No. 17-1951

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

NARRAGANSETT INDIAN TRIBE, acting by and through the Narragansett Indian Tribal Historic Preservation Office

Plaintiff/Appellant

v.

RHODE ISLAND DEPARTMENT OF TRANSPORTATION; FEDERAL HIGHWAY ADMINISTRATION; ADVISORY COUNCIL ON HISTORIC PRESERVATION; RHODE ISLAND HISTORICAL PRESERVATION & HERITAGE COMMISSION

Defendants/Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF RHODE ISLAND C.A. No. 17-125-S-LDA

RESPONSE BRIEF OF THE STATE APPELLEES

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I. JURISDICTIONAL STATEMENT

This matter stems from a complaint filed on March 31, 2017, in the United States District Court for the District of Rhode Island by the Narragansett Indian Tribe ("Tribe"), acting by and through the Narragansett Indian Tribal Historic Preservation Office ("NITHPO"), against State of Rhode Island defendants, the State of Rhode Island Department of Transportation ("RIDOT") and the Rhode Island Historical Preservation & Heritage Commission ("RIHPHC") (collectively, "State Defendants"); and federal defendants, the Federal Highway Administration ("FHWA") and the Advisory Council on Historic Preservation ("ACHP") (collectively, "Federal Defendants"). In the complaint, the Tribe asserts that this matter "arises under the Administrative Procedures Act, 5 U.S.C. § 701 et seq., the National Historic Preservation Act, 54 U.S.C. § 301101 et seq., and the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq." App'x 26. The Tribe further avers that the District Court "has jurisdiction over this matter pursuant to 28 U.S.C. § 1331 (Federal Question), 28 U.S.C. § 1362 (Jurisdiction Over Indian Tribes), and 28 U.S.C. §§ 2201-2202 (Declaratory Judgment and Injunctive Relief)." Id.

On June 9, 2017, the Federal Defendants filed a motion to dismiss the allegations in the Tribe's complaint, followed by the State Defendants' separate motion to dismiss filed on June 19, 2017. On September 11, 2017, District Court Chief Judge William E. Smith issued a Memorandum and Order granting both the

Federal and State Defendants' motions to dismiss. The District Court dismissed the claims asserted against the Federal Defendants, determining that the court lacked subject-matter jurisdiction, and found that the Tribe failed to state a valid claim against the State Defendants. Judgment entered for the Federal Defendants and State Defendants on September 11, 2017.

The final judgment that was entered on September 11, 2017 disposed of all the issues in the case and is now being appealed by the Tribe, pursuant to 28 U.S.C. § 1291. The Tribe filed a timely notice of appeal on September 26, 2017, and no motions or requests to modify the September 11, 2017 judgment were filed that could have altered the time to appeal.

II. STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

Defendants-Appellees, the State Defendants, hereby submit this brief in opposition to the brief filed by the Plaintiff-Appellant, the Narragansett Indian Tribe acting by and through the Narragansett Indian Tribal Historic Preservation Office. The issues on appeal to this Honorable Court that pertain to the State Defendants are as follows:

(1) Whether the District Court correctly determined that the National Historic Preservation Act, 54 U.S.C. § 300101, et seq., does not provide a private right of action to the Tribe under the facts of this case; and,

(2) Whether the District Court correctly determined that the Tribe's Complaint failed to state an adequate claim for relief against the State Defendants.

