IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

MUSCOGEE CREEK NATION, *et. al.*,	)	
	)	
Plaintiffs,	)	Case No. 2:12-cv-01079-BL
	)	
v.	)	Judge Bill Lewis
	)	
POARCH BAND OF CREEK	)	
INDIANS, *et. al.*,	)	
	)	
Defendants.	)	

FEDERAL DEFENDANTS' MEMORANDUM IN SUPPORT OF THEIR MOTION TO DISMISS PLAINTIFFS' THIRD AMENDED COMPLAINT AND SUPPLEMENTAL COMPLAINT

I. INTRODUCTION

Federal Defendants hereby move to dismiss Plaintiffs' Third Amended Complaint and Supplemental Complaint (hereinafter "Third Amended Complaint"), Dkt. No. 261, pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction, and Rule 12(b)(6) for failure to state a claim upon which relief may be granted. This dispute is part of a deeper conflict regarding the Poarch Band of Creek Indian's ("Poarch Band") construction and operation of a gaming facility on land located near Wetumpka, Alabama (the "Hickory Ground property"). The property, which the Poarch Band purchased in 1980 and the United States has held in trust for its benefit since 1984, is the site of "Hickory Ground," the last known capital of the Muscogee (Creek) Nation in Alabama before its removal to the Indian Territory in the eastern sections of present-day Oklahoma. Plaintiffs claim cultural, historic, and lineal ties to the Hickory Ground property and state that it holds religious significance to them. The Third Amended Complaint requests this Court order Federal Defendants to take the Hickory Ground property out of trust for the Poarch Band and require the Poarch Band to restore the property to its natural state. 3rd Am. Compl., Prayer for Relief.

Plaintiffs raise six claims against Federal Defendants, alleging violations of the Indian Reorganization Act of 1934 ("IRA"), 25 U.S.C.§ 5123 (Count I), the Native American Graves Protection and Repatriation Act ("NAGPRA"), 25 U.S.C. §§ 3001-3013 (Count XI), the Archaeological Resources Protection Act ("ARPA"), 16 U.S.C. §§ 470aa-mm (Count XIV), the National Historic Preservation Act ("NHPA"), 54 U.S.C. §§ 300101–320303 (Count XVII), the Religious Freedom Restoration Act ("RFRA"), 42 U.S.C. §§ 2000bb-2000bb-4 (Count XX), and Plaintiffs' free exercise of religion (Count XIX). These claims fail and must be dismissed for several reasons.

First, Plaintiffs lack standing to assert their claims. Second, Plaintiffs' IRA claim challenges Interior's 1984 decision to take land into trust for the Poarch Band and is brought well outside the six-year statute of limitation. Third, Plaintiffs fail to state a NAGPRA claim because the Hickory Ground property is not federal land for purposes of that statute, and Federal Defendants have no duty to act under NAGPRA. Fourth, Plaintiffs' allegations under ARPA fail to state a claim. The challenged activities—the Poarch Band's construction of a gaming facility on its land—do not require a permit under ARPA because they are specifically exempted by the statute and applicable regulations. Fifth, Plaintiffs fail to state a claim for relief under the NHPA because they have not alleged a federal undertaking within the statute of limitations. Sixth, Plaintiffs fail to state a claim under RFRA because Federal Defendants, as a matter of law, have not substantially burdened Plaintiffs' exercise of religion. Finally, Plaintiffs' claims that NAGPRA and ARPA substantially burden their exercise of religion should be dismissed because there are no federal actions implicating the First Amendment. Accordingly, for all these reasons, Federal Defendants request that this Court dismiss all claims against Federal Defendants.

II. BACKGROUND

A. Factual Background

Plaintiffs and the Poarch Band of Creek Indians ("Poarch Band" or "Poarch") claim cultural affiliation with, and descent from, Muscogee (Creek) Indians that historically inhabited land within the State of Alabama. 3rd Am. Compl. ¶¶ 22, 30. In 1980, the Poarch Band acquired approximately 35 acres of land in proximity of Hickory Ground, Alabama. *Id.* ¶¶ 84, 99. This property included a significant archeological site known as Hickory Ground, which was an early 19th century tribal town of the Creek Nation. *Id.* ¶ 4. In the same year the Poarch Band acquired the land, the National Park Service included the property as a historic property on the National

Register of Historic Places. *Id.* ¶ 8. The land was encumbered with a twenty-year covenant with measures to protect the archeological site that elapsed at the end of 2000. *Id.* ¶ 100. In 1984, the Poarch Band gained federal recognition as an Indian tribe and, in 1985, the U.S. Department of the Interior accepted the Hickory Ground site in trust for the benefit of the Poarch Band under the IRA. *Id.* ¶ 117-18.

In the early 1990s, the Poarch Band submitted a management agreement to the Bureau of Indian Affairs ("BIA") as part of a plan to develop the site with a community center, bingo hall, and museum. The BIA, as part of its duties under the NHPA, entered into consultation with the Alabama State Historic Preservation Office ("SHPO") and the BIA proposed archeological excavations as a means to resolve any potential adverse effects to Hickory Ground.[1] Declaration of Devon Tice ("Tice Decl.") ¶¶ 2, 3 Ex. A, B. The SHPO did not believe excavations would mitigate any potential adverse effects and BIA elevated the matter to the Advisory Council on Historic Preservation ("ACHP"). In 1992, ACHP and BIA formally terminated consultation when they failed to reach an agreement. BIA approved the management agreement, contingent on further archeological work to recover information that might be lost in development. In 1999, the NPS entered into an agreement with the Poarch Band for assumption by the Tribe of certain

---

[1] This Court may consider materials outside the four corners of the complaint in support of a motion to dismiss without converting it to one for summary judgment when jurisdictional facts are challenged. Factual attacks challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings testimony and affidavits, are considered." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (citations omitted). The Eleventh Circuit has explained that in a factual attack, the presumption of truthfulness afforded a plaintiff under Rule 12(b)(6) does not attach, and the court is free to weigh the evidence. *Scarfo v. Ginsberg*, 175 F.3d 957, 960–61 (11th Cir. 1999) citing *Lawrence*, 919 F.2d at 1529 (quoting *Williamson v. Tucker*, 645 F.2d 404, 412–13 (5th Cir. 1981)); *see also Mowa Band of Choctaw Indians v. United States*, No. 07-0508-CG-B, 2008 WL 2633967, at *1 (S.D. Ala. July 2, 2008).

responsibilities pursuant to the NHPA. 3rd Am. Compl., Ex. J. The Poarch Band began developing the site in 2000.

Plaintiffs submitted many objections and challenges to the Poarch Band's construction activities over the years. On October 31, 1992, after BIA approved the management agreement, Plaintiff Muscogee (Creek) Nation passed an ordinance objecting to the Poarch Band's proposed construction and requesting that the BIA investigate alleged violations of section 106 of the NHPA, NAGPRA, ARPA, and the Antiquities Act of 1906. Tice Decl. ¶ 4 Ex. C.

B. Procedural History

Plaintiffs initially brought this litigation in December 2012. Compl., Dkt. No. 1. Plaintiffs filed an amended complaint in January 2013. Dkt. No. 57. In February 2013, Federal Defendants moved to dismiss the amended complaint, as did other defendants. Dkt. No. 94; *see also* Dkt. Nos. 74, 75, 77, 88, 90. In January 2018, the court stayed the case pending settlement negotiations. Dkt. No. 155.

In March 2020, this Court granted Plaintiffs' motion to amend their complaint. Dkt. No. 190. The Second Amended Complaint raised eleven counts. On April 23, 2020, Federal Defendants moved to dismiss the Second Amended Complaint, as did the other defendants. Dkt. No. 200. In March 2021, this Court granted the Tribal Defendants' motion to dismiss finding (1) that the Poarch Band Defendants enjoyed sovereign immunity from all claims, and (2) claims against the remaining Defendants could not proceed without the Poarch Band. Dkt. No. 223 at 33-32. Plaintiffs appealed and the Eleventh Circuit reversed, finding that the Poarch Band's sovereign immunity should have been assessed claim-by-claim and defendant-by-defendant. Dkt. No. 234 at 11, 13. But the Court also determined that Plaintiffs' Second Amended Complaint made this analysis difficult by "assert[ing] 'multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against.'" *Id.* at 14 (quoting *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1323 (11th Cir. 2015)). Neither this Court nor the Eleventh Circuit reached Federal Defendants' arguments for dismissal that Federal Defendants had raised. *Id.* at 21. The Eleventh Circuit directed Plaintiffs to amend their Complaint and remanded further proceedings back to this Court. *Id.*

On January 15, 2025, Plaintiffs filed the Third Amended Complaint, which alleges twenty-two counts. Dkt. No. 261. Against Federal Defendants, Plaintiffs allege six counts: (1) Count I alleges that Federal Defendants violated the IRA by taking the Hickory Ground Site into trust for the Poarch Band; (2) Count XI alleges that Federal Defendants violated NAGPRA in various ways, including lack of consultation and failure to give Plaintiffs custody of artifacts and remains; (3) Count XIV alleges violations of ARPA for alleged lack of consultation and failure to issue permits to the Poarch Band for construction; (4) Count XVII alleges that Federal Defendants failed to comply with the NHPA and its regulations; (5) Count XIX 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; and (6) Count XX alleges that Federal Defendants violated the First Amendment and RFRA by substantially burdening the exercise of Plaintiffs' religion.

