IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

RHONDA LEONA BROWN FLEMING and THE HARVEST INSTITUTE FREEDMEN FEDERATION, LLC, Plaintiffs, v. THE CHEROKEE NATION, CHEROKEE NATION ELECTION COMMISSION, BILL JOHN BAKER, DAVID BERNHARDT, Secretary of the Interior, and TARA MACLEAN SWEENEY, Assistant Secretary-Indian Affairs, Defendants.	)	Case No. 19-cv-01397 (TFH)

COMBINED MEMORANDUM IN SUPPORT OF FEDERAL DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT AND IN OPPOSITION TO MOTION OF RHONDA LEONA BROWN FLEMING FOR A PRELIMINARY INJUNCTION

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INTRODUCTION

Plaintiffs Rhonda Leona Brown Fleming, a member of the Cherokee Nation, and the Harvest Institute Freedmen Federation, LLC ("Harvest Institute"), bring three causes of action: (1) a claim for violation of the United States Constitution asserting that defendants have a duty to protect the tribal voting rights of the Freedmen, Compl. ¶¶ 31-32, ECF No. 1; (2) a claim for judicial review of agency action alleging that Federal Defendants "are responsible for protecting the voting and electoral interest of the Cherokee Nation, including the interests of the Freedmen" and that they have failed to act in this respect, *id*. ¶¶ 34-37; and (3) a claim for declaratory judgment seeking a declaration that the rejection of Ms. Fleming's candidacy for election as Principal Chief is a violation of the Court's February 2018 order in *Cherokee Nation v. Nash*, *id*. ¶ 39. Plaintiffs purport to bring this as a class action on behalf of all persons who are or were Freedmen descendants. *Id*. ¶¶ 16-21.

Plaintiffs seek an order permitting Ms. Fleming to appear on the ballot for the June 1, 2019 Cherokee Nation election, an order enjoining "enforcement" of Section 2, Article VII of the Cherokee Nation Constitution as well as the June 1, 2019 Cherokee Nation election, and also request a declaration that there is no requirement for the Cherokee Principal Chief to be a "blood" Cherokee. *Id*. Prayer for Relief. These claims are nearly identical to those Plaintiffs brought in Case No. 18-cv-02041, which the Court dismissed without prejudice on May 14, 2019.

As the Court is aware, the general subject of this lawsuit—the rights of the Freedmen within the Cherokee Nation, including the right to vote and run for office—was addressed by now-concluded litigation in this Court. *See Cherokee Nation v. Nash*, 267 F. Supp. 3d 86 (D.D.C. 2017). In *Nash*, this Court ruled that the Treaty of 1866 continues to guarantee the

descendants of Cherokee Freedmen, as listed on the Dawes Freedmen roll, "all the rights of native Cherokee" that are neither superior nor inferior to those of "native Cherokees." *Id*. at 140. The Cherokee Nation took a number of steps to implement the Court's ruling, including obtaining an order from the Supreme Court of the Cherokee Nation that provides, as a matter of tribal law, that eligible Freedmen descendants have the same rights to tribal citizenship and to run for office as other Cherokees. And, this Court's February 20, 2018 Order and Judgment in *Nash* declared those provisions of the Cherokee Nation Constitution that make descendants of Cherokee Freedmen ineligible for Cherokee citizenship invalid, and ordered that "any Cherokee Freedmen descendant who qualifies for citizenship in the Cherokee Nation shall have all the benefits and privileges of such citizenship on the same terms as other citizens of the Cherokee Nation." This Court retained jurisdiction to enforce the Final Judgment, and no party to that lawsuit has alleged any noncompliance.

Nothing in Plaintiffs' Complaint suggests that the Cherokee Nation has not complied with the Final Judgment in *Nash* and the Cherokee Nation Supreme Court order in its dealings with Plaintiff Fleming. Ms. Fleming was found ineligible to run for Principal Chief, but that was because she failed to meet the Nation's residency requirement, not because she is a Freedmen descendant.

Plaintiffs' claims against the Federal Defendants should be dismissed in their entirety. Plaintiffs have failed to establish standing for these claims because their alleged injuries are not caused by Federal Defendants nor are they redressable by a court order directed to Federal Defendants. In addition, the Harvest Institute has not stated any cognizable injury to its members or its organization. The Court thus lacks Article III jurisdiction over this action.

Alternatively, each of Plaintiffs' causes of action fail to state a claim. Plaintiffs' First Cause of Action fails to identify a valid constitutional cause of action, and also is not supported by plausible allegations that could sustain a claim for relief. Plaintiffs' Administrative Procedure Act claim does not identify a discrete, legally required action that Interior has failed to take, as is required to state a claim under 5 U.S.C. § 706(1). And the claim for declaratory judgment does not state any claim for relief against the Federal Defendants. For these reasons, the claims against Interior should be dismissed.[1]

If the Court does not dismiss all claims against Federal Defendants on these grounds, the motion for preliminary injunction should nonetheless be denied. Plaintiff Fleming cannot meet the extraordinarily high burden required for emergency relief that will interfere with the Cherokee Nation's election. She has not shown a likelihood of success on the merits. Nor has she shown that the balance of equities or public interest weighs in her favor.

BACKGROUND

I. *Cherokee Nation v. Nash*

Before the Civil War, some members of the Cherokee Nation owned slaves of African descent. *See Nash*, 267 F. Supp. 3d at 92-96. During the Civil War, the Cherokee Nation aligned itself with the Confederate States, *id*. at 97-98, and after the war's conclusion, the United States and the Cherokee Nation negotiated a new treaty to restore relations with the Federal government. *See id*. at 98. In Article 9 of the Treaty of 1866, the Cherokee Nation agreed that

[1] Since Federal Defendants are filing a motion to dismiss for lack of subject matter jurisdiction and failure to state a claim, Federal Defendants have not prepared a certified list of the contents of an administrative record. *See* Local R. 7(n). Even if an index is otherwise required by Local R. 7(n), Federal Defendants respectfully request that the Court waive the production of an index until the Court enters a scheduling order in the event this case proceeds once this motion is decided.