III. STATEMENT OF THE CASE

A. Legal Background

The history of litigation between the State of Rhode Island and the Narragansett Indian Tribe provides the necessary background for the instant matter. In 1975, the Tribe filed two lawsuits claiming rights to approximately 3,200 acres of land in and around the Town of Charlestown, Rhode Island. See Narragansett Indian Tribe v. Rhode Island, 449 F.3d 16, 19 (1st Cir. 2006), cert. denied, 549 U.S. 1053 (2006). In 1978, the Tribe, the State, the Town of Charlestown and private land owners with property at issue settled the lawsuits by entering into a Joint Memorandum of Understanding Concerning Settlement of the Rhode Island Indian Land Claims ("JMOU"). See id. Under the terms of the JMOU, the State donated approximately 900 acres of land to the Tribe. Id.; see also 25 U.S.C. §§ 1702 (e), 1706 (b); R.I. Gen. Laws § 37-18-7. The parties further identified approximately 900 acres of certain privately-held lands to be purchased by the Tribe with federal monies, including the Camp Davis property, which was then held by the Providence Boys Club and is at the center of the current controversy. See Narragansett Indian Tribe, 449 F.3d at 19; see also 25 U.S.C. §§ 1702(d), 1703, 1704, 1707(a). In exchange, the State and the Town

obtained the elimination of all potential Indian claims of any kind—possessory, monetary or otherwise—involving land in the State of Rhode Island. See Narragansett Indian Tribe, 449 F.3d at 19.

In 1978, the United States Congress enacted the Rhode Island Indian Land Claims Settlement Act, 25 U.S.C. § 1701 et seq., which codified the terms of the JMOU. As expressed by Congress, the purpose and effect of the Settlement Act is specific to Rhode Island and distinctive in its purpose and effect: to resolve all existing land disputes and prevent future land claims of any nature by any Indian or tribe of Indians—including the Narragansett Indian Tribe—within the State of Rhode Island. See 25 U.S.C. § 1701(c). Moreover, the Settlement Act expressly stipulated that the approximately 1800 acres of land in Charlestown acquired by the Tribe pursuant to the Act was subject to the civil and criminal laws and jurisdiction of the State of Rhode Island. See 25 U.S.C. § 1708. Thus, since 1978 the land occupied by the Narragansett Indian Tribe, as well as all other land within the State, has been subject to the civil and criminal laws and jurisdiction of the State of Rhode Island. See Narragansett Indian Tribe, 449 F.3d at 22. Nonetheless, the relationship between the State of Rhode Island and the Tribe has been fraught with tension—unfortunately documented in numerous court cases—largely based upon disputes over the extent of State jurisdiction and tribal sovereignty. See, e.g., Narragansett Indian Tribe, 449 F.3d at 22 (holding that the State did not violate the

sovereign rights of the Tribe by enforcing criminal provisions of the State's cigarette tax scheme); see also In re Advisory Opinion to House of Representatives (Casino II), 885 A.2d 698, 705 (R.I. 2005) (describing that "the Tribe's sovereign immunity is 'an ongoing and overarching question which has vexed the State and Tribe over the years as various issues have arisen . . . all of the relevant questions cannot be answered by an all-encompassing solution.'") (quoting Narragansett Indian Tribe of Rhode Island v. State of Rhode Island, 407 F.3d 450, 461 (1st Cir. 2005), vacated in part, Narragansett Indian Tribe v. State of Rhode Island, 415 F.3d 134 (1st Cir. 2005)).

B. Factual Background

As set forth in the Tribe's complaint, on or about October 3, 2011, the Tribe, the State Defendants and defendant Federal Highway Administration ("FHWA") entered into a programmatic agreement ("PA") pursuant to the National Historic Preservation Act, 54 U.S.C.A. § 300101 et seq. ("NHPA"), in connection with the Providence Viaduct Bridge No. 578 Replacement Project (the "Undertaking"). App'x 34-39. The 2011 PA contained eleven (11) distinct stipulations, including provisions governing dispute resolution and termination of the PA. Id. The PA was designed to ensure that the Undertaking's potential effects on a historic property—known as the Providence Covelands Archaeological District—were considered, and to satisfy FHWA's Section 106 responsibility for the Undertaking.

App'x 34-35.

