ORAL ARGUMENT NOT YET SCHEDULED

No. 24-5193

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NARRAGANSETT INDIAN TRIBE,
Appellant,

v.

GLORIA M. SHEPHERD,
Acting Administrator, Federal Highway Administration,
Appellee.

On Appeal from the United States
District Court for the District of Columbia

BRIEF FOR APPELLEE

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CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel certifies as follows:

Parties and Amici. The plaintiff-appellant is the Narragansett Indian Tribe. The defendant-appellee is Gloria M. Shepherd, Acting Administrator of the Federal Highway Administration. The United South and Eastern Tribes Sovereignty Protection Fund is amicus curiae.

Ruling Under Review. At issue in this appeal is the Honorable Rudolph Conteras' order and memorandum opinion, dated July 23, 2024, granting Appellee summary judgment and denying Appellant summary judgment. The opinion is available in the joint appendix, JA___, and on Westlaw, 2024 WL 3509491.

Related Cases. This case has not previously been before this Court. Undersigned counsel is unaware of any pending related cases.

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INTRODUCTION

The Federal Highway Administration (the "Agency") entered into a programmatic agreement with both the Narragansett Indian Tribe (the "Tribe") and the state of Rhode Island under Section 106 of the National Historic Preservation Act. The agreement's purpose was to mitigate a highway project's adverse effects on land that is religiously and culturally significant to the Tribe. Importantly, the land is not within the Tribe's reservation boundaries, and the Tribe does not own it. The agreement required Rhode Island to convey to the Tribe three other parcels that are culturally significant to the Tribe, which the Tribe then would maintain.

But when it came time to convey the parcels, Rhode Island refused to do so unless the Tribe first agreed to waive tribal sovereign immunity as to the parcels. This demand was not a term of the agreement, and the Tribe refused to accede to it. The Agency admonished Rhode Island that its refusal to convey these parcels to the Tribe free and clear violated the agreement. The Agency withheld all project funds from Rhode Island in an effort to pressure it to convey the parcels free and clear, but the state did not budge. Lacking any means to force Rhode Island to convey the three parcels free and clear, and recognizing that the agreement could

not proceed given the state's refusal to convey the parcels, the Agency eventually terminated the agreement and returned to the drawing board.

Over the course of nearly fifteen months, the Agency engaged with the Tribe regarding the terms of a new programmatic agreement. It sent the Tribe successive drafts of the new agreement, solicited the Tribe's input, listened and responded to the concerns that the Tribe raised, and met repeatedly with the Tribe. When the Agency at last finalized the new programmatic agreement, it invited the Tribe sign onto it. The Tribe refused to do, however, out of dissatisfaction with the agreement's terms. The Agency and Rhode Island thus proceeded with the new agreement without the Tribe's further involvement or participation.

The Tribe sued to challenge the original agreement's termination and new agreement's adoption. The district court dismissed the Tribe's claims without prejudice for lack of standing, concluding that the Tribe had not plausibly alleged an injury that was either traceable to the Agency or redressable by relief against the Agency. Rather than amend its complaint, the Tribe filed a new lawsuit raising the exact same claims as its previous suit. The district court once again dismissed the Tribe's

challenge to the original agreement's termination for lack of standing but let its challenge to the new agreement proceed beyond the pleadings.

In a thorough thirty-three page opinion, the district court rejected the Tribe's remaining claim on the merits. Following extensive briefing and an exhaustive examination of the administrative record, the district court concluded that the Agency had complied with the National Historic Preservation Act when it adopted the new programmatic agreement. Accordingly, the district court granted the Agency summary judgment and denied the Tribe's motion for summary judgment.

The district court's well-reasoned judgment is correct and warrants this Court's affirmance. Issue preclusion bars the Tribe from relitigating the District Court's conclusion, in the Tribe's earlier suit, that it lacks standing. And in any event, the Tribe lacks standing because it does not plausibly allege that its asserted injury either traces to an Agency action or is redressable by Agency action. On the merits, the Agency consulted with the Tribe in adopting the new programmatic agreement, and the new agreement did not require the Tribe's signature to take effect. Last, the Court need not address Amicus Curiae's argument that the Agency did not adequately explain why the new agreement did not require the

Tribe's signature to take effect while the original agreement did. In any event, the Agency explained this difference: the new agreement requires no action on the Tribe's part, whereas the original agreement did.

JURISDICTIONAL STATEMENT

The district court had statutory jurisdiction under 28 U.S.C. § 1331 and this Court has statutory jurisdiction under 28 U.S.C. § 1291. Article III jurisdiction is absent, as the Tribe lacks standing to raise its claims.

STATEMENT OF ISSUES

In the opinion of the United States, the questions presented are:

1. In a previous lawsuit that the Tribe filed against the Agency, the district court dismissed the exact same claims that the Tribe now raises in this suit. Does issue preclusion bar the Tribe's claims?

2. Alternatively, did the Tribe establish that it satisfies either the traceability or redressability elements of standing?

3. Did the Agency comply with the regulations implementing Section 106 the National Historic Preservation Act by consulting with the Tribe in adopting the new programmatic agreement?

4. Did the new programmatic agreement, which did not concern an undertaking on tribal lands, require the Tribe's signature in order to take effect?

5. The new programmatic agreement required no action on the Tribe's part, whereas the original agreement had required action by the Tribe. Did the Agency provide a reasoned explanation for requiring the Tribe's signature for the original agreement but not the new agreement?

STATEMENT OF THE CASE

I. Section 106 of the National Historic Preservation Act

Section 106 of the National Historic Preservation Act requires an agency with "jurisdiction over a proposed Federal or federally assisted undertaking in any State . . . prior to the approval of the expenditure of any Federal funds on the undertaking" to "take into account the effect of the undertaking on any historic property." 54 U.S.C. § 306108. The Advisory Council on Historic Preservation (the "Council") promulgates regulations implementing Section 106. *See id.* § 304108(a); 36 C.F.R. pt. 800. "The section 106 process seeks to accommodate historic preservation concerns with the needs of Federal undertakings through consultation

among the agency official and other parties with an interest in the effects of the undertaking on historic properties." 36 C.F.R. § 800.1(a).

An agency must "consult with any Indian tribe . . . that attaches religious and cultural significance to historic properties that may be affected by an undertaking," including properties that are located "off tribal lands." 36 C.F.R. § 800.2(c)(2)(ii)(D). The agency "shall ensure that consultation in the section 106 process provides the Indian tribe . . . a reasonable opportunity to identify its concerns about historic properties, advise on the identification and evaluation of historic properties, including [properties] of traditional religious and cultural importance, articulate its views on the undertaking's effects on such properties, and participate in the resolution of adverse effects." *Id.* § 800.2(c)(2)(ii)(A).

As an alternative to the ordinary Section 106 process, an agency may "develop procedures to implement section 106" that will "substitute" for the ordinary process. 36 C.F.R. § 800.14(a). One type of alternative is "a programmatic agreement to govern the implementation of a particular program or the resolution of adverse effects from certain complex project situations or multiple undertakings." *Id.* § 800.14(b).

II. The Original Programmatic Agreement

The Agency provided federal funds to the state of Rhode Island to support replacing the I-95 Providence Viaduct in Providence, Rhode Island. Compl. (R.1) ¶ 31, JA____. The Agency determined that the proposed highway project would have adverse effects on the Providence Covelands Archaeological District, land that is religiously and culturally significant to the Tribe. *Id.* ¶¶ 34-35. To meet Section 106's requirements, the Agency executed a programmatic agreement with the Rhode Island State Historic Preservation Office, the Rhode Island Department of Transportation (together "Rhode Island"), and the Tribe. *Id.* ¶¶ 36, 38.

