FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PHILIP PINKERT, individually and on behalf of a class of similarly situated individuals, and on behalf of the general public, *Plaintiff-Appellant*, v. SCHWAB CHARITABLE FUND; CHARLES SCHWAB & CO.; SCHWAB CHARITABLE BOARD OF DIRECTORS; SCHWAB CHARITABLE INVESTMENT OVERSIGHT COMMITTEE, *Defendants-Appellees.*	No. 21-16299 D.C. No. 3:20-cv-07657-LB OPINION

Appeal from the United States District Court
for the Northern District of California
Laurel D. Beeler, Magistrate Judge, Presiding

Argued and Submitted April 11, 2022
San Francisco, California

Filed September 14, 2022

Before: EUGENE E. SILER,* MILAN D. SMITH, JR., and DANIEL A. BRESS, Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.;
Concurrence by Judge Bress

SUMMARY**

Article III Standing

The panel affirmed the district court's judgment, holding that Philip Pinkert did not have Article III standing to sue Schwab Charitable Fund for allegedly breaching its fiduciary duties by, among other things, deducting excessive fees from Pinkert's donor-advised fund.

A donor-advised fund ("DAF") is a charitable giving vehicle that allows donors to take a present-year income tax deduction, while distributing the funds to charity at a later time. Pinkert opened a DAF at Schwab Charitable in 2007. Pinkert argued that Schwab Charitable's conduct injured him in four ways. First, although Pinkert donated funds to Schwab Charitable for *some* purposes, he retained a property right to direct the funds to charities, and the excessive fees and Schwab Charitable's related mismanagement of the funds impaired his ability to exercise that property right. Second, because his DAF does not contain as much money

* The Honorable Eugene E. Siler, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

as it would have absent the excessive fees and Schwab Charitable's allegedly imprudent management of his account, Pinkert's reputation for charitable giving will not be enhanced as much as he intended. Third, having less funds available to direct means that Pinkert cannot express his values as strongly as he would have been able to otherwise. Fourth, Pinkert may need to contribute more funds to his DAF in the future to make up for the excessive fees and other mismanagement by Schwab Charitable.

The panel held that it need not decide whether Pinkert's arguments, regarding his purported need to contribute more to the DAF and related impact on his reputation and expressive rights, were cognizable in general because Pinkert did not allege that he had experienced or will experience any of these purported injuries. The panel concluded that Pinkert had not adequately alleged standing based on these theories of injury.

The panel held that Pinkert's property-rights argument was also unpersuasive. Pinkert did not retain any right to direct where the funds will be invested or donated. Schwab Charitable was not obligated to follow Pinkert's recommendations. In addition, Pinkert did not allege that Schwab Charitable refused to listen to his advice. Pinkert did not allege that the right that he does have–-the right to provide nonbinding advice—was infringed. The panel concluded that Pinkert's property-rights-based theory of standing failed too. The panel held that Pinkert lacked Article III standing to press his claims in federal court. The panel, therefore, did not address whether Pinkert had statutory standing under California law.

Judge Bress concurred in all but Part II.A of the majority opinion and concurred in the judgment. He agreed that the

plaintiff lacked Article III standing to sue over the alleged mismanagement of monies in his donor advised fund. As to the reputational and expressive injuries addressed in Part II.A, he concurred in the judgment that any claim founded on those purported injuries was properly dismissed. Judge Bress wrote that the majority wrongly held it was not deciding whether plaintiff's theories of reputational and expressive harm would create cognizable Article III injuries. Both to resolve this case and to provide guidance for future cases, he would make clear that a plaintiff lacks Article III standing to allege expressive or reputational injuries associated with the spending of money in a donor advised fund—money that the donor irrevocably relinquished.

COUNSEL

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OPINION

M. SMITH, Circuit Judge:

The question presented in this case is whether Philip Pinkert has standing to sue Schwab Charitable for allegedly breaching its fiduciary duties by, among other things, deducting excessive fees from Pinkert's donor-advised fund. We hold that he does not.