In January 2013, Amendment No. 1 was added to the PA, which replaced Stipulation No. 3. App'x 41-43. The new Stipulation No. 3 of Amendment No. 1 detailed three separate properties that RIDOT was to acquire and transfer ownership of to the Tribe, complete with "[a]ppropriate covenants that preserve the property and its cultural resources in perpetuity . . . included in the deed" for each property. Id. RIDOT acquired title to the three properties outlined in Stipulation No. 3, and attempted to convey said properties to the Tribe in September 2013, complete with the appropriate covenants. App'x 45-46. The Tribe refused to accept the properties with enforceable covenants. App'x 28. Unable to reach a resolution, on February 15, 2017, FHWA terminated the PA in accordance with Section 106 of the NHPA. App'x 48.

C. Travel of the Case

On March 31, 2017, the Tribe filed a complaint in the United States District Court for the District of Rhode Island, alleging breach of contract and seeking declaratory and injunctive relief against the State and Federal Defendants. App'x 3, 26. Contemporaneous to the filing of the complaint, the Tribe also filed a motion for a temporary restraining order—incorporating by reference the allegations set forth in the complaint—seeking to enjoin further construction of the I-95 Providence Viaduct Bridge replacement project and to enforce the terms of the

terminated PA. App'x 3. The Tribe's motion for a temporary restraining order was denied by Chief Judge William E. Smith by way of text order following a chambers conference on May 3, 2017. Id.

On June 9, 2017, the Federal Defendants filed a motion to dismiss the Tribe's complaint pursuant to Federal Rule of Civil Procedure 12(b)(1). App'x 5. The State Defendants filed a separate motion to dismiss on June 19, 2017, seeking dismissal of the Tribe's complaint pursuant to Federal Rule of Civil Procedure 12(b)(6). Id. On September 11, 2017, Chief Judge Smith filed a Memorandum and Order granting both the Federal and State Defendants' motions to dismiss, ruling that the court lacked jurisdiction over the claims asserted against the Federal Defendants and that the Tribe failed to state a valid claim against the State Defendants. App'x 7, 25. Judgment entered for the Federal Defendants and State Defendants on September 11, 2017. App'x 10. On appeal, the Tribe challenges the District Court's Memorandum and Order with respect to its claims against both the Federal and State Defendants.

IV. SUMMARY OF THE ARGUMENT

The State Defendants submit that the District Court properly dismissed the allegations against the State Defendants contained in the Tribe's complaint. The District Court correctly determined that the NHPA does not provide a private right of action to enforce its provisions. Although a question of first impression before

this Honorable Court, the District Court's well-reasoned and legally supported holding is in accordance with other circuit courts that have examined the NHPA following the United States Supreme Court's holding in Alexander v. Sandoval, 532 U.S. 275, 289 (2001). Furthermore, the Tribe's argument that the NHPA provides an implied private right of action—based on the attorneys' fee provision in 54 U.S.C. § 307105—has been addressed and rejected by other circuit courts who have followed the Supreme Court's guidance in Sandoval.

Moreover, the District Court correctly recognized that, because the Tribe had failed to meet its initial burden of establishing the Court's subject matter jurisdiction over the dispute, the Tribe failed to state a viable claim against the State Defendants. The District Court correctly held that the two other bases cited by the Tribe for subject matter jurisdiction—the Administrative Procedures Act and the Declaratory Judgment Act—did not independently confer jurisdiction upon the court.

V. ARGUMENT

A. The District Court correctly ruled that the NHPA does not provide a private right of action.

The National Historic Preservation Act was enacted by Congress in 1966 with a stated purpose "to encourage historic preservation in the United States in federal and federally assisted projects." Friends of St. Frances Xavier Cabrini Church v. Fed. Emergency Mgmt. Agency, 658 F.3d 460, 462 (5th Cir. 2011)

