No. 21-11643

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MUSCOGEE (CREEK) NATION, et al.,
Plaintiffs/Appellants,

v.

BUFORD ROLIN, et al.,
Defendants/Appellees.

Appeal from the United States District Court
for the Middle District of Alabama
No. 2:12-cv-1079 (Hon. Myron H. Thompson)

BRIEF FOR FEDERAL APPELLEES

TODD KIM
Assistant Attorney General

WILLIAM B. LAZARUS
RACHEL HERON
DEVON LEHMAN McCUNE
ARIELLE MOURRAIN JEFFRIES
Attorneys
Environment & Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 532-3140
arielle.jeffries@usdoj.gov

Of Counsel:

BRITTANY M. BERGER
STEPHEN L. SIMPSON
Attorneys
U.S. Department of the Interior
Office of the Solicitor

Oral argument is requested.

CERTIFICATE OF INTERESTED PERSONS

Allan, Aria

Auburn University

Balch & Bingham LLP

Berger, Brittany M.

Benge, Shawn, Deputy Director of the National Park Service

Boyd, David Randall

Bryan Gantt, Amy

Bryan, Stephanie A.

Carter, Dewitt

Cohen, Devra R.

Dauphin, Charles A.

Dauphin Paris, LLC

United States Department of the Interior

Dillard, McKnight, James & McElroy, LLP

DuBois, James J.

Flintco, LLC

Foster Garvey, P.C.

Gehman, David

Haaland, Debra A., Secretary of the U.S. Department of the Interior

Haikey, Larry

Hammer, Jaime Stone

Heron, Rachel

Hickory Ground Tribal Town

Hollinger, Sandy

Jeffries, Arielle Mourrain

Kilpatrick Townsend & Stockton LLP

King, Lauren

Knight, Griffin Lane

Lazarus, William B.

Manning, Timothy A.

Martin, Keith

Martin Construction, Inc.

McCune, Devon Lehman

McGhee, Brice

McGhee, Robert R.

McKnight, Stewart Davidson III

Meckel, Charlotte

Mothershed, Arthur

Munson, Catherine F.

Muscogee (Creek) Nation

Nagle, Mary Kathryn

Newland, Bryan, Principal Deputy Assistant Secretary of Indian Affairs

Poarch Band of Creek Indians

PCI Gaming Authority d/b/a Wind Creek Hospitality

Poust, Teresa E.

Reeves, Mark H.

Rolin, Buford

Schwarz, Jody H.

Simpson, Stephen L.

Sport, Morgan McCue

Sprague, Mary Gabrielle

Stabler, Justin

Thompson, George

Thompson, Myron H.

Tullis, Eddie L.

United States Department of Justice

Villagomez, Chloe

Walker, Jordan Dorman, Jr.

Woodruff, Westly L.

STATEMENT REGARDING ORAL ARGUMENT

Though deferring to the Court's judgment on the matter, Federal Appellees believe that oral argument would be useful to the Court, particularly as to Issue I, which raises complex questions about whether other sovereigns are required and indispensable parties in challenges to federal actions.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules and Regulations

Other Authorities

INTRODUCTION

Plaintiffs sued defendants affiliated with the Poarch Band of Creek Indians over the Poarch Band's construction of a gaming facility on land near Wetumpka, Alabama that Plaintiffs regard as culturally, historically, and religiously significant. Plaintiffs also brought several Administrative Procedure Act and Religious Freedom Restoration Act claims against Federal Defendants based on actions that Plaintiffs allege the federal government took or failed to take with regard to the Wetumpka property. The district court dismissed Plaintiffs' complaint in full under Federal Rule of Civil Procedure 19 on the ground that the Poarch Band of Creek Indians was a required party that could not be joined in the litigation.

As relevant to the claims brought against Federal Defendants, while the district court was correct that the Poarch Band cannot be joined due to sovereign immunity, the district court was incorrect that the inability to join the Poarch Band required dismissal under Rule 19. Federal Defendants' presence as a party defendant in this suit is adequate to protect the Poarch Band's interest in the claims brought challenging federal action under the Administrative Procedure Act and the Religious Freedom Restoration Act.

Although Rule 19 does not bar the suit from proceeding against Federal Defendants, Plaintiffs' claims contain jurisdictional and other defects and

should be dismissed. This Court should therefore affirm the dismissal of the claims against Federal Defendants on the alternative grounds presented in Federal Defendants' motion to dismiss, which the district court found unnecessary to reach, but which this Court can and should address in the first instance.

STATEMENT OF JURISDICTION

The United States agrees with Plaintiffs that this Court has jurisdiction pursuant to 28 U.S.C. § 1291 over Plaintiffs' appeal from the judgment entered on March 15, 2021, and that Plaintiffs timely filed their Notice of Appeal.

Plaintiffs' jurisdictional statement incorrectly implies, however, that the district court had jurisdiction over all of Plaintiffs' claims. In fact, as described in Section II below, Plaintiffs' complaint contains several jurisdictional defects.

STATEMENT OF THE ISSUES

1. Did the district court err in dismissing Plaintiffs' claims against Federal Defendants under Federal Rule of Civil Procedure 19 on the ground that the Poarch Band of Creek Indians was a required party that could not be joined in the litigation and that equity and good conscience required dismissal?

2. Should this Court affirm the dismissal of the claims against Federal Defendants on the alternative grounds that Plaintiffs' claims suffer jurisdictional and other defects?

STATEMENT OF THE CASE

A. Statutory and regulatory background

1. Federal Rule of Civil Procedure 19

Rule 19 declares that a non-party to a case is "required to be joined if feasible" if—

> (A) in that person's absence, the court cannot accord complete relief among existing parties; or
>
> (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
>
> > (i) as a practical matter impair or impede the person's ability to protect the interest; or
> >
> > (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

When "a person who is required to be joined if feasible cannot be joined, the court must determine whether, in equity and good conscience, the action should proceed among the existing parties or should be dismissed." Fed. R. Civ. P. 19(b). The rule provides four non-exhaustive factors to consider in making that determination, including "(1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties"; (2) the extent to which the court can avoid or lessen that prejudice through protective

provisions in the judgment or shaping relief; "(3) whether a judgment rendered in the person's absence would be adequate"; and "(4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder." *Id.*

2. The Indian Reorganization Act

Section 5 of the IRA provides that:

> The Secretary of the Interior is [hereby] authorized, in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in land[], water rights, or surface rights to lands, within or without existing reservations, including trust or otherwise restricted allotments, whether the allottee be living or deceased, for the purpose of providing land for Indians.
>
> …
>
> Title to any lands or rights acquired pursuant to this Act or the Act of July 28, 1955 (69 Stat. 392), as amended (25 U.S.C. 608 et seq.) shall be taken in the name of the United States in trust for the Indian tribe or individual Indian for which the land is acquired, and such lands or rights shall be exempt from State and local taxation.

