IN THE UNITED STATED 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.

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

Plaintiffs' Response (Doc. 111) does not even address (much less show compliance with) the standards relevant to whether the Commission has standing here. Rather, the Response raises and answers phantom arguments having no bearing on whether the Commission has such standing. It does not. The Commission should be dismissed.

ARGUMENT

A. Plaintiffs contend that the Commission's (lack of) standing has no practical effect on this case but that is incorrect. Either the Commission has standing, and can remain a party to this case going forward; or it does not, and should be dismissed.

Section I of Plaintiffs' Response cites several cases for the proposition that the Commission's standing is not an issue worthy of consideration because other plaintiffs do have standing. Doc. 111 at 2-3. For example, in *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023), the Supreme Court considered the issue of standing arising from a lower court dismissal for lack of standing. In its work, the Supreme Court reasoned that all it needed to do was find standing as to one of the putative plaintiffs to proceed to the merits of the case. *Id.* ("Because we conclude that the Secretary's plan harms [plaintiff] MOHELA and thereby directly injures Missouri—conferring standing on that State—we need not consider the other theories of standing raised by the States.").

Here, by contrast, Defendants by their briefing challenge the particular right of the Navajo Nation Human Rights Commission to be a part of this case going forward, because Defendants do not believe the Commission has standing under relevant law. For Plaintiffs to say that other, unchallenged Plaintiffs have standing entirely misses the point. Whether other Plaintiffs may have standing does not confer standing upon the Commission. The Commission's standing has been challenged, and that issue now must be resolved by the Court.

Taken to its extreme, Plaintiffs' logic would allow for congesting cases with innumerable putative plaintiffs who might want seats at the litigation table, even if they have no standing. Plaintiffs' logic would shield a challenge to the standing of any such putative plaintiff in a case, unless there were a challenge to the standing of every plaintiff in that case. That makes no sense, and should not be the future of federal docket management, and standing doctrine, in this court or elsewhere.

B. The Commission does not meet organizational or associational standing requirements as articulated under *Students for Fair Admissions*, so it should be dismissed.

1. No caselaw supports imputing *parens patriae* standing of the Navajo Nation, already a party to this case, to the Commission.

Plaintiffs' second argument laboring to keep the Commission in this lawsuit also misses the mark. Plaintiffs assert that the Navajo Nation's *parens patriae* standing somehow confers standing upon the Commission. There is no law supporting that contention, and Plaintiffs cite none. The Navajo Nation already is a party to this lawsuit. Its *parens patriae* standing is not challenged by Defendants. But that does not mean that a stand-alone putative party, the Navajo Nation Human Rights Commission, has its own *parens patriae* standing.

Plaintiffs' exhibits do not aid their cause. Exhibit A provides a "Plan of Operation" for the Commission, but among the many specific, enumerated powers of the Commission, there is no enumerated power to sue or be sued, or to somehow stand in the shoes of the entirety of the Navajo Nation in this, or any other litigation. *See* Doc. 111-1 at 2-3. As a point of comparison, in *Maine Human Rights Comm. v. Sunbury Primary Care, P.A.*, the court found standing of a statutorily created human rights commission where enabling legislation specifically granted power to sue:

> Maine law authorizes the MHRC to file suit 'seeking such relief as is appropriate, including temporary restraining orders' if it 'finds reasonable grounds to believe that unlawful discrimination has occurred, and further believes that irreparable injury or great inconvenience will be caused the victim of such discrimination, or to members of a ... physical ... disability ... group if relief is not immediately granted....'

770 F. Supp 2d. 370, 400 (D. Me. 2011) (quoting 5 M.R.S. § 4612(4)(A)). In that case, "[t]he Maine Human Rights Act expressly authorize[d] the MHRC to bring a civil action in its name 'for the use of the victim of the alleged discrimination or of a described class' and for courts to 'grant relief as in other civil actions for injunctions.'" *Id.* (quoting 5 M.R.S. § 4612(4)(A)). Here, the Navajo Nation Council easily could have invested the Commission with the power to represent

Navajo citizens or the Navajo Nation in (San Juan County Commission) voting rights litigation, but it did not. The Court should not invest the Commission with a power it was never given, to further invest it with standing it does not have.

The same holds as to Plaintiffs' Exhibit B, Naabik'íyáti' Comm. Res. NABIJN-15-21, § 3 (2021), Doc. 111-2. This resolution invests the Commission with power to "represent the Navajo Nation on all state legislative and Congressional redistricting activities," specifically previously described in the resolution as relating to the New Mexico Task Force on Redistricting and the New Mexico Redistricting Commission. Doc. 111-2 at 2. There is no grant of authority for the Commission to involve itself in litigation. And there certainly is no grant of authority for the Commission to involve itself in litigation concerning San Juan County Commission districts. While Plaintiffs may want to read such authorization into the resolution, it is not there. Accordingly, the lack of such authorization does not support the standing of the Commission here, it controverts it.

2. Finally, Plaintiffs do not adequately plead the Commission's 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.*

Plaintiffs' Response nowhere argues direct harm to the Commission itself, so they let go of any argument as to organizational standing. Plaintiffs' Response and exhibits also further evidence that the Commission actually has no membership at all. Thus, the Commission again is down to establishing standing exclusively through a permutation of the representational standing approach through 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).

To reiterate, 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.

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 August 7, 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.