(citing 16 U.S.C. § 470 et seq.[1]); see also Te-Moak Tribe of W. Shoshone of Nevada v. U.S. Dep't of Interior, 608 F.3d 592, 609 (9th Cir. 2010) ("[T]he fundamental purpose of the NHPA is to ensure the preservation of historical resources."). The NHPA has been described as "a procedural statute designed to ensure that, as part of the planning process for properties under the jurisdiction of a federal agency, the agency takes into account any adverse effects on historical places from actions concerning that property." Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd., 252 F.3d 246, 252 (3rd Cir. 2001) (citing Morris County Trust for Historic Preservation v. Pierce, 714 F.2d 271, 278-79 (3rd Cir. 1983)). While the NHPA does not require that all historic properties associated with a federally assisted project be preserved, the act "does require justification for, and planning to reduce, harm to the properties." Friends of St. Frances Xavier Cabrini Church, 658 F.3d at 462-63 (citing 36 C.F.R. § 800.6). Thus, when a government agency such as FHWA receives an application for a federally assisted project in which federal funds will be used, "it must evaluate the project to determine if the project will be an 'undertaking' with 'the potential to cause effects on historic properties.'" Id. at 63 (quoting 36 C.F.R. § 800.3(a)). If the undertaking may affect a property with historic value, the federal agency then

[1] In 2014, the NHPA was revised and moved from its former location at 16 U.S.C.A. § 470 et seq.

begins the review process outlined under Section 106 of the NHPA. Id.

Importantly, the responsibilities delineated in Section 106 are "directives to federal government actors[;] [t]he thrust of § 106 is not directed to individuals or entities that may be harmed through violation of NHPA's dictates, but rather, . . . to the persons regulated-the heads of federal agencies." San Carlos Apache Tribe v. United States, 417 F.3d 1091, 1095 (9th Cir. 2005). Notably, "[a]ny claim for violation of § 106 obligations under NHPA is against the federal government, not a third party." Id. at 1098. The express terms of the NHPA provide authority to the Advisory Council on Historic Preservation to promulgate regulations outlining the procedures to be followed by a federal agency in satisfying its Section 106 responsibilities. See 54 U.S.C. § 304108(a); see also Te-Moak Tribe of W. Shoshone of Nevada, 608 F.3d at 607. These regulations, codified at 36 C.F.R. Part 800, "establish a three-step process: identification of historic properties; assessment of any adverse effects of the proposed undertaking on such properties; and creation of a plan to avoid, minimize, or mitigate those adverse effects." Friends of the Atglen-Susquehanna Trail, 252 F.3d at 252 (citing 36 C.F.R. § 800.1(a)). This process effectuates the overarching purpose that "Section 106 of the NHPA is a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs." Muckleshoot Indian Tribe v. U.S. Forest Serv., 177 F.3d 800, 804 (9th Cir. 1999) (citing Apache Survival Coalition v.

United States, 21 F.3d 895, 906 (9th Cir. 1994)).

The regulations governing the Section 106 process require that the federal agency consult with the public and various interested parties, including the state official appointed to administer the state historic preservation program. Id. (citing 36 C.F.R. § 800.16(v)). The Section 106 process also requires the federal agency to consult with any Indian tribe "that attaches religious and cultural significance to historic properties that may be affected by an undertaking." 36 C.F.R. § 800.2(c)(ii). The stated purpose for an Indian tribe to consult in the Section 106 process is so that the Indian tribe is given "a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including those of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties and participate in the resolution of adverse effects." Section 800.2(c)(ii)(2).

Although not required, the federal agency "may negotiate a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings" on historic lands. See 36 C.F.R. § 800.14. The regulations governing the Section 106 process that provide for the creation of programmatic agreements also provides the procedure that is to be followed if a programmatic agreement is terminated. See 36 C.F.R. § 800.14(b)(2)(v).

