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 et. al.,

Defendants.

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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") moved the Court to dismiss 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 [ECF No. 35] (the "Motion"). Plaintiffs' Response Brief in Opposition to Motion to Dismiss ("Response") was filed July 17, 2024 [ECF No. 43].

I. POINTS AND AUTHORITIES

A. Subject Matter Jurisdiction Can Be Raised at Any Time.

Plaintiffs' first argument is that the Motion is untimely and Defendants have waived the defense that the Court lacks subject matter jurisdiction. The Motion was made pursuant to Fed. R. Civ. Pro. 12(b)(1) asserting the Court lacks subject matter jurisdiction.

Plaintiffs ignore two things. First, Fed. R. Civ. Pro. 12 (h) states:

> Waiving and Preserving Certain Defenses.
> (1) When Some Are Waived. **A party waives any defense listed in Rule 12(b)(2)-(5)** by:
> (A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or
> (B) failing to either:
> (i) make it by motion under this rule; or
> (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

This waiver provision does not apply to the subject matter defense provided in Fed. R. Civ. Pro. 12(b)(1); that defense is not waived if made after an answer is filed. Defendants' Twelfth Affirmative Defense states" The Court does not have subject matter jurisdiction." [ECF No. 14] Defendants' Sixth Affirmative Defense states" Plaintiffs' Complaint fails, in whole or in part, to state a claim upon which relief can be granted against UNM." *Id*. Defendants' Seventh Affirmative Defense states" Leadership Institute is not a proper party to this litigation and lacks standing." *Id.* The Fed. R. Civ. Pro. 12(b)(1) defense is explicitly included in the Defendants' Answer. Additionally, in their Twenty-fourth Affirmative Defense, the Defendants reserved the right to assert any additional affirmative defenses that may become relevant or apparent through the course of discovery or otherwise during the course of this litigation. *Id.*

Fed. R. Civ. Pro. 12(h) (3), entitled "Lack of Subject-Matter Jurisdiction," mandates that "**if the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action**." (Emphasis added). It is well established that a Court may, and should, address

its subject- matter jurisdiction *sua sponte*. *See Arbaugh v. Y & H Corp.*, 546 U.S. 500, 506 (2006) ("The objection that a federal court lacks subject-matter jurisdiction may be raised by a party, or by a court on its own initiative, at any stage in the litigation, even after trial and the entry of judgment." (citation omitted)). This Court must determine whether it has jurisdiction under Fed. R. Civ. Pro.12(b)(1), because "district courts have an independent obligation to address their own subject-matter jurisdiction and can dismiss actions *sua sponte* for a lack of subject-matter jurisdiction." *City of Albuquerque v. Soto Enterprises, Inc*., 864 F.3d 1089, 1093 (10th Cir. 2017). If the Court lacks subject matter jurisdiction, it may not decide the merits of the Plaintiffs' claims, even if it would otherwise dismiss them. *See Rector v. City and County of Denver*, 348 F.3d 935, 942 (10th Cir. 2003) ("Constitutional standing raises jurisdictional questions and a Court is required to consider 'the issue sua sponte to ensure that there is an Article III case or controversy').

Rule 12(b)(1) allows a party to raise the defense of the court's "lack of subject-matter jurisdiction" by motion. Fed. R. Civ. P. 12(b)(1). The United States Court of Appeals for the Tenth Circuit has held that motions to dismiss for lack of subject-matter jurisdiction "generally take one of two forms: (1) a facial attack on the sufficiency of the complaint's allegations as to subject matter jurisdiction; or (2) a challenge to the actual facts upon which subject matter jurisdiction is based." *Ruiz v. McDonnell*, 299 F.3d 1173, 1180 (10th Cir. 2002). On a facial attack, a plaintiff is afforded safeguards similar to those provided in opposing a rule 12(b)(6) motion and the Court must consider the complaint's allegations to be true. *See Ruiz v. McDonnell*, 299 F.3d at 1180; *Williamson v. Tucker*, 645 F.2d 404, 412 (5th Cir. [1981).]. However, when the attack is factual, a district court may not presume the truthfulness of the complaint's factual allegations. 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). *Alto Eldorado Partners v. City of Santa Fe*, No.

