

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF COLUMBIA

DEADRIA FARMER-PAELLMANN, *et al.*,

*Plaintiffs,*

v.

SMITHSONIAN INSTITUTION,

*Defendant.*

Civil Action No. 22-3048 (CRC)

**DEFENDANT’S MOTION TO DISMISS AND OPPOSITION TO PLAINTIFFS’  
EMERGENCY MOTION FOR TEMPORARY RESTRAINING ORDER AND  
PRELIMINARY INJUNCTION**

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Defendant Smithsonian Institution (“Smithsonian”), by and through undersigned counsel, respectfully opposes Plaintiffs’ emergency motion for temporary restraining order and preliminary injunction (ECF No. 2) and, pursuant to Federal Rules of Civil Procedure (“Rules”) 12(b)(1) and 12(b)(6), moves to dismiss this action.

## BACKGROUND

### I. The Smithsonian’s Unique Status Within the Federal Government.

The Smithsonian was established by an act of Congress in 1846 “for the increase and diffusion of knowledge among men.” 20 U.S.C. § 41. The Smithsonian conducts its business through a Board of Regents charged with conducting the business of the institution. *Id.* § 42(a). Congress has delegated to the Secretary of the Smithsonian’s Board of Regents the sole authority to “discharge the duties of librarian and of keeper of the museum” and to “take charge of the building and property of the institution.” 20 U.S.C. § 46. The Smithsonian is a unique establishment within the Federal Government and has a long and storied history. *See Dong v. Smithsonian Inst.*, 125 F.3d 877, 879 (D.C. Cir. 1997) (“It is plain that the Smithsonian is not an establishment in the executive branch. To begin with, nine of the seventeen members of its governing Board of Regents are appointed by joint resolution of Congress, 20 U.S.C. § 43, and six of the remaining eight are members of Congress, 20 U.S.C. § 42. (The other two are the Vice President and the Chief Justice of the United States, *id.*.)”) (emphasis omitted).

### II. The History of the Benin Bronzes.

As alleged in the Complaint, the Benin Bronzes are a collection of sculptures casted from copper alloys, including brass and bronze. Compl. (ECF No. 1) ¶ 51. They were made by specialist guilds working for the Royal Court of the Oba (equivalent to a king) of Benin City. *Id.* They were made from “no later than the 11th century C.E. . . . through the 19th century C.E.” *Id.* ¶ 52. The Kingdom of Benin is in modern-day Nigeria. Pls.’ Br. (ECF No. 2-1) at 7–8; *see also*

Mayeni Jones, *Benin Bronzes: “My Great-Grandfather Sculpted the Looted Treasures”*, BBC News, Oct. 27, 2021, <https://www.bbc.com/news/world-africa-59065274> (providing a map of the Kingdom of Benin).

Midway through this period, the Portuguese made contact with Benin. Compl. ¶ 53. The Portuguese and other European traders began contracting with Benin and its Oba to supply people for transport to South America and North America, where they would live as enslaved people. *Id.* ¶ 55. In exchange, the Europeans would provide them copper. *Id.* ¶ 55. The copper would be melted and cast into some of the Benin Bronzes. *Id.* ¶ 56. The Complaint does not allege that this European-provided copper was the only copper used to create the Benin Bronzes; indeed, Benin Bronzes were being created long before European contact. *Id.* ¶ 52.

Benin was only one of many sources for enslaved people. *See, e.g.*, Pl.’s Decl. (ECF No. 2-2) ¶ 6. Plaintiffs acknowledge that the number of individuals transported from Benin is unknown, but estimates that 103,000 enslaved people were taken from Benin to South America and North America. *Id.* The same Trans-Atlantic Slave Trade Database that Plaintiffs rely upon for that figure estimates that more than 10 million individuals were shipped to the Americas to live in enslavement. Trans-Atlantic Slave Trade – Database, <https://www.slavevoyages.org/voyage/database#tables> (10,003,553). The Database estimates that only 366,033 of these individuals (less than 4%) were sent to mainland North America, which includes both the United States and Canada.<sup>1</sup> *Id.*

In January 1897, residents of Benin attacked officers of the British Royal Navy and African porters on a trade mission to Benin City. Compl. ¶ 58. The British responded in February 1897