The Undertaking at the center of the current controversy is occurring upon a property with historical value, causing the project to become subject to Section 106 of the NHPA. The Tribe was invited to be a consulting party in the Section 106 process in accordance with 36 C.F.R. § 800.2, for the purpose of identifying its concerns related to the Undertaking on an area that has cultural significance to the Tribe—even though the Tribe had no title rights or property interest in the land at the heart of the Undertaking—the Providence Covelands Archeological District. The Tribe, State Defendants and FHWA implemented a PA to mitigate the effects of the Undertaking on the historical property and to fulfill FHWA's Section 106 responsibilities. An impasse occurred and the PA was terminated by FHWA after it became evident that the Tribe sought to acquire title interest in the mitigation properties outlined in Stipulation No. 3 of the PA free of the requisite "appropriate covenants that preserve the property and its cultural resources in perpetuity."

The Tribe brought suit to enforce the terminated PA pursuant to the NHPA, which the District Court correctly determined provides no private right of action to seek compliance with Section 106. The District Court first identified that, in Narragansett Indian Tribe v. Warwick Sewer Authority, 334 F.3d 161 (1st Cir. 2003), this Honorable Court assumed, without deciding, that the NHPA provided a basis for the Tribe's appeal of a denial of preliminary injunctive relief. See id. at 166 n.4 (noting that "[b]oth the parties and the district court assumed that the

NHPA gives the Tribe a private right of action in this case. Because this is a statutory question rather than one of Article III jurisdiction, we may bypass it where the case can otherwise be resolved in defendant's favor.") (emphases added) (citing Restoration Pres. Masonry, Inc. v. Grove Europe Ltd., 325 F.3d 54, 59-60 (1st Cir. 2003)). It should be noted, however, that in Warwick Sewer this Court ultimately held that, "the NHPA provides no grounds for an injunction regarding the use of a particular type of digging blade or payment for monitoring personnel[,]" because the property in question had not been identified as a historic property. Id. at 165. Warwick Sewer is nevertheless distinguishable from the present action, wherein the State and Federal Defendants both directly contend that the NHPA does not provide a private right of action to support the Tribe's allegations.

Although the issue of whether the NHPA provides a private right of action is one that this Honorable Court has not yet answered directly, the District Court was compelled by the reasoning of those Courts that have squarely addressed the issue and concluded that no private right of action exists under the NHPA. See San Carlos Apache Tribe, 417 F.3d at 1094 ("Section 106 does not expressly provide that private individuals may sue to enforce its provisions. Nor does the statute specify a remedy for violation of this section."); Karst Envtl. Educ. & Prot., Inc. v. E.P.A., 475 F.3d 1291, 1295 (D.C. Cir. 2007) (noting that "because NHPA, like

NEPA, contains no private right of action, we agree with the Ninth Circuit [in San Carlos Apache Tribe] that NHPA actions must also be brought pursuant to the APA."); Friends of Hamilton Grange v. Salazar, No. 08 CIV. 5220, 2009 WL 650262, at *20 (S.D.N.Y. Mar. 12, 2009) ("Absent from Sections 106 and 110 is any suggestion of congressional intent to confer a private right of action. Sections 106 and 110 govern agency conduct. They are addressed to the agencies being regulated, not the classes of individuals who may be protected by the NHPA. They therefore do not bestow on those individuals implied rights to bring a lawsuit.") (citing San Carlos Apache Tribe, 417 F.3d at 1098). The District Court identified that those courts who have concluded that no private right of action existed under Section 106 of the NHPA were made in—either direct or indirect—reliance upon the United States Supreme Court's opinion in Alexander v. Sandoval, 532 U.S. 275, 286 (2001), where the Supreme Court affirmed that, "[l]ike substantive federal law itself, private rights of action to enforce federal law must be created by Congress." (citing Touche Ross & Co. v. Redington, 442 U.S. 560, 578 (1979)).