III. STATUTORY BACKGROUND

A. The Indian Reorganization Act of 1934

In 1934, Congress enacted the IRA to encourage tribes "to revitalize their self-government," to take control of their "business and economic affairs," and to assure a solid territorial base by "put[ting] a halt to the loss of tribal lands through allotment." *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 151 (1973). This "sweeping" legislation, *Morton v. Mancari*, 417 U.S. 535, 542 (1974), manifested a sharp change of direction in federal policy toward the Indians. It replaced the assimilationist policy at the time of the General Allotment Act, which had been designed to "put an end to tribal organization" and to "dealings with Indians . . . as tribes[.]" *United States v. Celestine*, 215 U.S. 278, 290 (1909).

The "overriding purpose" of the IRA, however, was more far-reaching than remedying the negative effects of the General Allotment Act. *Morton*, 417 U.S. at 542. Congress sought to "establish machinery whereby Indian tribes would be able to assume a greater degree of self-government, both politically and economically." *Id.* Congress thus authorized Indian tribes to adopt their own constitutions and bylaws, 25 U.S.C. § 476, and to incorporate, 25 U.S.C. § 477. Of particular relevance here, section 5 of the IRA provides in pertinent part that:

> [t]he 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.*

B. 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 subsequent to the enactment of ARPA to protect rights to items of tribal significance, including Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony (collectively "cultural items"). 25 U.S.C. § 3001(3). This repatriation process can proceed on two different tracks, depending on when the cultural items were discovered. Section three of NAGPRA, relevant here, provides guidance for determining who should get ownership or control of Native American human remains and objects discovered and excavated from federal and tribal lands after NAGPRA's enactment on November 16, 1990. 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[.]" *Id*. § 3002(a)(1). Section 3(c) allows for the intentional excavation or removal of human remains on tribal lands, provided that an ARPA permit is issued by the BIA and consent is given by the tribe owning the land. 25 U.S.C. § 3002(c). NAGPRA's repatriation provisions are not prospective and are triggered only after a person has made an inadvertent discovery. *San Carlos Apache Tribe v. United States*, 272 F. Supp. 2d 860, 889 (D. Ariz. 2003), *aff'd* 417 F.3d 1091 (9th Cir. 2005).

C. The National Historic Preservation Act

The NHPA, 54 U.S.C. §§ 300101–317108, "requires each federal agency to take responsibility for the impact that its activities may have upon historic resources, and establishe[d] the Advisory Council on Historic Preservation ("ACHP") . . . to administer the Act." *City of Grapevine, Tex. v. Dep't of Transp.*, 17 F.3d 1502, 1508 (D.C. Cir. 1994). It "neither . . . forbid[s] the destruction of historic sites[,] nor . . . command[s] their preservation." *United States v. 162.20 Acres of Land*, 639 F.2d 299, 302 (5th Cir. 1981). 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 ("ACHP")] a reasonable opportunity to comment with regard to the undertaking." 54 U.S.C. § 306108. NHPA's obligations are chiefly procedural in nature; the NHPA is a "stop, look, and listen" statute that merely requires that an agency acquire information before acting. *Ill. Commerce Comm'n v. Interstate Commerce Comm'n*, 848 F.2d 1246, 1260-61 (D.C. Cir. 1988).

As a first step in the section 106 process, agency officials assess whether a proposed action meets the definition of "undertaking" in 36 C.F.R. § 800.16(y). 36 C.F.R. § 800.3(a). ACHP promulgated regulations implementing section 106, including the section 800.16(y) definition, pursuant to its authority under 54 U.S.C. § 304108. The 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).

D. Archaeological Resources Protection Act

ARPA was enacted in 1979 with the goal of protecting "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.* at § 470cc. In 1984, the Secretary of the Interior promulgated uniform government-wide regulations under ARPA dealing with 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*" and the Secretary of the Interior may "promulgate regulations providing for . . . the ultimate disposition of archaeological resources . . . when such resources have been excavated or removed from public lands and Indian lands." 43 C.F.R. § 7.13(b)-(c) (emphasis added). The BIA has promulgated specific regulations that confirm the application of NAGPRA to archaeological resources that comprise human remains and other NAGPRA cultural items from Indian lands. *See* 25 C.F.R. § 262.8(a); Protection of Archaeological Resources, 58 Fed. Reg. 65246, 65248 (Dec. 13, 1993).

E. Religious Freedom Restoration Act

RFRA provides that "Government 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," *id.* § 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). This statute was Congress's response to a First Amendment decision of the Supreme Court that, in Congress's view, "virtually eliminated the requirement that the government justify burdens on religious exercise imposed by laws neutral toward religion." *Id.* § 2000bb(a)(4). RFRA restores the compelling interest test set forth in *Sherbert v. Verner*, 374 U.S. 398 (1963), and *Wisconsin v. Yoder*, 406 U.S. 205 (1972), and "guarantee[s] its application in all cases where free exercise of religion is substantially burdened." 42 U.S.C. § 2000bb(b)(1). Although RFRA "restored" the standard by which federal government actions burdening religion were to be judged, it does not expand the class of actions to which the standard would be applied. *Vill. of Bensenville v. FAA*, 457 F.3d 52, 62 (D.C. Cir. 2006) (citing *Hall v. Am. Nat'l Red Cross*, 86 F.3d 919, 921 (9th Cir. 1996)).

F. The Administrative Procedure Act

The Administrative Procedure Act ("APA") waives sovereign immunity for suits seeking relief other than money damages from federal agencies. *See* 5 U.S.C. § 702. The APA does not create an independent basis of jurisdiction. *See Gallo Cattle Co. v. U.S. Dep't of Agric.*, 159 F.3d 1194, 1198 (9th Cir. 1998). With certain exceptions, the APA provides for judicial review only of agency action that is made reviewable by statute or for which there is no other adequate remedy in a court. 5 U.S.C. §§ 702, 704. 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. Under the APA, the reviewing court may, *inter alia*, "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.

A federal court has authority to review only "final agency action" pursuant to 5 U.S.C. § 704, unless another statute provides a right of action. *Wilderness Soc'y v. Alcock*, 83 F.3d 386, 388 n.5 (11th Cir. 1996). 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 v. Spear*, 520 U.S. 154, 177–78 (1997) (quotations and citations omitted). Absent "agency action" within the meaning of the APA, the action is not reviewable. *Nat'l Parks Conservation Ass'n v. Norton*, 324 F.3d 1229, 1236 (11th Cir. 2003). Section 704 specifies that agency action is not final if the agency "requires by rule[,] and provides that the action meanwhile is inoperative, for an appeal to superior agency authority." 5 U.S.C. § 704. In other words, agency action is not final for purposes of section 704 until "an aggrieved party has exhausted all administrative remedies expressly prescribed by statute or agency rule . . . ." *Darby v. Cisneros*, 509 U.S. 137, 146 (1993).

IV. STANDARDS OF REVIEW

Federal court jurisdiction is limited, present only where authorized by statute or the Constitution. *See Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 377 (1994). Once challenged, the burden of establishing a federal court's subject matter jurisdiction rests on the party asserting jurisdiction. *Id.* If a plaintiff cannot meet this burden, the case should be dismissed. A motion to dismiss for lack of subject matter jurisdiction must be granted if the court lacks the statutory authority to hear and decide the dispute. Fed. R. Civ. P. 12(b)(1). Facial attacks on a complaint "require[] the court merely to look and see if [the] plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in [plaintiff's] complaint are taken as true for the purposes of the motion." *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990) (citations omitted). Factual attacks challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." *Id.* at 1529 (citations omitted). The Eleventh Circuit has explained that, in a factual attack, the presumption of truthfulness afforded a plaintiff under Rule 12(b)(6) does not attach, and the court is free to weigh the evidence. *Scarfo v. Ginsberg*, 175 F.3d 957, 960-61 (11th Cir. 1999) (citing *Lawrence*, 919 F.2d at 1529). Where, as here, the defendant challenges subject matter jurisdiction, the burden of establishing jurisdiction falls squarely upon the plaintiff. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir. 1980).

A motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) tests the sufficiency of the complaint. *Christopher v. Harbury*, 536 U.S. 403, 406 (2002). A claim may be dismissed under Rule 12(b)(6) either because it asserts a legal theory that is not cognizable as a matter of law or because it fails to allege sufficient facts to support a cognizable legal claim. *See Kjellvander v. Citicorp*, 156 F.R.D. 138, 141 (S.D. Tex. 1994). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court clarified the specificity in pleading required by Rule 8 necessary to survive a motion to dismiss. The Court stated that a plaintiff's obligation to set forth the "grounds" of its entitlement to relief "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Id.* at 555 (citations omitted). The Court added that "[f]actual allegations must be enough to raise a right to relief above the speculative level . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* (citations omitted); *see also Davis v. Coca-Cola Bottling Co.*, 516 F.3d 955, 974 (11th Cir. 2008). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 557). In *Iqbal*, the Supreme Court stated that a claim must have facial plausibility, which "asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." *Id.* at 678 (internal quotation marks, brackets and citations omitted).

Further, federal courts "are not bound to accept as true a legal conclusion couched as a factual allegation." *Papasan v. Allain*, 478 U.S. 265, 286 (1986) (citation omitted). Under Rule 12(b)(6), "conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003); *see also S. Fla. Water Mgmt. Dist. v. Montalvo*, 84 F.3d 402, 409 n.10 (11th Cir. 1996) ("As a general rule, conclusory allegations and unwarranted deductions of fact are not admitted as true in a motion to dismiss") (citing *Assoc. Builders, Inc. v. Ala. Power Co.*, 505 F.2d 97, 100 (5th Cir. 1974)).

V. ARGUMENT

Plaintiffs' six claims against the Federal Defendants should be dismissed for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. First, Plaintiffs lack standing to raise their claims. Second, Plaintiffs' IRA claim should be dismissed for failure to state a claim. Third, Plaintiffs fail to state a claim under NAGPRA because they do not identify a final agency action or discrete, nondiscretionary duty that Federal Defendants failed to take under the statute. Fourth, Plaintiffs' ARPA should be dismissed for failure to state a claim because Federal Defendants are not required to issue permits for the Poarch Band's construction on tribal land. Fifth, Plaintiffs' NHPA claim should be dismissed because they do not identify a federal undertaking sufficient to state a claim under the NHPA. Finally, Plaintiffs fail to state a claim under RFRA and the First Amendment because Federal Defendants have not substantially burdened Plaintiffs' free exercise of religion and NAGPRA and ARPA do not implicate the First Amendment. As such, all of Plaintiffs' claims against Federal Defendants should be dismissed.

A. Plaintiffs lack standing.

Plaintiffs' claims against Federal Defendants should be dismissed because Plaintiffs lack standing. Plaintiffs cannot demonstrate either that their alleged injuries stem from federal actions or that the Court can redress their injuries. Specifically, Plaintiffs' alleged injury, the excavation and disturbance by construction activities on land they claim is historically and religiously significant, does not stem from the United States' acquisition of the Hickory Ground property in trust or any other federal action. And even if this Court were to hold that Interior lacked authority to take the land into trust for Poarch, it would not redress Plaintiffs' injury.

"[S]tanding is a threshold jurisdictional question. . . ." *Wiand v. ATC Brokers Ltd.*, 96 F.4th 1303, 1311 (11th Cir. 2024). "Because standing is jurisdictional, a dismissal for lack of standing has the same effect as a dismissal for lack of subject matter jurisdiction under" Rule 12(b)(1). *Stalley ex rel. U.S. v. Orlando Reg'l Healthcare Sys., Inc.*, 524 F.3d 1229, 1232 (11th Cir. 2008) (quoting *Cone Corp. v. Fla. Dep't of Transp.,* 921 F.2d 1190, 1203 n. 42 (11th Cir. 1991). The threshold inquiry in evaluating Plaintiffs' claims, therefore, is whether they have met their burden and properly invoked this court's limited subject matter jurisdiction. *See Parker v. Scrap Metal Processors, Inc.*, 386 F.3d 993, 1002–03 (11th Cir. 2004) (quoting *Wolff v. Cash 4 Titles*, 351 F.3d 1348, 1353 (11th Cir. 2003). Plaintiffs fail to meet their burden and this Court lacks jurisdiction to review the merits of Plaintiffs' claim.

Standing is a constitutional requirement imposed pursuant to the "cases and controversies" provision of Article III. *Stalley*, 524 F.3d at 1232. To satisfy the constitutional standing requirements of Article III of the Constitution, 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 by the proposed remedy. *Parker*, 386 F.3d at 1003–04. Plaintiffs must demonstrate that the injury is not one that results from the independent action of some third party. *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 41–44 (1976). Further, Plaintiffs have the burden of establishing all three prongs of the standing test. *Lujan*, 504 U.S. at 561 (internal quotes and citations omitted).

Here, Plaintiffs' alleged injury fails to meet the second prong of the test because Plaintiffs' alleged injuries from the construction activities on the Hickory Ground property are not "fairly traceable" to Federal Defendants' actions. As to the IRA claim, the United States' acquisition of the land in trust decades ago or any other federal action is not the source of Plaintiffs' injury. The Poarch Band acquired the property in fee in 1980, four years before Federal Defendants' decision to take the land into trust. 3d Am. Compl. ¶ 99. When the Poarch Band first purchased the property in 1980, "a protective covenant was placed on the property for 20 years." *Id.* ¶ 100. The covenant therefore expired in 2000, after which the Poarch Band was allowed to use the land, including engaging in construction activities. Even if the United States had not acquired the land in trust, the Poarch Band would still be the owners of the Hickory Ground property and able to manage the land in their own interests as they are now. In short, Plaintiffs' alleged injury is not the result of Interior taking the land into trust in 1984.

Plaintiffs also have failed to identify any other federal action that is the source of their harm. Plaintiffs' alleged injuries stem from the actions of entities other than Federal Defendants. As the Third Amended Complaint states, Plaintiffs' alleged injuries stem from the Poarch Officials' construction of a casino, removal of remains and artifacts, and "ongoing mistreatment of the remains and artifacts." 3d Am. Compl. ¶ 17. Because Plaintiffs' alleged harms are based on actions by a third party other than Federal Defendants, Plaintiffs have not shown causation to support standing for their claims against Federal Defendants.

Plaintiffs also fail to establish the third prong of the standing test because the Court cannot remedy Plaintiffs' alleged injuries. There must be a "'substantial likelihood' that Plaintiffs' injury will be redressed by the relief [sought]." *Region 8 Forest Serv. Timber Purchasers Council v. Alcock*, 993 F.2d 800, 808 (11th Cir. 1993) (quoting *Duke Power Co. v. Carolina Envt'l Study Grp., Inc.*, 438 U.S. 59, 75 n.20 (1978)). The only remedy Plaintiffs seek for their IRA claim, for example, is an order requiring Federal Defendants to take the land "out of trust, thereby returning the site to fee simple ownership." 3d Am. Compl., Prayer for Relief ¶ (a). But requiring the land to be taken out of trust will not redress Plaintiffs' injury. Taking the land out of trust would mean that the Poarch cannot conduct gaming on the land, but Plaintiffs' alleged injury arises from archaeological excavations and development, not from gaming on the site. And, of course, revoking the land's trust status would not undo any archaeological excavation or development that has already occurred. If the land is not held in trust, the Poarch Band will still own the property in fee and have the right to conduct activities on the land.

And many of the federal statutes under which Plaintiffs seek relief will cease to apply to the land if it is taken out of trust status. *See, e.g.*, 16 U.S.C. §§ 470aa (establishing ARPA's purpose as "the protection of archaeological resources and sites which are on public lands and Indian lands"); 25 U.S.C. §§ 3001–3002 (establishing that NAGPRA applies to "Native American cultural items which are excavated or discovered on Federal or tribal lands," with tribal land defined as "all lands within the exterior boundaries of any Indian reservation"); 54 U.S.C. § 300320 (defining "undertaking" under NHPA as requiring federal control or approval). Plaintiffs have failed to establish any connection between the land-into-trust decision and the alleged failures to comply with NAGPRA, APRA, NHPA, or other statutes. *See Yankton Sioux Tribe v. U.S. Army Corps of Engr's*, 396 F. Supp. 2d 1087, 1094 (D.S.D. 2005) (finding lack of standing when injury was not due to challenged land transfer but to failure to fulfill statutory duties under the cultural protection statutes (citing *Crow Creek Sioux Tribe v. Brownlee*, 331 F.3d 912, 914 (D.C. Cir. 2003). Plaintiffs have not alleged redressability sufficient to support their standing for their IRA claim and the claims against Federal Defendants should be dismissed on that basis.

