IN THE UNITED STATES DISTRICT COURT
DISTRICT OF NEW MEXICO

LEADERSHIP INSTITUTE et al.,	)	
Plaintiffs,	)	
v.	)	Case No. 1:24-cv-187-DHU-JMR
STOKES et al.,	)	
Defendants.	)	

PLAINTIFFS' RESPONSE BRIEF IN OPPOSITION TO MOTION TO DISMISS

This Court should deny Defendants' (UNM) untimely motion to dismiss for lack of jurisdiction. Both Leadership Institute (LI) and Turning Point USA at the University of New Mexico (TP-UNM) have standing. In the alternative, should the Court find that TP-UNM lacks standing, it should permit Mr. Gonzales to be substituted or amended in as a plaintiff under Rule 17 or Rules 15 and 16, hold that he has standing, and deny UNM's motion to dismiss for lack of jurisdiction on that basis.

ANALYSIS

Rule 12(b) of the Federal Rules of Civil Procedure requires that any motions under it "shall be made before pleading." Fed. R. Civ. P. 12(b). UNM filed its motion three months after it filed an Answer. (*See* Doc. 14; Doc. 35.) "Nevertheless, the court in its discretion may convert an erroneously filed 12(b) motion into a Rule 12(c) motion on the pleadings." *Greenlee v. Runyon*, Case No. 93-2066-KHV, 1994 U.S. Dist. LEXIS 4065, at *3 (D. Kan. Mar. 28, 1994). Where "matters outside the pleadings have not been presented, the standard for evaluating a rule 12(c) motion is the same as the standard for evaluating a 12(b) motion." *Id.*

Standing requires three elements: (1) an injury in fact to a legally protected interest that is (2) fairly traceable to the conduct complained of and that would be (3) redressed by a favorable judicial decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs must support each element of standing "with the manner and degree of evidence required at the successive stages of the litigation." *Id.* at 561. "At the preliminary injunction stage, then, the plaintiff[s] must make a 'clear showing' that [they are] 'likely' to establish each element of standing." *Murthy v. Missouri*, 219 L. Ed. 2d 604, 617 (U.S. 2024) (quotation omitted). In a declaratory action, a party must assert a claim for relief that "if granted, would affect the behavior of the particular parties listed in his complaint." *Jordan v. Sosa*, 654 F.3d 1012, 1025 (10th Cir. 2011).

The parties agree that the one-plaintiff rule controls and that the case may proceed if any Plaintiff has standing. (Doc. 35 at 7 ("Plaintiffs are correct there is a doctrine that if at least one plaintiff has a personal stake – called standing – then a suit may proceed." (citing *Biden v. Nebraska*, 600 U.S. 477 (2023)).) UNM does not challenge that Plaintiffs' injuries would be redressed by a favorable judicial decision.

A. Leadership Institute suffered past injury and will likely suffer future injury.

UNM first argues that LI lacks a sufficiently likely future harm to establish standing. (*See* Doc. 35 at 6.) But UNM focuses exclusively on *prospective* harms. (*Id.*) UNM ignores altogether that LI has a past injury in the form of the outstanding debt that it was forced to assume. (Clark Decl., Doc. 18-1 ¶ 18.) This injury is fully realized since UNM has assessed it and sent it to the Office of the University Counsel after it remained unpaid. (Pls.' Ex. 25 (July 11, 2024).) UNM does not question that this injury is redressable both by a declaration that UNM cannot constitutionally collect the fees and by an order of nominal damages. *See Uzuegbunam v.*

Preczewski, 592 U.S. 279, 282–83 (2021) ("This case asks whether an award of nominal damages by itself can redress a past injury. We hold that it can."). This injury alone is sufficient to confer standing for all claims.

LI is threatened with irreparable harm by UNM's future actions as well. To show standing, all LI must do is "establish a substantial risk of future harm." *Murthy*, 219 L. Ed. 2d at 623. "To carry that burden, the plaintiffs must proffer evidence that the defendants' 'allegedly wrongful behavior w[ould] *likely* occur or continue.'" *Id.* (quoting *Friends of the Earth v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000)). And "[o]f course, past wrongs are evidence bearing on whether there is a real and immediate threat of repeated injury." *O'Shea v. Littleton*, 414 U.S. 488, 496 (1974); *see also Harmon v. City of Norman*, 61 F.4th 779, 796 (10th Cir. 2023) ("[E]vidence of past activities . . . lends concreteness and specificity to plaintiffs' claims, and avoids the danger that Article III requirements be reduced to the formality of mouthing the right words."). In the First Amendment context, the projected harm may be minimal: "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).