25 U.S.C. § 5108.

Section 19 of the IRA provides an inclusive definition of those who are eligible for its benefits, including eligibility for land-into-trust acquisitions. That Section provides that "'Indian'. . . shall include all persons of Indian descent who are members of any recognized Indian tribe now under Federal jurisdiction . . . ." 25 U.S.C. § 5129. The IRA also includes within its definition of "Indian" "all persons who are descendants of such members who were, on

June 1, 1934, residing within the present boundaries of any Indian reservation," and "all other persons of one-half or more Indian blood." *Id.*

3. The Native American Graves Protection and Repatriation Act

NAGPRA, 25 U.S.C. §§ 3001-3013, creates procedures through which lineal descendants and culturally affiliated tribes can recover remains and cultural objects from federal agencies and museums. It was enacted by Congress to protect rights to Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. 25 U.S.C. § 3001(3). Section 3 of NAGPRA provides guidance for determining who should get ownership or control of human remains and cultural items discovered and excavated from federal and tribal lands after NAGPRA's enactment. 25 U.S.C. § 3002(a)-(d). The first priority in the case of Native American human remains and associated funerary objects, is "the lineal descendants of the Native American"; the second priority, if no lineal descendant can be ascertained, is the tribe from whose tribal land the human remains and cultural items were excavated. *Id.* §§ 3002(a)(1), (a)(2). Section 3(c) allows for the intentional excavation or removal of human remains on tribal lands, provided that an Archaeological Resources Protection Act permit is issued by the Bureau of Indian Affairs and consent is given by the tribe owning the land. 25 U.S.C. § 3002(c).

4. The National Historic Preservation Act

Under Section 106 of the NHPA, federal agencies "shall take into account the effect of the undertaking on any historic property," and "afford the [Advisory Council on Historic Preservation] a reasonable opportunity to comment with regard to the undertaking." 54 U.S.C. § 306108. NHPA regulations define "undertaking" as "a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including . . . those requiring a Federal permit, license or approval." 36 C.F.R. § 800.16(y).

5. The Archaeological Resources Protection Act

ARPA was enacted to protect "archaeological resources" (including remains) "on public lands and Indian lands." 16 U.S.C. § 470aa. ARPA prohibits the excavation or removal of archaeological resources located on public lands and Indian lands unless done in accordance with a permit or exempted under the Act or implementing regulations. *Id.* § 470cc. In 1984, the Secretary of the Interior promulgated regulations under ARPA regarding the custody of archaeological resources and amended them in 1995 to implement the requirements of NAGPRA. 43 C.F.R. § 7.13. The amended regulations provide that "[a]rchaeological resources excavated or removed from Indian lands remain the property of the Indian or Indian tribe having rights of ownership over such resources."

6. The Religious Freedom Restoration Act

RFRA states that the "[g]overnment may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person . . . is the least restrictive means of furthering [a] compelling governmental interest." 42 U.S.C. § 2000bb-1. "Government" is defined as "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States . . . ." *Id.* § 2000bb-2(1). RFRA provides that "[a] person whose religious exercise has been burdened in violation of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against a government." *Id.* § 2000bb-1(c).

7. The Religious Land Use and Institutionalized Persons Act

RLUIPA prevents governments from "impos[ing] or implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution (A) is in furtherance of a compelling governmental interest, and (B) is the least restrictive means of furthering that compelling governmental interest." 42 U.S.C. § 2000cc. "RLUIPA, by its terms, prohibits only state and local governments from applying regulations that govern land use or institutionalized persons to impose a 'substantial burden' on the

exercise of religion." *Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1077 (9th Cir. 2008). Generally, RLUIPA does not apply to a federal government action, and "even for state and local governments, RLUIPA applies only to government land-use regulations of private land—such as zoning laws—not to the government's management of its own land." *Id.*

8. The Administrative Procedure Act

The APA waives sovereign immunity for suits seeking relief other than money damages from federal agencies. *See* 5 U.S.C. § 702. That waiver does not extend to certain categories of agency action, including agency action that is "committed to agency discretion by law." *Id.* § 701(a)(2). Under the APA cause of action, the reviewing court may "compel agency action unlawfully withheld or unreasonably delayed," or "hold unlawful and set aside agency action" that is arbitrary, capricious, or not in accordance with law. *Id.* § 706.

The APA authorizes suits by "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute . . . ." 5 U.S.C. § 702. A federal court has authority to review only "final agency action." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997); *see also Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003) ("federal jurisdiction is . . . lacking when the administrative action in question is not 'final' within the meaning of 5 U.S.C. § 704"). Two conditions

must be satisfied for an agency action to be final. "First, the action must mark the consummation of the agency's decision-making process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett*, 520 U.S. at 177-78. (cleaned up).

B. Factual background

This dispute is part of a deeper conflict regarding the Poarch Band's construction and operation of a gaming facility on land located near Wetumpka, Alabama. The Wetumpka property, which the Poarch Band bought in 1980 and is held in trust for its benefit by the United States, is the site of Hickory Ground, the last known capital of the Creek Nation in Alabama before the Nation's removal to the Indian Territory in the eastern sections of present-day Oklahoma. Doc. 190, ¶¶ 1-2, 44-54. Plaintiffs—the Muscogee (Creek) Nation, the Hickory Ground Tribal Town, and Mekko George Thompson (the chief of the tribal town)—claim cultural, historic, and lineal ties to the Wetumpka property and state that it holds religious significance to them. *Id.*

In the same year that the Poarch Band acquired the Wetumpka property, the National Park Service included it as historic property on the National Register of Historic Places. *Id.* ¶¶ 3, 61. As a result, the land was encumbered with a twenty-year covenant with measures to protect the archeological site that

elapsed at the end of 2000. *Id.* ¶¶ 50, 285. In 1984, the Poarch Band gained federal recognition, and the federal government acquired the land in trust for the benefit of the Poarch Band under the IRA—meaning that the United States took legal title to the property and now holds the property in trust for the Poarch Band. *Id.* ¶ 73. In 1999, the National Park Service entered an agreement with the Poarch Band for assumption by the tribe of certain responsibilities under the NHPA. Doc. 190-1, Ex. I.