"all freedmen who have been liberated by voluntary act of their former owners or by law, as well as all free colored persons who were in the country at the commencement of the rebellion, and are now residents therein, or who may return within six months, and their descendants, shall have all the rights of native Cherokees…." *Id*. at 100 (citing Treaty with the Cherokee, 1866, art. 9, July 19, 1866, 14 Stat. 799, 801).

In the 1990s and 2000s, the Cherokee Nation took a series of acts, described in *Nash*, 267 F. Supp. 3d at 109-111, intended to alter the citizenship standards of the Tribe, and to limit membership to only those with Cherokee blood and exclude descendants of the Freedmen. In 2009, the Cherokee Nation filed suit against several individual Freedmen and Interior officials, seeking a declaration that the Treaty of 1866 had been modified by subsequent federal law and did not provide Freedmen descendants with the right to citizenship in the Cherokee Nation. *Id*. at 112. The Cherokee Nation voluntarily dismissed its claims against the Federal Defendants in that case, but Interior filed a cross-claim seeking a declaratory judgment that the Treaty of 1866 guaranteed certain Cherokee Freedmen and their descendants "all the rights of native Cherokees," including the right to citizenship in the Cherokee Nation, and that this Treaty provision continues to be in effect. *See Cherokee Nation v. Nash*, Case No. 13-cv-01313-TFH, ECF No. 71 (order granting dismissal of claims against federal defendants); ECF No. 118 (federal counterclaim against the Cherokee Nation). After years of litigation in *Nash* and the related case of *Vann v. Zinke*, Case No. 1:03-cv-01711 (D.D.C.), in 2013, the parties to *Nash* jointly requested that this Court set a schedule for briefing summary judgment on the core legal issue in dispute—whether the descendants of Freedmen possess a present right to equal citizenship in the Cherokee Nation. After briefing and oral argument, on August 30, 2017, this Court issued an order granting summary judgment to Federal Defendants and the Cherokee

Freedmen, concluding that the Cherokee Freedmen "have a present right to citizenship in the Cherokee Nation that is coextensive with the rights of native Cherokees." 267 F. Supp. 3d at 140.

On December 21, 2107, after discussions between the parties to negotiate a consent order, the Cherokee Nation moved for entry of final judgment as to the claims against it. *See Cherokee Nation v. Nash*, Case No. 13-cv-01313-TFH, ECF No. 251 (attached as Exhibit 1). The Cherokee Nation described the steps taken to implement the Court's ruling, including petitioning the Supreme Court of the Cherokee Nation "for an order ruling that this Court's decision is valid and enforceable against the Cherokee Nation, and directing the Cherokee Nation Registrar, and the Cherokee Nation government and its offices to begin processing the registration applications of eligible Freedmen descendants, and that such Freedmen descendants, upon registration as Cherokee Nation citizens, shall have all the rights and duties of any native Cherokee, including the right to run for office." Exhibit 1 at 3. The Cherokee Nation stated that the Supreme Court order was issued on September 1, 2017, and attached a copy. *Id*. at 3, Exhibit A. The Cherokee Nation described other steps it took to immediately begin processing citizenship applications and otherwise implement the Court's August 30, 2017 decision. *Id*. at 3.

Interior agreed to the entry of judgment, *Nash*, ECF No. 252, and on February 20, 2018, the Court entered the judgment against the Cherokee Nation. *Nash*, ECF No. 257 (attached as Exhibit 2). That Order and Judgment declared that "neither the descendants of native Cherokees nor the descendants of Cherokee Freedmen have rights that are superior or inferior to each other, including, but not limited to, the right to citizenship in the Cherokee Nation." Ex. 2, ¶ 1. "Accordingly, the March 3, 2007 Cherokee constitutional amendment making descendants of Cherokee Freedmen ineligible for Cherokee citizenship violates Article 9 and is unenforceable."

Id. The Order and Judgment also provides, *inter alia*, that "any Cherokee Freedmen descendant who qualifies for citizenship in the Cherokee Nation shall have all the benefits and privileges of such citizenship on the same terms as other citizens of the Cherokee Nation." *Id*. ¶ 2. This Court retained jurisdiction to enforce the Final Judgment. *Id*. ¶ 3. On September 5, 2018, Interior and the Freedmen parties entered a joint stipulation of dismissal of all remaining claims in the case. *Nash*, ECF No. 258.

II. Ms. Fleming's Candidacy

Ms. Fleming seeks to be elected Principal Chief of the Cherokee Nation in the June 1, 2019 election. Compl. ¶ 10, ECF No. 1. On February 21, 2019, the Cherokee Nation Election Commission considered a challenge to the eligibility of Ms. Fleming's candidacy. It concluded that she was ineligible because she did not meet the Cherokee Nation Constitution's residency requirement of living within the jurisdictional boundaries of the Cherokee Nation for at least 270 days prior to the election. The Election Commission stated "that any challenge to [Ms. Fleming] that she is not Cherokee by blood has no validity and Cherokee Freedmen Citizens are eligible to run for office if they meet all other requirements for the office, applicable to all Cherokee Citizens." Decision, ECF No. 6-2. Following an appeal by Ms. Fleming, the Supreme Court of the Cherokee Nation declared that Ms. Fleming was found to be ineligible solely "because she d[id] not comply with the constitutional residency requirements for the office of Principal Chief." Order, ECF No. 6-3.

III. Plaintiffs' Lawsuits

On August 30, 2018, Plaintiffs filed Case No. 18-cv-02041 in this Court. After Plaintiffs failed to oppose the Defendants' motions to dismiss, the Court dismissed the case without prejudice on May 14, 2019. *Fleming v. Cherokee Nation*, Case No. 18-cv-02041-TFH, ECF No.

20. That same day, Plaintiffs filed this suit, accompanied by a motion for temporary restraining order and preliminary injunction.[2] At a telephonic hearing on May 21, 2019, the Court denied the temporary restraining order, and ordered the Federal Defendants to file any opposition to the motion for preliminary injunction by May 23, 2019. Minute Order, ECF Entry of May 21, 2019. Defendants were also invited to file motions to dismiss by this date, Plaintiffs were directed to oppose any such motions by May 27, and Defendants instructed to file any replies by May 29.