UNM ignores the difference between facial and as-applied challenges when assessing standing. "The Supreme Court has recognized as an 'exception from general standing rules' facial challenges in the First Amendment context where the challenger asserts that the restriction is 'subject to facial review and invalidation' because it 'has the potential to chill the expressive activity of others not before the court.'" *Doe v. City of Albuquerque*, 667 F.3d 1111, 1123 n.7 (10th Cir. 2012) (quoting *Forsyth Cnty. v. Nationalist Movement*, 505 U.S. 123, 129 (1992)). Thus, "[t]he mere threat of prosecution under the allegedly unlawful statute may have a chilling effect on an individual's protected activity, and the concern that constitutional adjudication be avoided

whenever possible may be outweighed by society's interest in having the statute challenged." *Ward v. Utah*, 321 F.3d 1263, 1266–67 (10th Cir. 2003) (internal quotation marks omitted). Courts routinely find standing for facial challenges to policies even when the government has not enforced the policy like UNM has here. *See, e.g.*, *id.*; *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1120 (11th Cir. 2022) ("Litigants who are being chilled from engaging in constitutional activity suffer a discrete harm independent of enforcement, and that harm creates the basis for our jurisdiction." (cleaned up)); *Gilley v. Stabin*, No. 23-35097, 2024 U.S. App. LEXIS 5629, at *4 (9th Cir. Mar. 8, 2024) ("[W]hen the threatened enforcement effort implicates First Amendment rights, the inquiry tilts *dramatically* toward a finding of standing." (quotation omitted)); *Majors v. Abell*, 317 F.3d 719, 721 (7th Cir. 2003) (holding that if a statute "arguably covers" plaintiff's speech, "and so may deter constitutionally protected expression . . . , there is standing"); *Dambrot v. Central Michigan University*, 55 F.3d 1177, 1182 (6th Cir. 1995) (standing for facial challenge despite policy not yet having been enforced); *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330–31 (5th Cir. 2020) ("This court has repeatedly held, in the pre-enforcement context, that '[c]hilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement.'" (quotation omitted)); *Menders v. Loudoun Cnty. Sch. Bd.*, 65 F.4th 157, 164 (4th Cir. 2023) ("Establishing standing in First Amendment claims [challenging school policies] alleging the chilling of free speech, however, is not that demanding.").

The injury here is simple. The security fee policy is vague and overbroad and chills LI's speech on campus in three ways. First, Commander Stump determines whether to apply the policy at all. Vesting this unbridled discretion in an official is a First Amendment injury itself. *See Forsyth Cnty.*, 505 U.S. at 131. Second, there is no schedule of fees—meaning no one knows how much they will be charged—until Commander Stump provides an invoice using unspecified means. This

shortcoming is starkest when contrasted with a policy that *does* provide a schedule of fees that provides certainty, like UC Berkeley's. *See* Univ. of Cal., Berkeley, Major Events Hosted by Non-Departmental Users (2019), https://perma.cc/3XKX-H753 (providing when security fees will be charged and never charging for "the cost of extraordinary security measures," *id.* at 6); Univ. of Cal., Berkeley, UCPD Fee Schedule (2020), https://perma.cc/BAU9-U9XS (providing standards for security fees by breaking them down by type of event, venue capacity, and whether money is handled at the event). This is a second kind of First Amendment injury; the policy lacks the kind of "narrowly drawn, reasonable and definite standards" that the Supreme Court requires. *Id.* at 133. And third, there is then an additional factor Commander Stump considers: the need for "crowd control," i.e., the potential reaction of a hostile mob. This is another First Amendment injury—the heckler's veto. *See Flanagan v. Munger*, 890 F.2d 1557, 1566 (10th Cir. 1989). LI already suffered all three of these injuries and will suffer them again when it tries to send another speaker to UNM's campus.