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<sup>1</sup> For more on Canada’s history with the slave trade, see Matthew McRae, *The Story of Slavery in Canadian History*, Canadian Museum for Human Rights, <https://humanrights.ca/story/the-story-of-slavery-in-canadian-history> (last accessed Oct. 13, 2022).

by sending a military expedition, which captured Benin City.<sup>2</sup> *Id.* ¶¶ 59–60. During the raid, the British seized and removed the Benin Bronzes. *Id.* ¶ 60. Approximately 900 Benin Bronzes are in the British Museum. *Id.* ¶ 61. The Smithsonian also acquired at least thirty-nine Benin Bronzes. *Id.* ¶ 63.

### III. The Smithsonian Elects to Deaccession Some of the Benin Bronzes.

Beginning in March 2022, several European countries decided to repatriate the Benin Bronzes in their possession to Nigeria. *Id.* ¶ 64. On March 8, 2022, the Washington Post reported that the Smithsonian would be returning certain Benin Bronzes to Nigeria. Peggy McGlone, *Smithsonian to Give Back Its Collection of Benin Bronzes*, Wash. Post, <https://www.washingtonpost.com/arts-entertainment/2022/03/08/smithsonian-benin-bronzes-nigeria-return/>.

On that same day, Plaintiff Deadria Farmer-Paellmann<sup>3</sup> read this article. Pl.’s Decl. (ECF No. 2-2) ¶ 3. Plaintiff has stated that the news that “the Smithsonian Institution reached a decision to repatriate [the] Benin bronzes to Nigeria to be displayed in a museum in Benin City” was “very distressing” to her. *Id.* She then contacted the Smithsonian on March 12, 2022, and “advised [the Director of the Smithsonian’s National Museum of African Art, where the Benin Bronzes were held] that the Smithsonian Institute’s decision to return the Benin bronzes excluded an interested party – people like [her] who are descendants of the . . . enslaved.” *Id.* ¶ 4.

The Smithsonian dutifully responded to Plaintiffs’ concerns, even going so far as to schedule a meeting between Plaintiffs and the Smithsonian’s National Museum of African Art Director, which occurred on March 28, 2022. Compl. ¶ 34. Unsatisfied, Plaintiffs contacted the

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<sup>2</sup> For more on the 1897 British raid of Benin, see Smithsonian, *The Raid on Benin, 1897*, <https://africa.si.edu/exhibitions/current-exhibitions/visionary-viewpoints-on-africas-arts/the-raid-on-benin-1897/> (last accessed Oct. 13, 2022).

<sup>3</sup> The other plaintiff, Restitution Study Group, Inc., is a company that Plaintiff Farmer-Paellmann founded. Compl. ¶ 17.



Smithsonian's Inspector General on April 20, 2022, and filed a complaint asserting that the transfer of the Benin Bronzes "could be fraud, waste, or abuse." *Id.* ¶ 36.

On June 13, 2022, the Smithsonian Board of Regents voted to deaccession twenty-nine Benin Bronzes held in the Smithsonian's National Museum of African Art. *See* Smithsonian, *Smithsonian Board of Regents Votes To Return 29 Benin Bronzes to Nigeria*, June 13, 2022, <https://www.si.edu/newsdesk/releases/smithsonian-board-regents-votes-return-29-benin-bronzes-nigeria>. The Smithsonian publicly announced its decision on the same date and noted that "[t]he bronzes, which were removed during the 1897 British raid of Benin City, will be returned to Nigeria's National Commission for Museums and Monuments." *Id.*; *see also* Compl. ¶ 65. This announcement triggered further emails from Plaintiffs as Plaintiffs attempted to stop the Smithsonian from exercising its authority. Compl. ¶¶ 41–48. It also brought joy to countless Nigerians, especially in Benin City, who have long sought the return of the Benin Bronzes that the British had looted in 1897. *Cf.* Mayeni Jones, *Benin Bronzes: "My Great-Grandfather Sculpted the Looted Treasures"*, BBC News, Oct. 27, 2021, <https://www.bbc.com/news/world-africa-59065274> ("I feel happy that the work of my great-grandfather will be coming back to Benin," says Monday Aigbe, who, like his ancestor, is a sculptor.").