STANDARD OF REVIEW

Federal Defendants move to dismiss the Complaint for lack of subject matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1). Plaintiffs bear the burden of demonstrating jurisdiction. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994); *Rempfer v. Sharfstein*, 583 F.3d 860, 868-69 (D.C. Cir. 2009). Federal courts are presumed to lack jurisdiction unless a plaintiff establishes its existence. *Kokkonen*, 511 U.S. at 377; *see also DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 n.3 (2006). "One 'essential and unchanging' component of federal court jurisdiction is the 'requirement that a litigant have standing to invoke the authority of a federal court.'" *See Hancock v. Urban Outfitters, Inc.*, 830 F.3d 511, 513 (D.C. Cir. 2016) (citing *DaimlerChrysler Corp.*, 547 U.S. at 342). Because the Court has "an affirmative obligation … to ensure that it is acting within the scope of its jurisdictional authority," the Court may "consider matters outside the pleadings" in addressing Defendants' motion to dismiss under Rule 12(b)(1) without converting it to a motion for summary judgment. *Jerome Stevens Pharm., Inc. v. Food and Drug Admin.*, 402 F.3d 1249, 1253 (D.C. Cir. 2005).

[2] Only Ms. Fleming moved for a temporary restraining order and preliminary injunction. Motion, ECF No. 2.

If the Court determines that it has jurisdiction, Federal Defendants move to dismiss the Complaint under Federal Rule of Civil Procedure 12(b)(6). To survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). Although the Court must accept all well-pleaded factual allegations as true, it need not accept "a legal conclusion couched as a factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. Under this rule, the Court may consider well-pleaded factual allegations, as well as "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007).

In addition to failing to demonstrate jurisdiction, Plaintiff Fleming has failed to show that she is entitled to the "'extraordinary and drastic remedy,'" *Munaf v. Geren*, 553 U.S. 674, 689 (2008) (citation omitted), of an injunction interfering with the Cherokee Nation's election. A party seeking a preliminary injunction must demonstrate: (1) a substantial likelihood of success on the merits; (2) that it would suffer irreparable injury if the injunction were not granted; (3) that the balance of the equities tips in its favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008) (citations omitted); *Sherley v. Sebelius*, 644 F.3d 388, 392 (D.C. Cir. 2011). Injunctive relief may issue only if all four of these elements are met. *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995).

ARGUMENT

I. Plaintiffs Have Failed to Establish Standing.

The Complaint should be dismissed for lack of standing. Neither of the plaintiffs can show the necessary causation or redressability. Assuming that Ms. Fleming has suffered a cognizable injury in the rejection of her candidacy for Principal Chief, that injury was not caused by the Federal Defendants nor would it be redressed by a favorable ruling against them. Moreover, Harvest Institute cannot show either associational standing or organizational standing because it relies only on unidentified members and does not claim that its activities or resources have been injured by the actions of Federal Defendants.

Article III of the Constitution limits federal court jurisdiction to "Cases" and "Controversies"; thus, "[s]tanding is one of the essential prerequisites to jurisdiction under Article III." *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 915 (D.C. Cir. 2003) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). To establish standing, Plaintiffs must demonstrate: (1) an "actual or imminent," "concrete and particularized" injury-in-fact that is "not conjectural or hypothetical," (2) a "causal connection between the injury" and the challenged action, and (3) it is likely, as opposed to merely speculative, that the "injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560-61. Demonstrating the elements of standing is an "indispensable part" of Plaintiffs' case. *Id*. at 561. "Standing is determined at the time the complaint is filed." *Natural Law Party of the United States of Am. v. Fed. Election Comm'n*, 111 F. Supp. 2d 33, 40 (D.D.C. 2000). "[E]ach plaintiff must demonstrate standing, including in a putative class action." *In re United States OPM Data Sec. Breach Litig.*, 266 F. Supp. 3d 1, 19 (D.D.C. 2017) (citations omitted), *appeals docketed*, No. 17-5217 (D.C. Cir. Sept. 27, 2017), No. 17-5232 (D.C. Cir. Oct. 12, 2017), No. 18-1182 (Fed. Cir. Nov. 15, 2017). *See also O'Shea v.*

Littleton, 414 U.S. 488, 494 (1974) (class representative must have standing before he can seek relief on behalf of himself and another member of putative class).

A. Plaintiff Rhonda Leona Brown Fleming Lacks Standing.

1. Ms. Fleming Has Not Established Causation or Redressability.

Ms. Fleming alleges that she was "disqualified . . . as a candidate for the office of Principal Chief due to her failure to meet the 270 [day] residency requirement." Compl. ¶ 10, ECF No. 1. By her own allegations, this decision was made by the Cherokee Nation Election Commission, and affirmed by the Cherokee Nation Supreme Court. *Id.* ¶¶ 10, 28. Ms. Fleming's injury is thus not "fairly traceable" to Federal Defendants. *Lujan*, 504 U.S. at 560 (to show causation the injury has to be fairly "traceable to the challenged action of the defendant" and not "the independent action" of a third party) (internal quotations omitted). Rather, this alleged injury arises from the actions of the Cherokee Nation, which has control over the tribal election process, including determinations regarding who is eligible to run for Principal Chief. *See, e.g.*, *Morris v. Watt*, 640 F. 2d 404, 409 n.12 (D.C. Cir. 1981) (the Five Civilized Tribes of Oklahoma are permitted to select their own principal chiefs). Ms. Fleming does not allege that Federal Defendants make determinations on eligibility to run for Cherokee Nation office, and it is not Federal Defendants' role to make individual eligibility determinations or conduct the Principal Chief election. Nor has Ms. Fleming alleged how a favorable ruling against Federal Defendants will redress her purported injury. The relief she seeks—permitting her to appear on the election ballot, barring enforcement of the Cherokee Nation Constitution, enjoining the June 2019 tribal election, and making a declaration about Principal Chief eligibility—is not directed at actions that the Federal Defendants are authorized to take.