Plaintiffs have shown that UNM would continue to apply the security fee policy to speakers from LI's bureau. Every statement from UNM indicates that it would continue to do so in the same way it did with the Riley Gaines event: (1) UNM maintains the policy; (2) UNM has not renounced future enforcement; (3) UNM's declarants defend the policy and claim it is necessary; and (4) UNM's counsel continues to defend the security fee policy and argue it is necessary. (*See, e.g.*, Stump Decl., Doc. 15-1 ¶¶ 14–19; Doc. 15 at 12); *cf. Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 719 (2007) (noting the importance of the government's decision to "vigorously defend" the constitutionality of a challenged program when analyzing for mootness). LI's ability to send speakers to UNM's campus will be harmed by the security fee policy through (1) attempts by UNM to force LI to pay the outstanding $5,384.75 bill by collecting from TP-

UNM or from LI directly, *see* Pls.' Ex. 25 (July 11, 2024, hearing) (sending unpaid invoices to the Office of University Counsel); (2) a loss of LI's ability to send speakers to UNM's campus; (3) UNM suspending TP-UNM's charter, preventing LI from working with TP-UNM to bring its affiliated speakers like Riley Gaines to UNM's campus; and (4) the fees deterring student organizations like TP-UNM from inviting LI's speakers to campus. (*See* Doc. 18-1 ¶¶ 15–20.) Ms. Clark testified to each of these considerations at the July 11th hearing and explained why they threaten LI's ability to speak on UNM's campus. (Transcript of July 11, 2024, hearing, Doc. __ at __:__.)[1]

UNM's argument that LI's proffered injury is insufficiently certain is conclusory and contrary to Tenth Circuit precedent. UNM never explains why, in its words, LI's injury from "being forced to pay" when it sends more speakers in the future is "speculative, conjectural, and hypothetical." (Doc. 35 at 6); *see also, e.g.*, *United States v. Supreme Court of New Mexico*, 839 F.3d 888, 901 (10th Cir. 2016) ("The threat of prosecution is generally credible where a challenged 'provision on its face proscribes' the conduct in which a plaintiff wishes to engage, and the state 'has not disavowed any intention of invoking the . . . provision' against the plaintiff."); *Axson-Flynn v. Johnson*, 356 F.3d 1277, 1290 (10th Cir. 2004) (noting that suppression of speech does not require "a direct threat or a gun to the head"); *Harmon*, 61 F.4th at 796 ("[E]vidence of past activities . . . lends concreteness and specificity to plaintiffs' claims . . . ."). On its face, the policy allows UNM to decide whether to assess the fee and in what amount. LI's injury is not "conjectural or hypothetical." *Petrella v. Brownback*, 697 F.3d 1285, 1293 (10th Cir. 2012) (quotation omitted). And the undisputed facts show that UNM considers possible crowd reaction—i.e., the heckler's

[1] Plaintiffs will move to file an addendum or amended brief with the Court upon publication of the official transcript, which is expected on Monday, July 22nd, providing page and line number citations for all references to and quotations of statements made at the July 11 hearing.

veto—when assessing the fee amount. This satisfies the Tenth Circuit's test for concreteness in a suit for prospective relief based on a chilling effect.

That test has three components: (1) past evidence of the plaintiff engaging in the speech activity; (2) affidavits or testimony stating the plaintiff's present desire to engage in the speech; and (3) a plausible claim that the plaintiff has no intention to do so because of a credible threat of enforcement. *Harmon*, 61 F.4th at 796. LI sent Ms. Gaines to UNM's campus and UNM threatened to cancel her event unless someone agreed to pay the excessive security fees UNM demanded. (Doc. 18-1 ¶ 14.) Ms. Clark submitted a declaration and testified that LI wants to send speakers to UNM's campus but will not because of the excessive security fees. (*See* Doc. 18-1 ¶ 19; Tr. of July 11 hearing, Doc. __, at __:__ (stating that LI has no plans to send speakers to UNM due to the high security fees but that it would if its speakers were charged more normal security fees).) Mr. Gonzales submitted a declaration and testified that TP-UNM wants to bring speakers to campus, including a return visit from Ms. Gaines, an LI employee, but is unable to owing to the security fees. (Doc. 5-1 ¶¶ 49–51; Tr. of July 11 hearing, Doc. __, at __:__ (Mr. Isgur: "Are there any specific speakers you're interested in inviting in the future?" Mr. Gonzales: "Yes. So there is Ian Haworth. There is also Riley Gaines again, Brandon Tatum, and Tomi Lahren. They have all expressed interest in coming to campus.").) This evidence is unrebutted. UNM has provided no contrary evidence, and this covers all three components of the Tenth Circuit's inquiry.

