

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

**NAVAJO NATION, a federally recognized
Indian Tribe; NAVAJO NATION HUMAN
RIGHTS COMMISSION; LORENZO
BATES; JONNYE KAIBAH BEGAY;
GLORIA ANN DENNISON; TRACY DEE
RAYMOND; and BESSIE YAZZIE
WERITO,
Plaintiffs,**

v.

Case 1:22-cv-00095-JB-JFR

**SAN JUAN COUNTY, NEW MEXICO;
SAN JUAN COUNTY BOARD OF
COMMISSIONERS; JOHN BECKSTEAD,
in his official capacity as Chairman; TERRI
FORTNER, in her official capacity as
Commissioner; STEVE LANIER, in his
official capacity as Commissioner;
MICHAEL SULLIVAN, in his official
capacity as Commissioner; GLOJEAN
TODACHEENE, in her official capacity as
Commissioner; and TANYA SHELBY, in
her official capacity as COUNTY CLERK,
Defendants.**

**DEFENDANTS' MOTION TO DISMISS:
RULE 12(B)(1) DISMISSAL FOR LACK OF STANDING OF PUTATIVE
PLAINTIFF NAVAJO NATION HUMAN RIGHTS COMMISSION**

Putative Plaintiff Navajo Nation Human Rights Commission (“Commission”) by its pleading purports to sue in a “representational capacity on behalf of the affected citizens of the Navajo Nation it represents.” Doc. 1, Compl. ¶ 14. But this pleading fails to give rise to standing under the relevant standards, for the following reasons:

1. the Commission nowhere pleads standing based on allegations of injury to the Commission itself, and thus it has no “organizational standing”;
2. the Commission fails to plead (and cannot plead), sufficient facts to qualify for “associational standing” based on representation of membership as it ostensibly has no actual members; and finally,

3. the Commission does not meet the criteria for “indicia of membership” sufficient to qualify under the modified standing criteria for associations having no actual members.

Accordingly, the Commission should be dismissed from this case.

I. PROCEDURAL AND FACTUAL BACKGROUND

1. On February 10, 2022, Plaintiffs, including putative Plaintiff Navajo Nation Human Rights Commission, filed their Complaint for Declaratory and Injunctive Relief (“Complaint”).

2. The Complaint states a single paragraph of allegations bearing on the standing of the Commission as follows:

Plaintiff NAVAJO NATION HUMAN RIGHTS COMMISSION is an Office within the legislative branch of the Navajo Nation and operates as a clearinghouse to administratively address discriminatory actions against citizens of the Navajo Nation and to promote the cultural, economic, political and social welfare of citizens of the Navajo Nation. Citizens of the Navajo Nation include U.S. citizens who are registered to vote or are eligible to register to vote in San Juan County, New Mexico for federal, state and local elections. The voting strength of citizens of the Navajo Nation is diluted by the Section 2 violations alleged herein. Plaintiff NAVAJO NATION HUMAN RIGHTS COMMISSION sues in a representational capacity on behalf of the affected citizens of the Navajo Nation it represents. Neither the claims asserted nor the relief requested by Plaintiff NAVAJO NATION HUMAN RIGHTS COMMISSION requires the participation in this litigation of individual citizens of the Navajo Nation who reside in San Juan County.

Doc. 1, Compl. ¶ 14.

II. PLEADING STANDARD

“Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a court must grant a motion to dismiss if it lacks subject matter jurisdiction to hear a claim.” *Hernandez v. Grisham*, 499 F. Supp. 3d 1013, 1047 (D.N.M. 2020). “Motions to dismiss for lack of standing are ‘properly brought pursuant to rule 12(b)(1), because standing is a jurisdictional matter.’” *Id.* (quoting *Ballentine v. United States*, 486 F.3d 806, 810 (3d Cir. 2007)). “Rule 12(b)(1) motions to dismiss may be either a facial attack or a factual attack.” *Id.* (citing *Holt v. United States*, 46 F.3d 1000, 1002-03 (10th

Cir. 1995). As well, the court has an independent obligation to establish standing. *See Producers of Renewables United for Integrity Truth & Transparency v. Env't Prot. Agency*, No. 19-9532, 2022 WL 538185, at *3 (10th Cir. Feb. 23, 2022) (“We recognize that Intervenorors have not challenged the standing of Producers of Renewables to raise their claims. Nevertheless, we have an independent obligation to verify that Producers of Renewables has Article III standing to bring its claims before proceeding further.”). *Accord United States v. Ramos*, 695 F.3d 1035, 1046 (10th Cir. 2012) (“The parties here did not address standing in their initial round of briefing. However, standing is a question of justiciability [that] implicates this court's jurisdiction; consequently, where the record reveals a colorable standing issue, we have a duty to undertake an independent examination (*sua sponte* if necessary) of that issue.”) (quotations and citations omitted).