At most, Ms. Fleming alleges that Federal Defendants are responsible for protecting the interests of the Freedmen in tribal elections, *see* Compl. ¶¶ 27, 31, 34, 35, ECF No. 1. This is inaccurate, *see* Section II, *infra*, but even if true, it does not establish causation and redressability. Where a plaintiff alleges an injury arising "from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, much more is needed." *Lujan*, 504 U.S. at 562. It is "the burden of plaintiff to adduce facts showing that … choices [of the independent actors] have been or will be made in such manner as to produce causation and permit redressability of injury," and when the plaintiff is not himself the object of the government action or inaction he challenges, standing is not precluded, but it is "ordinarily substantially more difficult to establish." *Id*. (internal quotations omitted); *see also Renal Physicians Ass'n v. U.S. Dep't of Health and Human Servs.*, 489 F.3d 1267, 1275 (D.C. Cir. 2007) ("substantial evidence" is needed of a "causal relationship between the government policy and the third-party conduct, leaving little doubt as to causation and the likelihood of redress"); *Cierco v. Mnuchin*, 857 F.3d 407, 418 (D.C. Cir. 2017) ("We are particularly disinclined 'to endorse standing theories that rest on speculation about the decisions of independent actors.'" (quoting *Clapper*, 568 U.S. at 413-14)). Ms. Fleming falls far short of meeting this "heightened showing" here, *see Renal Physicians*, 489 F.3d at 1273, since she has made no credible allegation that any action of the Federal Defendants has caused her any injury, much less that relief ordered against the Federal Defendants would remedy it.

Because any alleged injury to Ms. Fleming is not caused by Federal Defendants or likely to be redressed by relief ordered against them, Ms. Fleming lacks standing.

B. Plaintiff Harvest Institute Lacks Standing.

When an association such as Harvest Institute seeks to invoke federal jurisdiction, it can establish standing either through "associational standing," by suing on behalf of its members, or through "organizational standing" by suing on its own behalf. *See Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977) (associational standing); *People for the Ethical Treatment of Animals* (*PETA*) *v. USDA*, 797 F.3d 1087, 1093 (D.C. Cir. 2015) (organizational standing). While the Complaint is far from clear on this point, Harvest Institute appears to assert standing on behalf of its members and on its own behalf. *See* Compl. ¶ 11, ECF No 1. But it has not shown either.

1. Harvest Institute Has Not Identified Any Member Who Has Been Harmed.

Because Harvest Institute fails to identify a single member allegedly harmed by Federal Defendants' purported actions or failure to act, it lacks standing to sue as the representative of its members. To establish associational standing, Harvest Institute must demonstrate that "(1) at least one of its members would have standing to sue in his own right, (2) the interests the association seeks to protect are germane to its purpose, and (3) neither the claim asserted nor the relief requested requires that an individual member of the association participate in the lawsuit." *Sierra Club v. EPA*, 292 F.3d 895, 898 (D.C. Cir. 2002). Harvest Institute cannot rely on unidentified members to establish standing. *Chamber of Commerce v. EPA*, 642 F.3d 192, 199-200 (D.C. Cir. 2011). Instead, it must specifically "identify members who have suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009); *Am. Chemistry Council v. Dep't of Transp.*, 468 F.3d 810, 820 (D.C. Cir. 2006) (the identity of the party suffering an injury-in-fact must "be firmly established").

Harvest Institute's threadbare statement that its "membership is comprised of persons with African and Native American ancestry, each of whom has standing to sue [in] their own right," Compl. ¶ 11, ECF No. 1, does not meet this test. The Complaint does not allege that Ms. Fleming is a member of this organization, but even if it did, she lacks standing and cannot provide a basis for associational standing, *see supra* Section I.A. Because Harvest Institute has "not identified a single member who was or would be injured by [Federal Defendants]," associational standing is lacking. *Chamber of Commerce*, 642 F.3d at 200; *see also Nat'l Ass'n of Home Builders v. EPA*, 667 F.3d 6, 15 (D.C. Cir. 2011) (affirming dismissal where associations did not establish "certainly impending dangers for any particular member") (internal quotation omitted); *Am. Chemistry Council*, 468 F.3d at 819 ("[w]e decline to assume missing links" regarding alleged injury to associations' members).

2. Harvest Institute Has Failed to Allege Organizational Injury, Causation, or Redressability.

Harvest Institute does not claim that its activities or resources have been injured by Federal Defendants. Because Harvest Institute fails to allege or otherwise show that it has suffered an injury-in-fact and cannot connect any theoretical injury and requested relief to Federal Defendants, it also lacks standing to sue as an organization.

To assert organizational standing, Harvest Institute must, "like an individual plaintiff," show "actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 919 (D.C. Cir. 2015). The alleged injury to Harvest Institute's activities must be "concrete and demonstrable." *PETA*, 797 F.3d at 1093 ("a mere setback to [the plaintiff's] abstract social interests is not sufficient" to establish injury) (citations omitted); *Food & Water*

Watch, Inc., 808 F.3d at 919 (injury-in-fact requires an organization to show more than just its "mission has been compromised").

The Complaint alleges only that Harvest Institute seeks "redress through the courts to compel the United States and Cherokee Nation to perform obligations owed under federal law to Freedmen" and that it "has conducted research, provided financing and required legal resources, including counsel" in support of this purpose. Compl. ¶ 11, ECF No. 1. This is insufficient. Harvest Institute does not allege that Federal Defendants' actions or inaction injured the organization's activities or had any effect on its resources. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (there must be a "concrete and demonstrable injury to [an] organization's activities—with the consequent drain on the organization's resources"). And providing financing and legal resources is not enough to establish injury-in-fact. *Am. Soc. for Prevention of Cruelty to Animals v. Feld Entm't, Inc.*, 659 F.3d 13, 25 (D.C. Cir. 2011) (use of resources for litigation or investigation is a "'self-inflicted' budgetary choice," not an injury-in-fact); *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1434 (D.C. Cir. 1995) ("An organization cannot, of course, manufacture the injury necessary to maintain a suit from its expenditure of resources on that very suit."). Since Harvest Institute has not alleged any organizational injury, it cannot establish injury-in-fact.

Harvest Institute has similar causation and redressability problems. Courts do not excuse organizational plaintiffs from meeting these requirements. *Food & Water Watch, Inc.*, 808 F.3d at 919; *Equal Rights Ctr. v. Post Props.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011). And like Ms. Fleming, Harvest Institute has not, and cannot, establish that Federal Defendants' purported actions or failure to act are the cause of any injury to Harvest Institute as an organization, or that

a favorable ruling against Federal Defendants will redress this theoretical injury. Hence, Harvest Institute also lacks standing to sue as an organization.