UNM argues that any harm would befall only TP-UNM, not LI. This is incorrect. LI itself suffered harm before and will suffer harm again. UNM threatened to cancel the event—featuring Riley Gaines, an employee of Leadership Institute, there speaking in her job duties—unless someone agreed to pay the invoiced security fee. (*See* Doc. 22 at 3, stip. 14; Tr. of July 11 hearing, Doc. __, at __:__ (Ms. Williams: "Does Leadership Institute employ Riley Gaines?" Ms. Clark:

"Yes.").) LI was forced to agree to do so or else forgo the event. LI's signed agreement was given to UNM officials who only agreed that the event could proceed once they were satisfied that LI would pay the fee. (*See* Pls.' Ex. 10 (July 11, 2024, hearing).)[2] The emails between then-Lieutenant Stump, Ms. Fleig, and Mr. Gonzales show that UNM only allowed the Gaines event to proceed once it received LI's offer to pay the fees via email. (Pls.' Ex. 10 (July 11, 2024, hearing).) LI was forced to choose between agreeing to pay the high fees or cancelling its event, forfeiting the tens of thousands already spent preparing for the event, and losing a day of Ms. Gaines's time. (*See* Doc. 18-1 ¶ 15; Tr. of July 11 hearing, Doc. __, at __:__ (Mr. Isgur: "Why did you agree to pay the fee in this instance on behalf of the UNM students?" Ms. Clark: "Riley's schedule is intense. . . . It costs around $25,000 to do a single Riley Gaines event with all of the moving parts, including my time, Riley's time, private security, other expenses related to the events, AV requirements, my time, the regional field coordinator's time, our field representative's time. All of that across the board is a very costly effort. So to stop that, it would have been more expensive than to just pay the fee.").)

If UNM is claiming this injury is not traceable to its conduct, it forgets that a plaintiff need not show that the defendants' conduct was the proximate cause of the injury. *Nova Health Sys. v.*

[2] UNM claims in its motion to dismiss that "all conversations, negotiations and contracts regarding security fees for the Riley Gaines event occurred between UNM and TP-UNM." (Doc. 35 at 2.) But this is inaccurate. (*See* Pls.' Ex. 10 (July 11, 2024, hearing).) After UNM gave TP-UNM an invoice, LI agreed with TP-UNM to pay the security fees on TP-UNM's behalf. As shown by the email chain between then-Lieutenant Stump and Mr. Gonzales and Ms. Fleig, the members of TP-UNM took the quote of $7,420 to LI, who agreed in writing to pay. (Pls.' Ex. 10 at 2.) The TP-UNM students *did not* agree to pay the security fee prior to discussing it with LI, which is why then-Lieutenant Stump emailed the students to ask about whether the invoice was approved because that was necessary for the event to proceed. (*Id.* at 3.) The students then provided a copy of their agreement with LI, acknowledged the quote, and stated that "LI will be paying for those charges on our behalf." (*Id.* at 1.) Only after accepting *LI's* offer to pay for the event did then-Lieutenant Stump agree to let the event proceed. (*Id.*)

Gandy, 416 F.3d 1149, 1156 (10th Cir. 2005*)*. "Nor does it require a showing that a 'defendant's actions are the very last step in the chain of causation.'" *Bennett v. Spear*, 520 U.S. 154, 169 (1997). A plaintiff can satisfy the "fairly traceable" requirement by advancing allegations which, if proven, allow for the conclusion that the challenged conduct is a "but for" cause of the injury. *Petrella*, 697 F.3d at 1293 (citing *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 74–78 (1978)); *see also Santa Fe All. for Pub. Health & Safety v. City of Santa Fe*, 993 F.3d 802, 814 (10th Cir. 2021).

This was a direct assault on LI's First Amendment rights. LI's mission requires it to send speakers out to campuses to connect with the next generation of American conservatives. Ms. Gaines is employed by LI. UNM threatened to prevent her from speaking unless someone agreed to foot an enormous bill. And UNM would like to do just that again when Ms. Gaines is invited back to campus, as both Mr. Gonzales and Ms. Clark testified the parties had discussed and would like to do. (Tr. of July 11 hearing, Doc. __, at __:__, __:__.) That is a direct and impending prospective injury to LI's First Amendment rights.