I

A donor-advised fund (DAF) is a charitable giving vehicle that allows donors to take a present-year income tax deduction, while distributing the funds to charity at a later time. A donor may wish to do so to save money on taxes. If, for example, a donor expects to have an unusually high income in a particular year, he may wish to accelerate his planned donations for the next several years into that year so that he can take a larger charitable deduction to offset the additional income tax he would otherwise owe. *See* 26 U.S.C. § 170(a)(1) (allowing a taxpayer to deduct from his taxable income "any charitable contribution . . . which is made within the taxable year").

To establish a DAF, one must donate funds to a "sponsoring organization," which, in many cases, is a nonprofit organization affiliated with a private asset manager. *See* 26 U.S.C. § 4966(d)(2)(A)(ii). The sponsoring organization then holds those funds in a "separately identified" "fund or account" that is "owned and controlled by [the] sponsoring organization." *Id.* § 4966(d)(2)(A)(i)–(ii). Although sponsoring organizations are nonprofit organizations, they generally do not perform charitable works themselves. Instead, they tend to act as "charitable savings accounts" where assets are held (and possibly

invested) temporarily before they are later distributed to another charity. Consistent with general principles governing charitable deductions, a donation to a DAF is tax-deductible only if the sponsoring organization "own[s] and control[s]" the assets that are donated, 26 U.S.C. § 4966(d)(2), and the sponsoring organization provides the donor with "a contemporaneous written acknowledgment . . . that such organization has exclusive legal control over the assets contributed," 26 U.S.C. § 170(f)(18). *See also Pauley v. United States*, 459 F.2d 624, 626 (9th Cir. 1972) ("To constitute a completed gift of property the subject-matter must have been placed beyond the dominion and control of the donor."); *Fakiris v. Comm'r of Internal Revenue*, 113 T.C.M. (CCH) 1555, 2017 WL 2805207, at *5 (2017), *supplemented*, 120 T.C.M. (CCH) 344 (T.C. 2020) (collecting cases, and holding that a charitable "contribution is not deductible unless it constitutes a completed gift, meaning the donor 'must do everything reasonably permitted by the nature of the property and the circumstances of the transaction in parting with all incidences of ownership.'") (citation omitted).

At the same time, a key feature of a DAF is that the donor "has, or reasonably expects to have, advisory privileges with respect to the distribution or investment of amounts held in such fund." 26 U.S.C. § 4966(d)(2)(A)(iii). This means the donor can advise the sponsoring organization regarding how it should invest the funds and where it should donate them, but the sponsoring organization is not legally obligated to comply with the donor's advice.

Pinkert opened a DAF at Schwab Charitable in 2007. The assets in Pinkert's DAF are subject to at least two kinds of fees: an administrative fee and an investment fee. The administrative fee "covers the expense of operating the

accounts and processing charitable donations" and "is generally charged annually as a percentage of assets in the account." The investment fee is charged as a percentage of the assets invested in particular funds. Pinkert does not allege that he did not agree to pay these fees, that the amount of the fees was not disclosed, or that the defendants charged higher fees than he agreed to.

Instead, Pinkert alleges that Schwab Charitable, its board of directors, and its Investment Oversight Committee breached their fiduciary duties under California law by partnering with Schwab & Co.—a legally separate but closely related company—for brokerage, custodial, and administrative services. This arrangement, Pinkert alleges, resulted in the defendants charging higher fees than they would have charged if Schwab Charitable had complied with its fiduciary duties. Pinkert contends that these excessive fees injured him by leaving him with less money in his DAF to direct to charities. Pinkert also raises other objections to Schwab Charitable's management of his account, including that Schwab Charitable imprudently selected suboptimal investment options.

Pinkert filed suit in the United States District Court for the Northern District of California. After the defendants moved to dismiss, the district court held that Pinkert lacked standing under Article III and statutory standing under California law. The district court allowed Pinkert to amend his complaint, but he notified the district court that he did not intend to do so, and instead wished to appeal. The district court then entered judgment for the defendants. Pinkert timely appealed.

