly abridged the political speech of the Littlefield Monuments and attempted to substitute a new interpretation of the monuments' political communication. Case law on this issue clearly shows that government actors may not enforce their own interpretation of political messages on political symbols. *Johnson*, 491 U.S. at 415. Plaintiffs are confident that the Court will agree that Pres. Fenves is abridging the long-standing tradition of political speech in a public forum, which should be remedied by the Court's authority.

25. The on-going harm to plaintiffs outweighs the harm that a temporary restraining order would inflict on defendant. *Winter*, 555 U.S. at 24; *Yakus v. United States*, 321 U.S. 414, 440 (1944). Plaintiffs are already

experiencing continuing harm by the denial of political speech communicated by the statues and their inscriptions on the plinths. *Elrod*, 427 U.S. at 373. Defendant will suffer no harm by allowing the plinths to stand. Likewise, no harm would accrue from removing the plastic wrap or metal covers from around or over the plinths.

26. Issuance of a temporary restraining order would not adversely effect the public interest and public policy, because issuance of the order would serve the public interest. *See Winter*, 555 U.S. at 24-26. Indeed, the benefit to third parties would be enormous, as the freeing of the direct, factual inscriptions on the plinths, such as “James Hogg, Governor of Texas” or “Woodrow Wilson, President of the United States, Founder of the League of Nations” would allow everyone in this public forum at the University that historic facts pose no actual harm. Indeed, the order would mark the end of the Orwellian terror that Pres. Fennes is attempting to inflict on the public, students, faculty, and staff by his administration.

27. Plaintiffs are willing to post a bond in the amount the Court deems appropriate. However, plaintiffs are filing this cause in the public interest and request that the Court order no or a nominal bond. *Kaepa, Inc., v. Achilles Corp.*, 76 F.3d 624, 628 (5th Cir. 1996). Firstly, defendant stands in no financial risk by the issuance of the requested injunction. And secondly, plaintiffs are suing in the public interest and stand to recover no damages in this action.

28. The Court should enter this temporary restraining order without notice to defendant, because plaintiffs will likely suffer immediate and irreparable injury, loss, or damage if the order is not granted before defendant can be heard and there is no less drastic way to protect plaintiffs' interests. Fed. R. Civ. P. 65(b)(1); *Garcia v. Yonkers Sch. Dist.*, 561 F.3d 97, 106 (2d Cir. 2009); *see also Benchbook for U.S. District Court Judges*, at 239. Twice before, Pres. Fenves has removed portions of the Littlefield Monument without notice and under cover of darkness. He has removed the monuments contrary to express promises he made to the public. In the most recent illegal removal, Pres. Fenves has had plastic wrap placed around the plinths of the statues. This is the same plastic wrap the University has used in removing the statues permanently. Road closing signs, used by the University to close the street and remove the statues, are still positioned along the street where the monument is located. Plaintiffs have reason to believe that Pres. Fenves will once again, contrary to his voluntary promises, surreptitiously remove the plinths without notice in the dead of night. Plaintiffs believe that were Pres. Fenves to receive notice that this Court was contemplating an injunction to protect what remains of the monument, Pres. Fenves would quickly order the further removal of the monument.

29. Plaintiffs ask the Court to set the request for a preliminary injunction hearing at the earliest possible time.

J. CONCLUSION

30. Plaintiffs have proper jurisdiction and venue to appear before the Court and request injunctive relief. Pres. Fenves has breached his promise not to alter the Littlefield Monument further by having four statues of Texas statesmen removed from the University. In removing the statues, Pres. Fenves has breached the University's long-standing promotion of American history from the Southern perspective that it promised to its generous donor, Maj. George Washington Littlefield. In addition, Pres. Fenves has abridged plaintiffs' constitutional guarantees of political speech and due process. Plaintiffs are concerned that Pres. Fenves will continue to eradicate political speech at the University by removing the plinths with factual information concerning the statues that Pres. Fenves removed. Plaintiffs suffering continuing constitutional harm by the removal of the political speech expressed in the statues and the covering of the plinth's inscriptions. Plaintiffs have serious concerns that Pres. Fenves' Orwellian agenda will consider without intervention of this Court. For these reasons, plaintiffs ask the Court to issue a temporary restraining order preventing defendant from removing the plinths to the Littlefield Monument, from removing the Littlefield Fountain, and to remove the plastic wrap and any other obscuring substance from the plinths of the six Littlefield statues.

K. PRAYER

31. For these reasons, plaintiffs ask that the Court do the following:

- a. Order that Pres. Fenves not remove the plinths to the Littlefield Statues from the South Mall at the University of Texas at Austin;
- b. Order that Pres. Fenves not remove the Littlefield Fountain from the South Mall at the University of Texas at Austin;
- c. Order that Pres. Fenves remove the plastic wrap and any other substances from the plinths from the six Littlefield plinths on the South Mall at the University of Texas at Austin within twenty-four hours and cease and desist from obscuring in any way the factual inscriptions on the plinths;
- d. Enter judgment for plaintiffs;
- e. Award attorney fees to plaintiffs;
- f. Award costs of suit to plaintiffs; and,
- g. Grant any other relief the Court deems appropriate.

Respectfully submitted,

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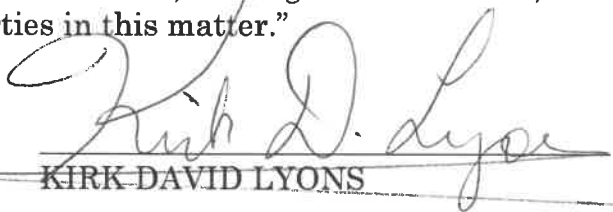
STATE OF NORTH CAROLINA §
BUNCOMBE COUNTY §

1:17cv822

AFFIDAVIT OF KIRK DAVID LYONS

Before me, the undersigned notary, on this day personally appeared Kirk David Lyons, affiant, a person whose identity is known to me. After I administered an oath, affiant testified as follows:

1. "My name is Kirk David Lyons. I am competent to make this affidavit. The facts stated in this complaint are within my personal knowledge and are true and correct.
2. I have been reading news articles, talking with witnesses, and reading statements made by the parties in this matter."



KIRK DAVID LYONS

SWORN TO and SUBSCRIBED before me by Kirk David Lyons on August 23, 2017.

Robert E. Callihan / Robert E. Callihan
 Notary Public in and for
 The State of North Carolina

ROBERT E. CALLIHAN
NOTARY PUBLIC
Henderson County, NC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing PLAINTIFFS' ORIGINAL COMPLAINT & APPLICATION FOR TRO which is filed Ex Parte and will be forwarded to counsel of record for the Defendants, when order by the Court by electronic transmission on this, the 23th day of August 2017

/s/ Kirk D. Lyons
Kirk D. Lyons