Even if UNM were correct that this injury was one it inflicted only on TP-UNM, LI still suffers a third-party injury. *See FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 383 (2024) (explaining that third parties can allege standing when the injury is certain enough to result). Any punishment UNM inflicts on TP-UNM would impact LI. LI works with student groups like TP-UNM to bring its speakers to campus. If TP-UNM lost its ability to bring speakers to campus, LI would no longer be able to work with TP-UNM to send Riley Gaines back to campus or send other speakers to UNM. When TP-UNM tries to invite Ms. Gaines back to campus, UNM will (at best) provide the same ultimatum it did here: agree to pay thousands of dollars or she can't come. And LI will be placed in the same impossible situation that occurred once already under this policy.

Worse still, UNM may simply refuse to allow TP-UNM to bring Ms. Gaines to campus owing to the unpaid invoice.

Standing does not require a plaintiff repeatedly engage in futile exercises to demonstrate that the government will repeat the challenged behavior. That is especially true when, as here, the government vigorously defends its policy. *Cf. 303 Creative LLC v. Elenis*, 6 F.4th 1160, 1174 (10th Cir. 2021) (noting importance of failure to disclaim future enforcement), *rev'd on other grounds*, 600 U.S. 570 (2023). However UNM decides to enforce it, LI is harmed by the security fee policy. And that is all that is needed to satisfy standing—a concrete and likely harm traceable to UNM's actions.

B. TP-UNM is not an unincorporated association and has standing.

As Plaintiffs have explained from the beginning, TP-UNM is a registered and chartered student organization at the University of New Mexico. (Doc. 1 ¶ 14.) TP-UNM is not a common law unincorporated association.[3] The Supreme Court has defined the "ordinary meaning" of the term association. *See Hecht v. Malley*, 256 U.S. 144, 157 (1924) (listing three definitions of an association, all of which require that the entity be unchartered, and citing to various late-1800s and early-1900s dictionaries and state decisions); *see also, e.g.*, *Morrissey v. Commissioner*, 296 U.S. 344, 352 (1935) (same definitions); *Penrod Drilling Co. v. Johnson*, 414 F.2d 1217, 1222 (5th Cir. 1969) (citing 7 C.J.S. Associations § 1 for the same definition noting lack of charter).

[3] In the alternative, Plaintiffs seek to preserve the argument that Tenth Circuit precedent on whether unincorporated associations are "persons" within the context of 42 U.S.C. § 1983 is incorrect and should be overruled by an appropriate court. *See Colorado Mont. Wyoming State Area Conf. of the NAACP v. United States Election Integrity Plan*, 653 F. Supp. 3d 861, 872 (D. Colo. 2023) (noting that "the Tenth Circuit's holding in *Lippoldt* 'stands alone against the trend of treating unincorporated associations as "persons,"'" but also noting that "that does not permit this Court to ignore binding precedent").

TP-UNM is a chartered and registered student organization, not an unincorporated association. (Doc. 22 at 2, stip. 1 (stipulating that TP-UNM is a "chartered student organization at the University of New Mexico")); *see also, e.g.*, UNM Student Organization Handbook 2023-2024, at 2 (2023), https://perma.cc/6U59-PQE5 (explaining that chartered student organizations "are *formally recognized* by the University and are *conferred with privileges and benefits* not offered to non-recognized groups" (emphases added)); N.M. Stat. § 60-2F-4(I) (defining "educational organization" to include "recognized student organizations" for the purposes of law pertaining to bingo and raffle business licenses and permitting those organizations to apply for those licenses and appeal to state courts concerning disputes).

This situation is not novel. Student groups seeking to vindicate their First Amendment rights routinely proceed under § 1983 even when unincorporated. The Supreme Court has resolved a nearly identical case, and courts regularly see formally recognized student organizations bringing § 1983 cases against the schools that recognize them. *See Christian Legal Soc'y Chapter of the Univ. of Cal. v. Martinez*, 561 U.S. 661 (2010) (resolving § 1983 case where plaintiff was "an unincorporated student organization comprised of students attending University of California, Hastings College of the Law," *Christian Legal Soc'y v. Kane*, No. C 04-04484, 2006 U.S. Dist. LEXIS 27347, at *4 (N.D. Cal. Apr. 17, 2006) (lower court opinion)); *see also Good News Club v. Milford Cent. Sch.*, 533 U.S. 98 (2001) (resolving § 1983 case where plaintiff was "an unincorporated community-based Christian youth organization," *Good News Club v. Milford Cent. Sch.*, 21 F. Supp. 2d 147, 149 (N.D.N.Y. 1998) (lower court opinion)); *Cowboys for Life v. Sampson*, 983 F. Supp. 2d 1362 (W.D. Okla. 2013) (resolving § 1983 case where plaintiff was an unincorporated student organization).