II

We have jurisdiction pursuant to 28 U.S.C. § 1291.[1] We commence, as we must, by analyzing whether Pinkert has Article III standing. *See Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 583 (1999). Since we conclude that he does not, we need not and do not address whether he has statutory standing under California law.

We review standing determinations de novo. *Tailford v. Experian Info. Sols., Inc.*, 26 F.4th 1092, 1098 (9th Cir. 2022). "[T]o establish [Article III] standing, a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). As the party "invoking federal jurisdiction," Pinkert "bears the burden of establishing these elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). At the pleading stage, Pinkert is not required to *prove* these elements, but he is required to allege facts that, when accepted as true, show that they are satisfied. *Id.*

Pinkert concedes that the allegedly excessive fees are assessed on funds that he has already donated to Schwab Charitable, and these same funds have been invested in what Pinkert claims are "more expensive and poorly performing

[1] A district court's order dismissing a plaintiff's claims with leave to amend is ordinarily not a final appealable order. *See WMX Techs., Inc. v. Miller*, 104 F.3d 1133, 1136 (9th Cir. 1997) (en banc). If, however, the plaintiff files "a notice of intent not to file an amended complaint" and the district court enters judgment for the defendant, the judgment is final and appealable. *See id.* at 1135–36 (quoting *Lopez v. City of Needles*, 95 F.3d 20, 22 (9th Cir. 1996)).

investment options." But he argues that Schwab Charitable's conduct nevertheless injured him in four ways. *First*, Pinkert claims that although he donated the funds to Schwab Charitable for *some* purposes, he retained a property right to direct the funds to charities, and the excessive fees and Schwab Charitable's related mismanagement of the funds impair his ability to exercise that property right. *Second*, Pinkert argues that each donation from his DAF enhances his reputation, these reputational benefits are directly correlated with how much is donated, and because his DAF does not contain as much money as it would have absent the excessive fees and Schwab Charitable's allegedly imprudent management of his account, his reputation will not be enhanced as much as he intended. *Third*, Pinkert argues that each donation he directs from his DAF expresses his values, that the level of expression corresponds to the amount he directs, and that having less funds available to direct means that he cannot express his values as strongly as he would have been able to otherwise. *Finally*, Pinkert suggests that he may need to contribute more funds to his DAF in the future to make up for the excessive fees and other mismanagement by Schwab Charitable.

A

We can quickly dispense with Pinkert's arguments regarding his purported need to contribute more to the DAF and the related impact on his reputation and his expressive rights. We need not decide whether these theories of injury are cognizable in general because Pinkert did not allege that he has experienced or will experience any of these purported injuries.

Pinkert did not allege that he has attempted to direct a donation of a particular amount and was unable to do so because Schwab Charitable's alleged mismanagement left

less in the account than he expected. Nor did he allege that he has contributed more to the DAF to make up for the allegedly excessive fees and poor investment decisions. Because Pinkert did not allege that he has *already* been injured in these ways, we understand him to be arguing that he is likely to be injured by the excessive fees in the future.

An injury that has not yet materialized but will occur in the future can be a basis for Article III standing, but the injury must be "imminent," meaning that it must be "certainly impending." *Clapper v. Amnesty Int'l*, 568 U.S. 398, 409 (2013) (citations omitted). Whether Pinkert's asserted injuries are certainly impending depends on whether he plans to make donations of particular amounts in the future and will be unable to do so because of the alleged mismanagement. But Pinkert did not allege that he has any such plans, nor did he allege the details necessary to show that any such plans are concrete. *See Lujan*, 504 U.S. at 564 ("'[S]ome day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require."). Therefore, Pinkert has not adequately alleged standing based on these three theories of injury.

