IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

LEADERSHIP INSTITUTE and
TURNING POINT USA at the UNIVERSITY
OF NEW MEXICO,

Plaintiffs,

v. Case No. 1:24-cv-187-DHU-JMR

GARNETT STOKES, in her official capacity as President of the University of New Mexico,

JOSEPH SILVA, in his official capacity as Chief of Police of the University of New Mexico Police Department,

TIMOTHY STUMP, in his official capacity as Lieutenant of the University of New Mexico Police Department,

CHERYL WALLACE, in her official capacity as Director of the Student Union Building at the University of New Mexico,

DENNIS ARMIJO, in his official capacity as Assistant Director of the Student Union Building at the University of New Mexico, and

RYAN LINDQUIST, in his official capacity as Director of the Student Activities Center at the University of New Mexico,

Defendants.

DEFENDANTS' MOTION TO DISMISS AND MEMORANDUM IN SUPPORT

Pursuant to Fed. R. Civ. Pro. 12(b)(1), Defendants Garnett Stokes, in her official capacity as President of the University of New Mexico, Joseph Silva, in his official capacity as Chief of Police of the University of New Mexico Police Department, Timothy Stump, in his official capacity as Lieutenant of the University of New Mexico Police Department, Cheryl Wallace, in

her official capacity as Director of the Student Union Building at the University of New Mexico, Dennis Armijo, in his official capacity as Assistant Director of the Student Union Building at the University of New Mexico, and Ryan Lindquist, in his official capacity as Director of the Student Activities Center at the University of New Mexico, (collectively "Defendants") hereby submit this motion and memorandum in support of dismissal of all claims brought by Plaintiffs Leadership Institute ("LI") and Turning Point USA at the University of New Mexico ("TP-UNM") in Counts One through Five, on the basis of lack of subject-matter jurisdiction due to lack of standing.

Pursuant to D.N.M.LR-Civ. Rule 7.1(a), Defendants have contacted counsel for Plaintiffs, who oppose the requested relief.

I. INTRODUCTION

LI and TP-UNM claim that UNM's policies regarding security fees and free speech are unconstitutional and deny Plaintiffs their "right to engage freely and openly in the marketplace of ideas." **[Doc. 1, p. 3, ¶ 12].** Specifically, Plaintiffs allege five counts arising directly under the First Amendment and Fourteenth Amendment to the United States Constitution; the Civil Rights Act of 1871, 42 U.S.C. § 1983; the Declaratory Judgment Act, 28 U.S.C. § 2201; and Article II, Section 17 of the New Mexico Constitution. Plaintiffs' allegations stem from UNM's security fees relating to public speaker, Riley Gaines, who was hosted by TP-UNM, during an on-campus event on October 4, 2023. ***See*** **[Doc. 1, p. 10, ¶ 60].** However, neither TP-UNM nor LI have standing to bring such claims against UNM based on the facts alleged. To begin, all conversations, negotiations and contracts regarding security fees for the Riley Gaines event occurred between UNM and TP-UNM. After UNM and TP-UNM reached an agreement regarding security fees, LI agreed with TP-UNM to pay the security fees on TP-UNM's behalf. ***See*** **[Doc. 1, p. 10, ¶ 59].** Therefore, LI did not and does not have a contractual relationship with UNM. Plaintiffs admitted

in their Complaint that LI simply agreed to pay reasonable security costs on behalf of TP-UNM. **[Doc. 1, p. 10, ¶ 59].** LI's rights could not have been violated by UNM's policies regarding security fees and free speech, and thus, LI does not have standing to bring claims against UNM. Further, TP-UNM, as a charted student organization ("CSO") formally recognized by UNM and conferred with privileges and benefits by UNM, does not have standing to sue UNM.

Plaintiffs preemptively responded to UNM's current Motion to Dismiss in their Reply Brief in Support of [Plaintiffs'] Motion for Preliminary Injunction. ***See*** **[Doc. 19, pp. 5-6]**. Plaintiffs claim that "[b]oth TP-UNM and LI have standing, and, in the alternative, the one-plaintiff rule would permit the case to move forward." *Id*. at 5. Plaintiffs further allege that Defendants simply make conclusory statements and recite case law related to TP-UNM's and LI's standing to bring the instant claims, while doing that exact thing in their Reply brief. Plaintiffs simply make a conclusory statement alleging that both TP-UNM and LI have standing, and if LI does not have standing, then the one-plaintiff rule applies to allow the case to move forward. Plaintiffs do not argue anything beyond this statement. Further, Plaintiffs allege that Defendants' briefing regarding TP-UNM's and LI's standing is "inadequate," citing to *Keyes-Zachary v. Astrue*, 695 F.3d 1156, 1161 (10th Cir. 2012) (noting that inadequately briefed arguments are not considered). Plaintiffs fail to acknowledge that they preliminary responded to this Motion to Dismiss before Defendants even filed this Motion, because Plaintiffs were on notice of Defendants' intention of filing a motion to dismiss, given the first footnote in Defendants' Response to Plaintiffs' Motion for Preliminary Injunction. ***See*** **[Doc. 15, p. 6, n. 1]**.