On October 11, 2022, the Smithsonian entered into an agreement with the Nigerian National Commission for Museums and Monuments. Agreement (Ex. 1, appendices omitted). The Nigerian National Commission for Museums and Monuments is an arm of the Federal Government of Nigeria. *Id.* at 1. The Agreement provides that nine of the twenty-nine Benin Bronzes will be loaned back to the Smithsonian for a five-year period, subject to renewal. *Id.* at 3. It provides that the parties to the Agreement intend to work collaboratively on creating a joint exhibit, tentatively entitled *Benin Today*, to open in 2023-2024 at the Smithsonian's National

Museum of African Art, the Nigerian National Museum of Benin, or another appropriate venue, and that the exhibit will feature new artworks by Benin-Edo artists that will be created in response to the return of the Benin bronzes. *Id.* It further provides that the parties desire to work together to produce innovative educational programs, workshops, and seminars on Benin arts and photography for secondary and tertiary students, educators, emerging artists, curators, musicians, designers, etc. *Id.* Plaintiffs have noted that the remaining twenty Benin Bronzes subject to the Agreement will be displayed in the Edo Museum of West African Art in Benin City, Nigeria. Pls.’ Br. (ECF No. 2-1) at 5. As was noted during the October 11, 2022 hearing, the Benin Bronzes will be shipped to Nigeria on October 17, 2022.

#### **IV. Plaintiffs Bring This Civil Action.**

On October 7, 2022, Plaintiffs initiated this civil action. The Complaint brings four causes of action: (1) acting without statutory authority; (2) anticipatory breach of trust to the people of the United States; (3) anticipatory breach of trust to United States citizens descended from West Africans trafficked by Benin royalty; and (4) unjust enrichment. *Id.* ¶¶ 69–96. Plaintiffs filed an emergency motion for temporary restraining order and preliminary injunction on the same day (ECF No. 2).

#### **LEGAL STANDARDS**

A “preliminary injunction is an extraordinary and drastic remedy.” *Munaf v. Geren*, 553 U.S. 674, 689–90 (2008) (quotation marks omitted). An injunction should be entered only “upon a clear showing that the [movant] is entitled to such relief.” *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). To obtain a preliminary injunction, the moving party must demonstrate (1) that it is likely to succeed on the merits of its claims; (2) that it is likely to suffer an irreparable injury in the absence of injunctive relief; (3) that the balance of equities tips in its favor; and (4) that the proposed injunction is in the public interest. *Id.* at 20. The same substantive standards apply

for both temporary restraining orders and preliminary injunctions. *See, e.g., Sterling Com. Credit-Mich., LLC v. Phoenix Indus. I, LLC*, 762 F. Supp. 2d 8, 13 (D.D.C. 2011) (Friedman, J.) (denying motion); *Hall v. Johnson*, 599 F. Supp. 2d 1, 4 (D.D.C. 2009) (same); *Experience Works, Inc. v. Chao*, 267 F. Supp. 2d 93, 96 (D.D.C. 2003) (same).

Under Rule 12(b)(1), a plaintiff bears the burden of establishing jurisdiction by a preponderance of the evidence. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). A court considering a Rule 12(b)(1) motion must “assume the truth of all material factual allegations in the complaint and ‘construe the complaint liberally, granting plaintiff the benefit of all inferences that can be derived from the facts alleged.’” *Am. Nat’l Ins. Co. v. FDIC*, 642 F.3d 1137, 1139 (D.C. Cir. 2011) (quoting *Thomas v. Principi*, 394 F.3d 970, 972 (D.C. Cir. 2005)). A court may examine materials outside the pleadings as it deems appropriate to resolve the question of its jurisdiction. *See Herbert v. Nat’l Acad. of Scis.*, 974 F.2d 192, 197 (D.C. Cir. 1992).

Under Rule 12(b)(6), the Court may dismiss a complaint where a plaintiff fails to state a claim upon which relief can be granted. To survive a Rule 12(b)(6) motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). When resolving a motion to dismiss pursuant to Rule 12(b)(6), the pleadings are construed broadly so that all facts pleaded therein are accepted as true, and all inferences are viewed in a light most favorable to the plaintiff. *Id.* Nevertheless, a court is not required to accept as true conclusory allegations or unwarranted factual deductions. *Id.* “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* Likewise, a court need not “accept as true a legal conclusion couched as a factual allegation.” *Papasan v. Allain*, 478 U.S. 265, 286 (1986). Ultimately, the focus is on the

language in the complaint and whether that sets forth sufficient factual allegations to support Plaintiff's claim for relief.