In Sandoval, the Supreme Court explained that, when a private right of action is not plainly expressed in the text of the law, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." Id. (citing Transamerica Mortgage Advisors, Inc. v. Lewis, 444 U.S. 11, 15 (1979)). The

Court clarified that, without the intent to create such a private remedy, "a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute." Id. at 286-87 (citing Massachusetts Mut. Life Ins. Co. v. Russell, 473 U.S. 134, 145 (1985); Transamerica Mortgage Advisors, 444 U.S. at 23; Touche Ross & Co., 442 U.S. at 575-76). Thus, in determining that Section 106 of the NHPA confers no implied private right of action, in San Carlos Apache Tribe the Ninth Circuit relied on the Supreme Court's reasoning in Sandoval that "[s]tatutes that focus on the person regulated rather than the individuals protected create 'no implication of an intent to confer rights on a particular class of persons.'" San Carlos Apache Tribe, 417 F.3d at 1095) (quoting Sandoval, 532 U.S. at 286).

In its decision, the District Court noted that still other courts—who had not yet directly addressed the issue—had questioned the viability of an implied private right of action under the NHPA following the Supreme Court's pronounced standard in Sandoval. See Friends of St. Frances Xavier Cabrini Church, 658 F.3d at 466 n.2 (indicating that, although the parties and lower court assumed, based on precedent, that the NHPA provided a private right of action to enforce its provisions, "the Supreme Court's recent jurisprudence [in Sandoval] casts serious doubt on the continued viability of the private right of action under the NHPA."); see also Bus. & Residents All. of E. Harlem v. Jackson, 430 F.3d 584, 590 (2nd

Cir. 2005) (similarly declining to reach the question of whether a private right of action exists under the NHPA, while identifying the Ninth Circuit's holding that Section 106 of the NHPA does not give rise to a private right of action). The District Court also distinguished that those cases principally relied upon by the Tribe—in which a private right of action had previously been identified under the NHPA—were issued prior to the Supreme Court's opinion in Sandoval. See, e.g., Boarhead Corp. v. Erickson, 923 F.2d 1101, 1017 (3rd Cir. 1991); Vieux Carre Prop. Owners, Residents & Assocs. V. Brown, 875 F.2d 453, 458 (5th Cir. 1989).

Before this Court, the Tribe now argues, for the first time, that Section 307105 of Title 54—the attorney's fees' provision within the NHPA—provides for an implied private right of action because attorney's fees may to be awarded to a successful litigant in "any civil action" brought to enforce the NHPA. As this argument was neither raised before nor addressed by the District Court, the State Defendants maintain that "[t]his issue has been forfeited because the appellant[] failed to raise it squarely in the trial court." Campos-Orrego v. Rivera, 175 F.3d 89, 95 (1st Cir. 1999) ("We have reiterated, with a regularity bordering on the echolalic, that a party's failure to advance an issue in the nisi prius court ordinarily bars consideration of that issue on appellate review.") (citing LaChapelle v. Berkshire Life Ins. Co., 142 F.3d 507, 510 (1st Cir. 1998); Teamsters, Chauffeurs,

Warehousemen and Helpers Union v. Superline Transp. Co., 953 F.2d 17, 21 (1st Cir. 992); McCoy v. Massachusetts Inst. of Tech., 950 F.2d 13, 22 (1st Cir. 1991)).

Nevertheless, the Tribe's newest argument is easily distinguishable, because it originates from the pre-Sandoval cases previously relied upon by the Tribe, and is the very reason why an implied private right of action under the NHPA was once identified prior to the Supreme Court's analysis in Sandoval. See Boarhead Corp., 923 F.2d at 1017; Vieux Carre, 875 F.2d at 458. This argument was squarely addressed, and negated, by the Ninth Circuit in San Carlos Apache Tribe. See 417 F.3d at 1098-99 ("A section providing for recovery of fees does not answer the question whether there is a direct, private right of action [. . .] The fees provision does not authorize suit against federal agencies nor is it a waiver of sovereign immunity against the United States for a claim under § 106 of NHPA."). This argument was again addressed and discounted in Friends of Hamilton Grange v. Salazar, No. 08 CIV 5220, 2009 WL 650262, at *21 (S.D.N.Y. Mar. 12, 2009), where the court determined that the attorneys' fee provision is insufficient to infer a private right of action under the NHPA in light of Sandoval, "the source of the current private-right-of-action standard[,]" and should instead "be read to authorize a fee award in cases brought under the APA to enforce NHPA obligations, and should not be construed to authorize a private lawsuit under the NHPA itself." Thus, the Tribes newest argument has already been rejected by those courts that

have squarely addressed the issue and determined that the NHPA does not independently confer a private right of action.