CIV 08-0175 JB/ACT, 2009 WL 1312856, at *8-9 (D.N.M. Mar.11, 2009) (Browning, J.) (citations omitted), aff'd, 634 F.3d 1170 (10th Cir. 2011).

A party or the Court can raise the issue of the lack of subject matter jurisdiction at any time. The Motion is not untimely.

B. LI Lacks Standing.

LI is an officious intermeddler, not a proper party. An officious intermeddler is defined variously as:

> A person under no obligation to confer a benefit or privilege to another individual, but does so unilaterally. This person cannot expect anything in return for the performance of the aforementioned deed.

Black's Law Dictionary 2nd Ed.

> One who unnecessarily meddles in the affairs of another and then seeks restitution or compensation for the beneficial results but who is barred from receiving it

Merriam Webster Dictionary

> A volunteer who assists and/or benefits another without contractual responsibility or legal duty to do so, but nevertheless wants compensation for his/her actions. The courts generally find that the intermeddler must rely on the equally voluntary gratitude of the recipient of the alleged benefit.

The Peoples Law Dictionary

While LI argues it was "forced" to assume an outstanding debt of TP-UNM. [ECF No. 43, 2] I LI, LI volunteered to pay the security fee on behalf of TP-UNM. [Doc. 1, p. 10, ¶ 59]. In fact, LI has not paid the invoice sent to TP-UNM. LI did not and does not have a contractual relationship with UNM. LI ignores the fact that NMSA § 37-1-23(A) provides that "governmental entities are granted immunity from actions based on contract, except actions based on a valid written contract." It is undisputed that LI does not have a valid written contract with UNM, which is a governmental entity. LI has suffered no harm for agreeing to assume the debt of another. In this case, the alleged beneficiary of LI's promises is TP-UNM. Plaintiffs admitted in their

Complaint that LI simply agreed to pay reasonable security costs on behalf of TP-UNM. [ECF No. 1, 10, ¶ 59]. A plaintiff must be personally harmed to have a stake in the litigation and otherwise is a mere intermeddler. *See Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (denying standing to prevent construction of ski resort because general environmental concerns were not sufficient to demonstrate the plaintiffs would be personally affected by the project). LI's rights could not have been violated by UNM's policies regarding security fees and free speech. The fact that TP-UNM is a charted student organization ("CSO") formally recognized by UNM and conferred with privileges and benefits by UNM means TP-UNM does not have standing to sue UNM and LI cannot derive standing from TP-UNM. Neither putative plaintiff can meet the three 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).

Standing is "an indispensable part of the plaintiff's case. *Lujan* at 561. Whether a plaintiff has standing is a legal question. *Ward v. Utah,* 321 F.3d 1263, 1266 (10th Cir.2003). The burden of establishing standing rests on the plaintiff. *See, e.g., Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 104 (1998). The United States Supreme Court has declared that "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal court jurisdiction to actual cases or controversies." *Simon v. E. Ky. Welfare Rights Org*., 426 U.S. 26, 37 (1976) (emphasis added). The plaintiff must allege facts essential to show jurisdiction. If they fail to make the necessary allegations, they have no standing." *FW/PBS v. City of Dallas,* 493 U.S. 215, 231 (1990) (*internal citations and quotations omitted*). "Even when the plaintiff has alleged injury sufficient to meet the 'case or controversy' requirement, the

United States Supreme has held that the plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.". *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Third party standing suits are disfavored and even when a plaintiff does have an injury in fact that can be redressed by suit, standing is denied if the rights properly belong to someone else. I*d.*