Shortly after the protective covenant expired in 2000, the Poarch Band began developing its property. In 2001, the Bureau of Indian Affairs investigated a possible ARPA violation on the Wetumpka property when the Poarch Band began construction activities in an area within the boundaries of the archeological site. Doc. 200-2, Ex. H. The Bureau could not verify that damages had occurred to the archeological site and no penalty was assessed. *Id.*

In 2003, the Bureau of Indian Affairs issued an ARPA permit to Auburn University authorizing excavation of the site. Doc. 200-2, Ex. G. The Poarch Band began excavating the site with archaeologists from Auburn University to gather information about the artifacts buried on the Wetumpka property. On March 12, 2008, Plaintiff Mekko George Thompson contacted the National Park Service about alleged violations of NAGPRA by Auburn University. *Id.*,

Ex. I. Interior investigated those allegations and on April 21, 2009, found that Auburn University had not violated the statute. *Id.*, Ex. J.

In July 2012, the Poarch Band announced plans to begin construction of a casino on the property. Plaintiffs filed their initial complaint in December 2012. Doc. 190. Construction was completed in 2014, and the casino has been in operation since then.

C. Proceedings below

After filing their initial complaint in December 2012, Plaintiffs filed an amended complaint in January 2013. Tab A, ECF No. 57. In February 2013, Federal Defendants moved to dismiss the amended complaint, as did other defendants. *Id.*, ECF No. 94; *see also id.,* ECF Nos. 74, 75, 77, 88, 90. After briefing, the court stayed the case pending settlement negotiations. *Id.*, ECF No. 155.

On March 9, 2020, Plaintiffs filed their operative Second Amended Complaint and Supplemental Complaint. Doc. 190. The Second Amended Complaint raises eleven counts. Count I asserts that Federal Defendants violated the IRA by taking land into trust for the Poarch Band because the Band was not under federal jurisdiction in 1934. Doc. 190, ¶¶ 190-99.

Counts II through IV "are applicable only if the Court determines that the Department of the Interior lacked authority to take the Hickory Ground Site

into trust for Poarch." *Id.* ¶ 200. These counts assert claims based on Alabama common law against the individual and official capacity tribal defendants for unjust enrichment, promissory estoppel, and outrage.

Conversely, if the Court determines that Federal Defendants did have authority to take the land into trust, Plaintiffs assert Claims V through IX. *Id.* ¶ 236. Counts V and VI are against the individual and official-capacity tribal defendants for violating federal common law. *Id.* ¶¶ 237-40. Count VII asserts that Federal Defendants and Tribal Defendants violated NAGPRA. Count VIII asserts that portions of NAGPRA and ARPA, if construed in a way that would allow anyone other than Plaintiffs to give authority for excavation or removal of remains from the site, violate Plaintiffs' free exercise of religion under the First Amendment, as well as RLUIPA and RFRA. Count IX asserts violations of ARPA by Federal Defendants, Tribal Defendants, and Auburn University.

Finally, Count X asserts violations of the NHPA by Federal and Tribal Defendants, and Count XI asserts violations of RFRA by Federal and Tribal Defendants.

As to Federal Defendants, six claims are relevant:

1. Indian Reorganization Act (Count I)

2. Native American Graves Protection and Repatriation Act (Count VII)

3. Archaeological Resources Protection Act (Count IX)

4. National Historic Preservation Act (Count X)

5. Religious Freedom Restoration Act (Count XI)

6. Free Exercise/Religious Land Use and Institutionalized Persons Act/Religious Freedom Restoration Act (Count VIII)

In general, Plaintiffs seek injunctive and declaratory relief to have the Wetumpka property taken out of trust for the Poarch Band and to have the Poarch Band return the Wetumpka property to its pre-excavation and pre-construction condition. *Id*. at 76-80.

Federal Defendants moved to dismiss Plaintiffs' claims against Federal Defendants pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(b)(6). Doc. 200. Federal Defendants' motion was based on a variety of jurisdictional, procedural, and other merits defects in Plaintiffs' claims, including lack of standing, lack of final agency action, untimeliness, and failure to state a claim. *Id*. Tribal Defendants (the Poarch Band, the Poarch Band Gaming Authority, and various official-capacity tribal defendants) and Individual Defendants (former and current members of the Poarch Band Tribal Council, sued in their individual capacities) each moved to dismiss as well, likewise asserting that Plaintiffs' claims should be dismissed for lack of subject-matter jurisdiction and failure to state a claim. Docs. 202, 205. Tribal Defendants additionally moved to dismiss the complaint under Federal Rule of Civil Procedure 19, asserting that the Poarch Band was a required party that could not be joined due to its

sovereign immunity. Doc. 202. Federal Defendants did not request dismissal on Rule 19 grounds.

The district court reached only two issues: 1) the Poarch Band and tribal officials' sovereign immunity and 2) whether the Poarch Band was an indispensable party under Rule 19 such that the court was required to dismiss the case in its absence. Doc. 223. The district court concluded that the Poarch Band and the Poarch Gaming Authority were immune to Plaintiffs' claims. *Id.* at 25. It additionally concluded that, because the lawsuit implicates "special sovereignty interests," the Supreme Court's decision in *Coeur d'Alene Tribe of Idaho v. Idaho* precludes the application of *Ex parte Young*, 209 U.S. 123 (1908), thus preventing the claims against the Poarch Band official-capacity defendants from proceeding. Doc. 223 at 20 (quoting 521 U.S. 261, 281 (1997)). Having concluded that Tribal Defendants were immune from suit, the court dismissed them. *Id.* at 25.