Plaintiffs also do not allege that revoking any other federal action would redress Plaintiffs' asserted injury. In addition, they seek relief that is not available under the statutes. For example, Plaintiffs' prayer for relief for their NAGPRA claim is aimed at "restoration of the Hickory Ground Site to its pre-construction condition." 3d Am. Compl., Prayer for Relief ¶ k(ii). This relief is not contemplated by NAGPRA. Similarly, Plaintiffs' NHPA claim seeks an injunction prohibiting construction activities at the Hickory Ground Site, as well as restoration of the site to pre-construction conditions and an injunction preventing excavation or destruction. The NHPA is a procedural statute and does not provide relief in the form of injunctive relief or site restoration. *See, e.g.*, *Nat'l Tr. for Historic Pres. v. Blanck*, 938 F. Supp. 908, 925 (D.D.C. 1996), *aff'd,* 203 F.3d 53 (D.C. Cir. 1999) (holding that NHPA's "obligation, once triggered, is procedural in nature" and that court cannot order agencies to restore historical properties). Plaintiffs seek similar relief preventing additional construction and requiring restoration of the Hickory Ground Site under Claims XIV, XIX, and XX. This relief is neither directed at nor available from Federal Defendants. Accordingly, to the extent Plaintiffs seek relief that is outside the scope of the statutes, the Court cannot dress their claims.

B. Plaintiffs' IRA claim was brought outside the statute of limitations.

Setting standing aside, Count I still requires dismissal. Plaintiffs argue that Federal Defendants lacked authority to take land into trust for the Poarch Band because Poarch was not under federal jurisdiction in 1934. 3d Am. Compl. ¶¶ 118–119, 297 (citing *Carcieri v. Salazar*, 555 U.S. 379 (2009)). Plaintiffs rely on the Supreme Court's holding *Carcieri* to argue that a tribe must have been under federal jurisdiction in 1934 for Interior to have authority to take land into trust for the tribe. *Id.* at ¶ 297. Federal Defendants took the land into trust in 1984, nearly three decades before Plaintiffs filed their Complaint in this Court, and twenty-five years before *Carcieri*. Plaintiffs knew of the land-into-trust decision when it occurred. As such, Plaintiffs' IRA claim is well outside the statute of limitations.

Under the APA, a plaintiff has six years from accrual to bring a claim. 28 U.S.C. § 2401(a); *see also Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 809 (2024). "A right of action 'accrues' when the plaintiff has a 'complete and present cause of action'—*i.e*., when she has the right to 'file suit and obtain relief.'" *Corner Post*, 603 U.S. at 809 (quoting *Green v. Brennan*, 578 U.S. 547, 554 (2016)). For claims brought under the APA, the statute of limitations does not begin to run until the plaintiff "suffers an injury from final agency action." *Id.* Plaintiffs agree that their IRA claim is brought pursuant to the APA. Compl. ¶ 296; *see Match-E-Be-Nash-She-Wish Band of Pottawatomi Indians v. Patchak*, 567 U.S. 209, 220–21 (2012) (challenge of an Interior fee-to-trust decision is a "garden-variety APA claim").

The Eleventh Circuit has rejected challenges to the decision to take land into trust for the Poarch Band, finding that the statute of limitations to challenge the decision ran from the date the land was taken into trust. *See Alabama v. PCI Gaming Auth.*, 801 F.3d 1278, 1292 (11th Cir. 2015) ("Because the Secretary accepted the lands at issue into trust for the Tribe in 1984, 1992, and 1995, the statute of limitations to challenge those decisions had run by 1991, 1999, and 2002, respectively). The Eleventh Circuit also later affirmed *PCI Gaming*, holding that the statute of limitations had run when the plaintiff could have raised a timely challenge to the land-into-trust decision but failed to do so. *Poarch Band of Creek Indians v. Hildreth*, 656 F. App'x 934, 944 (11th Cir. 2016). Similarly, the United States District Court for the Southern District of Alabama, in another case involving a land-into-trust decision for the Poarch Band, held that challenges to land into trust decisions should be brought as APA challenges within six years of the decision. *Poarch Band v. Moore*, No. CA 15-00277-CG-C, 2016 WL 4778788, at *4 (S.D. Ala. Aug. 10, 2016), *report and recommendation adopted in part, rejected in part sub nom. Poarch Band of Creek Indians v. Moore*, No. CV 15-0277-CG-C, 2016 WL 4745185 (S.D. Ala. Sept. 12, 2016). Plaintiffs also had knowledge that the land was taken into trust. The Third Amended Complaint asserts that Plaintiffs chose not to object to Poarch's acquisition of the site in fee or trust. 3d Am. Compl. ¶ 110. They also wrote a letter advocating for Poarch's federal recognition. *Id.* ¶ 113. This Court thus should follow the binding precedent and hold that Plaintiffs' land-into-trust claim is time-barred.

The Court also should reject Plaintiffs' attempt to make an end-run around the APA by framing their challenge as "ultra vires." 3d Am. Compl. ¶¶ 299, 303. According to the Eleventh Circuit, "the 'proper vehicle' for challenging the Secretary's authority to take tribal lands into trust is a timely APA claim pursuant to 5 U.S.C. § 702, not a collateral challenge to a long-ago decision of the Secretary." *Poarch Band*, 656 F. App'x at 943 (citing *PCI Gaming*, 801 F.3d at 1292; *Patchak*, 567 U.S. at 220–21). Plaintiffs' claim cannot be properly characterized as one that the agency acted ultra vires—Plaintiffs are not arguing that fee-to-trust acquisitions are outside the Secretary's statutory authority. Instead, Plaintiffs assert that the Federal Defendants' decision to take land into trust violated the IRA because the Poarch Band was not under federal jurisdiction in 1934, exactly the claim that the Supreme Court termed "a garden-variety APA claim." *See Patchak*, 567 U.S. at 220–21. Accordingly, the decision to take land into trust was a final agency action that cannot be challenged at this late date.

The Eleventh Circuit has cited with approval a Ninth Circuit case rejecting a state's attempt to challenge a BIA land-into-trust decision on a similar ultra vires theory. *PCI Gaming*, 801 F.3d at 1291 (citing *Big Lagoon Rancheria v. Cal.*, 789 F.3d 947 (9th Cir. 2015) (en banc)). In *Big Lagoon*, a tribe brought suit against the state of California, alleging that the state had refused to negotiate a gaming contract in violation of the Indian Gaming Regulatory Act (IGRA). In response, the state, relying on *Carcieri*, argued that the tribe did not have standing under IGRA because Interior lacked the authority to take land into trust for the tribe. *See Big Lagoon*, 789 F.3d at 953. The court found that challenges to land-into-trust decisions must be brought as "a petition for review pursuant to the APA." *Id.* (quoting *Patchak,* 567 U.S. at 220–21). "Allowing California to attack collaterally [Interior's] decision to take the eleven-acre parcel into trust outside the APA would constitute just the sort of end-run that we have previously refused to allow, and would cast a cloud of doubt over countless acres of land that have been taken into trust for tribes recognized by the federal government." *Id.* at 954. California had not brought an APA challenge, but even if it had, it would be barred by the statute of limitations because the land was taken into trust more than six years before the state's claim. *Id.*

Here, similarly, the Court should reject Plaintiffs' attempt to collaterally attack the 1984 land-into-trust decision by framing it as "ultra vires." The decision to take land into trust was a final agency action that could only be challenged by an APA claim brought within the statute of limitations. It cannot be challenged at this late date.

Nor can Plaintiffs successfully challenge the land into trust decision by arguing that Interior keeping the land in trust for the Poarch Band is an ongoing violation of the IRA. *See* Compl. ¶ 300. "The continuing violation doctrine permits a plaintiff to sue on an otherwise time-barred claim when additional violations of the law occur within the statutory period." *Ctr. for Biological Diversity v. Hamilton ("CBD")*, 453 F.3d 1331, 1334 (11th Cir. 2006) (citing *Hipp v. Liberty Nat'l Life Ins. Co.,* 252 F.3d 1208, 1221 (11th Cir. 2001)). The Eleventh Circuit "has distinguished between the continuing effects of a discrete violation and continuing violations." *Id.* at 1335. In addition, the continuing violation doctrine can only be applied "to situations in which a reasonably prudent plaintiff would have been unable to determine that a violation had occurred." *Id.* Neither of those conditions is met here.

Plaintiffs do not point to any final agency action that violated the IRA after the 1984 land into trust decision. Instead, they allege that the "ongoing violation of law" stems from "Interior continuing to hold the land in trust." Compl. ¶¶ 296, 312. In other words, they complain of the *effects* of the initial land-into-trust decision. This does not extend the limitations period. *See McGroarty v. Swearingen*, 977 F.3d 1302, 1307–08 (11th Cir. 2020) (noting that the plaintiff failed "to appreciate the limits of the continuing violation doctrine—he has alleged a continuing harm (which does not extend the limitations period), not a continuing violation (which may extend the period)." Agency actions that "have 'simply implemented' the decision made and spelled out long ago" do not restart the limitations period. *See Alaska Cmty. Action on Toxics v. EPA*, 943 F. Supp. 2d 96, 105 (D.D.C. 2013); *see also Huff v. Swearingen*, 847 F. App'x 816, 817 (11th Cir. 2021) (holding that continuing harms from a one-time act do not constitute continuing violations that would extend the limitations period). In addition, Plaintiffs knew about the land-into-trust decision at the time it occurred, and thus the continuing violation doctrine does not apply. *See CBD*, 453 F.3d at 1334.