Plaintiffs cite to *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 have stated 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." [ECF No. 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, LI does not have an unfettered ability to send its speakers to UNM; it requires LI to have a sponsor organization for the speaker and compliance with the policies that bind its student sponsor organization. Third, 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. Defendants acknowledged the existence of the "one good plaintiff rule" that Plaintiffs rely heavily on in an attempt to confer standing on LI. Defendants do not agree, as Plaintiffs state, that the rule controls in this case. The leading critique of this rule is Aaron-Andrew P. Bruhl, *One Good Plaintiff Is Not Enough*, 67 Duke L.J. 481 (2017), which asserts that the one

good plaintiff rule is unlawful and should be rejected. Defendants prescribe to this view and absolutely contest the argument that Plaintiffs have standing under this rule. *Biden v. Nebraska*, 600 U.S. 477 (2023) is instructive as to the limitations of the one plaintiff rule and is distinguishable. [1]

C. TP-UNM Lacks Standing.

The burden of establishing standing rests on the plaintiff. *See, e.g., Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 104 (1998). The plaintiff must allege facts essential to show jurisdiction. If they fail to make the necessary allegations, they have no standing." *FW/PBS v. City of Dallas,* 493 U.S. 215, 231 (1990) (*internal citations and quotations omitted*). Where a defendant challenges standing, a court must presume lack of jurisdiction "unless the contrary appears affirmatively from the record." *Renne v. Geary,* 501 U.S. 312, 316 (1991) (*quoting Bender v. Williamsport Area Sch. Dist*., 475 U.S. 534, 546 (1986)) (*internal quotation marks omitted)*. "It is a long-settled principle that standing cannot be inferred argumentatively from averments in the pleadings but rather must affirmatively appear in the record." *Phelps v. Hamilton*, 122 F.3d 1309, 1326 (10th Cir. 1997) (Henry, J.) (*quoting FW/PBS v. City of Dallas*, 493 U.S. at 231) (*citations and internal quotation marks omitted*). Whether a party has Article III standing is a "threshold jurisdictional question" that a court must decide before it may consider the merits. *Steel Co. v.*

[1] When the Biden administration announced its intent to forgive, via executive action, $10,000 in student loans for borrowers with an annual income of less than $125,000, Nebraska and five other states challenged the forgiveness program, arguing that it violated the separation of powers and the Administrative Procedure Act. The district court dismissed the challenge, finding that the states lacked judicial standing to sue. Standing was an issue on appeal to the United States Supreme Court. The Court concluded Missouri likely had standing through the Missouri Higher Education Loan Authority (MOHELA), a public corporation the state created to hold and service student loans. The Court held that by law and function, MOHELA is an instrumentality of Missouri, created by the State to further a public purpose, governed by state officials and state appointees, required to report to the State, and subject to dissolution the State. Since the loan forgiveness plan cut MOHELA's revenues and impaired efforts to aid Missouri college students, this harm to MOHELA in the performance of its public function is necessarily a direct injury to Missouri itself. This one plaintiff analysis is very specific appellate issue regarding the relationship of governmental plaintiffs.
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Citizens for a Better Env't, 523 U.S. 83, 102 (1998). As an unincorporated association, TP-UNM must either satisfy Article III's requirements with respect to its own harm or satisfy the Supreme Court's three-part test governing associational standing. *See Kansas Health Care Ass'n, Inc. v. Kansas Dep't of Soc. & Rehab. Servs*., *supra*, 958 F.2d at 1021. Plaintiffs argue that because TP-UNM is a chartered and registered student organization that it is not an unincorporated association. This does not logically follow. A student charter does not serve as an incorporation. Registration of a student association does not equate with incorporation. Recognition of a CSO for purposes of conducting educational extracurricular activities does not serve to incorporate the association for purposes of a §1983 analysis.

Likewise, Plaintiffs' attempt to analogize CSOs with labor unions is faulty; they are not legally comparable entities for purposes of a §1983 analysis. In fact, in the case Plaintiffs rely upon for this argument, *Lippoldt v. Cole*, 468 F.3d 1204 (10th Cir. 2006), the Tenth Circuit held that plaintiff in that case, Operation Save America OSA, as an unincorporated association, is not a "person" under 42 U.S.C. § 1983. The same will be true for TP-UNM.