The programmatic agreement required Rhode Island to acquire and convey to the Tribe three land parcels that are of religious and cultural significance to the Tribe. Amend. Orig. Agreement (R.49-1), JA____. The agreement called for Rhode Island and the Tribe to own one land parcel jointly and for the Tribe alone to own the two other parcels, subject to appropriate covenants to preserve the property and its cultural resources in perpetuity. *Id.* The agreement did not require the Tribe to waive its tribal sovereign immunity as to these parcels. *Id.*

Eventually, Rhode Island announced that it would not transfer the two parcels to the Tribe unless the Tribe agreed to waive tribal sovereign immunity as to the parcels and execute a covenant to subject the parcels to Rhode Island's laws and jurisdiction. Compl. (R.1) ¶ 49, JA____; Ltr. from Agency to R.I. (R.31-1, AR 139), JA____.[1] The Agency admonished Rhode Island that requiring the Tribe to waive tribal sovereign immunity as a condition to conveying the parcels would violate the agreement, but Rhode Island continued to refuse to convey the parcels absent such a waiver. Compl. (R.1) ¶¶ 50-52, JA____. The Tribe, in turn, deemed Rhode Island's demand unacceptable and refused to waive its tribal sovereign immunity as a condition to the parcels' conveyance. *Id.* ¶¶ 49-54.

On September 1, 2016, the Agency notified Rhode Island that it would withhold all project funds from the state due to the state's refusal to convey the parcels free and clear. Compl. (R.1) ¶ 13, JA____; Ltr. from Agency to R.I. (R.50-1, AR 139-40), JA____. Rhode Island still refused to convey the parcels. *Id.* On January 19, 2017, the Agency terminated the

[1] All citations to "AR #" refer to the corresponding page of the administrative record.

programmatic agreement, citing the "impasse" between Rhode Island and the Tribe. Ltr. from Agency to Council (R.50-1, AR 155-56), JA____.

III. The New Programmatic Agreement

On June 28, 2018, the Agency announced that it would reinitiate the Section 106 process and invited the Tribe to participate. Ltr. from Agency to Council (R.50-2, AR 262), JA____. The Agency proposed that Rhode Island and the Tribe jointly own one parcel of land, as the original agreement had contemplated, but did not propose that Rhode Island convey the other two parcels to the Tribe, instead proposing different mitigation terms. *Id.* The Tribe responded by voicing its dissatisfaction with the Agency's proposed terms. Ltr. from Tribe to Agency (R.50-2, AR 270), JA____. The Agency recognized that the Tribe "generally object[ed]" to the proposed terms and said it would give the Tribe a draft agreement for review and comment and consider all comments carefully in drafting the new agreement. Ltr. from Agency to Tribe (R.50-2, AR 267), JA____.

The Tribe sent the Agency another letter reiterating its discontent with the Section 106 process. Ltr. from Tribe to Agency (R.50-3, AR 492-94), JA___. The Agency sent the Tribe a draft of the new agreement. Ltr. from Agency to Tribe (R.50-3, AR 445), JA____. As proposed, the draft

contemplated that Rhode Island and the Tribe own one parcel jointly, but did not address the other two parcels, instead proposing other mitigation terms. Draft Agreement at 3-5 (R.50-3, AR 448-50), JA____. The Agency also responded to the Tribe's letter, acknowledging the Tribe's "concerns" about the original agreement's termination and promising to consider "all points of view and all information provided, including the information [that] you provided." Ltr. from Agency to Tribe (R.50-2, AR 371), JA____.

The Tribe sent the Agency a letter voicing disapproval of the draft agreement's proposed mitigation terms. Ltr. from Tribe to Agency (R.50-3, AR 499-500), JA____. The Agency sent the Tribe a draft bargain and sale deed for the parcel to be owned jointly with Rhode Island, requesting that the Tribe review it and provide feedback. Ltr. from Agency to Tribe (R.50-3, AR 502), JA____. The Agency also responded to the Tribe's letter, stating that it "has duly noted [the Tribe's] position with respect to the terms of the new [programmatic agreement]," and that it "will schedule a meeting with all consulting and concurring parties to discuss the draft [agreement]." Ltr. from Agency to Tribe at 1 (R.50-3, AR 506), JA____.

The Agency "reiterate[d] that the [Tribe] can convey [its] concerns through participation in the new Section 106 consultation process and by

providing comments to the draft [agreement] as well." Ltr. from Agency to Tribe at 1 (R.50-3, AR 506), JA____. It also expressed its "continued commitment to comply with the requirements set forth in the Section 106 process while providing opportunities to all consulting parties to consider their comments in drafting the new [agreement's] final version," thereby "allowing the I-95 Providence Viaduct Project to move forward." *Id.* at 2.

The Agency sent the Tribe a revised draft agreement and invited it to participate in a meeting "to provide an opportunity to all the parties consulted under Section 106 to present any concerns." Emails (R.50-3, AR 443-44), JA____. The Tribe said that it already "provide[d] comments by way of correspondence" on the proposed mitigation terms, and argued the meeting was "premature and flies in the face of Section 106." Emails (R.50-3, AR 441), JA____; *see also* Email (R.50-3, AR 509), JA____ (stating that the meeting was "premature"). The Agency responded that the meeting was "an additional step provided to all the consulting parties, including the [Tribe], to make sure that we can address collectively any concerns." Emails (R.50-3, AR 508), JA____. The Tribe told the Agency that it would attend the meeting but said it "reserves all of its rights." *Id.*

The Tribe attended the meeting and then sent the Agency a letter expressing five "glaring concerns" with the Section 106 process. Ltr. from Tribe to Agency at 1 (R.50-3, AR 631), JA____. The Agency responded, addressing all five concerns that the Tribe has raised. Ltr. from Agency to Tribe (R.50-3, AR 643-44), JA____. The Tribe later participated in a "consultation meeting" with the Agency in which it offered "proposals for consideration." Ltr. from Tribe to Agency (R.50-3, AR 649), JA____.

The Agency sent the Tribe a third draft of the new agreement and requested comments within thirty days. Ltr. from Agency to Tribe (R.50-4, AR 705), JA____. Prior drafts had proposed conveying a parcel to Rhode Island and the Tribe to own jointly, but the new draft proposed conveying it to Rhode Island only. Emails at 1 (R.50-4, AR 834), JA____. The Agency invited the Tribe to a conference call to discuss the new draft. *Id.* at 5-6.

A day before the call, the Tribe sent the Agency an email voicing its "primary concerns" with the proposed mitigation terms and the Section 106 process in general. Emails at 2. (R.50-4, AR 835), JA____. The Agency responded to the Tribe's email, addressing each point the Tribe raised. *Id.* at 1-2. The Agency stated that it had "taken into consideration all the proposals presented for evaluation, including the" Tribe's proposals, "to

provide commensurate mitigation proportional to the [project's] adverse effects." *Id.* at 1. The Agency also noted that it "provided an opportunity to the Tribe . . . during Nation-to-Nation consultation, to communicate its concerns regarding to the new proposed [agreement]." *Id.*

The Agency explained that it had proposed conveying the parcel to Rhode Island alone as "a result of the Tribe not accepting the conditions stipulated in the Draft Bargain and Sales Deed transmitted to the Tribe . . . for review and comments." Emails at 1. (R.50-4, AR 834), JA____. The Agency also informed the Tribe that it "will be given an opportunity to provide [its] input" concerning a "Management Plan . . . describing how [the disputed] properties would be preserved in perpetuity." *Id.* at 2.

The Agency invited the Tribe to discuss the draft with either "the other Section 106 consulting parties" or with the Agency one on one. Email (R.50-4, AR 775), JA___. The Tribe accused the Agency of playing "a supporting role" in "conspiracy and fraud" with Rhode Island. Email (R.50-5, AR 879), JA____. The Agency responded that it "has taken into consideration the contents of that email" and that it "continued to engage in Nation to Nation consultation on the project and has been working with" the Tribe "to come to resolution on a Programmatic Agreement [ ]

for the [I-95] Viaduct Project." Ltr. from Agency to Tribe (R.50-5, AR 877), JA____. The Agency also said it "addressed the adverse impacts to the Covelands Archaeological District via the [draft] and believe[d] [that] the mitigation outlined [therein] is commensurate with the adverse effects to the site by the proposed project." *Id.* The Tribe responded that the Agency had "answer[ed] our [prior] inquiry." Email (R.50-5, AR 875), JA____.