The Court should also reject any argument that Plaintiffs were not injured until April 2009. The Third Amended Complaint alleges that in March 2008, Mekko Thompson sent a letter on behalf of Plaintiffs to NPS "relaying eight allegations regarding NAGPRA violations arising from disturbance and/or removal of human remains and funerary objects from the Hickory Ground Site." 3d Am. Compl. ¶ 197. In April 2009, Interior sent Auburn University a letter notifying Auburn of the allegations and informing it of Interior's determination that none of the allegations were substantiated. *Id.* ¶ 199. Plaintiffs frame this letter as "Interior's incorrect determination that Poarch retained legal interest in the 'NAGPRA items from the Hickory Ground site' based on the fact that Interior had previously placed the land in trust for Poarch." *Id.* ¶ 200. Plaintiffs' Third Amended Complaint alleges, therefore, that this letter to Auburn "was a new application of Interior's unauthorized decision to take the Hickory Ground Site into trust for Poarch." *Id.* ¶ 203.

The Court should reject Plaintiffs' attempt to establish a 2009 injury from the land-into-trust decision. First, as discussed above, binding precedent establishes that any challenge to the land-into-trust decision had to be brought within six years of the decision. Plaintiffs do not allege, nor could they, that they were unaware of the land being taken into trust for Poarch before December 2006. Plaintiffs' allegations are another attempt to collaterally attack the land-into-trust decision, which is not permitted.

Even assuming that Plaintiffs were injured in 2009, their claim *first* accrued when the land-into-trust decision was made and they needed to bring their claim within six years of that time. *See* 28 U.S.C. § 2401(a) (complaint must be "filed within six years after the right of action first accrues"); *Corner Post*, 603 U.S. at 810. Plaintiffs had a complete cause of action to challenge the land-into-trust decision in 1984 but did not file their case until 2012. Any injury in 2009 is an effect of the previously made decision to take the land into trust, not a new cause of action.

Plaintiffs also misread the letter to Auburn and Interior's findings in an attempt to tie the letter to the land-into-trust decision.[2] The letter does not refer to land being held in trust and holds that Auburn University did not have possession or control of the remains under NAGPRA. *See* Doc. No. 95-12 (letter). Plaintiffs have previously acknowledged this. *See* Pls.' Resp. to Defs.' Mot. to Dismiss, Dkt. No. 100, at 22 ("On April 21, 2009, the Federal Defendants summarily denied the claim on the basis that Defendant Auburn University did not have possession or control of the remains."). Thus, Plaintiffs' attempt to establish a 2009 injury that would bring their IRA claim within the statute of limitations is meritless.

In sum, Plaintiffs' IRA challenge to the land-into-trust decision is brought outside the statute of limitations and should be dismissed.

C. Plaintiffs fail to state a claim under NAGPRA (Count XI).

The Court must also dismiss Plaintiffs' NAGPRA claim, Count XI, because Plaintiffs do not identify a final agency action made under, nor allege a failure to act on a nondiscretionary duty required by, NAGPRA.

NAGPRA contains a private right of action but does not contain a waiver of sovereign immunity. Therefore, a NAGPRA claim relies on the APA's waiver of sovereign immunity. 25

[2] The Court can consider the letter on this Motion to Dismiss because it is central to Plaintiffs' claim and its authenticity is not challenged. *See SFM Holdings, Ltd. v. Banc of Am. Secs., LLC*,

U.S.C. § 3013; *San Carlos Apache Tribe*, 272 F. Supp. 2d at 886 ("The APA waives the sovereign immunity of the Government for NAGPRA claims."). To establish jurisdiction under the APA for purposes of NAGPRA, a plaintiff "must allege action on the part of an agency," or inaction in violation of a nondiscretionary duty. *Geronimo v. Obama*, 725 F.Supp.2d 182, 186 (D.D.C. 2010) (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990)). Plaintiffs' Third Amended Complaint fails to identify any agency action or nondiscretionary duty. The Hickory Ground property is not federal land, and Federal Defendants had no duty to act under NAGPRA. Therefore, Count XI must be dismissed.

First, Plaintiffs allege that the Defendants failed to consult with Plaintiffs prior to excavation and removal, failed to obtain Plaintiffs' consent, and failed to give custody of human remains and cultural objects found to Plaintiffs. 3rd Am. Compl. ¶¶ 419, 422–23. But the statutory duty of repatriation under 25 U.S.C. § 3005 applies only to "Native American human remains and objects *possessed or controlled by Federal agencies and museums.*" *Id.* § 3005(a) (emphasis added). The operative complaint does not allege that Federal Defendants possess or control any remains or objects.

Second, Plaintiffs allege that Federal Defendants "[f]ail[ed] to create a Phase III inventory or report regarding the cultural items recovered or destroyed." 3rd Am. Compl. ¶ 422(i). But reporting requirements only apply to "[e]ach Federal agency and each museum which has *possession or control* over holdings or collections of Native American human remains and associated funerary objects. . ." 25 U.S.C. § 3003 (emphasis added). Plaintiffs do not allege

---

600 F.3d 1334, 1337 (11th Cir. 2010). Although the Third Amended Complaint does not attach the letter, it relies on it and even quotes from it. 3d Am. Compl. ¶¶ 199–200.

that any federal agency has "possession or control" of any items recovered from the Hickory Ground property.

Third, Plaintiffs allege that Federal Defendants violated NAGPRA by "failing to establish a preservation program for the protection of historic properties that ensures that the agency's procedures for compliance with Section 106 of the NHPA 'provide for the disposition of Native American cultural items from Federal or tribal land in a manner consistent with section 3(c) of [NAGPRA]." 3rd Am. Compl. ¶ 424. But an alleged violation of the NHPA cannot give rise to a claim under NAGPRA. Even if an agency violated this NHPA requirement, it would not be a NAGPRA violation. *See* 54 U.S.C. § 306102.

Fourth, Plaintiffs allege a violation of 25 U.S.C. § 3002, a NAGPRA provision governing inadvertent discoveries on federal and tribal lands. 3rd Am. Compl. ¶ 423. But this argument fails because the Hickory Ground property is tribal land for purposes of NAGPRA and thus Federal Defendants do not have enforceable duties under NAGPRA. "Tribal land" under NAGPRA includes "(A) all lands within the exterior boundaries of any Indian reservation; (B) all dependent Indian communities; (C) any lands administered for the benefit of Native Hawaiians . . ." 25 U.S.C. § 3001(15). And "federal lands' are 'any land *other than tribal lands* which are controlled or owned by the United States' and lands held in trust by the federal government for an Indian tribe are 'tribal,' rather than 'federal.'" *Rosales v. United States*, No. 07-cv-0624, 2007 WL 4233060, *6 (S.D. Cal. Nov. 28, 2007) (quoting 25 U.S.C. § 3001(15) (internal quotations omitted)).

As land held in trust for the Poarch Band, the Hickory Ground property is tribal land for purposes of NAGPRA. 3rd Am. Compl. ¶¶ 99, 117–18. The Supreme Court has held that "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation,'" but on whether the land has been "validly set apart" for the use of Indians. *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 511 (1991). The term "reservation," is interpreted by the Supreme Court to include formal and informal reservations for purposes of the Indian country statute. 18 U.S.C. § 1151(a). *Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993). The Court found that Congress defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments. *Id.* The Court also concluded that land held in trust outside a formal reservation boundary qualified as "any Indian reservation" under 18 U.S.C. § 1151(a), presumably as an informal reservation. *Id.*; *see also United States v. Roberts*, 185 F.3d 1125, 1131 (10th Cir. 1999) (tribal trust land outside formal reservation boundary determined to be Indian Country under 18 U.S.C. § 1151(a)); *United States v. Azure*, 801 F.2d 336, 339 (8th Cir. 1986) (actions of the federal government in its treatment of Indian land can create a de facto reservation for certain purposes). To meet the goals of NAGPRA, the term "any reservation" as used in the definition of "tribal lands," may draw on the interpretation of "any reservation" under 18 U.S.C. § 1151(a), and would refer to both formal and informal reservations. Informal reservations may include tribal trust land outside the boundaries of formal reservations.

Because the Hickory Ground is tribal land for purposes of NAGPRA, no federal agency duty under NAGPRA has been triggered. Under NAGPRA, tribes are afforded responsibility for compliance on tribal lands, rather than federal agencies. *See Rosales*, 2007 WL 4233060, at *8. NAGPRA's regulations also emphasize the division between tribal and federal lands, discussing the steps for the responsible Indian tribe official following notification of an inadvertent discovery on tribal land, and the steps for the responsible federal agency official following notification of inadvertent discovery on federal land. 43 C.F.R. § 10.5(a) (noting that discoveries on federal lands are appropriately reported to a federal representative while discoveries on tribal lands are appropriately reported to the Indian tribe).