The court next turned to the Rule 19 issue and concluded that the entire suit must be dismissed because the Tribal Defendants were required but could not be joined. *Id.* at 33. The court reasoned that "[p]roceeding without any of the Tribal Defendants would seriously impair the Tribe's ability to protect its interest in continuing to operate its casino on its land, an interest not shared by the Federal Defendants who would remain in the suit." *Id.* at 27. The court

further reasoned that it "could not afford complete relief without the Tribe or any of its representatives present" because relief running against the remaining defendants could not "force the Tribe to stop operating the [casino]." *Id.* at 27-28. As for the Rule 19(b) factors, the court heavily weighed the Poarch Band's sovereign immunity. *Id.* at 30. It also noted that relief that did not run against Tribal Defendants would be partial and therefore inadequate. *Id.* at 31. As a result, the court granted the Tribal Defendants' motion to dismiss under Rule 19 and denied as moot Federal and Individual Defendants' motions to dismiss. *Id.* at 5-6.

SUMMARY OF ARGUMENT

This Court should affirm the dismissal of Plaintiffs' claims against Federal Defendants, although not on the grounds stated by the district court. Rule 19 does not provide a proper basis for dismissing Plaintiffs' claims against Federal Defendants.

1. Under Rule 19(a), the Poarch Band is not required to be joined in the claims against Federal Defendants if feasible. Assuming that the Poarch Band "claim[s] an interest relating to the subject matter of the action," the presence of Federal Defendants ensures that "as a practical matter," that interest will not be impeded in the Poarch Band's absence.

Even if the Poarch Band were a required party under Rule 19(a), Rule 19(b) would not necessitate dismissal of Plaintiffs' claims against Federal Defendants. Rule 19(b) requires courts to determine whether "in equity and good conscience" the action can proceed among the existing parties or should be dismissed. Fed. R. Civ. P. 19. The suit can proceed under that standard.

Furthermore, the public-rights exception to traditional joinder rules would allow this suit to proceed against Federal Defendants even if the Poarch Band otherwise would be considered a required and indispensable party under Rule 19.

2. Although Rule 19 does not bar this suit, Plaintiffs' claims have procedural or other defects, which Federal Defendants identified in their motion to dismiss. For any of the reasons identified in that motion and reiterated in Section II below, this Court can affirm the dismissal of the claims against Federal Defendants. Alternatively, if this Court chooses to reverse the district court's Rule 19 dismissal without considering these alternative grounds for dismissal, it should remand with the instruction that the district court rule on the other grounds for dismissal that it did not previously reach.

STANDARD OF REVIEW

This Court reviews dismissal for failure to join an indispensable party for abuse of discretion. *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 746 F.3d 1008,

1039 (11th Cir. 2014). "A district court abuses its discretion when, in reaching a decision, it applies an incorrect legal standard, follows improper procedures in making the determination, or makes findings of fact that are clearly erroneous." *Id.* (quoting *United States v. Rigel Ships Agencies, Inc.*, 432 F.3d 1282, 1291 (11th Cir. 2005)). Underlying questions of law, including mixed issues of law and fact, are reviewed de novo. *United States v. Shamsid-Deen*, 61 F.4th 935, 945 (11th Cir. 2023).

ARGUMENT

I. The district court erred in concluding that Rule 19 requires dismissal of the claims against Federal Defendants.

The Poarch Band is not a required party under Rule 19(a) because the district court can afford complete relief as to Plaintiffs' APA and RFRA claims against Federal Defendants, and Federal Defendants can adequately represent the Poarch Band's interest in seeing federal action upheld, such that "disposing of the action in the [Poarch Band's] absence" will not "as a practical matter impair or impede the [Poarch Band's] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i).

Nor is the Poarch Band an indispensable party such that in equity and good conscience the matter must be dismissed in its absence. The claims against Federal Defendants can proceed without unduly prejudicing the interests of the Poarch Band. Furthermore, deeming the Poarch Band indispensable would

undermine Congress's deliberate decision in enacting the APA and RFRA to waive the sovereign immunity of the United States. Finally, even if the Poarch Band would otherwise be considered an indispensable party under a traditional Rule 19 analysis, the public-rights exception would apply, allowing the claims against Federal Defendants to proceed.[1]

A. The Poarch Band is not required under Rule 19(a).

The Poarch Band is not a "required party" within the meaning of Rule 19(a). Rule 19(a)(1) reads:

> (1) Required Party. A person who is subject to service of process and whose joinder will not deprive the court of subject-matter jurisdiction must be joined as a party if:
>
> > (A) in that person's absence, the court cannot accord complete relief among existing parties; or
> >
> > (B) that person claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may:
> >
> > > (i) as a practical matter impair or impede the person's ability to protect the interest; or

[1] Federal Defendants are appellees in this case because the district court's judgment below was in Federal Defendants' favor. Federal Defendants' response brief is due on the same day as the Tribal Defendants' response brief. The concurrent due date will deprive the Tribal Defendants of an opportunity to respond to Federal Defendants' position that the district court erred by dismissing the claims against them on Rule 19 grounds. For that reason, Federal Defendants would not oppose a request by Tribal Defendants to be given leave to file a supplemental response addressing the Rule 19 arguments raised in this brief.

> (ii) leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest.

Fed. R. Civ. P. 19(a)(1).