Plaintiffs cite three cases for the proposition that an unincorporated association of students has standing. None of the cited cases stand for that proposition. In *Christian Legal Society v. Martinez*, 561 U.S. 661 (2010), standing was not an issue in appeal. Christian Legal Society ("CLS") filed an action under 42 U. S. C. §1983 against the law school's dean and other school officials. The Hastings College of Law failed to recognize CLS as an official student organization because state law requires all registered student organizations to allow "any student to participate, become a member, or seek leadership positions, regardless of their status or beliefs." CLS requires its members to attest in writing to Christian beliefs and excludes homosexuals from joining. CLS claimed that Hastings' refusal to register CLS violated its First Amendment rights. The district

court dismissed the case and the U.S. Court of Appeals for the Ninth Circuit affirmed, holding that the school's conditions on recognizing student groups were viewpoint neutral and reasonable. The United States Supreme Court also affirmed, holding public college does not abridge the First Amendment by declining to acknowledge a student group that refuses to permit all students to join the group, in accordance with state law. The standing of CLS was not a feature of the appeal and was not addressed in the opinion at all.

Similarly, in *Good News Club v. Milford Central School,* 533 U.S. 98 (2001), standing was not an issue in appeal. Good News Club ("GNC") is a "private Christian organization for children". Two residents of the school district submitted a request to hold GNC's weekly afterschool meetings at Milford Central School. The school denied the request reasoning that the proposed use, including singing songs, hearing Bible lessons, memorizing scripture, and praying, was the equivalent of religious worship prohibited by the community use policy. GNC filed suit alleging that the denial violated its free speech rights under the First and Fourteenth Amendments. The district court granted summary judgment to the school and the U.S. Court of Appeals for the Second Circuit affirmed. The United States Supreme Court reversed and remanded, holding the school violated GNC's free speech rights when it was excluded from meeting after hours at the school. Standing was not an issue on appeal and GNC's legal structure was not at issue on appeal.

In *Cowboys for Life v. Sampson*, 983 F. Supp. 2d 1362 (W.D. Okla 2013), Cowboys for Life and its officers (collectively "CFL"), filed a §1983action against, the president of Oklahoma State University ("OSU") in his official and individual capacities, the Chief Executive Officer of the Board of Regents of OSU in his official capacity, the members of the Board of Regents of OSU in their official capacities, and certain students and Does 1–30, who were members of the Student

Government Association at OSU in their official and individual capacities. CFL asserted violations of their constitutional rights to free speech, freedom from retaliation and unconstitutional conditions, equal protection and due process and seek monetary, declaratory and injunctive relief. Accepting all the allegations in the complaint as true, the Court dismissed the case on qualified immunity grounds.[2] The standing of CFL was not an issue raised in the case nor the basis of the Oklahoma Court's decision. These cases do not support Plaintiffs' arguments that TP-UNM has standing to maintain this lawsuit.

D. Neither Plaintiff Has Associational Standing

Plaintiffs fail to allege imminent danger that may warrant an examination of their associational standing. "Standing is determined as of the time the action is brought." *Smith v. U.S. Court of Appeals, for the Tenth Circuit,* 484 F.3d 1281, 1285 (10th Cir. 2007) (Seymour, J.) (quoting *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1154 (10th Cir. 2005) (Ebel, J.)). In *Nova Health System v. Gandy*, the Tenth Circuit found that abortion providers had standing to challenge an Oklahoma parental-notification law on the grounds that they were in imminent danger of losing patients because of the new law. *Id*. at 1154. Although it concluded that the plaintiffs had standing, the Tenth Circuit was careful to frame the issue as whether, "as of June 2001 [the time the lawsuit was filed]," Nova Health faced any imminent likelihood that it would lose some minor patients seeking abortions. *Id.* at 1155. TP-UNM alleges no imminent danger to itself that would allow associational standing.