NAPGRA and its implementing regulations do not assign any nondiscretionary duty to the federal government in the event of an inadvertent discovery on tribal land. All Plaintiffs' alleged discoveries took place on tribal land, and Federal Defendants therefore do not have any nondiscretionary duties that they failed to perform. *See Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62–64 (2004). For purposes of section 3002, the only responsibility of a federal agency triggered by an inadvertent discovery on tribal lands relates to permits. 43 C.F.R. § 10.4. ("Any permit, license, lease, right-of-way, or other authorization issued for an activity on Federal or Tribal lands must include a requirement to report any discovery of human remains or cultural items under § 10.5 of this part."). *Id.* Here, Interior issued a permit for the Hickory Ground property, which provided that:

> Excavation or removal of any Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony must be preceded by consultation with or, in the case of tribal lands, consent of the appropriate Indian tribe or Native Hawaiian organization. Consultation should be conducted with the lineal descendants, tribal land owners, Native American representatives, and traditional religious leaders of all Indian tribes and Native Hawaiian organizations that can reasonably be assumed to be culturally associated with the cultural items or, if the cultural affiliation of the objects cannot be reasonably ascertained, from whose judicially established aboriginal lands the cultural items originated."

Tice Decl. ¶ 9 Ex. G. In issuing that permit, the federal agencies' duties regarding inadvertent discoveries on tribal land were satisfied. 43 C.F.R. § 10.4(g).

Finally, Plaintiffs allege a violation of section 3002(c)(1), which refers to permits under ARPA, 16 U.S.C. § 470cc. ARPA section 470cc(g)(1) provides that no permit is required "for the excavation or removal by any Indian tribe or member thereof of any archeological resource located on Indian lands of such Indian tribe . . . ." Here, as discussed, the alleged excavation and removals are taking place by the Poarch Band on its own land. No permit is required under section 470cc(g)(1) for excavation by an Indian tribe on its own land. Plaintiffs have failed to state a viable claim for relief under 3002(c)(1).

Therefore, the Third Amended Complaint does not allege a plausible claim that Federal Defendants have acted contrary to NAGPRA nor identify a nondiscretionary NAGPRA duty that Federal Defendants failed to take. Plaintiffs must identify such a nondiscretionary duty in order for Federal Defendants to waive sovereign immunity under the APA. *See SUWA*, 542 U.S. at 64. Because they fail to do so, Plaintiffs have not stated a claim under NAGPRA and Count XI must be dismissed.

D. Plaintiffs fail to state a claim under ARPA (Count XIV) for which relief may be granted.

Plaintiffs also do not state a viable claim for relief under ARPA and Count XIV must be dismissed. Federal Defendants were not required to issue any permits under ARPA. Additionally, while not required, the BIA permit issued to Auburn University in 2003 also falls outside the statute of limitations.

ARPA establishes a permitting system regulating excavation and removal of "archeological resources" from public and Indian lands. 16 U.S.C. §§ 470aa-mm. Archaeological resources are defined as material remains of past human life or activities that are of archeological interest. To obtain an ARPA permit, one must establish to a federal land manager that the "activity is undertaken for the purpose of furthering archaeological knowledge in the public interest." 16 U.S.C. § 470cc(b)(2). The findings section of ARPA sets forth Congress's intent to prevent "uncontrolled excavations and pillage" and to facilitate orderly access to archaeological sites by professionals. *See* 16 U.S.C. § 470aa(a)(3). ARPA and its implementing regulations establish a permitting regime to allow those focused on archaeological resources to maintain access to those resources on federal land. Interior has promulgated uniform regulations for protection of archaeological resources under ARPA. *See* 43 C.F.R. Pt. 7. While ARPA does maintain a permitting process, there are exemptions to allow excavations without a permit, including for "general earth-moving excavations," officials carrying out official duties under a federal land manager's direction, and Indian tribes excavating on their own lands. *See* 43 C.F.R. §§ 7.5(b)(1) and (c); 16 U.S.C. § 470cc(g)(1).

Plaintiffs allege various violations of ARPA, including that Federal Defendants failed to get Plaintiffs' consent "as *parens patriae* of the lineal descendants of those buried at the Site and as the Tribe with the closest cultural and religious connection to the Site." 3rd Am. Compl. ¶ 458. Plaintiffs also assert that Federal Defendants were required to notify, consult, and get consent from Plaintiffs, or ensure the Poarch Defendants did so. *Id.* ¶ 459. And Plaintiffs claim that activities were undertaken on the Hickory Ground property without a valid ARPA permit, pursuant to an invalid ARPA permit, or in violation of valid ARPA permits. *Id.* ¶¶ 458-462.

All of Plaintiffs' allegations fail to state a claim under ARPA because the challenged activities—the Poarch Band's construction of a gaming facility on its land, *see* 3rd Am. Compl. ¶ 461—are specifically exempted by the statute and applicable regulations. 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 or such Indian tribe . . . ." 16 U.S.C. § 470cc(g)(1); *see also Attakai v. United States*, 746 F. Supp. 1395, 1411 (D. Ariz. 1990). In *Attakai*, the court found that a neighboring Indian tribe failed to state a claim for a violation of ARPA because the defendant Indian Tribe did not need a permit "even for excavations of qualifying archaeological resources . . . on its land." *Id.* (citing 16 U.S.C. § 470cc(g)(1)). The same result is appropriate here.

BIA did issue a permit to Auburn University in 2003, 3rd Am. Compl. ¶ 161, even though not required to under ARPA. Tice Decl. ¶ 9 Ex. G. This permit was not required under ARPA because Auburn University conducted activities on the Poarch Band's tribal land at the Poarch Band's request. *See* 3rd Am. Compl. ¶¶ 154, 161. However, even if required, this permit was issued well outside the six-year statute of limitations that applies to claims against the United States. 28 U.S.C. § 2401(a); *Corner Post*, 603 U.S. at 804 ("A claim accrues when the plaintiff has the right to assert it in court—and in the case of the APA, that is when the plaintiff is injured by final agency action."). Plaintiffs' alleged injuries stem from a purported lack of consultation on that ARPA permit which materialized at the point Interior issued the permit without the alleged consultation. Plaintiffs have been aware of the Poarch Band's construction activities since they began, *see* Tice Decl. ¶ 4 Ex. C, and knew, or should have known, that any challenge to the 2003 permit began to accrue. Therefore, any challenge to the 2003 permit should be time-barred. Additionally, under 16 U.S.C. § 470cc(f), the federal land manager has discretionary enforcement authority over that permit, including the imposition of civil penalties or the decision to request pursuit of criminal penalties. Plaintiffs therefore cannot state a claim for relief under ARPA and Count XIV must be dismissed.

E. Plaintiffs' NHPA claim (Claim XVII) fails to state a claim and is barred by the statute of limitations.

Plaintiffs' Claim XVII argues that Federal Defendants failed to comply with the NHPA and its regulations. 3d Am. Compl. ¶¶ 481–507. This claim, too, requires dismissal.

"[T]he NHPA imposes purely procedural requirements" and does not mandate particular decisions. *City of Oxford, Ga. v. FAA*, 428 F.3d 1346, 1356 (11th Cir. 2005). The NHPA requires a government agency to "take into account the effect of [any] undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register." 54 U.S.C. § 306108. This requirement, generally referred to as the Section 106 process, is governed by federal regulations. *See* 36 C.F.R. §§ 800–899. "An 'undertaking' is 'a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including' 'those carried out by or on behalf of the Federal agency'; 'those carried out with Federal financial assistance'; 'those requiring a Federal permit, license, or approval'; and 'those subject to State or local regulation administered pursuant to a delegation or approval by a Federal agency.'" *Edgerton v. City of St. Augustine, Fla.*, No. 3:20-CV-941-BJD-PDB, 2023 WL 4687563, at *27 (M.D. Fla. Jan. 31, 2023), *report and recommendation adopted sub nom. Edgerton v. Augustine*, No. 3:20-CV-941-BJD-PDB, 2023 WL 4687515 (M.D. Fla. Mar. 20, 2023) (quoting 54 U.S.C. § 300320).

The NHPA does not provide a private cause of action and may only be enforced through the APA. *San Carlos Apache Tribe v. United States*, 417 F.3d 1091, 1094 (9th Cir. 2005). Judicial review under the APA is expressly conditioned on the existence of a final agency action, if no other statute provides for this review. *See Gallo Cattle*, 159 F.3d at 1198. In addition, the six-year statute of limitations applicable to APA actions applies to Plaintiffs' NHPA claims. *See* 28 U.S.C. § 2401(a); *US Steel Corp. v. Astrue*, 495 F.3d 1272, 1280 (11th Cir. 2007).