On September 19, 2019, the Agency executed a new programmatic agreement. Programmatic Agreement (R.50-5, AR 970), JA____. Unlike the earlier agreement, the new agreement did not provide for conveyance of land to the Tribe. *Id.* The new agreement said that "the Narragansett Indian Tribal Historic Preservation Officer [ ] has participated in the consultation and has been invited to sign this [agreement][.]" *Id.* at 2. Despite being designated an "invited signator[y]," the Tribe refused to sign the agreement because it was dissatisfied with its terms. *Id.* at 7.

IV. Procedural History

This is the Tribe's second action raising identical claims against the Agency, and its third action arising from the same overall nucleus of operative facts. Initially, the Tribe sued the Agency in the District of Rhode Island, raising claims "arising out of [Rhode Island's] alleged

breach of a contract." *Narragansett Indian Tribe v. R.I. Dep't of Transp.*, 903 F.3d 26, 30 (1st Cir. 2018).[2] The district court dismissed due to federal sovereign immunity, and the First Circuit affirmed. *Id.*

The Tribe then sued the Agency in the District of Columbia. The Tribe raised two claims under the Administrative Procedure Act ("APA"), arguing that the Agency behaved in an "arbitrary and capricious" way by "terminating the original programmatic agreement" and adopting a new programmatic agreement that contained "mitigation items . . . that the Tribe was never consulted about." *Narragansett Indian Tribe v. Pollack*, Civ. A. No. 20-0576 (RC), 2022 WL 782410, at *3 (D.D.C. Mar. 15, 2022); *see also id.* at *7 n.7 (Tribe challenged both "the termination of the first programmatic agreement" and "formation of the second" agreement). The district court dismissed the Tribe's claims for lack of standing. *Id.* at *8 ("the Court must hold that [the Tribe] has not sufficiently demonstrated standing to survive the Agency's motion to dismiss"). If the Tribe "decides

[2] The Tribe also brought claims against Rhode Island in all three of its suits against the Agency. As Rhode Island no longer is a party to this appeal, *see* Per Curiam Order (Feb. 11, 2025), and the Tribe's claims against Rhode Island do not bear on its claims against the Agency, this narrative focuses on the history of the Tribe's claims against the Agency.

to try again," the court said, it "strongly encourages [the Tribe] to address —separately and clearly—each of the Agency's arguments." *Id.* at *8.

Rather than simply amend its complaint, the Tribe filed a new suit in the District of Columbia on August 3, 2022, raising the same claims against the Agency that it had raised in its most recent suit. Compl. (R.1), JA___. The district court again dismissed the Tribe's claim challenging the original programmatic agreement's termination for lack of standing, concluding that the Tribe did not plausibly allege that its injury traces to the agreement's termination or the relief sought would redress its injury. Order (R.38); Mem. Op. (R.39) at 16-18, JA__-__. It concluded that the Tribe plausibly alleged standing as to the new agreement. *Id.* at 18-21.

The district court later granted the Agency summary judgment as to the Tribe's challenge to the new programmatic agreement, the Tribe's only remaining claim. Order (R.51); Mem. Op. (R.52), JA____-__. In a thorough decision, the district court concluded that, while the Tribe had standing to challenge the new agreement, the agreement did not require the Tribe's signature to take effect under the Section 106 regulations. *Id.* at 9-26. The district court further concluded that the Agency provided a reasoned explanation for requiring the Tribe's signature for the original

agreement but not the new agreement: the original agreement required action on the Tribe's part, whereas the new agreement did not. *Id.* at 26-28. Finally, the district court concluded that the Agency consulted with the Tribe in accordance with Section 106 in adopting the new agreement. *Id.* at 29-33. The Tribe timely filed a notice of appeal.

SUMMARY OF THE ARGUMENT

The Tribe lacks standing. In the Tribe's prior suit, the district court concluded that the Tribe lacks standing to raise the same claim against the Agency that it raises in this lawsuit. The doctrine of issue preclusion prevents the Tribe from relitigating that conclusion now. Regardless, the Tribe fails to show that it satisfies either the traceability or redressability elements of standing. The Tribe cited no evidence that the Agency would have adopted more favorable mitigation measures had it not adopted the new programmatic agreement, or that vacating the agreement would cause the Agency to adopt more favorable mitigation measures now. All it offers on these points is speculative and conclusory assertions.

The Tribe's claim also fails on the merits. The Agency consulted with the Tribe in adopting the agreement. Over nearly fifteen months, the Agency repeatedly sent the Tribe successive drafts of the agreement,

solicited the Tribe's feedback, listened to and addressed its concerns, and met with the Tribe to discuss the agreement's terms. Although the Tribe may be dissatisfied with the mitigation terms that the Agency ultimately adopted, Section 106 did not require the Agency to adopt the Tribe's preferred mitigation terms—only to consult with it. The new agreement also did not require the Tribe's signature in order to take effect, and the Tribe's contrary argument rests on a plain misreading of the Section 106 regulations. Finally, while this Court need not address Amicus Curiae's argument that the Agency failed to explain why the original agreement needed the Tribe's signature to take effect but the new one did not, the Agency offered a legitimate explanation: the original agreement required action on the Tribe's part, whereas the new agreement does not. For these reasons, this Court should affirm the district court's judgment.

STANDARDS OF REVIEW

This Court reviews de novo a district court's grant of summary judgment. *See Hight v. Dep't of Homeland Sec.*, 135 F.4th 996, 1005 (D.C. Cir. 2025). Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). At the summary

judgment stage, a plaintiff "must set forth by affidavit or other evidence specific facts" to establish standing and cannot rely on "mere allegations." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quotation marks omitted). If the plaintiff establishes standing, in a case under the APA, this Court "review[s] the administrative record to determine whether the agency's decision was arbitrary [or] capricious." *New LifeCare Hosps. of N.C., LLC v. Becerra*, 7 F.4th 1215, 1222 (D.C. Cir. 2021).

ARGUMENT

I. The Tribe Lacks Standing

The Tribe lacks standing to challenge the new programmatic agreement.[3] A federal court's jurisdiction is limited only to "Cases" and

[3] The Tribe does not in its opening brief challenge the district court's conclusion that it lacks standing to challenge the original agreement's termination, Mem. Op. (R.39) at 16-18, JA____, and thus forfeits any such argument. *See Int'l Longshore & Warehouse Union v. Nat'l Lab. Rel. Bd.*, 971 F.3d 356, 363 (D.C. Cir. 2020) ("Although a party cannot forfeit a claim that we lack jurisdiction, it can forfeit a claim that we possess jurisdiction"); *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008) ("arguments in favor of subject matter jurisdiction can be waived"); *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) ("A party forfeits an argument by failing to raise it in his opening brief"). Regardless, the Tribe lacks standing to raise such a claim for the reasons that the district court explained. Mem. Op. (R.39) at 16-18, JA____; *cf. Young Am.'s Found. v. Gates*, 573 F.3d 797, 800 (D.C. Cir. 2009) (appellant's "task was to allege facts sufficient to show it is likely" that agency's "withholding or threatening to withhold federal funds would" achieve a desired outcome,

"Controversies." U.S. Const. art. III, § 2. A case or controversy exists only if a plaintiff meets the "three elements" of "the irreducible constitutional minimum of standing." *Lujan*, 504 U.S. at 560. "First, the plaintiff must have suffered an injury in fact." *Id.* (quotation marks omitted). "Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Id.* (cleaned up). And "[t]hird, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Id.* at 561 (quotation marks omitted).

If "traceability and redressability depend on third-party conduct, standing . . . is ordinarily substantially more difficult to establish." *Growth Energy v. EPA*, 5 F.4th 1, 33 (D.C. Cir. 2021). "A permissible theory of standing does not rest on mere speculation about the decisions of third parties; it relies instead on the predictable effect of Government action on the decisions of third parties." *Hawkins v. Haaland*, 991 F.3d 216, 225 (D.C. Cir. 2021) (quotation marks omitted). "Mere unadorned

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but it did "not alleged facts from which we can reasonably infer [a certain actor] could do more than it has done already" to achieve that outcome).

speculation as to the existence of a relationship between the challenged government action and the third-party conduct will not suffice to invoke the federal judicial power." *Scenic Am., Inc. v. Dep't of Transp.*, 836 F.3d 42, 50 (D.C. Cir. 2016) (cleaned up). "The plaintiff must [establish] facts sufficient to demonstrate a substantial likelihood that the third party directly injuring the plaintiff would cease doing so as a result of the relief the plaintiff sought." *Waterkeeper All. v. Regan*, 41 F.4th 654, 660 (D.C. Cir. 2022) (cleaned up). And in all events, "standing to challenge" agency action "cannot be founded merely on speculation as to what third parties will do in response to a favorable ruling." *Id.* at 661.