Whether either TP-UNM or LI have standing individually has yet to be decided, and therefore, Plaintiffs cannot conclude that the one-plaintiff rule controls in this case.

As detailed herein, TP-UNM's and LI's Complaint should be dismissed in its entirety in accordance with Fed. R. Civ. Pro. 12(b)(1) for lack of subject matter jurisdiction, as TP-UNM and LI both lack standing to bring claims against these Defendants.

II. STANDARD OF REVIEW

Article III of the Constitution requires courts to only adjudicate actual cases and controversies. If there is not an actual case or controversy, the federal court lacks jurisdiction. There are three immutable elements of constitutional standing: (1) injury in fact, (2) causation, and (3) redressability. *Steel Company v. Citizens for a Better Env't*, 523 U.S. 83, 103 (1998); *Bennet v. Spear*, 520 U.S. 154, 162 (1997); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Wyoming ex rel. Crank v. United States,* 539 F.3d 1236, 1241 (10th Cir. 2008).

> 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 traceable to the challenged action of the defendant, and not the 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.

Defenders of Wildlife, 504 U.S. at 560–61 (quotations, ellipsis, brackets, and citations omitted).

Standing is an element of subject matter jurisdiction. *See Disabled American Veterans v. Lakeside Veterans Club, Inc.*, 2011-NMCA-099, ¶ 14. TP-UNM and LI, as the parties invoking federal jurisdiction, bear the burden to prove standing. *Id.* at 561; *Renne v. Geary*, 501 U.S. 312, 316 (1991); *Marcus v. Kansas Dept. of Revenue*, 170 F.3d 1305, 1309 (10th Cir.1999) ("Because the jurisdiction of federal courts is limited, there is a presumption against our jurisdiction, and the party invoking federal jurisdiction bears the burden of proof." (internal quotations omitted)). The Tenth Circuit requires that a plaintiff "com[e] forward with evidence of specific facts which prove standing." *Bear Lodge Multiple Use Ass'n v. Babbit*, 175 F.3d 814, 821 (10th Cir. 1999). Article

III's requirement of an actual case-or-controversy demands more than generalized concerns; instead, a plaintiff must provide "a factual showing of perceptible harm." *Defenders of Wildlife*, 504 U.S. at 566. TP-UNM and LI have not done so. Alleging a constitutional violation does not make it so for purposes of standing.

Motions to dismiss for lack of subject matter jurisdiction generally take two forms. *Holt v. United States*, 46 F.3d 1000, 1002 (10th Cir. 1995). The first is a facial attack on the complaint's allegations as to subject matter jurisdiction which questions the sufficiency of the complaint, wherein a district court must accept the allegations in the complaint as true. *Id*. In the second form, "a party may go beyond allegations contained in the complaint and challenge the facts upon which subject matter jurisdiction depends." *Id*. at 1003. "When reviewing a factual attack on subject matter jurisdiction, a district court may not presume the truthfulness of the complaint's factual allegations." *Id*. Further, "a court has wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1)." *Id*. "In such instances, a court's reference to evidence outside the pleadings does not convert the motion" to a Fed. R. Civ. Pro. 56 motion for summary judgment. *Id*.

III. POINTS AND AUTHORITIES

A. LI's Claims Must be Dismissed Because LI Lacks Standing.

Whether a plaintiff has standing is a legal question. *Ward v. Utah,* 321 F.3d 1263, 1266 (10th Cir.2003). "Article III of the Constitution limits the jurisdiction of federal courts to Cases and Controversies." *San Juan Cty., Utah v. United States*, 503 F.3d 1163, 1171 (10th Cir. 2007) (en banc). *See* U.S. Const. art. III, § 2. In general, this inquiry seeks to determine whether the plaintiff has such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for

illumination. *Wyoming ex rel. Crank v. United States*, 539 F.3d 1236, 1241 (10th Cir. 2008) (Ebel, J.) (*quoting Massachusetts v. EPA*, 549 U.S. 497, 539 (2007)). To establish standing, a plaintiff must show three things: "(1) an injury in fact that is both concrete and particularized as well as actual or imminent; (2) a causal relationship between the injury and the challenged conduct; and (3) a likelihood that the injury would be redressed by a favorable decision." *Protocols, LLC v. Leavitt,* 549 F.3d 1294, 1298 (10th Cir. 2008) (Hartz, J.) Neither TP-UNM nor LI even attempt to argue they meet these required elements.