Accordingly, because the District Court correctly determined that the NHPA does not independently confer a private right of action for the Tribe's allegations, the State Defendants respectfully request that this Honorable Court affirm the judgment of the District Court.

B. The District Court correctly held that the Tribe failed to state a claim for relief against the State Defendants.

The District Court also correctly determined that the Tribe failed to state a recognized claim for relief against the State Defendants, as the three bases upon which the Tribe claims to have brought its complaint—the Administrative Procedures Act, 5 U.S.C. § 701 et seq. ("APA"), the National Historic Preservation Act, 54 U.S.C. § 301101 et seq. ("NHPA"), and the Declaratory Judgment Act, 28 U.S.C. § 2201 et seq., each fail to independently provide the requisite subject matter jurisdiction.

First, the Tribe does not set forth a current case or controversy that may be independently adjudicated pursuant to the Declaratory Judgment Act. The Tribe's asserted jurisdiction under the Declaratory Judgment Act disregards that "[t]he Act does not itself confer subject matter jurisdiction, but, rather, makes available an added anodyne for disputes that come within the federal courts' jurisdiction on some other basis." Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530,

534 (1st Cir. 1995) (citing Franchise Tax Bd. v. Construction Laborers Vacation Trust, 463 U.S. 1, 15-16 (1983)). As further outlined below, because the Tribe fails to set forth a dispute that arises under another basis of federal jurisdiction that can be adjudicated pursuant to the Declaratory Judgment Act, the District Court properly dismissed the Tribe's claims.

The Tribe also purports to bring its action pursuant to the APA, however does not identify any final agency decision made in accordance with the APA that would presumably provide the basis for judicial review. See 5 U.S.C. § 704 (The APA provides for judicial review of an "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court[.]"). The Tribe's claim of jurisdiction under the APA also ignores this Court's recognition that, "[e]ven where the APA applies, however, it does not confer jurisdiction." Town of Portsmouth, R.I. v. Lewis, 813 F.3d 54, 63-64 (1st Cir. 2016) (citing Califano v. Sanders, 430 U.S. 99, 107 (1977) ("We thus conclude that the APA does not afford an implied grant of subject-matter jurisdiction permitting federal judicial review of agency action.")). Nevertheless, the District Court correctly recognized that "the APA only provides for review of federal agency action[, . . .] [i]t does not provide a right of action against a state agency." Town of Portsmouth, 813 F.3d at 64 (citing Johnson v. Rodriguez, 943

F.2d 104, 109 n. 5 (1st Cir. 1991)). As such, the Tribe's reliance on the APA as a basis for its claims against the State Defendants, for state action, is misplaced.

Next, as set forth supra, the District Court thoroughly examined the Tribe's claim that the NHPA provided the requisite subject matter jurisdiction for the Tribe's allegations, and found that it did not. The District Court identified that the D.C. Circuit Court of Appeals and the Ninth Circuit Court of Appeals have both determined that Section 106 of the NHPA does not confer a private right of action. Examining San Carlos Apache Tribe, 417 F.3d at 1099, the District Court found not only the Ninth Circuit's analysis of Sandoval both instructive and persuasive, but also the circuit court's comparison of NHPA to its "close statutory analog," the National Environmental Policy Act, 42 U.S.C. § 4321 et seq. ("NEPA"), which numerous circuit courts—including this Court—have resolutely determined confers no private right of action. See, e.g., Town of Portsmouth, 813 F.3d at 62 ("NEPA provides no right of action at all."); Scarborough Citizens Protecting Res. v. U.S. Fish & Wildlife Serv., 674 F.3d 97, 102 (1st Cir. 2012) ("NEPA does not by its terms create a private right of action; but . . . federal agency action covered by NEPA is reviewable under the APA."); Theodore Roosevelt Conservation P'ship v. Salazar, 661 F.3d 66, 72 (D.C. Cir. 2011); Sw. Williamson Cty. Cmty. Ass'n, Inc. v. Slater, 173 F.3d 1033, 1035 (6th Cir. 1999); see also Te-Moak Tribe