In the Tribe's earlier suit, the district court concluded that the Tribe lacks standing to raise the same claim that it raises now.[4] The doctrine

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[4] The Tribe does not in its opening brief challenge the district court's conclusion that it lacks standing to challenge the original agreement's termination, Mem. Op. (R.39) at 16-18, JA____, and thus forfeits any such argument. *See Int'l Longshore & Warehouse Union v. Nat'l Lab. Rel. Bd.*, 971 F.3d 356, 363 (D.C. Cir. 2020) ("Although a party cannot forfeit a claim that we lack jurisdiction, it can forfeit a claim that we possess jurisdiction"); *NetworkIP, LLC v. FCC*, 548 F.3d 116, 120 (D.C. Cir. 2008) ("arguments in favor of subject matter jurisdiction can be waived"); *Al-Tamimi v. Adelson*, 916 F.3d 1, 6 (D.C. Cir. 2019) ("A party forfeits an argument by failing to raise it in his opening brief"). Regardless, the Tribe lacks standing to raise such a claim for the reasons that the district court explained. Mem. Op. (R.39) at 16-18, JA____; *cf. Young Am.'s Found. v. Gates*, 573 F.3d 797, 800 (D.C. Cir. 2009) (appellant's "task was to allege

of issue preclusion prevents the Tribe from relitigating that conclusion here. Regardless, the Tribe fails to demonstrate that it satisfies either the traceability or redressability elements of Article III standing.

A. Issue Preclusion Prevents the Tribe From Relitigating the District Court's Conclusion That It Lacks Standing

The doctrine of "issue preclusion, also known as collateral estoppel . . . precludes a party from relitigating an issue actually decided in a prior case and necessary to the judgment." *Brownback v. King*, 592 U.S. 209, 215 n.3 (2021).[5] Put simply, "the general rule is that when an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim." *B & B Hardware, Inc. v. Hargis Indus., Inc.*, 575 U.S. 138, 148 (2015) (quotation marks omitted). Thus, "once a court

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facts sufficient to show it is likely" that agency's "withholding or threatening to withhold federal funds would" achieve a desired outcome, but it did "not alleged facts from which we can reasonably infer [a certain actor] could do more than it has done already" to achieve that outcome).

[5] Issue preclusion is distinct from claim preclusion, which "prevents parties from relitigating the same claim or cause of action, even if certain issues were not litigated in the prior action." *Brownback*, 592 U.S. at 215 n.3 (quotation marks omitted). Both are aspects of "res judicata." *Id.*

has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit . . . involving a party to the first case." *Klayman v. Rao*, 49 F.4th 550, 553 (D.C. Cir. 2022).

"Issue preclusion applies to threshold jurisdictional issues like standing." *Nat'l Ass'n of Home Builders v. EPA*, 786 F.3d 34, 41 (D.C. Cir. 2015). As such, "a jurisdictional dismissal . . . may preclude relitigation of the precise issues of jurisdiction adjudicated." *Id.* (cleaned up). "That is, . . . the dismissal of a complaint for lack of jurisdiction . . . adjudicate[s] the court's jurisdiction, and a second complaint cannot command a second consideration of the same jurisdictional claims." *Id.* (cleaned up); *see also Underwriters Nat'l Assur. Co. v. N. Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 455 U.S. 691, 706 (1982) ("principles of res judicata apply to questions of jurisdiction as well as to other issues" (cleaned up)); *Jackson v. Off. of the Mayor of D.C.*, 911 F.3d 1167, 1171 (D.C. Cir. 2018) ("A dismissal for lack of jurisdiction does preclude relitigation of the precise issue of jurisdiction that led to the initial dismissal" (cleaned up)).

If a case is dismissed on jurisdictional grounds, a party cannot avoid issue preclusion merely by pleading new jurisdictional facts that existed at the time of the dismissal. Rather, the party can "establish jurisdiction

in a subsequent case only if a material change following dismissal cured the original jurisdictional deficiency." *Home Builders*, 786 F.3d at 41. The party thus can defeat issue preclusion only by citing facts that occurred "subsequent to the original dismissal"—not facts that existed when the dismissal occurred. *Id.* (emphasis omitted); *see also GAF Corp. v. United States*, 818 F.2d 901, 912 (D.C. Cir. 1987) (new facts "tending to 'cure' the jurisdictional deficiency" must have occurred "subsequent to the initial dismissal"); *Dozier v. Ford Motor Co.*, 702 F.2d 1189, 1193 n.4 (D.C. Cir. 1983) (the party must be "relying upon a new fact or occurrence, and not merely relying upon those that existed at the time of the first dismissal").

Issue preclusion bars the Tribe's claims. In its prior suit, the district court concluded that the Tribe lacked standing to raise the same claim at issue here—a claim under the APA challenging the Agency's adoption of the new agreement. *See Narragansett Indian Tribe*, 2022 WL 782410, at *8 ("Accordingly, the Court must hold that [the Tribe] has not sufficiently demonstrated standing to survive the Agency's motion to dismiss."). The Tribe attempted to cure the jurisdictional defects that the district court identified when it filed its complaint in this action, *see* Compl. (R.1) at 2, ¶¶ 6-16, JA___, but all of the Tribe's newly identified facts "existed at the

time of the first dismissal," *Dozier*, 702 F.2d at 1193 n.4. None of the new facts occurred "subsequent to the original dismissal," *Home Builders*, 786 F.3d at 41. For these reasons, issue preclusion bars the Tribe's claims. *See id.*; *Underwriters Nat'l*, 455 U.S. at 706; *Jackson*, 911 F.3d at 1171.

Although the Agency did not move for, and the district court did not grant, summary judgment on the basis of issue preclusion, this Court can affirm on that ground nonetheless. This Court "can affirm a district court judgment on any basis supported by the record, even if different from the grounds the district court cited." *Parsi v. Daioleslam*, 778 F.3d 116, 126 (D.C. Cir. 2015). Because issue preclusion "belongs to courts as well as to litigants, even a party's forfeiture of the right to assert it—which has not happened here . . . —does not destroy a court's ability to consider the issue sua sponte." *Stanton v. D.C. Court of Appeals*, 127 F.3d 72, 77 (D.C. Cir. 1997), (emphasis omitted); *see also SBC Commc'ns Inc. v. FCC*, 407 F.3d 1223, 1230 (D.C. Cir. 2005) (reaffirming this rule and observing that issue preclusion "ha[s] a somewhat jurisdictional character"). "Concern for the efficient use of adjudicative resources seems even more compelling here," *Brown v. Wheat First Sec., Inc.*, 257 F.3d 821, 827-28 (D.C. Cir. 2001), as addressing issue preclusion would enable this Court to resolve

the entire appeal without addressing any other issues. Finally, "the only prejudice that [the Tribe] will suffer is the prejudice that comes from having a losing argument," which is not cognizable. *Id.* at 828.

In any event, the Agency preserved its issue preclusion argument. The Agency pleaded issue preclusion as an affirmative defense when it filed its answer. *See* Answer (R.24) at 11, JA___ ("Claim and/or issue preclusion bar Plaintiff's claims."). It did not need to move for summary judgment on that ground, as well, in order to preserve the issue. *See, e.g.*, Fed. R. Civ. P. 56(a) ("A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought."); Fed. R. Civ. P. 56(a) advisory comm.'s notes to 2010 amend. ("summary judgment may be requested not only as to an entire case but also as to a claim, defense, or part of a claim or defense"); *BBL, Inc. v. City of Angola*, 809 F.3d 317, 325 (7th Cir. 2015) (Rule 56 "explicitly allow[s] for partial summary judgment" (cleaned up)).