## ARGUMENT

The Court should deny Plaintiffs' motion as they cannot satisfy any of the requirements for injunctive relief. Because Plaintiffs lack standing and fail to state a cause of action, the Court should also dismiss this action.

### **I. Plaintiffs Fail to Demonstrate a Substantial Likelihood of Success on the Merits, Lack Standing, and Fail to State a Cause of Action.**

Plaintiffs are not likely to succeed on the merits, and indeed dismissal is warranted. First, Plaintiffs lack standing. Second, Plaintiffs' claims fail to state a cause of action. Count I fails because the Smithsonian is not subject to the Administrative Procedure Act. Counts II and III fail because the Smithsonian is not a trust. Count IV fails because Plaintiffs do not allege that they were deprived of any property that unjustly enriched the United States or Nigeria.

#### **A. Plaintiffs Lack Standing.**

Plaintiffs' request for relief fails at the threshold because neither of them has standing to proceed. Plaintiffs have not identified a concrete and particularized injury.

Standing concerns whether a plaintiff "has alleged such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (quotation marks omitted). Built on separation-of-powers principles, standing "serves to prevent the judicial process from being used to usurp the powers of the political branches." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 408 (2013).

To satisfy the "'irreducible constitutional minimum' of standing" under Article III of the Constitution, a plaintiff must demonstrate that they have: "(1) an 'injury in fact' that is 'concrete

and particularized’ as well as ‘actual or imminent’; (2) a ‘causal connection’ between the injury and the challenged conduct; and (3) a likelihood, as opposed to mere speculation, ‘that the injury will be redressed by a favorable decision.’” *Ark Initiative v. Tidwell*, 749 F.3d 1071, 1075 (D.C. Cir. 2014) (quoting *Lujan*, 504 U.S. at 560-61). If a plaintiff is “not directly subjected” to the agency action they challenge, then “standing is substantially more difficult to establish.” *Food & Water Watch, Inc. v. Vilsack*, 808 F.3d 905, 914 (D.C. Cir. 2015) (quotation marks omitted).

While an organization may assert standing on its own behalf, “organizational standing requires [the organization], ‘like an individual plaintiff, to show actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision.’” *Id.* at 919 (quoting *Equal Rights Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1138 (D.C. Cir. 2011)). “Making this determination is a two-part inquiry—‘we ask, first, whether the agency’s action or omission to act injured the [organization’s] interest and, second, whether the organization used its resources to counteract that harm.’” *Id.* (quoting *PETA v. USDA*, 797 F.3d 1087, 1094 (D.C. Cir. 2015)). “To allege an injury to its interest, ‘an organization must allege that the defendant’s conduct perceptibly impaired the organization’s ability to provide services in order to establish injury in fact.’” *Id.* (quoting *Turlock Irrigation Dist. v. FERC*, 786 F.3d 18, 24 (D.C. Cir. 2015)). The D.C. Circuit has made “clear that an organization’s use of resources for litigation, investigation in anticipation of litigation, or advocacy is not sufficient to give rise to an Article III injury.” *Id.* (citing *PETA*, 797 F.3d at 1093–94).

The party invoking federal jurisdiction bears the burden of establishing standing. *See Lujan*, 504 U.S. at 561. “[B]ecause standing is a necessary predicate to any exercise of the Court’s jurisdiction, the plaintiff and its claims have no likelihood of success on the merits, if the plaintiff lacks standing.” *Arpaio v. Obama*, 27 F. Supp. 3d 185, 207 (D.D.C. 2014) (Howell, C.J.), *aff’d*,

797 F.3d 11 (D.C. Cir. 2015) (cleaned up). Similarly, an absence of standing “dooms the plaintiff’s ability to show irreparable harm.” *Id.* Thus, when plaintiffs lack standing, the Court must deny a preliminary injunction motion and dismiss the case outright. *Id.*