TP-UNM, as an unincorporated but registered and chartered student organization, is most akin to the labor unions treated as "persons" for § 1983 purposes in *Lippoldt v. Cole*. 468 F.3d 1204, 1215 (10th Cir. 2006). An unincorporated association, which is formed by a common law agreement between only the members, is not subject to any entity other than its members. But UNM can revoke a chartered student organization's charter: "Misuse or nonuse of a charter will result in the withdrawal of recognition by the University." *Id.* The labor unions discussed in *Lippoldt* are the same; they are subject both to state and federal regulators and to their members. *See* 468 F.3d at 1215. TP-UNM is not incorporated, but unlike an unincorporated association, it is officially sanctioned by the state and conferred with benefits and privileges. A labor union, too, is officially sanctioned. And it is conferred with the privilege of representing its members—in labor disputes, in salary and benefits negotiations, and, critically, in court. TP-UNM has the same character. It speaks on behalf of its members to UNM through its elected co-presidents, arranges visits from speakers like Ms. Gaines on their behalf, and it can protect the First Amendment rights of its members through resort to the courts. TP-UNM is a "person" within the meaning of 42 U.S.C. § 1983 capable of asserting both its own First Amendment rights and the First Amendment rights of its student members, like Mr. Gonzales.

UNM does not contest that TP-UNM possesses standing if it is a person for § 1983 purposes. (*See* Doc. 35 at 7–8 (arguing only that TP-UNM is not a "person").) It is easy to see why: Mr. Gonzales' standing to bring a First Amendment claim against UNM is plain as day. Either as a member and co-president of TP-UNM and thus through organizational standing[4] or in

[4] As the Supreme Court recently reaffirmed, an organization can have standing in two ways: in its own right if the organization itself is injured, or as the representative of its members. *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll.*, 600 U.S. 181, 199 (2023). In the latter case, the organization must meet a three-part test: "(a) its members would otherwise have standing

his own right if substituted or amended in under Federal Rules of Civil Procedure 15 or 17, Mr. Gonzales' standing is beyond dispute. Mr. Gonzales and TP-UNM have standing for the same reasons. They want to bring speakers to UNM's campus. (*See* Doc. 5-1 ¶ 50.) They are trying to make plans to do so right now. (*See* Doc. 5-1 ¶ 51.) The security fee policy prevented them from doing so in the spring of 2024. It will do so again in the upcoming fall semester unless this Court enjoins the policy. And they both also fear the likely consequences of nonpayment of the existing $5,384.75 invoice: legal action, charter revocation, reputational harm, and an inability to bring speakers to campus.

C. In the alternative, the Court should grant leave to substitute or amend.

Should the Court disagree and find that TP-UNM lacks standing or otherwise cannot proceed as plaintiff here, and that LI's standing is not sufficient to allow Plaintiffs to proceed with all their claims under the one-plaintiff rule, Plaintiffs respectfully request leave to substitute Mr. Gonzales as a plaintiff. *See* Fed. R. Civ. P. 17(a)(3) ("The court may not dismiss an action for failure to prosecute in the name of the real party in interest until, after an objection, a reasonable time has been allowed for the real party in interest to ratify, join, or be substituted into the action."). Rule 17(a)(3) requires that substitution be permitted rather than dismissal after UNM raised this objection if the error was an "honest" mistake in naming the real-party-in-interest. *See Esposito v. United States*, 368 F.3d 1271, 1276 (10th Cir. 2004). The Tenth Circuit explained that "we have never required a plaintiff seeking substitution to show that his mistake was 'understandable' in

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.* (quotation omitted). TP-UNM satisfies this test. Mr. Gonzales would have standing in his own right; TP-UNM's primary purpose is to promote speech on UNM's campus and those are the interests the lawsuit seeks to protect; and an injunction against UNM does not require the participation of the individual members.

addition to being 'honest.' Instead, our cases focus primarily on whether the plaintiff engaged in deliberate tactical maneuvering (i.e. whether his mistake was 'honest'), and on whether the defendant was prejudiced thereby." *Id.* Application of Rule 17(a)(3) to this case tracks with the Advisory Committee notes relied on there by the Tenth Circuit: "Modern decisions are inclined to be lenient when an honest mistake has been made in choosing the party in whose name the action is to be filed—in both maritime and nonmaritime cases." *Id.* at 1275. The decision not to name Mr. Gonzales as a party was not made because of any intentional tactical maneuvering by Plaintiffs; he was named in the complaint, submitted a declaration, and testified. He has undergone all the burdens that he would have as a party. And UNM cannot show any prejudice. It appears to agree he is an injured party. It has not only had notice of Mr. Gonzales; it has actually cross-examined him. Substitution under Rule 17(a)(3) is an appropriate remedy under the circumstances.