Relief can be afforded among the current parties to the lawsuit,[2] and the Poarch Band's interest in seeing federal action upheld will be protected by Federal Defendants' presence in this suit. Although couched in various ways in Plaintiffs' amended complaint, Plaintiffs' IRA, NAGPRA, NHPA, and ARPA challenges raise claims, if at all, under the APA, as they assert either unlawful action or unlawful failure to act by Federal Defendants. In an APA lawsuit, the question to be resolved is whether challenged agency action will be sustained or held invalid because the agency acted unlawfully. *See* 5 U.S.C. § 706(2). Likewise, Plaintiffs' RFRA and Free Exercise claims raise questions about whether the challenged federal action unlawfully burdened their exercise of

---

[2] Federal Defendants take no position on whether *Ex parte Young* permits the claims against tribal officials to proceed, and the Court need not answer that question to determine whether Rule 19 requires dismissal of the claims against Federal Defendants. Either the district court was correct that *Coeur d'Alene* creates an exception to *Ex parte Young* that bars the claims against tribal officials, Doc. 223 at 14-25, in which case Federal Defendants would adequately represent whatever interest the Poarch Band might still have in the remaining claims challenging federal action; or the claims against the tribal officials may proceed under *Ex parte Young*, in which case the Poarch Band's interests would be adequately represented by Federal Defendants and the tribal officials, *see Salt River Project Agr. Imp. & Power Dist. v. Lee*, 672 F.3d 1176, 1177 (9th Cir. 2012); *Vann v. U.S. Dep't of Interior*, 701 F.3d 927, 930-31 (D.C. Cir. 2012); *Kansas v. United States*, 249 F.3d 1213, 1227 (10th Cir. 2001).

religion. Neither the APA nor RFRA authorizes relief against non-federal entities. *See id.* §§ 702, 706; 42 U.S.C. § 2000bb-2(1); *see also City of Boerne v. Flores*, 521 U.S. 507, 511 (1997).

Thus, put in Rule 19 terms, a court can "accord complete relief" on Plaintiffs' claims so long as Federal Defendants participate. Fed. R. Civ. P. 19(a)(1)(A). And the Poarch Band's absence puts the federal government at no greater risk of "incurring double, multiple, or otherwise inconsistent obligations" than necessarily inheres in APA or RFRA litigation, given that agency action can often be challenged by multiple aggrieved parties in multiple jurisdictions. *Id*. 19(a)(1)(B)(ii).

Federal Defendants can adequately represent the Poarch Band's interest in seeing federal action upheld, such that "disposing of the action in the [Poarch Band's] absence" will not "as a practical matter impair or impede the [Poarch Band's] ability to protect the interest." Fed. R. Civ. P. 19(a)(1)(B)(i). The district court did not specifically consider whether the federal government could serve as an adequate representative with regard to the federal claims. Rather, the district court erroneously concluded that "[p]roceeding without any of the Tribal Defendants would seriously impair the Tribe's ability to protect its interest in continuing to operate its casino on its land, an interest not shared by the Federal Defendants who would remain in the suit." Doc. 223 at 27. But what matters

for the purposes of adequate representation is that Federal Defendants and the Poarch Band share the same ultimate interest in defending challenged federal action. *See, e.g.*, *Ramah Navajo Sch. Bd., Inc. v. Babbitt*, 87 F.3d 1338, 1351 (D.C. Cir. 1996); *Sac & Fox Nation of Missouri v. Norton*, 240 F.3d 1250, 1259 (10th Cir. 2001); *but see Diné Citizens Against Ruining our Environment v. Bureau of Indian Affairs*, 932 F.3d 843, 855 (9th Cir. 2019), *cert. denied* 141 S. Ct. 161 (2020). Plaintiffs assert that Federal Defendants have acted arbitrarily and capriciously or otherwise violated federal law. Federal Defendants have at least the same interest as Tribal Defendants, if not a stronger one, in defending against that charge. Contrary to the district court's conclusion, the different *reasons* for that shared interest do not make Federal Defendants an inadequate representative. *See id.*

APA and RFRA relief run directly against only one sovereign: the United States. To be sure, a judgment holding agency action unlawful may *affect* other sovereigns, just as it may affect myriad private parties. But even then, it leaves the affected parties in the same position they would have been if the federal agency had never taken the challenged action in the first place. In other words, Plaintiffs' claims challenging federal action do not threaten any sovereign interest of Tribal Defendants that is independent of federal action. It is the sovereign interest of the United States that is squarely at issue, and Congress

deliberately chose to waive the United States' sovereign immunity as to APA and RFRA claims.

B. The Poarch Band is not indispensable under Rule 19(b).

Rule 19(b) instructs that the district court inquire into whether in equity and good conscience the matter must be dismissed in the absence of a third party. The four-factor test it sets out is as follows:

> (1) the extent to which a judgment rendered in the person's absence might prejudice that person or the existing parties;
>
> (2) the extent to which any prejudice could be lessened or avoided by:
>
> > (A) protective provisions in the judgment;
> >
> > (B) shaping the relief; or
> >
> > (C) other measures;
>
> (3) whether a judgment rendered in the person's absence would be adequate; and
>
> (4) whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder.

Fed. R. Civ. P. 19(b).

None of the Rule 19(b) factors favors dismissal of the claims against Federal Defendants. The Poarch Band faces minimal risk of prejudice because of Federal Defendants' presence in this suit, so the first two factors do not favor dismissal. Nor does the third factor support dismissal, because a judgment

rendered under the APA or RFRA would be enforceable against Federal Defendants. And the fourth factor, the availability of adequate alternative remedies for Plaintiffs, favors permitting the action to proceed.

In concluding that the Rule 19(b) factors favor dismissal, the district court relied heavily on the Poarch Band's sovereign immunity. Doc. 223 at 29-32. To be sure, that a required party is shielded by sovereign immunity is in some contexts an important consideration in determining whether equity favors allowing a lawsuit to proceed in the party's absence, notwithstanding that sovereign immunity is not expressly listed in Rule 19(b). *E.g.*, *Fla. Wildlife Fed'n Inc. v. United States Army Corps of Engineers*, 859 F.3d 1306, 1318 (11th Cir. 2017). But while some weight is due to a required party's sovereign status "out of recognition that any consideration of the merits in the sovereign's absence is 'itself an infringement on . . . sovereign immunity,'" that consideration is not dispositive. *Id.* (quoting *Republic of Philippines v. Pimentel*, 553 U.S. 851, 864-65 (2008)); *see also De Csepel v. Republic of Hungary*, 27 F.4th 736, 749 (D.C. Cir. 2022) (rejecting argument that *Pimentel* mandates dismissal when a required sovereign cannot be joined). Before dismissing an action, a court should consider "what, if anything, might protect the [absent sovereign's] interests were the case to proceed in its absence"—including, "[c]ritically," whether any "party

with interest aligned with the [absent sovereign]'s remain[s] in the case to guard against prejudice." *De Csepel*, 27 F.4th 749-50.