of W. Shoshone of Nevada, 608 F.3d at 607 ("NHPA is similar to NEPA except that it requires consideration of historic sites, rather than the environment.").

The District Court noted that like NEPA, the statutory scheme governing NHPA imposes a "stop, look, and listen" responsibility on a government agency to consider the effects of a project, "which militates against implying a private right of action." App'x 14. The District Court was persuaded by the Ninth Circuit's analysis, based on the Sandoval Court's guidance that, "[t]he thrust of § 106 is not directed to individuals or entities that may be harmed through violation of NHPA's dictates, but rather, . . . to the persons regulated." App'x 23. Accordingly, the District Court's determination that the NHPA does not provide a private right of action is in accordance with the Supreme Court's analysis in Sandoval as well as this Honorable Court's prior determination that no private right of action exists under NEPA.

As such, the District Court correctly determined that, because NHPA does not confer a private right of action, the court was without the requisite jurisdiction to adjudicate the Tribe's claims. Nevertheless, the Tribe argues that, because its breach of contract claim against the State Defendants involves the construction and application of federal law—namely, the provisions of the NHPA—the District Court should have exercised federal question jurisdiction. The Tribe's assertion,

however, is simply a disguised attempt to circumvent the court's determination that the NHPA does not provide a private right of action.

The terms of the PA were developed in accordance with 36 C.F.R. § 800.6(c)(8), which provides, in relevant part, that when a signatory determines that the terms of the agreement cannot be implemented, "the signatories shall consult to seek amendment of the agreement. If the agreement is not amended, any signatory may terminate it." Thus, the express language of the governing statutory scheme allows the PA to be terminated by any party, at any time—a provision that was agreed to by all the parties, including the Tribe. Nonetheless, "Section 106 does not expressly provide that private individuals may sue to enforce its provisions. Nor does the statute specify a remedy for violation of this section." San Carlos Apache Tribe, 417 F.3d at 1094.

As the NHPA provides no implied private right of action for the Tribe to challenge the Section 106 process—a process that is focused on federal agency action and compliance, not third parties—the Tribe similarly has no right of action to question State Defendants' participation as an invited signatory to a terminated PA that is inextricably intertwined with the Section 106 process. Accordingly, the District Court correctly held that the Tribe failed to state a valid claim against the State Defendants over which the court could exercise jurisdiction.

VI. CONCLUSION

Accordingly, because the Tribe failed to set forth proper grounds upon which the District Court could exercise subject matter jurisdiction, the allegations against the State Defendants were properly dismissed. The State Defendants respectfully request that this Honorable Court affirm the District Court's judgment in favor of the State Defendants.

Respectfully submitted,
DEFENDANTS-APPELLEES
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DEPARTMENT OF TRANSPORTATION
and RHODE ISLAND HISTORICAL
PRESERVATION AND HERITAGE
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Dated: March 12, 2018

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Signature: /s/ Mariana E. Ormonde

Attorney for: Appellees, State of Rhode Island Department of Transportation and Rhode Island Historical Preservation & Heritage Commission

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I hereby certify that I filed the within Appellees' Brief via the ECF filing system and that a copy is available for viewing and downloading. I have also caused a copy to be sent via the ECF system to the following attorneys of record on this 12th day of March, 2018:

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