TP-UNM and LI must show that: (i) its members have standing to sue; (ii) the interests at stake are relevant to the organization's purpose; and (iii) neither the claim asserted, nor the relief

[2] Depending on the procedural posture of the case after the Court's rulings on pending motions, Defendants will be filing a qualified immunity motion and the concomitant motion to stay while that motion is pending, like the Defendants in *Cowboys for Life* that lead to the reported decision.

requested, requires the individual members to participate in the lawsuit. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333(1977); *Friends of the Earth v. Laidlaw Envtl. Serv*., 528 U.S. 167, 181 (2000).

Turning to the first prong, Plaintiffs do not assert they currently have individual members or that their respective individual members have standing. *See Am. Chem. Council v. Dep't of Transp*., 468 F.3d 810, 820 (D.C. Cir. 2006) (holding that "an organization bringing a claim based on associational standing must show that at least one specifically-identified member has suffered an injury-in-fact . . . At the very least, the identity of the party suffering an injury in fact must be firmly established."). Plaintiffs do not show that their members have standing individually. Additionally, TP-UNM does not demonstrate associational standing on any of the claims asserted in the Complaint.

The Tenth Circuit has stated that an association usually lacks standing to pursue damages claims on its members' behalf. *See In re Integra Realty Res., Inc*., 262 F.3d 1089, 1098 n.5 (10th Cir. 2001). *See United Food and Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 554 (1996) (stating that the Supreme Court's "precedents have been understood to preclude associational standing when an organization seeks damages on behalf of its members"). When litigating the claim made or providing the requested relief requires broad individual participation, the Tenth Circuit denies standing on *Hunt's* third prong. To illustrate, in *Kansas Health Care Ass'n v. Kansas Department of Social and Rehabilitation Services,* 958 F.2d 1018 (10th Cir. 1992), the Tenth Circuit concluded that the plaintiff organization lacked associational standing because the claims asserted would have required the association's individual members to participate extensively. *See* 958 F.2d at 1021-22. The organization sought only an injunction, not individualized damages for each of its members. *Id*. On this basis, the district court determined

that "individual participation of the providers will not be required with respect to the injunctive relief sought by plaintiffs." *Id*. The Tenth Circuit stated that even if the district court were correct in that respect, "that determination alone was insufficient to support a conclusion that plaintiffs meet the third standing prerequisite from *Hunt*. Under the *Hunt* test, an association has standing only if 'neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.'" *Id*. Accordingly, the Tenth Circuit proceeded to determine whether the plaintiffs' remaining claims would require individualized participation. *Id.*

First, the Tenth Circuit considered the plaintiffs' claim that the state's Medicaid reimbursement rates were not reasonable and adequate to meet their costs. *Id.* It observed that, in "some circumstances," a court may be able to determine whether reimbursement rates are reasonable without individualized proof. *Id.* However, the Court has to determine if the facts in the case lend themselves to a summary conclusion or not. *Id.* It stated: "Instead, in order to resolve plaintiffs' claims, we will be required to examine evidence particular to individual providers." *Id.* The Tenth Circuit therefore concluded that proving the claim "will necessarily require individual participation of the associations' members." *Id.* Second, it considered the plaintiffs' claim that the defendants failed to adequately consider the costs that efficiently operated hospitals incur and reasonable payment rates. *See Id.* at 1023. For the same reasons stated above, the Tenth Circuit concluded that proving this claim would require the plaintiffs to show that the defendants failed to adequately consider costs for each health care provider, yet the individual health care providers were not parties. *Id*. The Tenth Circuit determined that the organizations lacked standing, because litigating their claims would require their members to participate. *Id.*