Plaintiffs fail to identify any final agency action that they alleged to have been taken in violation of Section 106. Plaintiffs identify two alleged "undertakings": federal financial funding from NPS to Poarch to carry out historical preservation responsibilities, and excavation and construction at the Hickory Ground Site. Setting aside whether these instances even constituted an undertaking as defined by the Act, we address each, beginning with the excavation and construction.

Federal Defendants issued Auburn University an ARPA Permit in 2003, more than six years before Plaintiffs filed their original complaint. 3d Am. Compl. ¶ 161; *see also* 3d Am. Compl., Ex. W at 1-2. Plaintiffs do not allege any other federal undertaking with regard to authorizing excavation or construction. Thus, to the extent that Plaintiffs are alleging the 2003 permit is the final agency action that failed to comply with the NHPA, the claim is time-barred. Plaintiffs also knew that excavation began at least in 2006. 3d Am. Compl. ¶¶ 191, 193; Dkt. No. 261-1 at 285 (letter indicating that discussions between Poarch Band and Muscogee (Creek) Nation regarding re-internment at Hickory Grounds began in May 2006), 296 (same).

At least some NPS funding, by contrast, occurred fewer than six years before Plaintiffs originally filed this suit. 3d Am. Compl. ¶ 318. But the mere provision of funding is not an undertaking. *See Woodham v. Fed. Transit Admin.*, 125 F. Supp. 2d 1106, 1110 (N.D. Ga. 2000) (finding that "federal financial assistance alone is insufficient to trigger the requirements of NHPA.") (citing *Maxwell St. Historic Pres. Coal. v. Bd. of Trs. of the Univ. of Ill.*, No. 00-C-4779, 2000 WL 1141439, at *4 (N.D. Ill. Aug. 11, 2000)). Instead, there must "be some form of federal approval, supervision, control or at least a certain level of consultation over the spending of the federal funds." *Id.*; *see also Business & Residents All. of East Harlem v. Martinez*, 2004 WL 1335903, at *4 (S.D.N.Y. June 14, 2004) (collecting cases). Plaintiffs' Third Amended Complaint does not allege that Federal Defendants retained any control over the funds. And with the exception of a 2011 Preservation Grant from NPS, Plaintiffs do not identify the date or the source of such funding. As such, they have failed to establish an undertaking under the NHPA.

For the foregoing reasons, Plaintiffs have failed to state a claim on their NHPA claim.[3]

F. Plaintiffs fail to state a claim under RFRA (Count XX).

Plaintiffs' RFRA claim should be for two reasons. First, RFRA is not implicated because Federal Defendants' alleged actions are not the source of the alleged substantial burden on Plaintiffs' free exercise of religion. Second, Plaintiffs' allegations, regardless of whether they are imputed to Federal Defendants, do not state a claim under RFRA because they do not adequately allege a substantial burden on Plaintiffs' exercise of religion. For these reasons, Count XX should be dismissed.

Plaintiffs assert that their religion requires them to rebury any discovered remains in accordance with Plaintiffs' traditional religious protocol and protect the site from improper access and use. 3rd Am. Compl. ¶ 534. Plaintiffs claim that the excavation and construction of the casino, parking lots, and other facilities, and operation of the casino on the Hickory Ground property prevent Plaintiffs from fulfilling their religious obligations. *Id.* ¶¶ 535, 537. To state a claim for relief under RFRA against Federal Defendants, Plaintiffs must demonstrate that "there is a sufficiently close nexus between the [Federal Defendants] and the challenged action of [the Poarch Band] so that the action of the latter may be fairly treated as that of the [Federal Defendants themselves]." *Vill. of Bensenville,* 457 F.3d at 62 (quoting *Blum v. Yaretsky*, 457

---

[3] Plaintiffs also allege that Federal Defendants failed to consult with them in violation of the NHPA. Plaintiffs cite 54 U.S.C. §§ 302702, 302706, the NPS Agreement, and NPS's trust responsibilities to the MCN as the source of these duties. 3d Am. Compl. ¶ 494. None of these sources establish a duty to consult within the relevant time period. Section 302702 applies to tribes assuming the functions of a State Historic Preservation Officer. Federal Defendants delegated historic preservation duties to the Poarch Band in 1999, well outside the statute of limitations here. *See* Doc. No. 261-1, Ex. J, NPS Agreement. Similarly, § 302706 requires consultation for property that may be eligible for inclusion on the National Register of Historic

U.S. 991, 1004 (1982)); *Jackson v. Metro. Edison Co.*, 419 U.S. 354, 351 (1974)). And Plaintiffs must allege that such an action "substantially burdens" their exercise of religion. *Apache Stronghold v. United States*, 101 F.4th 1036, 1058 (9th Cir. 2024). Plaintiffs do not do so here.

First, Plaintiffs do not identify any federal actions that substantially burden their religious practice. The *Village of Bensenville* decision is instructive. In that case, plaintiffs, two suburbs, a church, and individuals located or residing near Chicago's O'Hare Airport, challenged under RFRA the Federal Aviation Administration's ("FAA") approval of a plan to expand O'Hare, requiring the relocation of a church cemetery. 457 F.3d at 57. The plaintiff groups challenged the decision on the basis that it burdened their exercise of religion and that the runway expansion plan, which required the relocation of a cemetery, was not the least restrictive means of satisfying the government's compelling interest in reducing delays. *Id.* In finding that the burden on religious exercise was not fairly attributable to the FAA, the court examined whether the FAA's role in the specific conduct challenged was "'[m]ere approval of or acquiescence in' the City's plan or whether the FAA '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 [FAA].'" *Id.* at 64 (quoting *Blum*, 457 U.S. at 1004). The court noted that "absent government coercion or significant government encouragement of the measure under inspection," *Id.* (quoting *Lunceford v. Dist. of Columbia Bd. of Educ.*, 745 F.2d 1577, 1581 (D.C. Cir. 1984)), the Supreme Court has held that the federal government may not be held responsible for a measure taken by a private actor. *Id.* The court found that it was the City of Chicago that was the cause of

---

Sites. The property was listed on the National Register in 1980. And neither the NPS Agreement nor trust duties establish a duty to consult the violation of which would state an NHPA claim.

any burden on religious exercise because it was the organizer and builder. The FAA exercised no coercive power nor provided significant encouragement for the project. *Id.* at 65.

Likewise, Plaintiffs do not allege that Federal Defendants exercised any coercive power or provided significant encouragement for the construction activities at the Hickory Ground property. The specific activities that Plaintiffs claim to burden their religious exercise, including excavation and construction of facilities by the Poarch Band on its own property, are the private actions of the Poarch Band. Although Plaintiffs cite to Federal Defendants' issuance or non-issuance of permits, Interior's issuance of a permit to Auburn University is only the approval of the Poarch Band's excavation on its land, which is insufficient to justify imposition of RFRA's compelling interest test. *See Vill. of Bensenville*, 457 F.3d at 66; *see also Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 53–54 (1999). Therefore, RFRA is not applicable to Federal Defendants in this case.

Second, even if Federal Defendants' issuance or non-issuance of permits could be considered a significant encouragement of or coercive power over the specific activities of which Plaintiffs complaint, Plaintiffs' RFRA claims must still be dismissed because Plaintiffs have not adequately alleged that Federal Defendants' alleged actions do not "substantially burden" Plaintiffs' exercise of religion. To establish a *prima facie* claim under RFRA, Plaintiffs must allege that a governmental action "substantially burdens" their exercise of religion. *Apache Stronghold*, 101 F.4th at 1058. A "substantial burden" is imposed if an action "completely prevents the individual from engaging in religiously mandated activity, or if the regulation requires participation in an activity prohibited by religion." *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004) (citing *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir.1995)) (applying RFRA, court found no substantial burden when religion did not require particular means of expressing religious view and alternative means of religious expression were available); *Church of Scientology Flag Serv. Org., Inc. v. City of Clearwater*, 2 F.3d 1514, 1550 (11th Cir. 1993) (finding a substantial burden when regulation had the effect of mandating religious conduct). "In *Holt v. Hobbs*, the Supreme Court held that a policy substantially burdens a prisoner's religious exercise if it forces him to choose between engaging in conduct that seriously violates his religious beliefs or facing a serious penalty." *Robbins v. Robertson*, 782 F. App'x 794, 802 (11th Cir. 2019) (quoting *Holt v. Hobbs*, 574 U.S. 352 (2015)). Plaintiffs do not establish that Federal Defendants imposed any such "substantial burden" here.