On the other side of the balance, deeming the Poarch Band indispensable would undermine Congress's deliberate decision in enacting the APA and RFRA to waive the sovereign immunity of the United States. It would deprive Plaintiffs—and, indeed, any aggrieved person in other contexts—of any "adequate remedy" for allegedly unlawful (even unconstitutional) final agency action. Fed. R. Civ. P. 19(b)(4).

To unpack the consequences for judicial review of agency action, myriad federal agency actions benefit absent sovereigns—including, notably, countless decisions that the Secretary of the Interior makes in the field of Indian affairs. Under the district court's view of Rule 19, those absent sovereigns are required to be joined to an APA challenge to that action—even where the federal government is mounting its own defense. If the fact that those sovereigns cannot be joined because they enjoy sovereign immunity favors dismissal, and neither Congress's decision to waive the United States' sovereign immunity nor the public's interest in judicial review of agency action provides a sufficient counterweight, then the gamut of federal actions benefitting states, tribes, or other sovereigns will be functionally immunized from judicial review. Joinder rules should not lightly be interpreted to categorically immunize whole classes

of agency action from review, particularly given the APA's "basic presumption of judicial review [for] one suffering legal wrong." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018).

C. The public-rights exception to traditional joinder rules applies.

Even if the Poarch Band would otherwise be considered an indispensable party to the claims against Federal Defendants, the public-rights exception to traditional joinder rules would apply. The Supreme Court has recognized that traditional joinder rules—which grew out of a model of private litigation that does not map neatly onto contemporary administrative law—give way in litigation to enforce public rights. *See Nat'l Licorice Co. v. Nat'l Labor Relations Bd.*, 309 U.S. 350, 363 (1940). In such cases, "there is little scope or need for the traditional rules governing the joinder of parties in litigation determining private rights." *Id.* And in fact, expansive application of traditional joinder rules in challenges to federal action could effectively "sound[] the death knell for any judicial review of executive decisionmaking," by making it impossible for courts to review agency action that benefits nonparties who cannot feasibly be joined. *Conner v. Burford*, 848 F.2d 1441, 1460-61 (9th Cir. 1988); *cf. Manygoats v. Kleppe*, 558 F.2d 556, 559 (10th Cir. 1977); *but see Diné Citizens*, 932 F.3d at 860-61. For that reason, this Court has explained that "when litigation seeks vindication of a public right, third persons who could be adversely affected by a decision

favorable to the plaintiff do not thereby become indispensable parties." *Jeffries v. Georgia Residential Fin. Auth.*, 678 F.2d 919, 929 (11th Cir. 1982).

Rule 19 reflects background equitable principles of joinder. *See Shields v. Barrow*, 58 U.S. 130, 139-40 (1854); Wright & Miller, 7 Fed. Prac. & Proc. Civ. 1601 (3d ed.). The public-rights exception recognized in *National Licorice* is therefore built into the rule. *Cf. Provident Tradesmens Bank & Tr. Co. v. Patterson*, 390 U.S. 102, 107 (1968) (admonishing against taking an "inflexible approach" when applying an earlier version of Rule 19). And indeed, since the enactment of the APA in 1946, federal courts of appeals have regularly invoked *National Licorice*'s "public rights" doctrine to permit claims against a federal agency to proceed, irrespective of whether those parties would otherwise arguably be required parties under Rule 19. *E.g.*, *S. Utah Wilderness All. v. Kempthorne*, 525 F.3d 966, 969 n.2 (10th Cir. 2008); *Manygoats*, 558 F.2d at 559; *Jeffries*, 678 F.2d at 927-929; *Natural Resources Defense Council v. Berklund*, 458 F. Supp. 925, 933 (D.D.C 1978), *aff'd*, 609 F.2d 553 (D.C. Cir. 1980); *cf. Kirkland v. New York State Dep't of Correctional Servs.*, 520 F.2d 420, 424 (2d Cir. 1975) (applying public rights exception in challenge to state agency action). So long as claims seek only to settle the legality of federal government action, not to bind or enjoin any non-government actor, the public-rights exception applies. *Cf. National Licorice*, 309 U.S. at 363-64 (recognizing that under traditional equitable joinder principles, a

court may adjudicate a contract without all parties present, provided that it limits relief to the present parties "in such a manner as to preserve the rights of those not before it").

For all these reasons, the district court erred in dismissing the claims against the Federal Defendants under Rule 19. But for the reasons below, this Court should still affirm on other grounds the judgment dismissing those claims.

II. The judgment dismissing Plaintiffs' claims against Federal Defendants should be affirmed on alternative grounds.

This Court "may affirm on any ground supported by the record, regardless of whether that ground was relied upon or even considered below." *Waldman v. Conway*, 871 F.3d 1283, 1289 (11th Cir. 2017). Because the district court dismissed the case in full under Rule 19, it denied as moot Federal Defendants' motion to dismiss. That motion presented several jurisdictional and substantive bases for dismissing Plaintiffs' claims. Each of those bases is sound and independently supports the judgment of dismissal.

First, Plaintiffs' IRA claim challenging Interior's 1984 decision to take land into trust for the Poarch Band was brought well outside the statute of limitations, and Plaintiffs lack standing to challenge the decision. Second, Plaintiffs' NAGPRA claim fails because the Wetumpka property is not federal land under NAGPRA and Federal Defendants had no duty to act. Third, Plaintiffs' NHPA claim fails because Plaintiffs cannot demonstrate that Federal

Defendants failed to take a discrete agency action that they were required to take. Fourth, Plaintiffs' allegations under ARPA fail to state a claim because the challenged activities—the Poarch Band's construction of a gaming facility on its land—are specifically exempted by the statute, and no permit is required. The ARPA claim was also brought outside the statute of limitations. Fifth, Plaintiffs fail to state a claim under RFRA, given that the Federal Defendants have not substantially burdened Plaintiffs' exercise of religion. And, finally, Plaintiffs' religious-exercise claims should be dismissed because Federal Defendants' interpretation of NAGPRA and ARPA does not substantially burden Plaintiffs' exercise of religion.

A. IRA

Plaintiffs' first claim asserts that Federal Defendants violated the IRA by taking land into trust for the Poarch Band in 1984. The limitations period to challenge the decision to take land into trust for the Poarch Band has long since run. Nor have Plaintiffs demonstrated standing; they failed to establish that Federal Defendants' actions injured them.