B

Pinkert's property-rights argument is also unpersuasive. Pinkert claims that "he retained the right to direct how donated funds would be invested among the menu of available investment options" and to "determine which charitable organizations would ultimately receive the donations (and in what amount)." Because Schwab Charitable's alleged misconduct resulted in less money in his account, Pinkert alleges these rights were impaired. But Pinkert misunderstands his rights with respect to the funds

in his DAF. When Pinkert donated to Schwab Charitable, he did so subject to Schwab's "Program Policies."[2] These Policies provide that all contributions "are subject to the exclusive legal authority and control of Schwab Charitable as to their use and distribution." Accordingly, "all contributions to Schwab Charitable . . . are irrevocable and unconditional." The Policies prohibit "conditional contributions," including any "reservation of a right to control or direct distributions from a particular account." While account holders may "recommend" funds in which Schwab Charitable may invest the assets, and charities to which it may issue grants, "Schwab Charitable retains final authority over the distribution of all grants and may decline or modify a grant recommendation that is inconsistent with the[] Program Policies, *or for any other reason*." (emphasis added). Therefore, Pinkert did not retain any "right" to direct where the funds will be invested or donated. While Pinkert may *advise* where the funds should be invested or donated, Schwab is not obligated to follow his recommendations.

Pinkert does not cite any authority establishing that his right to provide non-binding recommendations to Schwab Charitable is a property right. But whether that right is properly characterized as a property right, a contractual right, or something else does not matter for present purposes because Pinkert has not alleged that Schwab Charitable refused to listen to his advice. In fact, he acknowledges that

[2] Pinkert cited to these Policies in the complaint, and the district court took judicial notice of the Policies posted to Schwab Charitable's website, but the Policies were not entered into the record in the district court. On appeal, the parties jointly request that we supplement the record with the copy they provided. That motion is **GRANTED**. *See* Fed. R. App. P. 10(e)(2)(A); *see also Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005).

Schwab Charitable has followed his advice in the past by donating funds from his DAF to charities he supports.

To avoid this problem, Pinkert conceives of his advisory rights differently. He suggests that his advisory rights entitle him to advise where *every cent* he contributes to Schwab Charitable will go, and that by charging excessive fees and mismanaging his account, Schwab has deprived him of the ability to advise with respect to the amount that his account otherwise would have contained. But this understanding of his advisory rights is not consistent with the Program Policies. The Policies disclose that a donor's DAF is subject to administrative and investment fees, that the fees will be deducted automatically, and that the fees will go to Schwab Charitable and other entities rather than to a separate charity. The Policies also disclose that donors may "recommend how assets are invested," but only by choosing among the "investment pools selected as appropriate investment choices by Schwab Charitable." Thus, Pinkert did not reserve the right to advise where the funds necessary to pay the fees would go. In other words, he did not reserve the right to "advise" Schwab Charitable to donate those funds to another charity rather than to collect them as fees. Instead, he agreed at the time he donated to Schwab Charitable that some of the funds he donated would be used to pay the fees, and that the funds would be invested in Schwab Charitable's predetermined options. Therefore, the defendants did not deprive Pinkert of any advisory rights.

Because Pinkert has no right to control how Schwab Charitable invests or donates the funds he contributed, and he does not allege that the right he *does* have—the right to provide nonbinding advice—was infringed, his property-rights-based theory of standing fails too.

CONCLUSION

We hold that Pinkert lacks Article III standing to press his claims in federal court. We therefore do not address whether Pinkert has statutory standing under California law.

AFFIRMED.

BRESS, Circuit Judge, concurring in part and concurring in the judgment:

I agree that the plaintiff lacks Article III standing to sue over the alleged mismanagement of monies in his donor advised fund. Under the express terms of his relationship with Schwab Charitable, the plaintiff irrevocably disclaimed any right to the assets he donated in return for a substantial tax benefit and the limited right to make nonbinding recommendations as to how his donated funds would be used for charitable purposes. *See* 26 U.S.C. §§ 170(f)(18)(B), 4966(d)(2)(A). There is no allegation that Schwab failed to consider the plaintiff's nonbinding recommendations or that Schwab made misrepresentations to induce plaintiff to open his donor advised fund. I thus agree with the majority that the plaintiff lacks Article III standing to advance any claim based on his supposed property rights in the money in the donor advised fund. The plaintiff gave up the legal right to that money in return for other benefits.