Indeed, this Court has addressed issue preclusion under analogous circumstances. In *Stanton*, 127 F.3d at 76, for example, the defendant successfully moved to dismiss without raising issue preclusion, and then raised that defense for the first time on appeal. Although the defendant

"ha[d] an opportunity to make this argument below" yet did not do so, this Court nonetheless addressed it, reasoning that "if a party that fails to assert res judicata in [motion to dismiss] is sleeping on its rights, it is an inconsequential catnap; we know of no case in which a court has prevented a party from pleading res judicata in its answer simply because it failed to do so in an earlier motion to dismiss." *Id.* The Court noted that "[i]f prevented from making its res judicata arguments to us on this appeal, the [defendant] could simply present them in its answer on remand," and "conceive[d] of no reason for such judicial volleyball," especially as "resolution of the issue on appeal would [not] prejudice" the plaintiff. *Id.* Because there was "no prejudice to the plaintiff, no forfeiture has yet occurred, the relevant facts [were] uncontroverted in the record . . . and denial would only engender delay," this Court was "willing to consider the defense for the first time on appeal." *Id.* The Court later reaffirmed *Stanton* in *Brown*, 257 F.3d at 827, explaining that a party can "raise res judicata for the first time on appeal [if] there was no forfeiture and the claim could be successfully raised below on remand."

Applying *Stanton* and *Brown*, the Agency has not forfeited issue preclusion. Any factual distinction between those cases and this case is

one that cuts in the Agency's favor: in those cases, the defendants had not raised the defense of issue preclusion in theirs answers (because they had prevailed in moving to dismiss before their answers were due), *see* *Stanton*, 127 F.3d at 76; *Brown*, 257 F.3d at 827, whereas the Agency squarely raised the defense in its answer, *see* Answer (R.24) at 11, JA___. Finally, the relevant facts are undisputed, and the Tribe has an adequate opportunity to respond to the issue preclusion argument in its reply brief.

Issue preclusion thus bars the Tribe's effort to relitigate the district court's prior conclusion that the Tribe lacks standing to raise its claims.

B. The Tribe Fails to Establish that It Satisfies Either the Traceability or Redressability Elements of Standing

The Tribe fails to show that it satisfies either the traceability or the redressability elements of standing to challenge the new programmatic agreement. The Tribe argues the Agency could have adopted more favorable mitigation measures had it not adopted the new programmatic agreement, and that vacating the agreement could cause the Agency to adopt such measures. According to the Tribe, the Agency could (1) "decide that alternative properties should be managed by the Tribe as mitigation," (2) give the Tribe "funding to develop its own mitigation

measures," or (3) seek "some other form of mitigation." Tribe's Br. at 19.[6] Such arguments fail because the Tribe offers no evidence that the Agency would have adopted any of these vague, under-developed measures but for the new agreement or would adopt them were the agreement vacated —only speculative and conclusory assertions, which do not suffice to show traceability or redressability. The Tribe thus fails to establish standing.

First, the Tribe fails to show that it and Rhode Island would be able to agree on mutually acceptable terms by which the Tribe would manage any "alternative properties." Tribe Br. at 19. To the contrary, given Rhode Island's "aims, incentives, and independent decisionmaking authority, that outcome is particularly unlikely." *Hecate Energy LLC v. Fed. Energy Regul. Comm'n*, 126 F.4th 660, 667 (D.C. Cir. 2025); *see also St. John's United Church of Christ v. FAA*, 550 F.3d 1168, 1170 (D.C. Cir. 2008) (plaintiff lacked standing because it failed to show that "renegotiations" with a third party were likely to result in a favorable outcome); *Vill. of*

[6] These are the only mitigation measures that the Tribe argues in its opening brief the Agency could have adopted but for—and could adopt if the district court vacates—the new agreement. *See* Tribe's Br. at 19. It thus forfeits any argument based on other measures. *See Int'l Longshore*, 971 F.3d at 363; *NetworkIP*, 548 F.3d at 120; *Al-Tamimi*, 916 F.3d at 6.

Bensenville v. FAA, 457 F.3d 52, 70 (D.C. Cir. 2006) (no standing because "further negotiations" with third party unlikely to yield favorable result).

After all, Rhode Island refused to convey land to the Tribe unless the Tribe agreed to waive its tribal sovereign immunity, which the Tribe refused to do, after extended negotiations resulted only in an intractable impasse. *See* Compl. (R.1) ¶¶ 49-52, JA____; Ltr. from Agency to R.I. (R.31-1, AR 139), JA____. Given these facts, the Tribe offers no evidence (and the record offers reason to doubt) that Rhode Island would be willing to convey "alternative properties," Tribe Br. at 19, to the Tribe without requiring a waiver of tribal sovereign immunity. Nor did the Tribe offer any evidence that it would agree to waive its tribal sovereign immunity in return for such properties, especially given its earlier refusal to do so.

The Tribe also adduced no evidence that it would agree to manage "alternative properties," Tribe's Br. at 19, for Rhode Island without even receiving title to them. Beyond being entirely speculative, conclusory, and underdeveloped, such an arrangement would be even worse for the Tribe, from its perspective, than the arrangement that Rhode Island had tried to foist upon it earlier, which it had refused: it would neither enjoy tribal sovereign immunity as to those properties nor receive title to them.

Given this uncertainty, the Tribe had to adduce evidence that it and Rhode Island would be able to reach agreement on mutually acceptable terms by which the Tribe would manage alternative properties in order to establish standing. *See Lujan*, 504 U.S. at 560; *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.*, 366 F.3d 930, 938 (D.C. Cir. 2004) (if "causation and redressability . . . hinge on the independent choices of [a] third party, it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability" (cleaned up)). Absent any evidence, the notion that the Tribe and Rhode Island would manage to reach agreement on mutually acceptable terms is "speculation." *Growth Energy*, 5 F.4th at 33.

The Tribe could have attempted to satisfy this burden by, to offer an example, providing a declaration attesting that it would be willing to manage specific alternative properties for Rhode Island without receiving title to this land. *See Lujan*, 504 U.S. at 563 ("To survive the Secretary's summary judgment motion, respondents had to submit affidavits or other evidence showing, through specific facts, not only that listed species were in fact being threatened by funded activities abroad, but also that one or more of respondents' members would thereby be directly affected apart

from their special interest in the subject." (cleaned up)). The Tribe offered no such evidence, however, and cannot plug that evidentiary gap for the first time on appeal. *See, e.g.*, *Util. Workers Union of Am. Loc. 464 v. Fed. Energy Regul. Comm'n*, 896 F.3d 573, 578 (D.C. Cir. 2018) ("We require more than representations of counsel to establish standing" (cleaned up)); *Sierra Club v. EPA*, 292 F.3d 895, 901 (D.C. Cir. 2002) ("mere allegations in [a] brief . . . are not evidence" (quotation marks omitted)).

The procedural nature of the Tribe's asserted injury does not affect this analysis. "The relaxation of" standing requirements "for procedural injuries . . . applies only to the Agency's actions, not to third parties." *Food & Water Watch v. Dep't of Agric.*, 1 F.4th 1112, 1116 n.2 (D.C. Cir. 2021). A plaintiff thus must "satisfy the normal standard[s]" for standing, not relaxed standards, if the "obstacle [it] face[s] is uncertainty over what [a third party] would do—not the [agency]." *St. John's United Church of Christ v. FAA*, 520 F.3d 460, 463 (D.C. Cir. 2008); *see also Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 5 (D.C. Cir. 2005) ("The relaxation of procedural standing requirements would excuse [plaintiff] from having to prove the causal relationship regarding [agency's] action, but its burden regarding the action of [third parties] would not change").

The obstacle that the Tribe faces to any arrangement by which the Tribe would manage alternative properties is not the Agency, but rather, Rhode Island—specifically, the state's refusal to offer terms for an agreement that the Tribe would accept. As such, the procedural nature of the Tribe's injury cannot relieve it of the need to satisfy ordinary standing rules.