For these reasons, Plaintiffs lack standing, and cannot invoke federal court jurisdiction over their claims.

II. Plaintiffs Have Not Stated a Valid Claim for Relief.

If the Court determines that it has jurisdiction over Plaintiffs' claims, it should nonetheless dismiss the claims against Federal Defendants for failure to state a valid claim for relief. In order to establish a "claim upon which relief can be granted," Plaintiffs must demonstrate two things. First, there must be a cause of action that permits them to invoke the power of the court to redress the claimed violations of law. *Trudeau v. Federal Trade Comm'n*, 456 F.3d 178, 188 (D.C. Cir. 2006) (citing *Davis v. Passman*, 442 U.S. 228, 239-40 (1979)). Second, the allegations in the Complaint must be legally sufficient to state the violations Plaintiffs claim. *Id.*; *see also Iqbal*, 556 U.S. at 678. For the second requirement, "[t]o survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. But "mere conclusory statements" about the elements of a cause of action do not suffice, and the court need not accept legal conclusions as true. *Id*.

A. The First Cause of Action Fails to State a Claim.

The First Cause of Action, for "Violation of the United States Constitution," fails on both elements: Plaintiffs lack a valid cause of action, and also have failed to allege legally sufficient facts or legal theories to support a claim. This Cause of Action does not specify any particular

provision of the Constitution as a basis for Plaintiffs' claim, much less explain how that provision has been violated by the actions of Federal Defendants. Searching the remainder of the Complaint, the allegation relating to the Court's subject matter jurisdiction refers to three constitutional provisions: the Thirteenth Amendment, the Fourteenth Amendment, and the Fifteenth Amendment. Compl. ¶ 5, ECF No. 1. Even assuming that the First Cause of Action is based on these provisions, it does not state a claim, either because the cited constitutional provision does not provide a cause of action, or because plaintiffs have failed to allege a "plausible claim for relief," *Iqbal*, 556 U.S. at 679, or both.[3]

The Thirteenth Amendment abolished slavery and involuntary servitude, and authorizes Congress to enforce the Amendment by legislation, including legislation to abolish "all badges and incidents of slavery in the United States." *The Civil Rights Cases*, 109 U.S. 3, 20 (1883). Numerous courts have held that the Thirteenth Amendment provides no direct cause of action for suits based on discrimination or other "badges and incidents of slavery." *See Richardson v. Loyola College in Maryland, Inc.*, 167 Fed. Appx. 223, 225 (D.C. Cir. 2005) ("the Thirteenth Amendment does not provide an independent cause of action for discrimination"); *Doe v. Siddig*, 810 F. Supp. 2d 127 (D.D.C. 2011) ("Courts in this Circuit have consistently held that there is no private right of action under the Thirteenth Amendment." (citing cases)); *Holland v. Board of Trustees of the University of the District of Columbia*, 794 F. Supp. 420, 424 (D.D.C. 1992) ("The Thirteenth Amendment does not give rise to an independent cause of action."). Any claim

[3] This claim also appears to be at least partially moot or not in dispute, as it seeks to "require defendants to suspend or otherwise not enforce the restriction on eligibility to serve as principal chief to blood Cherokees." Compl. ¶ 32, ECF No. 1. But there is no allegation or evidence that the Cherokee Nation defendants or Federal Defendants are enforcing any restriction related to "blood Cherokees."

based on the Thirteenth Amendment should be dismissed on this basis. *See Siddig*, 810 F. Supp. 2d at 136 (dismissing Thirteenth Amendment claim regarding involuntary servitude).

The Fourteenth Amendment "applies only to the states," *Bolling v. Sharpe*, 347 U.S. 497, 499 (1954), and not to the Federal Defendants. *See Sluss v. Renaud*, 2016 WL 4487729, at *2 (D.D.C. Aug. 25, 2016) (dismissing Fourteenth Amendment claim against federal agencies). The Federal Defendants "cannot violate a provision of the Constitution that does not apply to them," and thus Plaintiffs have thus failed to state an actionable claim under the Fourteenth Amendment. *Quaid v. Kerry*, 161 F. Supp. 3d 70, 76 (D.D.C. 2016) (dismissing Fourteenth Amendment Claim against Department of State).

The Fifteenth Amendment bars the United States and States from denying or abridging the right to vote "on account of race, color, or previous condition of servitude," and gives Congress the power to enforce that command. Assuming that a plaintiff could bring a cause of action challenging a particular federal action as violating the Fifteenth Amendment, Plaintiffs have failed to do so here. Plaintiffs' Complaint relates to the election of the Cherokee Nation Principal Chief—a tribal, not federal, election. The Fifteenth Amendment does not apply to the actions of Indian tribes, which are "separate sovereigns pre-existing the Constitution" that "have historically been regarded as unconstrained by those constitutional provisions framed specifically as limitations on federal or state authority."[4] *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978); *see also Rice v. Cayetano*, 528 U.S. 495, 522 (2000) (distinguishing elections held by

[4] The Indian Civil Rights Act, 25 U.S.C. § 1302, imposed certain restrictions on Indian tribes that are similar, but not identical to those contained in the Bill of Rights and the Fourteenth Amendment. *See Santa Clara Pueblo*, 436 U.S. at 58. Notably, 25 U.S.C. § 1302 does not contain any provisions that parallel the Fifteenth Amendment.

states, which are subject to the Fifteenth Amendment, from elections held by tribes, which are "the internal affair of a quasi sovereign").

And Plaintiffs have failed to establish a "plausible claim for relief" against Federal Defendants for violating the Fifteenth Amendment. Plaintiffs do not allege that the Federal Defendants register Cherokee Nation voters, administer Cherokee Nation elections, or make determinations about eligibility to run for office, and Federal Defendants have no such role. The Complaint is devoid of ***any*** factual allegations relating to actions taken by the Federal Defendants that would violate the Fifteenth Amendment. *See Iqbal*, 556 U.S. at 678 (a complaint is insufficient "if it tenders naked assertions devoid of further factual enhancement" (internal quotations and citation omitted)).