The plaintiff also claims that Schwab's mismanagement of the donor advised fund has caused him reputational and expressive injury. The theory is that plaintiff enhances his reputation and expresses his values through charitable disbursements from the fund, and that Schwab's faulty management has left less money in the account, thereby

damaging plaintiff's reputational and expressive interests by leaving him less money to direct to charity. The majority (in Part II.A of its opinion) holds that plaintiff lacks standing to assert these alleged intangible injuries. On this point, I concur only in the judgment because I find the majority's rationale unduly narrow and insufficient to answer plaintiff's allegations.

The majority concludes that it need not decide whether the plaintiff's theories of reputational and expressive injury are cognizable "because [plaintiff] did not allege that he has experienced or will experience any of these purported injuries." Maj. Op. 9. The majority reasons that the plaintiff did not "allege that he has contributed more to the" donor advised fund to make up for Schwab's alleged mismanagement, nor did he "allege that he has any such plans" to do so. Maj. Op. 10. Based on this failure to plead sufficient facts showing imminent harm, the majority holds that the plaintiff lacks standing to assert any claimed reputational or expressive injuries.

Although there can be times when deciding cases on narrower grounds is appropriate, here the majority's rationale is so narrow that I do not think it would fully resolve the case. The district court held that plaintiff's theories of reputational and expressive harm were not cognizable as a matter of law. So the plaintiff is only now being informed that his claim fails based on his failure to plead certain facts that he may well be able to plead: it may not be that difficult for him to allege that in the future, he intends to contribute more to his donor advised fund to compensate for Schwab's alleged mismanagement, which is allegedly depleting the fund. If the plaintiff were accorded the usual right to amend his complaint in response to a newly identified pleading defect such as this, *see* Fed. R. Civ. P.

15(a)(2), the majority's narrow rationale would not resolve the plaintiff's claims.

The majority is clear that because it is resolving this issue on fact-pleading grounds only, it is not deciding whether the plaintiff's theories of reputational and expressive harm could create cognizable Article III injuries. But I would not kick that can down the road, nor do I view us as having that luxury. Both to resolve this case and to provide guidance for future cases, I would make clear that a plaintiff lacks Article III standing to allege expressive or reputational injuries associated with the spending of money in a donor advised fund—money that the donor irrevocably relinquished.

The Supreme Court has held that "[i]ntangible harms" may be concrete, but only when they bear a "close relationship to harms traditionally recognized as providing a basis for lawsuits in American courts." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021). Reputational and expressive harms are intangible injuries that can be sufficiently concrete in some contexts. But I do not read *TransUnion* to make such harms cognizable in all circumstances—a proposition that would allow an endless stream of suits lacking the traditional indicia of Article III standing. *See id.* (listing reputational harms as among those that "can" be concrete). Simply labeling an injury as "reputational" or "expressive," without more, does not answer the Article III question. Instead, we must ask whether the reputational and expressive harms asserted in this case bear a sufficiently close relationship to harm that history and tradition have recognized as conferring standing to sue. *See id.* (explaining that although an "exact duplicate" is not required, the "inquiry asks whether plaintiffs have identified a close historical or common law analogue for their asserted injury").