The plaintiff bears the burden of establishing the elements of standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 559–61, 112 S. Ct. 2130 (1992). In deciding the issue of standing, the Court must accept as true all well-pleaded facts, and construe all reasonable allegations in the light most favorable to the plaintiff. *Warth v. Seldin*, 422 U.S. 490, 501, 95 S. Ct. 2197 (1975).

Still, a “plaintiff must plead the elements of standing in accordance with *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S. Ct. 1937 (2009).” *LaVigne v. First Cmty. Bancshares, Inc.*, 215 F. Supp. 3d 1138, 1141 (D.N.M. 2016). “‘Threadbare recitals of the elements,’ which are ‘supported by mere conclusory statements,’ will no longer suffice at the pleadings stage.” *Id.* (quoting *Iqbal*, 556 U.S. at 678, 129 S.Ct. 1937). “Plaintiff’s claims for standing ‘do not require detailed factual allegations, but must set forth “more than labels and conclusions, and a formulaic recitation of the element of a cause of action will not do.”’ *Id.* (quoting *Twombly*, at 555, 127 S. Ct. 1955).

III. ARGUMENT

A. The Commission has limited legal paths to establish standing, none of which are available here.

“The requirements of Article III standing are well-settled. In brief, there must be a showing of an injury in fact, traceability, and redressability.” *United States v. Ramos*, 695 F.3d 1035, 1045 (10th Cir. 2012) (quotations and citations omitted). The Supreme Court recently addressed how these constitutional standing requirements apply to group plaintiffs in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199, 2023 WL 4239254 (U.S. June 29, 2023). Where a putative plaintiff is an organization, the standing requirements of Article III can be satisfied in two ways: “Either the organization can claim that it suffered an injury in its own right or, alternatively, it can assert ‘standing solely as the representative of its members.’” *Students for Fair Admissions*, 2023 WL 4239254 at *8 (quoting *Warth* 422 U.S. at 511).

1. The Commission does not plead injury to itself.

As an initial matter, the Commission does not even purport to have standing based on an injury to itself; rather it claims standing solely in a “representational capacity on behalf of the affected citizens of the Navajo Nation it represents.” Doc. 1, Compl. ¶ 14. Even if it now seeks to pivot and claim an injury to itself, known as “organizational standing,” the Commission would have to make a considerable showing. Critically, “an organization’s abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art[icle] III.” *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40, 96 S. Ct. 1917 (1976). The Commission would have to show that “the defendant’s conduct significantly and perceptibly impaired” the organization’s activities. *NAACP v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). Such injury must be “far more than simply a setback to the organization’s abstract social interests”

or costs related to the instant litigation. *Id.* (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379, 102 S. Ct. 1114 (1982)). If this were a viable means of establishing standing, the Commission likely would have pled accordingly. This standing path is foreclosed.

2. The Commission does not adequately plead standing based on representation of its members.

As noted, an organization also can assert “standing solely as the representative of its members.” *Students for Fair Admissions*, 2023 WL 4239254, at *8 (quotation omitted). To do so, the organization must demonstrate that “(a) its members would otherwise have standing 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.* (quoting *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343, 97 S. Ct. 2434 (1977)).

“This three-part test for associational standing ‘guarantees the satisfaction’ of Article III ‘by requiring an organization suing as representative to include at least one member with standing to present, in his or her own right, the claim (or the type of claim) pleaded by the association.’” *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1008–11 (7th Cir. 2021) (quoting *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 552, 116 S. Ct. 1529 (1996)). “Plaintiff need only show that a single member of the organization would have standing in her own right to bring the instant suit to show that it has organizational standing.” *WildEarth Guardians v. Salazar*, 30 F. Supp. 3d 1126, 1133 (D.N.M. 2011) (citing *Warth*, 422 U.S. at 511, 95 S. Ct. 2197).

Here, however, the Commission’s own pleading is wholly silent as to its membership. In fact, the Commission does not even plead that it has members. The Commission, by all pled

allegations, is simply “an Office within the legislative branch of the Navajo Nation.” Doc. 1, Compl. ¶ 14.