In their Reply brief **[Doc. 19, p. 5]** Plaintiffs cite to only one case, *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), in support of their argument that the "one-plaintiff rule" controls this case to allow both TP-UNM and LI to move forward as Plaintiffs. Plaintiffs do not even attempt to argue for their standing other than to boldly state without authority that "[b]oth TP-UNM and LI have standing, and, in the alternative, the one-plaintiff rule would permit the case to move forward." **[Doc. 19, p. 5]**. Plaintiffs' only argument for LI's standing is that LI may wish to send speakers to UNM's campus in the future, and (1) but for the outstanding unpaid security charges incurred by TP-UNM, and (2) if UNM successfully collects the security fees owed by TP-UNM, LI will be responsible for that amount. *See Id*. First, the alleged harm- being forced to pay should LI decide to send more speakers to UNM's campus, is speculative, conjectural, and hypothetical. Second, even if LI wanted to send speakers to UNM's campus in the future, LI would not be forced by UNM to pay TP-UNM's debt for security fees. LI did not have a contract with UNM. UNM was not involved in or a party to LI and TP-UNM's agreement to make any payments on TP-UNM's behalf.

Plaintiffs "seeking prospective relief must show more than past harm or speculative future harm." *Riggs v. City of Albuquerque,* 916 F.2d 582, 586 (10th Cir.1990). "A claimed injury that

is contingent upon speculation or conjecture is beyond the bounds of a federal court's jurisdiction." *Tandy v. City of Wichita*, 380 F.3d 1277, 123-84 (10th Cir.2004). LI's claims against UNM's officials must be dismissed due to lack of standing.

B. Despite Plaintiffs' Contentions, TP-UNM Does Not Have Standing,

Plaintiffs are correct there is a doctrine that if at least one plaintiff has a personal stake - called standing – then a suit may proceed. *See Biden v. Nebrask*a, 600 U.S. 477, 143 S. Ct. 2355 (2023). More specifically, "the plaintiff must have suffered an injury in fact - a concrete and imminent harm to a legally protected interest, like property or money - that is fairly traceable to the challenged conduct and that is likely to be redressed by the law suit." *Id*, at 489. (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561, 112 S. CT. 2130 (1992)). However, at least one plaintiff must maintain a personal stake, such that "an actual controversy" is "extant at all stages of review, not merely at the time the complaint is filed." *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71, 133 S. Ct. 1523 (2013). Otherwise, "the action can no longer proceed and must be dismissed as moot." *Id*. at 72. These related doctrines, standing and mootness, "implement[]" the Constitution's "limit on our authority." *Dep't of Educ. v. Brown*, 143 S. Ct. 2343, 2351 (2023).

In relevant part, 42 U.S.C. § 1983 states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State ...subjects, or causes to be subjected, any citizen of the United States **or other person** within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress ….

42 U.S.C. § 1983 (emphasis added); *Becker v. Ute Indian Tribe of the Uintah & Ouray Rsrv.*, 868 F.3d 1199, 1205 (10th Cir. 2017) (emphasis added). TP-UNM, therefore, can only be a Section 1983 plaintiff if it is a "person" within the jurisdiction of the United States. TP-UNM does not allege it is a corporation, a quasi-corporation or organized pursuant to, or recognized by, any law.

As a CSO, TP-UNM appears to be an unincorporated association and, as such, has no capacity to sue. *United Mine Workers of Am. v. Coronado Coal Co*., 259 U.S. 344, 385 (1922). In 2006, after extensive analysis of the Dictionary Act of 1871, the common understanding regarding unincorporated associations in 1871, and the legislative history of Section 1 of the Civil Rights Act of 1871, the Tenth Circuit held that unincorporated associations are not "persons" who can sue under § 1983. *See Lippoldt v. Cole*, 468 F.3d 1204, 1216 (10th Cir. 2006). This decision is directly on point and dispositive. *Christians in the Workplace Networking Group v. National Technology and Engineering Solutions of Sandia LLC, No. 1:22-CV-00267-DHU-DLM.*, 2024 WL 1334144. TP-UNM does not have standing to bring any constitutional claims under Section 1983.

IV. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss Plaintiffs' Complaint with prejudice because both Plaintiffs lack standing.

Respectfully submitted,

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We hereby certify that on this 3rd day of July 2024, the foregoing was filed electronically through the CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

WIGGINS, WILLIAMS & WIGGINS, P.C.

By *__/s/ Patricia G. Williams__*
Patricia G. Williams