The district court never concluded that the Tribe is able to satisfy ordinary standing requirements. The district court instead reasoned that because the Tribe asserts a procedural injury, it need only satisfy relaxed traceability and redressability rules—i.e., that the Agency merely could, not would, have adopted more favorable mitigation measures had it not adopted the programmatic agreement, and that vacating the agreement merely could, not would, cause the Agency to adopt such measures now. *See* Mem. Op. (R.52) at 9-17, JA___. That, as explained, misunderstands the applicable legal standard. After all, Rhode Island is a freestanding obstacle to the Tribe's desired outcome here, so the Tribe must satisfy the ordinary standing rules, rather than relaxed rules. *See Food & Water*, 1 F.4th at 1116 n.2; *St. John's*, 520 F.3d at 463. And as explained above, the Tribe fails to establish that it and Rhode Island would, not just could, agree on terms by which it would manage the alternative properties.

Second, the Tribe's bare assertion that it can use Agency "funds" to "develop [its] own methods of mitigation," Tribe Br. at 19, is conclusory. The Tribe fails to say *how* it could use Agency funds to mitigate the I-95 Viaduct project's impact on the historic properties. It provides only the conclusory assertion that it can use Agency funds to develop some sort of mitigation measure, in some unspecified way, with no other detail. Such "conclusory assertions are not evidence of standing." *Racing Enthusiasts & Suppliers Coal. v. EPA*, 45 F.4th 353, 357 (D.C. Cir. 2022) (cleaned up); *accord Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990) ("conclusory allegations" are insufficient to show a genuine dispute as to standing).

Although standing rules are "relax[ed]" when the plaintiff asserts a procedural injury, they are "not wholly eliminat[ed]." *Growth Energy*, 5 F.4th at 27. Even under the relaxed rules that govern procedural injuries, a bare assertion that the Tribe could use Agency funds to develop its own mitigation measures, without saying how, is too little for traceability or redressability. *See id.*; *Narragansett Indian Tribal Historic Pres. Off. v. Fed. Energy Regul. Comm'n*, 949 F.3d 8, 13 (D.C. Cir. 2020) ("[P]rocedural rights claims are subject to a less demanding redressability requirement. . . . But a wholly speculative prospect of redress still does not pass

muster."); *Racing Enthusiasts*, 45 F.4th at 357; *Lujan*, 497 U.S. at 888. To credit such wholly conclusory assertions would "allow Plaintiffs [to] rely on their ipse dixit to establish standing." *Whitewater Draw Nat. Res. Conservation Dist. v. Mayorkas*, 5 F.4th 997, 1018 (9th Cir. 2021).

Contrary to the Tribe's assertion, *see* Tribe's Br. at 19, the Agency never considered the option of providing the Tribe funds so that it could develop its own mitigation measures. That assertion rests on an incorrect reading of the administrative record. The Agency merely informed Rhode Island that "it is allowable for [Rhode Island] to make a payment directly to the [Tribe] to allow them to develop their own methods for mitigation for the impacts of the Providence Viaduct construction, provided that the funding source for the payment is non-federal (state funds)." Ltr. from Agency to R.I. (R. 50-1). JA____. In other words, the Agency said only that Rhode Island can give the Tribe its own (state) funds for the Tribe to use toward developing its own mitigation measures. *Id.* The Agency never considered giving the Tribe federal funds to develop mitigation measures.

And even putting that aside, the Agency never said that the Tribe would or could be able to use any such funds to develop its own mitigation measures. Rather, the Agency said only that it would be permissible for

Rhode Island to give the Tribe state funds for that purpose, without ever indicating that the Tribe would or could succeed in developing its own mitigation measures if given such funds. Ltr. from Agency to R.I. (R. 50-1). JA____. At most, the Agency merely contemplated the possibility that the Tribe might succeed in developing mitigation measures if given funds to do so, without ever concluding that the Tribe's efforts would or could succeed. Accordingly, although a plaintiff can rely on an "agency's own factfinding" to demonstrate traceability and/ redressability, *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 114 (D.C. Cir. 1990), the Agency never found that the Tribe would or could develop its own mitigation measure if given the funding to do so.[7] The Tribe's assertion that the Agency considered giving it funds to develop its own mitigation measures rests on a misunderstanding of the record.

Third, the Tribe's assertion that the Agency can pursue "some other form of mitigation," without saying how, Tribe Br. at 19, is the epitome

[7] The Tribe never argued that the Agency's failure to provide it funds to develop its own mitigation measures is a freestanding injury in fact. *See* Compl. ¶ 6 (R.1), JA____. Rather, the Tribe argued that the Agency could have given, and still can give, it funds to develop its own mitigation measures only in the context of arguing traceability and redressability.

of conclusory, and thus insufficient to show standing. *See Lujan*, 497 U.S. at 888; *Racing Enthusiasts*, 45 F.4th at 357. There would be little point to standing were such a bare assertion enough. *See Whitewater Draw*, 5 F.4th at 1018. Crediting this conclusory assertion was the third error in the district court's standing analysis. *See* Mem. Op. (R.52) at 14, JA___.

For all these reasons, the Tribe fails to establish either traceability or redressability as to its challenge to the new programmatic agreement.

II. The New Programmatic Agreement Was Not Arbitrary, Capricious, an Abuse of Discretion, or Contrary to Law

The APA authorizes a court to hold unlawful and set aside agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). The new programmatic agreement easily clears this low bar. The Agency amply satisfied Section 106's minimal procedural obligations by consulting extensively with the Tribe over the course of nearly fifteen months prior to adopting the new agreement. And contrary to the Tribes' argument, the Agency did not require the Tribe's signature in order to take effect because the I-95 Viaduct project is not on tribal lands. Last, although this Court need not address Amicus Curiae's argument that the Agency failed to explain why the original agreement needed the Tribe's signature to take effect but the

new one did not, the Agency offered a legitimate explanation: the original agreement required action on the Tribe's part, but the new one does not.

A. The Agency Consulted with the Tribe in Adopting the New Agreement

"Congress intended [for Section 106] to have a limited reach." *Lee v. Thornburgh*, 877 F.2d 1053, 1056 (D.C. Cir. 1989). "An essentially procedural statute, section 106 imposes no substantive standards on agencies." *Nat'l Min. Ass'n v. Fowler*, 324 F.3d 752, 755 (D.C. Cir. 2003) (cleaned up). It merely requires an agency "to solicit [consulting parties'] comments and to take into account the effect of their undertakings" on historic properties. *Id.* (cleaned up). "The Section 106 process requires" only "that an agency consider the impacts of its undertaking and consult various parties, not that [an agency] necessarily engage in any particular preservation activities." *United Keetoowah Band of Cherokee Indians in Okla v. FCC*, 933 F.3d 728, 734 (D.C. Cir. 2019) (cleaned up). The term "consultation," under the Section 106 regulations, means "the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process." 36 C.F.R. § 800.16(f).

The Agency amply satisfied its duty to consult with the Tribe in adopting the new programmatic agreement. Over nearly fifteen months, the Agency repeatedly sent the Tribe successive drafts of the proposed new agreement, solicited the Tribe's feedback on these drafts, met with the Tribe in person and communicated with it in writing, listened to the Tribe's concerns, and responded to its concerns. *See supra* at 8-13. This exhaustive "process of seeking, discussing, and considering the [Tribe's] views . . . was sufficient here, especially since the [Tribe] participated and could have raised its concerns." *Eagle Cnty. v. Surface Transp. Bd.*, 82 F.4th 1152, 1189 (D.C. Cir. 2023).[8] In a nutshell, the Agency "invited the Tribe's participation . . . and engaged with the Tribe," and thus "satisfied its consultation obligations." *Oglala Sioux Tribe v. Nuclear Regul.*

[8] The Supreme Court recently vacated the D.C. Circuit's judgment on other grounds, holding that the D.C. Circuit misapplied the National Environmental Policy Act. *See Seven Cnty. Infrastructure Coal. v. Eagle Cnty.*, No. 23-975, 2025 WL 1520964 (U.S. May 29, 2025). The Supreme Court did not disturb the D.C. Circuit's analysis of the National Historic Preservation Act, which remains binding precedent. *See United States v. Adewani*, 467 F.3d 1340, 1342 (D.C. Cir. 2006) ("When the Supreme Court vacates a judgment of [the D.C. Circuit] without addressing the merits of a particular holding in the panel opinion, that holding continues to have precedential weight, and in the absence of contrary authority, we do not disturb it." (cleaned up)); *Action All. of Senior Citizens of Greater Phila. v. Sullivan*, 930 F.2d 77, 83 (D.C. Cir. 1991) (same).