Alternatively, Plaintiffs request leave to amend the Complaint and add Mr. Gonzales as a plaintiff under Rules 15 and 16. Because this request comes after the deadline in the Court's scheduling order, (Doc. 26 at 2), Plaintiffs must satisfy both rules. Whether to grant a motion for leave to amend filed after the deadline to amend pleadings is a two-step inquiry. *Gorsuch, Ltd., B.C. v. Wells Fargo Nat'l Bank Ass'n*, 771 F.3d 1230, 1240–41 (10th Cir. 2014). Under Rule 16(b)(4), the scheduling order may be amended only with good cause. Fed. R. Civ. P. 16(b)(4). This Rule "focuses on the diligence of the party seeking leave to modify the scheduling order to permit the proposed amendment." *Advanced Optics Elecs., Inc. v. Robins*, 769 F. Supp. 2d 1285, 1313 (D.N.M. 2010) (quotation omitted). Once good cause is found to permit modification of the scheduling order, leave to amend under Rule 15(a)(2) should be freely given when justice so requires. *See Minter v. Prime Equip. Co.*, 451 F.3d 1196, 1208 (10th Cir. 2006) ("[I]n general permission is liberally granted where there is no prejudice." (internal quotation marks

omitted)); *Hardin v. Manitowoc-Forsythe Corp.*, 691 F.2d 449, 456 (10th Cir. 1982) ("Rule 15 was promulgated to provide the maximum opportunity for each claim to be decided on its merits rather than on procedural niceties.").

Good cause exists to modify the scheduling order. UNM did not raise this issue until its untimely motion to dismiss. Had it been timely filed, Plaintiffs could have amended without leave at all. *See* Fed. R. Civ. P. 12(b) ("A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed."); Fed. R. Civ. P. 15(a)(1)(B) (permitting amendment within 21 days of responsive pleading or Rule 12 motion, whichever is earlier). Plaintiffs have otherwise acted diligently, raising the possibility that they would request leave in this timely response to the motion to dismiss. Modifying the schedule will not prejudice UNM or delay resolution of the case. The deadlines for discovery, motions for summary judgment, and trial can remain in place. And a dismissal for lack of jurisdiction would be without prejudice, meaning the suit would just be refiled with Mr. Gonzales as a plaintiff. *Albert's v. Smith's Food & Drug Ctrs., Inc.*, 356 F.3d 1242, 1249 (10th Cir. 2004) ("In cases where the district court has determined that it lacks jurisdiction, dismissal of a claim must be without prejudice."). The Court has invested substantial time and resources into this case and discovery has commenced. Requiring Plaintiffs to refile identical claims with slightly different parties is a judicially wasteful solution. Plaintiffs' delay in requesting to amend the pleadings is supported by good cause.

Once it finds that good cause exists to permit the scheduling order to be amended, the Court must consider whether to grant leave to amend under Rule 15. UNM would not be prejudiced by the amendment. Mr. Gonzales' declaration has been part of this case since the beginning. UNM has known of Mr. Gonzales' involvement and importance to the case since the beginning and were allowed to question him at the hearing. Amendment of the pleadings is proper under the

circumstances. Should the Court conclude that TP-UNM lacks standing for any reason and that substitution under Rule 17 is not the correct remedy, permitting Plaintiffs to amend and include Mr. Gonzales under Rules 15 & 16 is the proper remedy rather than dismissal.

CONCLUSION

Both LI and TP-UNM have standing. In the alternative, should the Court conclude that TP-UNM lacks standing, it should grant leave to substitute or amend and permit Plaintiffs to include Jonathan Gonzales as plaintiff. In either case, the Court should deny UNM's motion to dismiss and grant Plaintiffs' motion for preliminary injunction.

Dated: July 17, 2024.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned served this document today by filing it using the Court's CM/ECF system, which automatically notifies the parties and counsel of record.

July 17, 2024.

/s/ Benjamin I. B. Isgur