Plaintiffs allege that the excavation and construction activities at the Hickory Ground property burdens the exercise of their religious practices because it will prevent them from performing significant and important religious activities, including "caring for buried ancestors and maintaining the sanctity of ceremonial grounds." 3rd Am. Compl. ¶ 535(a). Plaintiffs also claim that their religious beliefs require that they "[p]revent unauthorized activities or substances, including alcohol, from desecrating sacred spaces." *Id.* ¶ 534(c). These allegations do not demonstrate that any government action has completely prevented them from engaging in religiously mandated activity, that they are being required to participate in an activity prohibited by their religion, or that their religious conduct is being mandated. Nor do Plaintiffs claim that the government will impose a serious penalty on them from exercise of their religion. Rather, Plaintiffs claim that these activities on the Hickory Ground property "have caused ongoing spiritual harm." *Id.* ¶ 536. And Plaintiffs claim that the Poarch Band's excavation and construction activities affect their emotional experience or diminish their spiritual fulfillment, which courts have found fall short of the "substantial burden" cognizable under RFRA. *See Guam v. Guerrero*, 290 F.3d 1210, 1222 (9th Cir. 2002) (A "substantial burden" requires "substantial pressure on an adherent to modify his behavior and to violate his beliefs," including potential sanctions) (citation and internal quotation marks omitted).

The diminishment of a religious experience does not constitute a "substantial burden" under RFRA. *See Lyng*, 485 U.S. at 439.[4] In *Lyng*, the plaintiff tribes challenged the Forest Service's decision to construct a logging road on an area of a National Forest that the Tribes considered sacred and where they alleged to practice their religion. *Id.* at 442-43. In rejecting the plaintiffs' claims, the Court recognized that the challenged project might "interfere significantly" with the plaintiffs' religious practices but emphasized that the government's actions neither coerced plaintiffs into violating their beliefs, nor denied them rights or privileges enjoyed by other citizens as a penalty for their religious practices. *Id.* at 447–49. In fact, in *Lyng*, the Supreme Court found no cognizable RFRA claim even if it assumed that the proposed logging road "virtually destroy[ed] the . . . Indians' ability to practice their religion." 485 U.S. at 451–52 (quoting opinion below, *Nw. Indian Cemetery Prot. Ass'n v. Peterson*, 795 F.2d 688, 693 (9th Cir. 1985)). In *Snoqualmie Indian Tribe v. FERC*, the plaintiffs alleged that a proposed hydraulic dam would, among other things, deny them access to waterfalls necessary for their religious experiences. 545 F.3d 1207, 1213 (9th Cir. 2008). The court of appeals found that:

> [t]he Tribe's arguments that the dam interferes with the ability of tribal members to practice religion are irrelevant to whether the hydroelectric project either forces them to choose between practicing their religion and receiving a government benefit or coerces them into a Catch-22 situation: exercise of their religion under fear of civil or criminal sanction.

---

[4] As the Ninth Circuit observed in *Apache Stronghold*, "[w]hen Congress copied the 'substantial burden' phrase into RFRA, it must be understood as having similarly adopted the limits that Lyng placed on what counts as a governmental imposition of a substantial burden on religious exercise." *Apache Stronghold*, 101 F.4th at 1061. Therefore, Free Exercise Clause cases, which include *Lyng*, may be used to interpret RFRA.

Id. at 1214. Based on *Lyng* and *Snoqualmie,* Plaintiffs' allegations of the excavation and construction at the Hickory Ground property desecrating and damaging the sacred place for the practitioners of their spiritual beliefs are not germane to the question of whether they are being penalized by the challenged actions or deprived of otherwise available benefits.

In sum, Plaintiffs fail to state a claim for relief under RFRA and Count XX should be dismissed.

G. Plaintiffs' Religious Exercise claim (Count XIX) should be dismissed.

Finally, Plaintiffs' Count XIX asserts that if NAGPRA and ARPA are construed in a manner that results in a substantial burden on Plaintiffs' religion, they violate the First Amendment and the RFRA. This claim should be dismissed for several reasons.

First, Plaintiffs appear be challenging a ruling that this Court may make rather than a specific federal agency action. Plaintiffs assert that "[i]f ARPA and NAGPRA are interpreted or applied to allow any tribe other than [Plaintiffs] to provide consent for the excavation or removal of cultural items at the Hickory Ground Site," that interpretation or application would constitute a religious burden and violate RFRA and the First Amendment. 3rd Am. Compl. ¶ 522. A ruling by this Court cannot be the basis for a proper claim against Federal Defendants.

Second, Plaintiffs' religion has not been substantially burdened by Federal Defendants as discussed above. To the extent that Plaintiffs are prevented from practicing their religion because they cannot access the site or the remains, 3rd Am. Compl. ¶ 526, this is true regardless of any action by Federal Defendants. Plaintiffs claim that "[t]he designation of the Hickory Ground Site as trust land held by the United States on behalf of Poarch further compounds the religions infringement of ARPA and NAGPRA." *Id.* ¶ 525. But even if the land is not properly in trust, the Poarch Band would own the land in fee and would not be required to provide Plaintiffs access.

Plaintiffs' requested relief for Count XIX, including restoration of the Hickory Ground Site, *id.* Prayer for Relief, would not redress Plaintiffs' alleged inability to access the Hickory Ground Site. *Id.* ¶ 526.

Third, Plaintiffs have not stated a claim for relief under the First Amendment. The First Amendment of the Constitution provides that "Congress shall make no law respecting an establishment of religion, or *prohibiting the free exercise thereof*. . ." (emphasis added). "As interpreted by the Supreme Court, the Free Exercise Clause of the First Amendment does not prohibit the government from burdening religious practices through generally applicable laws." *Multi Denominational Ministry of Cannabis & Rastafari, Inc. v. Gonzales*, 474 F. Supp. 2d 1133, 1143 (N.D. Cal. 2007), *aff'd sub nom. Multi-Denominational Ministry of Cannabis & Rastafari, Inc. v. Holder*, 365 F. App'x 817 (9th Cir. 2010) (citing *Employment Division v. Smith*, 494 U.S. 872, 890 (1990)). Government programs that have the incidental effect of "mak[ing] it more difficult to practice certain religions but which have no tendency to coerce individuals into acting contrary to their religious beliefs" do not violate the Free Exercise Clause. *Lyng*, 485 U.S. at 450–51. "[A] law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531(1993). Plaintiffs do not point to any law prohibiting the exercise of religion. NAGPRA and ARPA are generally applicable laws aimed at protecting Native American grave sites and archaeological resources, not at the exercise of religion.

Therefore, Plaintiffs fail to state a claim for which relief may be granted under the First Amendment. And as discussed above, Plaintiffs have not stated a claim for relief under the

RFRA. Therefore, Plaintiffs fail to state a claim that NAGPRA and ARPA violate their free exercise of religion. Count XIX should be dismissed.

H. If any of Plaintiffs' claims survive, the Third Amended Complaint does not constitute "a short and plaint statement" for relief under Rule 8.

Even if this Court disagrees with the above bases for dismissing the claims against Federal Defendants, it should find that the Third Amended Complaint violates Rule 8 of the Federal Rules of Civil Procedure. Rule 8 requires "a short and plain statement of the claim showing that that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). It also requires "each allegation must be simple, concise, and direct." *Id.* at 8(d)(1). Plaintiffs' Third Amended Complaint contains 602 paragraphs of allegations and is 141 pages long. This can hardly be construed to be a "short and concise" statement. Indeed, the Eleventh Circuit previously observed that Plaintiffs' Second Amended Complaint did not constitute a short and plain statement. Dkt. No. 234 at 14 (noting that the Second Amended Complaint made the court's analysis difficult by "assert[ing] 'multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against.'"). In response, Plaintiffs *increased* the length of their complaint from 334 to 602 paragraphs. It would be unduly burdensome for Defendants to have to answer each paragraph in the Third Amended Complaint. *See, e.g., Trump v. New York Times Co.*, 800 F. Supp. 3d 1297, 1298 (M.D. Fla. 2025) (noting that some pleadings are necessarily longer than others but "both a shorter pleading and a longer pleading must comprise "simple, concise, and direct" allegations that offer a "short and plain statement of the claim."); *Owens v. Connecticut*, 771 F. Supp. 3d 92, 94 (D. Conn. 2025) (noting that a statement of a claim that is not short and direct unjustifiably burdens the court and the responding party).

VI. CONCLUSION

For the foregoing reasons, Plaintiffs' Third Amended Complaint should be dismissed for lack of jurisdiction under Rule 12(b)(1) and for failure to state a claim under Rule 12(b)(6).

Respectfully submitted this 11th day of February, 2026.

ADAM R.F. GUSTASON
Principal Deputy Assistant Attorney General

s/ Devon Lehman McCune
DEVON LEHMAN MCCUNE
Senior Attorney
U.S. Department of Justice
Environment & Natural Resources Division
Natural Resources Section
999 18th Street, North Terrace, Suite 600
Denver, CO 80202
Telephone: (303) 358-8981
devon.mccune@usdoj.gov

DEVON L. TICE
U.S. Department of Justice
Natural Resources Section
P.O. Box 7611
Washington, DC 20044-7611
Tel: (202) 598-1444
Fax: (202) 305-1275
Devon.tice@usdoj.gov

Attorneys for Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2026, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the parties entitled to receive notice.

/s/ Devon Lehman McCune