Statute of Limitations. A challenge to Interior's decision to take land into trust for a tribe is a "garden-variety APA claim." *Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 220-21 (2012*); see also Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1292 (11th Cir. 2015). The APA authorizes

"suit in a federal district court to obtain review of any 'final agency action for which there is no other adequate remedy in a court.'" *National Ass'n of Mfrs. v. Department of Def.*, 138 S. Ct. 617, 626 (2018) (quoting 5 U.S.C. § 704). "Those suits generally must be filed within six years after the claim accrues" because of the general-purpose statute of limitations for claims against the United States. *Id.* at 626-27. That provision states that civil actions against the United States are "barred unless the complaint is filed within six years after the right of action first accrues." 28 U.S.C. § 2401(a).

A "right of action first accrues" under the APA when the relevant agency action becomes final and thus reviewable under 5 U.S.C. § 704. *See Hardin v. Jackson*, 625 F.3d 739, 743 (D.C. Cir. 2010) ("Under this statute, a party challenging final agency action must commence his suit within six years after the right of action accrues and the 'right of action first accrues on the date of the final agency action.'") (quoting *Harris v. FAA*, 353 F.3d 1006, 1010 (D.C. Cir. 2004)). Plaintiffs' right of action accrued in 1984 when Interior made the final decision to take land into trust for the Poarch Band. The claim, therefore, was brought far outside the six-year limitations period and should be dismissed.

Standing. Nor do Plaintiffs have standing to challenge Interior's decision to take land into trust for the benefit of the Poarch Band. To satisfy the constitutional minimum of standing, Plaintiffs must establish: (1) they suffered

an injury in fact; (2) that the injury is fairly traceable to the challenged conduct; and (3) that the injury is likely to be redressed. *Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1003-04 (11th Cir. 2004).

Plaintiffs' asserted injury—the excavation and disturbance of land they claim is historically and religiously significant—does not stem from the United States' acquisition of the Wetumpka property in trust. As discussed, the United States acquired the Wetumpka property in trust *from the Poarch Band*, who acquired title to the property in 1980. Even if the United States had not acquired the land in trust, the Poarch Band would still be the owners of the Wetumpka property and able to manage the land in their own interests, including by engaging in construction activities. *See* Doc. 190, ¶ 61. Furthermore, Plaintiffs' asserted injury is not redressable. Even if Plaintiffs prevail on their decades-late IRA claim and the land is no longer held in trust for the Poarch Band, the Poarch Band will still own the land in fee and have the right to conduct activities on the land.

B. NAGPRA

The court lacks jurisdiction over Plaintiffs' NAGPRA claim. NAGPRA does not contain a waiver of sovereign immunity; rather, NAGPRA claims rely on the APA's waiver of sovereign immunity. 25 U.S.C. § 3013; *see also White v. Univ. of Cal.*, 765 F.3d 1010, 1024 (9th Cir. 2014) ("suits concerning the United

States under NAGPRA are not authorized by any specific portion of that statute, but rather under the Administrative Procedure Act").

Plaintiffs' NAGPRA claim is therefore subject to the APA's limitations. Section 706(2) of the APA authorizes a reviewing court to "hold unlawful and set aside agency action" that is found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A). Section 706(1) authorizes a reviewing court to "compel agency action unlawfully withheld or unreasonably delayed." *Id*. § 706(1). A failure-to-act claim "can proceed only where a plaintiff asserts that an agency failed to take a discrete agency action that it is required to take." *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 64 (2004). Plaintiffs have not identified a final agency action or the failure to take a discrete, legally required action, so the court lacks jurisdiction. *See Nat'l Parks Conservation Ass'n*, 324 F.3d at 1236.

Plaintiffs allege that Defendants failed to consult Plaintiffs before excavation and removal, failed to obtain Plaintiffs' consent, and failed to give custody of human remains and cultural objects found to Plaintiffs. Doc. 190, ¶¶ 241-61. But Plaintiffs do not identify any statutory basis for these asserted duties. Although NAGRPA establishes certain duties for the federal government on *federal* lands, those same duties do not apply on *tribal* land.

Lands held in trust for tribes, such as the Wetumpka Property, are tribal lands, not federal lands. NAGPRA defines federal lands as "land *other than tribal lands* which are controlled or owned by the United States." 25 U.S.C. § 3001(5) (emphasis added). At no point does NAGPRA or its regulations assign any nondiscretionary duty to the federal government in the event of an inadvertent discovery on tribal land.

Because Plaintiffs fail to assert a duty to act under NAGPRA, they also fail to identify a discrete agency inaction in violation of a nondiscretionary duty, which they must to invoke the APA's sovereign-immunity waiver. *See SUWA*, 542 U.S. at 64. Accordingly, the Court lacks jurisdiction over Plaintiffs' NAGPRA claims.

C. NHPA

The NHPA likewise does not create a private right of action, and therefore NHPA claims must proceed under the judicial-review provision of the APA. *See, e.g.*, *Karst Envt'l Educ. & Prot. v. EPA*, 475 F.3d 1291, 1295 (D.C. Cir. 2007); *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1099 (9th Cir. 2005). As with Plaintiffs' NAGPRA claims, Plaintiffs have not identified a final agency action or discrete nondiscretionary action that Federal Defendants failed to take, and any potential claims are outside the statute of limitations.

Plaintiffs assert six purportedly final agency actions that they assert violate the NHPA: (1) the issuance of ARPA permits; (2) the decision to allow excavation of the site without ARPA permits; (3) the excavation of the site; (4) federal funding; (5) construction and operation of the casino; (6) extension of the 1999 agreement between the National Park Service and the Poarch Band requiring the Poarch Band to take on certain duties prescribed by the NHPA without appropriate review and failure to terminate the agreement for noncompliance. Doc. 213-1 at 68-73. Many of those actions occurred more than six years before Plaintiffs brought their complaint, and any challenge based on them is therefore barred by the statute of limitations. In addition, none of the actions Plaintiffs identify is a final agency action under the APA.