Although Plaintiffs generally allege that "Defendants have the duty to vindicate and protect the voting rights of the Freedmen," Compl. ¶ 31, ECF No. 1, this is the sort of "mere conclusory statement[]" that does not suffice to support a cause of action under the Fifteenth Amendment, which does not impose any such duty. *Iqbal*, 556 U.S. at 678. Furthermore, Plaintiffs point to no statutory source of any such duty, and there is none. The Tenth Circuit has twice rejected an identical argument by Cherokee Freedmen descendants "that the federal government's general trust responsibilities impose a duty on these federal officials to involve themselves in the tribal election." *See Nero v. Cherokee Nation of Oklahoma*, 892 F.2d 1457, 1465 (10th Cir. 1989); *Wheeler v. U.S. Dep't of Interior*, 811 F.2d 549 (10th Cir. 1987). As the Tenth Circuit stated, "no statute or regulation requires Department involvement in Cherokee election disputes." *Wheeler*, 811 F.2d at 553. Like the plaintiffs in *Nero* and *Wheeler*, Plaintiffs here have "no cause of action based on the government's non-intervention in the tribal election process." Plaintiffs have not stated a valid claim under the Fifteenth Amendment.

Plaintiffs' First Cause of Action should be dismissed.

B. The Second Cause of Action Fails to State a Claim.

Plaintiffs' Second Cause of Action is framed as "Judicial Review of Agency Action," and appears to be brought under the Administrative Procedure Act (APA). Compl. ¶ 37, ECF No. 1. This Cause of Action fails to state a valid claim under the APA.

Plaintiffs appear to allege a failure to act by Federal Defendants, stating that defendants "breached their fiduciary duty" "by failing to require nondiscriminatory election procedures to be enacted prior to the 270 day deadline for Principal Chief election…."[5] *Id.* ¶¶ 34-35; *see also id.* ¶ 27 (alleging Federal Defendants "have failed to exercise appropriate oversight of Cherokee elections to assure that the decision of Judge Hogan concerning Cherokee Freedmen citizenship rights have been fully vindicated."). The APA, 5 U.S.C. § 706(1), authorizes a court to "compel agency action unlawfully withheld or unreasonably delayed," but such a "failure to act" claim is strictly limited "to a discrete action" that is "legally required." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63 (2004).

Thus, in order to state a failure-to-act claim under the APA, a complaint must "identify a legally required, discrete act that the [agency] has failed to perform." *Montanans for Multiple Use v. Barbouletos*, 568 F.3d 225, 227 (D.C. Cir. 2009); *see also W. Org. of Res. Councils v. Zinke*, 892 F.3d 1234, 1241 (D.C. Cir. 2018) ("the only action a court may compel an agency to

[5] The Complaint identifies no final agency action that would be subject to review under 5 U.S.C. § 704, which makes "final agency action for which there is no other adequate remedy in a court" subject to judicial review). *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) ("When … review is sought … under the general review provisions of the APA, the 'agency action' in question must be 'final agency action.'"); *Center for Auto Safety v. National Highway Traffic Safety Admin.*, 452 F.3d 798, 805 (D.C. Cir. 2006)). Thus, Plaintiffs have not stated a claim under Section 704 of the APA.

take under § 706(1) is discrete action that the agency has a duty to perform."). "The legal duty must be 'ministerial or nondiscretionary' and must amount to 'a specific, unequivocal command.'" *W. Org. of Res. Councils*, 892 F.3d at 1241. Accordingly, "[t]he limitation to required agency action rules out judicial direction of even discrete agency action that is not demanded by law." *S. Utah Wilderness Alliance*, 542 U.S. at 65; *see also In re Long-Distance Telephone Service Federal Excise Tax Refund Litigation*, 751 F.3d 629, 634 (D.C. Cir. 2014) (describing these as "exacting requirements").

Plaintiffs have not identified any discrete action that the Secretary or Assistant Secretary of the Interior is required to take. They allege that Federal Defendants are responsible for protecting the interests of the Freedmen in tribal elections, Compl. ¶ 34, ECF No. 1, but this allegation falls far short of the requirement that Plaintiffs identify a "legally required, discrete act." *Montanans for Multiple Use*, 568 F.3d at 227. Although the United States has a general trust relationship with Indian tribes and their members, that relationship does not, by itself, create legally-enforceable obligations for the United States. *See United States v. Jicarilla Apache Nation*, 564 U.S. 162, 173 (2011) (United States is "not a private trustee" and accepts fiduciary duties only as expressly defined by statute). Instead, Plaintiffs must point to a treaty, statute, or regulation that imposes a specific duty on Federal Defendants with regard to Plaintiffs' rights. *Id*. at 177; *Shoshone-Bannock Tribes v. Reno*, 56 F.3d 1476, 1482 (D.C. Cir. 1995) ("an Indian tribe cannot force the government to take a specific action unless a treaty, statute or agreement imposes, expressly or by implication, that duty"). Plaintiffs have pointed to no such provision. And the Tenth Circuit has twice explicitly rejected the argument that the "federal government's general trust responsibilities impose a duty on [] federal officials to involve themselves in the tribal election" to address the rights of the Freedmen. *Nero*, 892 F.2d at 1465; *Wheeler*, 811 F.2d

at 552-53; *cf. Aguayo v. Jewell*, 827 F.3d 1213, 1228 (9th Cir. 2016) (plaintiffs identified no "authority suggesting an uncabined trust duty requiring the BIA to protect their membership rights at any cost").

The Complaint also alleges that Defendants have failed "to require nondiscriminatory election procedures to be enacted prior to the 270 day deadline for Principal Chief election," framing this as a breach of fiduciary duty. Compl. ¶ 35, ECF No.1. But Plaintiffs have not identified any statute that establishes a "ministerial or nondiscretionary" duty that amounts to "a specific, unequivocal command" to the agency to require the enactment of new election procedures. *See W. Org. of Res. Councils*, 892 F.3d at 1241. The Complaint's jurisdictional allegations reference Public Law 91-495, also known as the Act of 1970 or the Principal Chief Act.[6] Compl. ¶ 5, ECF No. 1; Pub. L. 91-495, 84 Stat. 1091. Although this statute relates to tribal election procedures, it does not provide the sort of "specific unequivocal command" required to state a claim under Section 706(1).