Comm'n, 45 F.4th 291, 306 (D.C. Cir. 2022). The Tribe's insistence that the Agency somehow refused to "ensure [that its] views were part of the Section 106 process," Tribe's Br. at 12, simply defies the record.

Indeed, although the Tribe tries to cast its arguments in procedural parlance, the essence of its grievance plainly is that the Agency did not adopt its preferred mitigation terms. But Section 106 did not require the Agency to adopt the Tribe's preferred mitigation terms, or indeed, any specific terms at all—rather, its requirements are purely procedural. *See United Keetoowah*, 933 F.3d at 734; *Fowler*, 324 F.3d at 755. The Agency needed only "to seek, discuss, and consider the views of the Tribes, even if it did not ultimately adopt those views." *United Keetoowah*, 933 F.3d at 751 (cleaned up). That is precisely what it did. The Tribe's dissatisfaction with the agreement's terms does "not vitiate the reasonable opportunity the Tribe was, in fact, afforded." *Oglala Sioux Tribe*, 45 F.4th at 306.

Finally, to the extent that the Tribe argues that the Agency failed to consult with it because it did not obtain the Tribe's signature, any such argument is meritless. As explained above, the programmatic agreement did not require the Tribe's signature to take effect. *See supra* § II.A. Nor does consultation inherently mean getting a consulting party's approval

of a programmatic agreement. Rather, "[c]onsultation means the process of seeking, discussing, and considering the views of other participants, and, where feasible, seeking agreement with them regarding matters arising in the section 106 process," which means that an agency need not obtain a consulting party's agreement to the programmatic agreement when doing so is infeasible. 36 C.F.R. § 800.16(f) (emphasis omitted).

B. The New Agreement Did Not Require the Tribe's Signature to Take Effect

A programmatic agreement needs a tribe's signature to take effect only if it concerns an undertaking on tribal lands. It does not require a tribe's signature if it concerns an undertaking off tribal lands, even if that land is religiously and culturally significant to the tribe. The I-95 Viaduct project did not occur on tribal lands, so the new programmatic agreement did not require the Tribe's signature to take effect. The Tribe's argument to the contrary rests on a plain misreading of the Section 106 regulations.

The Section 106 regulations distinguish between undertakings on tribal lands and undertakings on non-tribal lands that are religiously and culturally significant to a tribe. "Tribal lands means all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities," 36 C.F.R. § 800.16(x), i.e., lands over which the tribe "ha[s]

jurisdiction," *id.* § 800.14(f)(1). The Section 106 regulations distinguish tribal lands from "historic properties of religious and cultural significance to an Indian tribe . . . which are located off tribal lands." *Id.* § 800.14(f)(1).

A programmatic agreement needs a tribe's signature to take effect only if the undertaking is on tribal lands, not if it is on non-tribal lands that are religiously and culturally significant to a tribe. "A programmatic agreement shall take effect on tribal lands only when the [Tribal Historic Preservation Officer], Indian tribe, or a designated representative of the tribe is a signatory to the agreement." 36 C.F.R. § 800.14(b)(2)(iii). In contrast, an agency "may," but is not required to, "invite an Indian tribe . . . that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties." *Id.* § 800.6(c)(2)(ii). The Supreme Court "has repeatedly observed that the word 'may' clearly connotes discretion." *Biden v. Texas*, 597 U.S. 785, 802 (2022) (cleaned up); *see also, e.g.*, *Perry Capital LLC v. Mnuchin*, 864 F.3d 591, 607 (D.C. Cir. 2017) ("'may' is, of course, permissive rather than obligatory" (quotation marks omitted)).

The I-95 Viaduct project is not on tribal lands. *See* Mem. Op. (R.52) at 22, JA____ ("So far as the Court can tell based on the administrative

record, the I-95 Viaduct Bridge construction project is located in the city of Providence. . . and not within the Narragansett reservation"); Ltr. from Agency to Tribe (R.50-3, AR 644), JA____ ("The project's adverse effects to historic properties are not on Tribal land"). The Tribe appears to resist this point, insisting that the project was "on Tribal Lands." Tribe's Br. at 22 (cleaned up). But there is no genuine dispute that the project did not occur on the Tribe's reservation land. Rather, the Tribe's argument seems to be that the phrase "tribal lands" is not limited to "the Tribe's Federal Reservation Land." *Id.* Not so. The Section 106 regulations define the phrase "tribal lands" to mean "all lands within the exterior boundaries of any Indian reservation and all dependent Indian communities," 36 C.F.R. § 800.16(x), i.e., those lands over which the Tribe "ha[s] jurisdiction," *id.* § 800.14(f)(1). The project was not on the Tribe's reservation land or other land within the Tribe's jurisdiction, so it did not occur on "tribal lands."

Alternatively, the Tribe might be arguing that what matters is that land that Rhode Island was to convey to it, not the undertaking itself, constitutes "tribal lands," but any such argument fails both factually and legally. Factually, nothing in the record suggests that those parcels are tribal lands. To the contrary, the very fact that the Tribe demanded to be

given these parcels as a term of the programmatic agreement virtually proves the Tribe does not already own them. And legally, consultation is necessary only if "the undertaking" itself "may occur on or affect historic properties on any tribal lands." 36 C.F.R. § 800.3(c). Accordingly, Section 106 requires "consultation with [an] Indian tribe regarding undertakings occurring on such tribe's lands or effects on such tribal lands," not when the undertaking itself does not concern or affect tribal land. *Id.* § 800.3(d). Finally, even assuming arguendo that the original agreement needed the Tribe's signature to take effect because it involved conveying certain land parcels to the Tribe, the new agreement does not involve those parcels at all, so there is no reason why it would require the Tribe's signature.

Because the I-95 Viaduct project is not on tribal lands, the new agreement did not need the Tribe's signature to take effect. *See* 36 C.F.R. §§ 800.6(c)(2)(ii), 800.14(b)(2)(iii). The Tribe's argument to the contrary rests on a plain misreading of a regulation. The Tribe gestures toward 36 C.F.R. § 800.6(c)(1)(i), which states that "the [State Historic Preservation Officer]/[Tribe Historic Preservation Officer] are the signatories to a memorandum of agreement." Tribe's Br. at 24, 32. This regulation, it argues, means that both a tribe and a state must sign an agreement. *Id.*

That is incorrect. 36 C.F.R. § 800.6(c)(1)(i) uses a forward slash, also called a "virgule," to separate the phrases "State Historic Preservation Officer" and "Tribal Historic Preservation Officer." And semantically, "a virgule normally is used to separate alternatives." *Dynalectron Corp. v. Equitable Tr. Co.*, 704 F.2d 737, 739 (4th Cir. 1983); *see also, e.g.*, *United States v. Almazan-Becerra*, 482 F.3d 1085, 1090 (9th Cir. 2007) ("the use of the virgule (/) sign . . . indicates . . . the disjunctive"); *Heritage Bank v. Redcom Lab'ys, Inc.*, 250 F.3d 319, 326 (5th Cir. 2001) ("The virgule separating the two terms signifies that [a person] may provide either" of two options); *United States v. Owens*, 904 F.2d 411, 414 (8th Cir. 1990) ("a 'virgule' . . . ordinarily means 'or'"). Section 800.6(c)(1)(i)'s use of a virgule accordingly means that a programmatic agreement requires the signature of either a state or a tribe, but not the signatures of both.