Here, there is no traditional analogue for the intangible injuries that the plaintiff asserts. The plaintiff has cited no case allowing a suit for such injuries associated with the use of donated property in which plaintiff no longer has a legal interest. More critically, the history and tradition are exactly the opposite: the common law has long disallowed donors from suing charities for the alleged mismanagement of fully relinquished charitable donations, leaving oversight of charities and the enforcement of charitable trusts to the state Attorneys General. *See, e.g.*, *Patton v. Sherwood*, 61 Cal. Rptr. 3d 289, 291 (Cal. Ct. App. 2007) ("It is well established that the settlor of a charitable trust who retains no reversionary interest in the trust property lacks standing to bring an action to enforce the trust independently of the Attorney General."); *O'Hara v. Grand Lodge Indep. Order of Good Templars of Cal.*, 2 P.2d 21, 24 (Cal. 1931) (per curiam) ("The law is well settled that when property has become fully vested in trustees for a valid charitable purpose, neither the creator of the trust nor his heirs or assigns have any standing in court in a proceeding to compel the proper execution of the trust, except as relators."); *see also, e.g.*, *Herbst v. Univ. of Colo. Found.*, 513 P.3d 388, 393 (Colo. Ct. App. 2022) (holding that plaintiff's "status as a donor" is "insufficient to give him standing" to challenge investment decisions and mismanagement of funds at charitable foundation); *Carl J. Herzog Found., Inc. v. Univ. of Bridgeport*, 699 A.2d 995, 997 (Conn. 1997) ("At common law, a donor who has made a completed charitable contribution, whether as an absolute gift or in trust, had no standing to bring an action to enforce the terms of his or her gift or trust unless he or she had expressly reserved the right to do so.") (footnote omitted); *Siebach v. Brigham Young Univ.*, 361 P.3d 130, 135 (Utah Ct. App. 2015); Restatement (Second) of Trusts § 391, cmts. e & f (absent a defined reversionary interest, "[a] suit for the enforcement of a

charitable trust cannot be maintained by the settlor or his heirs or personal representatives as such").

Although the common law did not always use the modern terminology of Article III standing, we can view the common law rule as grounded in the basic Article III insight that when a person fully donates property to charity, what later happens to that property cannot create a "concrete and particularized" injury in the donor, but at most one that is "abstract," and therefore not sufficient. *TransUnion*, 141 S. Ct. at 2203–04. As the California Supreme Court put it almost a century ago, a person who donated without a reversionary interest "parted with [his] entire interest in the property" and so "has no standing in court, except as a relator, to object to the disposition of the trust property." *O'Hara*, 2 P.2d at 24; *see also, e.g.*, *Clark v. Oliver*, 22 S.E. 175, 176 (Va. 1895) ("[W]here the donor has effectually passed out of himself all interest in the fund devoted to a charity, neither he nor those claiming under him, have any standing in a court of equity as to its disposition and control."). The misuse of property donated to charity is in essence an injury to the community as a whole, not one concrete or particularized to the donor, which explains why the Attorney General—on behalf of the community—has traditional enforcement authority in this area. *See* Austin Wakeman Scott, et al., *Scott and Ascher on Trusts* § 37.3.10, at 2431 (5th ed. 2008). And if, as I have explained, the donor lacks standing to sue for tangible injuries to the fully relinquished property donated to charity, it would mark an end-run around the common law rule to allow standing for suits alleging intangible reputational or expressive harms associated with the donated funds.

The plaintiff's only apparent response to this extensive common law authority (I have cited only example sources)

is that donor advised funds are different than traditional charitable organizations because the contributor to a donor advised fund retains advisory privileges. That is not enough of a distinction to overcome the weight of the considerable historical authority discussed above. Many donors to traditional charities also could be thought to retain certain advisory privileges (think of the mega donor whose donation lands him a spot on the charity's board of directors). Regardless, the plaintiff's advisory privileges would only give him standing to sue for Schwab's failure to consider his advice. Those privileges would not create Article III standing for suits alleging expressive and reputational injuries associated with money fully relinquished for charitable purposes—injuries that have never been previously recognized as a basis for lawsuits in American courts. *See TransUnion*, 141 S. Ct. at 2204.

For these reasons, I concur in all but Part II.A of the majority opinion. As to the reputational and expressive injuries addressed in Part II.A, I concur in the judgment that any claim founded on those purported injuries was properly dismissed.