The Act of 1970 was "passed to permit the members of the Five Civilized Tribes of Oklahoma to select their own principal chiefs or governors, rather than accepting such appointments by the Secretary of the Interior." *Morris*, 640 F. 2d at 409 n.12. It was "enacted to enhance, not undermine, tribal self-government." *Id*. at 409. Section 1 of the statute authorizes the Five Tribes to popularly select a Principal Chief in accordance with procedures that are

[6] Other portions of the Complaint also reference the Treaty of 1866, Compl. ¶¶ 23-24, ECF No. 1, but that document does not impose any obligations on the United States with respect to the Freedmen. Nor does the Indian Civil Rights Act set forth a specific enforceable duty requiring Federal Defendants to take action regarding the rights of the Creek Freedmen or undertake any other obligations for Plaintiffs. *See Cal. Valley Miwok Tribe v. Salazar*, 967 F. Supp. 2d 84, 93 (D.D.C. 2013) ("ICRA does not operate against the federal government."); *Wopsock v. Natchees*, 454 F.3d 1327, 1333 (Fed. Cir. 2006) (ICRA "does not impose duties on the federal government or its officials").

"subject to approval by the Secretary of the Interior." Section 2 provides that the Secretary of the Interior is "authorized to assist, upon request" the "in the development and implementation" of procedures for selecting a Principal Chief.

But the statute does not impose a "legally required" duty on Federal Defendants to require the Cherokee Nation to enact new laws or election procedures, as Plaintiffs suggest. Compl. ¶ 35, ECF No. 1. It merely provides that tribal procedures are "subject to approval" by the Secretary, but is devoid of any requirements imposed on the Secretary with respect to those procedures. As such, the statute confers upon the Secretary substantial discretion regarding whether and how to act, such that "it lacks the mandatoriness that is required to support a cause of action under Section 706(1)." *Center for Biological Diversity v. Zinke*, 260 F. Supp. 3d 11, 27 (D.D.C. 2017) (citing *Sierra Club v. Jackson*, 648 F.3d 848, 852, 856-57 (D.C. Cir. 2011)). And Plaintiffs have not challenged any specific approval or disapproval by Interior of Cherokee Nation election procedures that could support an APA claim.

C. The Third Cause of Action Fails to State a Claim

The Third Cause of Action seeks a "declaration that the rejection of Ms. Fleming's candidacy for election as Principal Chief is a violation of the Court's 2018 Order that Freedmen have all the rights of Native Cherokees." Compl. ¶ 39, ECF No. 1. Plaintiffs have not alleged a cognizable cause of action for this or their other claims and therefore have no basis on which to seek declaratory relief. *See, e.g. Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011). Nor does the Declaratory Judgment Act provide a private right of action or an independent source of federal jurisdiction. *Id*. (the Declaratory Judgment Act does not "provide a cause of action"). Rather, "the availability of [declaratory] relief presupposes the existence of a judicially remediable right." *C & E Servs., Inc. v. D.C. Water & Sewer Auth.*, 310 F.3d 197, 201 (D.C. Cir.

2002) (quoting *Schilling v. Rogers*, 363 U.S. 666, 667 (1960)). *See also Lewis v. Gov't of the Dist. of Columbia*, 161 F. Supp. 3d 15, 23 (D.D.C. 2015) (dismissing count for declaratory relief because "[r]equests for declaratory judgments and injunctions are not 'freestanding cause[s] of action' but rather invoke 'form[s] of relief to redress the other claims asserted by Plaintiff'") (citation omitted).

III. Plaintiff's Motion for Preliminary Injunction Should Be Denied.

In her motion for a temporary restraining order and preliminary injunction, Ms. Fleming seeks to restrain the Tribal and Federal Defendants "from conducting the June 1, 2019 election until it is determined whether the denial of Ms. Fleming's eligibility by the Cherokee Nation violates this Court's February 2018 Order."[7] Motion, ECF No. 2. The Court denied the motion for a temporary restraining order, finding that the Plaintiff had failed to establish a likelihood of success or that the other factors for evaluating preliminary injunctive relief weighed in her favor. ECF Minute Order, May 21, 2019. For the same reasons, her motion for a preliminary injunction should be denied.

In addition to the defects in the Complaint discussed above[8], Plaintiff has failed to

[7] The proposed order seeks different relief, to restrain the defendants from "enforcement of the provisions of Section 2 of Article VII of the Cherokee Nation Constitution that require candidates for the Office of Principal Chief of the Cherokee Nation be blood Cherokees and be domiciled within the boundaries of the Cherokee Nation 270 days prior to the June 1, 2019 election." Proposed Order, ECF No. 2-2.

[8] The Court must satisfy itself that it possesses jurisdiction before issuing a preliminary injunction. *See, e.g., Food and Water Watch, Inc.*, 808 F.3d at 913 ("A party who fails to show a 'substantial likelihood' of standing is not entitled to a preliminary injunction." (quoting *Obama v. Klayman*, 800 F.3d 559, 568 (D.C. Cir. 2015) (per curiam)); *see also Arbaugh v. Y & H Corp.*, 546 U.S. 500, 514 (2006) ("when a federal court concludes that it lacks subject-matter jurisdiction, the court must dismiss the complaint in its entirety" (citation omitted)). For the reasons stated above, the Court lacks jurisdiction, the claims against Federal Defendants should be dismissed, and this motion denied.

meet the high bar necessary to justify the "extraordinary relief" of an injunction interfering with a tribal election. A preliminary injunction is an "extraordinary remedy," and one that is "never awarded as of right." *Winter*, 555 U.S. at 9. Furthermore, "if the requested relief 'would alter, not preserve, the status quo,' the court must subject the plaintiff's claim to a somewhat higher standard." *Aracely, R. v. Nielsen*, 319 F. Supp. 3d 110, 125-26 (D.D.C. 2018) (citations omitted).