For more key background, the Court may take judicial notice of the Resolution of the Navajo Nation Council establishing the Commission, by amendment to the Navajo Nation Code. *See, e.g., Harvey v. United States*, No. 2:08-cv-00107-MCA-CG, 2009 WL 10698378, at *9 (D.N.M. Sept. 29, 2009) (“Finally, the Court takes judicial notice of the Navajo Nation Code, which is available on Westlaw, and particularly 7 N.T.C. § 701, which is viewed by the Navajo courts as a codification of nalyeeh, a Navajo common law concept applied by Navajo courts to tort claims.”). That enabling Resolution is attached here as “**Exhibit 1.**” *See* Ex. 1, Resolution of the Navajo Nation Council, 20th Navajo Nation Council – Fourth Year, 2006 at Section 2 (“Resolution”). Defendants sourced the Resolution from the Commission’s own web site.¹ The Resolution reveals the Commission’s purpose as follows:

Section 2. Purpose

The purpose of these amendments is to create a Navajo Nation Human Rights Commission to collect data regarding discrimination acts against citizens of the Navajo Nation by private citizens, businesses, organizations, and foreign governments (state, federal, and foreign nations) within and outside the Navajo Nation, subject to applicable laws.

Ex. 1, Resolution at Section 2.

The amendments to the Navajo Code made by the Resolution provide a further purpose as follows:

The Commission is organized to operate as a clearinghouse entity to administratively address discriminatory actions against the citizens of the Navajo Nation, and to interface with the local, state, federal governments and with national and international human rights organizations in accordance with its plan of operation and applicable laws and regulations of Navajo Nation.

¹ <https://nnhrc.navajo-nsn.gov/docs/Oct2006RESOLUTION.pdf>

Ex. 1, Resolution at 2, §921 Purpose.

The Commissions is comprised of five (5) Commissioners, appointed by the Speaker of the Navajo Nation Council. *Id.* §922. There is no mention of membership whatsoever. Nor is there any specific authorization to sue on behalf of citizens of the Navajo Nation in a representative capacity. *Id.*

Accordingly, the Commission cannot establish standing by demonstrating *Hunt* representation of its members, as it has none.

3. Nor does the Commission adequately plead representational standing based on the “indicia of membership” analysis employed in *Hunt v. Washington State Apple Advertising Commission*, as recently recognized in *Students for Fair Admissions*.

Finally, the Commission could in theory establish standing through a permutation of the representational standing approach described *supra* at Section III.A.2, through what has come to be described as the “indicia of membership” analysis, first articulated in *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343, 97 S. Ct. 2434 (1977). The Supreme Court in *Students for Fair Admissions, Inc.* analyzed this approach thus:

Hunt involved the Washington State Apple Advertising Commission, a state agency whose purpose was to protect the local apple industry. The Commission brought suit challenging a North Carolina statute that imposed a labeling requirement on containers of apples sold in that State. The Commission argued that it had standing to challenge the requirement on behalf of Washington’s apple industry. We recognized, however, that as a state agency, “the Commission [wa]s not a traditional voluntary membership organization ..., for it ha[d] no members at all.” As a result, we could not easily apply the three-part test for organizational standing, which asks whether an organization’s *members* have standing. We nevertheless concluded that the Commission had standing because the apple growers and dealers it represented were *effectively* members of the Commission. The growers and dealers “alone elect[ed] the members of the Commission,” “alone ... serve[d] on the Commission,” and “alone finance[d] its activities”—they possessed, in other words, “all of the indicia of membership.” The Commission was therefore a genuine membership organization in substance, if not in form. And it was “clearly” entitled to rely on the doctrine of organizational standing under the three-part test recounted above.

Students for Fair Admissions, 2023 WL 4239254, at *9 (quoting *Hunt*, 432 U.S. at 336-344) (emphasis in original).

Here, there is no pleading (or evidence otherwise available in the Resolution), to suggest that the Commission bears the required indicia of membership to establish standing as described by the Supreme Court in *Students for Fair Admissions*. First, the Resolution reveals that the Commission is appointed by the Navajo Nation Counsel Speaker, not elected by the affected Navajo Nation citizens it purports to represent in this case. Second, there is no pleading concerning the Commission being comprised solely of the affected Navajo Nation citizens it purports to represent in this case. Third, there is no pleading concerning the Commission being financed solely by the affected Navajo Nation citizens it purports to represent in this case. As a consequence, this standing path also is foreclosed.

IV. CONCLUSION

The Court must assure itself of the standing of all parties to this case as it proceeds. The Navajo Nation Human Rights Commission has not sufficiently pled (or proven) allegations to demonstrate standing, as it must, to justify continued participation in the case. Accordingly, Defendants respectfully request that the Commission be dismissed.

Respectfully Submitted:

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I HEREBY CERTIFY that on July 10, 2023, the foregoing was filed electronically through the CM/ECF system, which caused all parties and counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/ Brian Griesmeyer
Brian Griesmeyer, Esq.