The Tribe's position, meanwhile, conflicts with three other Section 106 regulations. First, under 36 C.F.R. § 800.6(c)(2)(ii), an agency "may invite an Indian tribe . . . that attaches religious and cultural significance to historic properties located off tribal lands to be a signatory to a memorandum of agreement concerning such properties." This provision, as explained, allows—but does not require—an agency to invite a tribe

that attaches religious and cultural significance to a historic property to sign an agreement concerning that property. *See Biden*, 597 U.S. at 802; *Perry Capital*, 864 F.3d at 607. To say that the new agreement required the Tribe's signature to take effect even though the project is not on tribal lands would render 36 C.F.R. § 800.6(c)(2)(ii) superfluous. *See Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 668 (2007) (rejecting a "reading [that] would render the regulation entirely superfluous").

Second, 36 C.F.R. § 800.14(b)(2)(iii) states that "[a] programmatic agreement shall take effect on tribal lands only when the [Tribal Historic Preservation Officer], Indian tribe, or a designated representative of the tribe is a signatory to the agreement." This regulation likewise would be superfluous if a tribe's signature is required every time a programmatic agreement takes effect on land that is religiously or culturally significant to a tribe, even if the land is not tribal land, not only when an agreement takes effect on tribal land. *See Home Builders*, 551 U.S. at 668.

Third, 36 C.F.R. § 800.6(c)(3) states that an agency "may invite all consulting parties to concur" in an agreement (which does not necessarily entail being a signatory to the agreement), but need not do so. *See Biden*, 597 U.S. at 802; *Perry Capital*, 864 F.3d at 607. The fact that an agency

need not even let a consulting party concur in an agreement shows that a right to be consulted does not necessarily entitle one to be a signatory.

For all these reasons, the regulations make clear that the Tribe was not entitled to be a signatory to the agreement. And even were that not clear already, Council guidance explains that a programmatic agreement requires a tribe's signature in order to take effect only when it concerns an undertaking on tribal lands. *See* Guidance at 26-27 (R.49-1, AR 30-31), JA___-__ ("the agency may, but is not required to, invite an Indian tribe to become a signatory or concurring party when the undertaking or affected historic properties are not on tribal lands". . . . Refusal by an Indian tribe to become a signatory or concurring party to [an agreement] for an undertaking on non-tribal lands, however, does not invalidate it. . . . consulting parties, including Indian tribes, may decline to participate, but they cannot terminate consultation."). To the extent the regulations are "genuinely ambiguous," the Council's guidance is "reasonable," "actually made by the agency," "implicate[s] its substantive expertise," and reflects its "fair and considered judgment," and, as such, merits deference. *Kisor v. Wilkie*, 588 U.S. 558, 574-75, 577, 579 (2019).

For the same reasons, the Council's guidance at a minimum "has the power to persuade" even if no deference is merited. *Kisor*, 588 U.S. at 573 (quotation marks omitted). Indeed, this Court and others have relied on the Council's guidance in resolving Section 106 issues. *See, e.g.*, *United Keetoowah Band*, 933 F.3d at 746-47 (considering Council's guidance in elucidating Section 106 process and affirming agency action because it was "consistent with the Advisory Council's preexisting guidance"); *Bus. & Residents All. of E. Harlem v. Jackson*, 430 F.3d 584, 589 n.6, 593 (2d Cir. 2005) ("our conclusion . . . is shared by the [Council], the agency that is itself charged with overseeing the Section 106 review process. . . . This assessment . . . to which we owe respect . . . to the extent that it has the power to persuade . . . accords with and provides further support for our conclusion"); *see also Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1088 (D.C. Cir.), *am. on reh'g in unrelated part*, 925 F.3d 500 (D.C. Cir. 2019) (considering the Council's National Historic Preservation Act guidance as Council is "responsible for administering" the statute).

The Tribe appears to conflate the Agency's obligation to consult it with a duty to obtain its signature for a programmatic agreement. As the foregoing discussion makes clear, however, an agency's duty to consult

with a tribe does not necessarily require it to obtain the tribe's signature for a programmatic agreement. Whether or not an agency must obtain a tribe's signature for a programmatic agreement is a conceptually distinct inquiry from whether the agency must consult with a tribe at all.

This is not to say, as the Tribe's straw-man argument inaccurately posits, that "the Section 106 process . . . limit[s] the Tribe's role to only . . . properties on Tribal reservation lands." Tribe's Br. at 1. The Agency's argument is narrower and closely tracks the Section 106 regulations' plain language: a tribe is entitled to be *consulted* about an undertaking that occurs on non-tribal land that is of religious and cultural significance to it, but a programmatic agreement governing that undertaking does not require the tribe's signature to take effect. *See* 36 C.F.R. §§ 800.6(c)(2)(ii), (c)(iii), 800.14(b)(2)(iii). Simply put, the regulations do not give a tribe a veto over projects that do not take place on its own land. The Tribe cites no case that has construed the regulations to give it such a veto, and their plain text refutes that idea. *See Chao v. Day*, 436 F.3d 234, 235 (D.C. Cir. 2006) ("Our analysis begins, as always, with the text . . . . Where, as here, it is plain and unambiguous, our analysis ends with the text as well").

For all these reasons, the new programmatic agreement did not require the Tribe's signature to take effect.

C. The Agency Reasonably Explained Why the Original Agreement Needed the Tribe's Signature to Take Effect But the New Agreement Did Not

Although Amicus Curiae argues that the Agency "fail[ed] to provide a sufficient explanation for treating [the Tribe] differently across the two [agreements]," Amicus Br. at 15, the Tribe does not raise this argument, so this Court need not address it. *See Narragansett Indian Tribe v. Nat'l Indian Gaming Comm'n*, 158 F.3d 1335, 1338 (D.C. Cir. 1998) (refusing to consider amicus's argument "[b]ecause we ordinarily do not entertain arguments not raised by parties"); *Huerta v. Ducote*, 792 F.3d 144, 151 (D.C. Cir. 2015) ("ordinarily this court will not entertain an amicus's argument if not presented by a party"); *Al-Tamimi*, 916 F.3d at 6.

Regardless, Amicus Curiae's argument is meritless. Amicus Curiae appears to refer to the fact that the original programmatic agreement needed the Tribe's signature to take effect, whereas the new agreement did not. *See* Orig. Agreement (R.50-5, AR 976), JA____; New Agreement (R.50-5, AR 1221), JA____. But "[a]n agency is free to change its mind so long as it supplies a reasoned analysis. *Anna Jaques Hosp. v. Sebelius*,

583 F.3d 1, 6 (D.C. Cir. 2009) (cleaned up); *see also Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016) ("Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change"); *E. Columbia Basin Irr. Dist. v. Fed. Energy Regul. Comm'n*, 946 F.2d 1550, 1560 (D.C. Cir. 1991) ("an agency is free . . . even to reverse its course" so long as it "provide a reasoned explanation" (cleaned up)).

The Agency explained why it required the Tribe's signature for the original agreement but not for the new one: "the mitigation commitments in [the new agreement] do not require any action or responsibility on the Tribe," whereas the original agreement had required action on the Tribe's part. Ltr. from Agency to Tribe (R.50-3, AR 644), JA____. That plainly is a reasoned explanation for this change. *See* 36 C.F.R. 800.6(c)(2)(iii) ("The agency official should invite any party that assumes a responsibility under a memorandum of agreement to be a signatory."). And "[h]aving properly explained why it" required the Tribe's signature for the original programmatic agreement but not for the new programmatic agreement, the Agency "met the standard for reasoned decision-making." *Env't Def. Fund v. EPA*, 124 F.4th 1, 17 (D.C. Cir. 2024); *see also Nasdaq Stock Mkt.*

LLC v. SEC, 38 F.4th 1126, 1141 (D.C. Cir. 2022) (no error where agency "provided an adequate explanation" for disparate treatment of entities).

CONCLUSION

This Court should affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

(Fed. R. App. P. 32(a)(7)(B))

This brief is prepared using 14-point Century Schoolbook, a proportionally spaced font and—omitting the items described in Federal Rule of Appellate Procedure 32(f) and D.C. Circuit Rule 32(e)(1)—contains 11,354 words as counted by Microsoft Word 365.

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CERTIFICATE OF SERVICE

I certify that on this 30th day of May, 2025, I caused a true and correct copy of the above brief to be served upon all counsel of record by filing the brief using the Court's ECF system.

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