Likelihood of success on the merits is particularly crucial. *See Sherley*, 644 F.3d at 393 (reading *Winter* "to suggest if not to hold 'that a likelihood of success is an independent, free-standing requirement for a preliminary injunction'"). Here, Plaintiff's claim lacks merit. First, the requested relief appears to be based on the premise that the Federal Defendants may prohibit the June 1, 2019 Cherokee Nation election, but as described more fully above there is no basis for this assertion. Federal Defendants do not make determinations on who is eligible to run for Cherokee Nation office, nor do they conduct the Principal Chief election. Nor can Ms. Fleming establish that Federal Defendants have any duty to require the amendment of Cherokee laws or take other actions on her behalf. *See Wheeler*, 811 F.2d at 553 ("no statute or regulation requires Department involvement in Cherokee election disputes").

Second, Plaintiff has not shown that the Cherokee Nation's determination that she does not meet the eligibility requirements for Principal Chief violates the Treaty or this Court's rulings in *Nash* (assuming *arguendo* that she could seek to enforce those rulings, and has properly done so through this lawsuit). To the contrary, the Cherokee Nation Election Commission was clear that her disqualification was not based on her status as a Freedmen descendant, but rather on her failure to meet the residency requirement, which applies to all candidates and has long been included in the Cherokee Nation Constitution. The Court's

February 2018 Order guarantees Freedmen citizens all the rights and obligations of "native Cherokee," and that is what Ms. Fleming has received.

To the extent that Plaintiff argues that she was not confident that she would be permitted to run for Principal Chief because she is not a Cherokee "by blood," and thus did not take steps to comply with the residency requirement, that reflects her choice, and not one that should be remedied by the Court. In fact, the rights of Freedmen descendants were addressed by the cited Order of this Court, *see Nash*, 267 F. Supp. 3d at 86; Exhibit 2 (Order and Judgment in *Cherokee Nation v. Nash*, Case No. 13-cv-01313-TFH), and by the actions of the Cherokee Nation to implement this Court's order. *See* Exhibit 1 (Cherokee Nation's motion for entry of judgment in *Cherokee Nation v. Nash*). In particular, the Cherokee Nation Supreme Court issued a September 1, 2017 order voiding the constitutional provision that excludes Freedmen from citizenship and stating that Freedmen citizens "shall have all the rights and duties of any other native Cherokee, including the right to run for office." Exhibit 1 at 3. All of these actions, which made clear the eligibility of Freedmen citizens to run for office, took place more than 270 days in advance of the tribal election (September 4, 2018). Thus, Plaintiff has failed to show that the recent order of the Cherokee Nation Supreme Court finding her ineligible to run for tribal office based on the residency requirement contravenes this Court's orders in *Cherokee Nation v. Nash* or otherwise violates federal law.

The majority of Plaintiff's argument in support of her likelihood of success is that the "by blood" requirement in the Cherokee Nation Constitution is illegal racial discrimination. *See* Memorandum, 5-10, ECF No. 2-5. But the validity of the "by blood" requirement under the Treaty was already established in *Nash*, and the Cherokee Nation did not seek to enforce this provision against Ms. Fleming or any other candidate.

Considering the other preliminary injunction factors, Plaintiff also fails to make a convincing argument that she is likely to be irreparably harmed in the absence of preliminary relief. Plaintiff's brief primarily cites cases involving the right to vote, which is not at issue here. But even assuming that her disqualification is a harm, it is one that she suffers because she did not meet the criteria applied to all other candidates.

Moreover, Plaintiff has made no showing that the "balance of the equities" or the "public interest" weighs in favor of her requested relief. If a preliminary injunction is granted, it will interfere with the federal government's relationship with a federally recognized Indian tribe, as well as with the Cherokee Nation's sovereign authorities. *See Santa Clara Pueblo,* 436 U.S. at 56, 72 (noting tribal authority has "the power to make their own substantive law in internal matters" and refusing to find that statute authorized federal claims against the tribe absent a clear "intention to permit the additional intrusion on tribal sovereignty…."); *see also Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1253 (10th Cir. 2001) (finding that "tribal self-government may be a matter of public interest"); *Bowen v. Doyle*, 880 F. Supp. 99, 137 (W.D.N.Y. 1995) (finding "the public's interest and the interests of [an Indian tribe] coincide" insofar as "there is a strong federal policy favoring tribal self-government [and] tribal self-sufficiency").

Plaintiff's brief makes general assertions about eliminating "a vestige of slavery" and denial of the right to vote, but Ms. Fleming was not treated differently due to her race, nor is she being denied the right to vote. Ms. Fleming's failure to take basic steps to determine whether her candidacy would be accepted prior to the residency deadline, or to relocate to tribal territory before she ran for the Tribe's highest elected office, weighs strongly against her request for

relief.[9] Interference with a tribal election is a significant matter. Plaintiff's requested relief will disadvantage other candidates, the Cherokee Nation, and Cherokee Citizens, and it should be denied.

CONCLUSION

Plaintiffs' claims should be dismissed for lack of jurisdiction because both Plaintiffs lack standing to bring these claims against Federal Defendants. Alternatively, Plaintiffs' causes of action fail to state a claim. Plaintiffs' First Cause of Action is not based on a valid cause of action, and also is not supported by plausible allegations that could sustain a claim for relief. Plaintiffs' Administrative Procedure Act claim does not identify a discrete, legally required action that Interior has failed to take, as is required to state a claim under 5 U.S.C. § 706(1). Plaintiffs' third claim for declaratory relief also is not based on a valid claim for relief. All of Plaintiffs' claims should therefore be dismissed with prejudice.

If any claim is not dismissed, the Court should nonetheless deny preliminary injunctive relief. Ms. Fleming has not shown a likelihood of success on the merits, nor has she shown that any of the other factors favor the extraordinary relief of interfering with a tribal election.

[9] Although not determinative, Plaintiff's delay also undermines her allegations of irreparable injury. *Heart 6 Ranch, LLC v. Zinke*, 285 F. Supp. 3d 135, 144 (D.D.C. 2018). Plaintiff initially brought suit in August 2018, failed to show that she was entitled to emergency relief, and chose not to respond to Defendants' motions to dismiss as ordered by the Court. The issues raised in Plaintiff's preliminary injunction motion could have been resolved much sooner but Plaintiff declined to pursue them. Any alleged emergency is simply a function of Plaintiff's own delay.

Respectfully submitted,

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