Plaintiffs have not identified any ARPA permit issued after 2003, so any claim related to permit issuance would be barred by the statute of limitations. *See* Doc. 190, ¶ 108; Doc. 200-2, Ex. G; 28 U.S.C. § 2401(a). And issuance of an ARPA permit "does not constitute an undertaking requiring compliance with section 106" of the NHPA in any event. 43 C.F.R. § 7.12. The excavation, construction, and operation of the casino were undertaken for and by non-federal actors and thus were not agency actions within the meaning of the APA. *See* 5 U.S.C. § 551(15). Plaintiffs assert that the excavation was federally funded, in whole or in part. Doc. 213-1 at 70. But the only grants Plaintiffs refer to were

awarded years after the excavation—in 2011, 2018, and 2019—and Plaintiffs have established no link between the grants and the excavation. Doc 190, ¶ 318. Finally, Plaintiffs do not identify any particular extension of the 1999 agreement that might constitute final agency action, and the 1999 agreement itself is outside the scope of the statute of limitations.

D. ARPA

Plaintiffs fail to state a claim under ARPA because the challenged activity—the Poarch Band's construction of a gaming facility on its land—is specifically exempted by statute. ARPA provides that "[n]o permit shall be required . . . for the excavation or removal by any Indian tribe or member thereof of any archaeological resource located on Indian lands of such Indian tribe . . . ." 16 U.S.C. § 470cc(g)(1). Even though ARPA permits were not required, the Bureau of Indian Affairs issued a permit to Auburn University, dated April 15, 2003. Doc. 200-2, Ex. G. Any challenge to that permit is outside the statute of limitations. In addition, under 16 U.S.C. § 470cc(f), enforcement of the permit is committed to the discretion of the federal land manager. Plaintiffs therefore cannot state a claim for failure to enforce the permit. *See* 5 U.S.C. § 701(a)(2); *see also Heckler v. Chaney*, 470 U.S. 821, 834-35 (1985) ("If [a statute] has indicated an intent to circumscribe agency enforcement discretion, and has provided meaningful standards for defining the limits of that discretion,

there is 'law to apply' under § 701(a)(2), and courts may require that the agency follow that law; if it has not, then an agency refusal to institute proceedings is a decision 'committed to agency discretion by law' within the meaning of that section.").

E. RFRA

Plaintiffs fail to state a claim under RFRA because Federal Defendants' actions are not the source of the asserted substantial burden on Plaintiffs' free exercise of religion. RFRA provides that the "*[g]overnment* shall not substantially burden a person's exercise of religion . . ." 42 U.S.C. § 2000bb-1 (emphasis added). RFRA defines "government" to include "a branch, department, agency, instrumentality, and official (or other person acting under color of law) of the United States." 42 U.S.C. § 2000bb-2(1). Plaintiffs do not identify any action by Federal Defendants that substantially burdens their religious exercise.

The specific activities that Plaintiffs complain burden their religious exercise are the excavation and construction of facilities by the Poarch Band. "[A] State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). "Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding

the State responsible for those initiatives . . .” *Id.* at 1004-05. Plaintiffs do not allege that Federal Defendants exercised any coercive power or provided significant encouragement for the Poarch Band’s excavation or construction activities at the Wetumpka property. Although Plaintiffs cite Federal Defendants’ issuance or non-issuance of permits, those actions constitute only permission for the Poarch Band’s excavation on its land. Federal permission cannot by itself justify imposition of RFRA’s compelling interest test. *See Vill. of Bensenville v. FAA*, 457 F.3d 52, 66 (D.C. Cir. 2006). RFRA, therefore, does not apply.

F. Religious exercise

Plaintiffs’ Count VIII asserts that if NAGPRA and ARPA are construed in a manner that results in a substantial burden on Plaintiffs’ religion, then NAGPRA and ARPA violate the First Amendment and would conflict with RLUIPA and RFRA. (Count VIII was pleaded as a separate “claim,” so this brief addresses it separately; however, it would perhaps be best understood as an argument in support of Plaintiffs’ NAGPRA and RFRA claims.)

Plaintiffs fail to state a First Amendment claim because ARPA and NAGPRA are neutral laws of general applicability that do not target or restrict religious practices. Accordingly, they “need not be justified by a compelling governmental interest even if [they have] the incidental effect of burdening a

particular religious practice." *First Assembly of God of Naples, Fla., Inc. v. Collier Cnty.*, 20 F.3d 419, 423 (11th Cir. 1994) (quoting *Church of the Lukumi Bablua Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993)). NAGPRA and ARPA are generally applicable laws aimed at protecting Native American grave sites and archaeological resources, not at the exercise of religion. Plaintiffs therefore fail to state a First Amendment claim.

Neither RLUIPA nor RFRA provides Plaintiffs a cause of action to challenge Federal Defendants' interpretation of NAGPRA and ARPA. "RLUIPA, by its terms, prohibits only state and local governments from applying regulations that govern land use or institutionalized persons to impose a 'substantial burden' on the exercise of religion." *Navajo Nation*, 535 F.3d at 1077; *see* 42 U.S.C. § 2000cc-5(4)(A). As discussed above, Plaintiffs have identified no federal action that would give rise to a claim for relief under RFRA.

CONCLUSION

For the foregoing reasons, this Court should affirm the dismissal of the claims against Federal Defendants on the alternate grounds demonstrated above, or else reverse the district court's Rule 19 dismissal and remand for a ruling on Federal Defendants' motion to dismiss.

Respectfully submitted,

s/ *Arielle Mourrain Jeffries*

TODD KIM
Assistant Attorney General

WILLIAM B. LAZARUS
RACHEL HERON
DEVON LEHMAN McCUNE
ARIELLE MOURRAIN JEFFRIES
Attorneys
Environment & Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 532-3140
arielle.jeffries@usdoj.gov

Of Counsel:

BRITTANY M. BERGER
STEPHEN L. SIMPSON
Attorneys
U.S. Department of the Interior
Office of the Solicitor

September 20, 2023
90-2-4-13882

CERTIFICATE OF COMPLIANCE

I hereby certify:

1. This document complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Rule 32(f), this document contains 8,417 words.

2. This document complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Rule 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word Version 2305 in 14-point Calisto MT font.

s/ *Arielle Mourrain Jeffries*
ARIELLE MOURRAIN JEFFRIES

Counsel for Federal Appellees