This case leads to the same conclusion. Demonstrating that each member of TP-UNM or LI was denied their right to engage freely and openly in the marketplace of ideas, requires each

individual to participate to determine his or her own rights and barriers created by UNM's officials to those rights. *See Catron Cty. v. United States*, 934 F. Supp. 2d 1298, 1307-08 (D.N.M. 2013) (Vazquez, J.*), declined to follow on other grounds, Kane Cty. v. United States,* 772 F.3d 1205 (10th Cir. 2014). Litigating each person's rights and any barriers created by UNM's officials would require highly individualized allegations and proof for each of TP-UNM's members. *Compare Friends for Am. Free Enterprise Ass'n v. Wal-Mart Stores, Inc.,* 284 F.3d 575 (5th Cir. 2002) (rejecting associational standing, because the plaintiff's common-law tortious interference claims were wholly fact-specific as to the individual members). TP-UNM should be denied associational standing.

In *Association of American Physicians and Surgeons v. United States Food and Drug Administration*, 13 F.4th 531 (6th Cir. 2021), the Sixth Circuit cast doubt on the continued viability of the associational standing doctrine. The Court noted the doctrine developed in the 1960s and 70s and it was "not obviously reconcilable" with the Supreme Court's more recent guidance on standing for three reasons. First, the Court recognized that the "'irreducible constitutional minimum' of standing requires a plaintiff to allege a particularized injury." The Sixth Circuit reasoned, that recent Supreme Court case law suggests that the "nonparty injury" inherent in associational standing "does not suffice." Second, the Sixth Circuit found issue with the doctrine in the context of standing's redressability requirement. Specifically, the Sixth Circuit opined that associational standing "is in tension with [] Article III redressability rules because it creates an inherent mismatch between the plaintiff and the remedy." Because its members, rather than the association itself, have suffered an injury, an "injunction that bars a defendant from enforcing a law or regulation against the 'specific' party before the court, the *associational plaintiff,* will not satisfy Article III because it will not redress an injury." Third and finally, the Sixth Circuit reasoned

that the Supreme Court's opinion in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014) "might also necessitate reexamination of the Court's associational-standing test." In *Lexmark*, the Supreme Court raised doubts about the notion of "prudential standing" rules when it examined the "zone of interests" requirement, which it characterized as "a statutory question" rather than "a standing question." The Sixth Circuit opined *Lexmark's* "skepticism of prudential standing suggests that the Court should reexamine all of the doctrines that have grown out of it," including associational standing. The Tenth Circuit is likely to join the Second, Fifth, Sixth, Seventh and Eighth Circuits in rejecting the doctrine of associational standing following *Lexmark* and its progeny. The Tenth Circuit affirmed the dismissal of a district attorney from a citizen suit alleging Clean Water Act violations by a neighboring municipality. *Thiebaut v. Colorado Springs Utilities*, 2011 WL 4824326 (Oct. 12, 2011), rejecting three standing theories proffered by the district attorney: *parens patriae* standing, associational standing, and standing on the basis of another party's standing.

E. Neither Plaintiff Has Prudential Standing.

TP-UNM and LI cannot establish prudential standing either. "Prudential standing is not jurisdictional in the same sense as Article III standing." *Finstuen v. Crutcher*, 496 F.3d 1139, 1147 (10th Cir. 2007) (Ebel, J.). Prudential standing consists of "a judicially-created set of principles that, like constitutional standing, places limits on the class of persons who may invoke the courts' decisional and remedial powers." *Bd. of Cty. Comm'rs v. Geringer,* 297 F.3d 1108, 1112 (10th Cir. 2002) (Ebel, J.) (*internal quotation marks omitted*). Generally, there are three prudential standing requirements: (i) "a plaintiff must assert his own rights, rather than those belonging to third parties"; (ii) "the plaintiff's claim must not be a generalized grievance shared in substantially equal measure by all or a large class of citizens"; and (iii) "a plaintiff's grievance must arguably fall

within the zone of interests protected or regulated by the statutory provision or constitutional guarantee invoked in the suit." *Id.,* 297 F.3d at 1112 (*internal quotation marks and citations omitted*). Neither Plaintiffs argues that they meet any of these requirements because they cannot do so in good faith.

II. 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 31st 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*
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