Plaintiffs do not address standing in their motion, but they include a section in the Complaint on the issue. *See* Compl. ¶¶ 29–31. Plaintiffs assert without support that the Smithsonian holds the Benin Bronzes in trust, either as “Trustee for the People of the United States” or as “Trustee of a special common law trust of the United States for United States citizens descended from that portion of Western Africa now called Nigeria whose ancestors the Kingdom of Benin abducted and sold.” *Id.* ¶ 29. Plaintiffs acknowledge that they “do not seek to assert possessory rights or monetary claims to the Benin Bronzes.” Pls.’ Br. (ECF No. 2-1) at 6. Plaintiffs allege that they “have personal stakes in the outcome of this action insofar as the metal of which the Benin Bronzes are made *are* and *represent* monetary or in-kind metallic value that European slavers used to pay royal Beni traffickers for the lives and liberties of Plaintiffs’ enslaved ancestors.” Compl. ¶ 30 (emphasis in original). While the organizational plaintiff, Restitution Study Group, Inc., does not have enslaved ancestors of its own, the Complaint elsewhere alleges that the company “represents heirs to the treasures of the Benin Bronzes who are DNA descendants of enslaved people who financed the making of the relics.” *Id.* ¶ 18. In other words, Plaintiffs’ theory of standing appears to be the same for both Plaintiffs—*i.e.*, because Plaintiff Farmer-Paellmann is descended from certain enslaved individuals and because Plaintiff Restitution Study Group, Inc., represents people like Plaintiff Farmer-Paellmann, Plaintiffs assert that they have standing to proceed. *Id.* ¶ 30.

The Smithsonian is not a trustee to the American public at large or to the descendants of enslaved people more specifically, but rather is “a cultural and research institution dedicated to

‘the increase and diffusion of knowledge among men.’” *McKinney v. Caldera*, 141 F. Supp. 2d 25, 33 (D.D.C. 2001) (quoting *Dong*, 125 F.3d at 882); *see also* 20 U.S.C. § 41. While the Smithsonian readily acknowledges that it “is a trust instrumentality of the United States,” *O’Rourke v. Smithsonian Inst. Press*, 399 F.3d 113, 114 (2d Cir. 2005), that does not mean that it is a trustee to Americans broadly or to the descendants of the enslaved specifically. *See also Dong*, 125 F.3d at 882 (“The Smithsonian is a cultural and research institution, established in 1846 pursuant to a trust bequest of James Smithson, and dedicated to ‘the increase and diffusion of knowledge among men.’”) (quoting 20 U.S.C. § 41). If any American would have standing to file a lawsuit over the contents of the Smithsonian’s collections, one would expect a long line of similar cases, but similar cases are few and far between. *See, e.g., Crowley v. Smithsonian Inst.*, 462 F. Supp. 725, 728 (D.D.C. 1978) (rejecting challenge to the Smithsonian’s exhibits on evolution).<sup>4</sup>

Where the United States subjects itself to a trust relationship, it does so specifically. *See, e.g., United States v. Navajo Nation*, 537 U.S. 488, 505–06 (2003) (“Although ‘the undisputed existence of a general trust relationship between the United States and the Indian people’ can ‘reinforc[e]’ the conclusion that the relevant statute or regulation imposes fiduciary duties, that relationship alone is insufficient to support jurisdiction under the Indian Tucker Act.”); *Harvest Inst. Freedman Fed’n v. United States*, 80 Fed. Cl. 197, 200 (2008) (former tribal slaves did not have breach of trust claim against the United States, noting “it is ‘not enough to rely on the general trust relationship between the Native Americans and the [G]overnment[;]’” and strictly construing terms of treaty that supposedly gave rise to trust). Plaintiffs provide no evidence to support the

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<sup>4</sup> In *Crowley*, as here, the Smithsonian likewise argued that plaintiff lacks standing. *See Crowley*, 462 F. Supp. at 726 (“While the defendants challenge plaintiffs’ standing to make this statutory claim, the Court will assume standing and proceed because the merits go clearly against plaintiffs.”).

assertion that the Smithsonian has entered into a trust relationship with the American public at large or the descendants of the enslaved, and the Smithsonian is aware of no such evidence.

Moreover, Plaintiffs' claim that Plaintiff Farmer-Paellmann's 23andMe DNA results somehow gives her personal entitlement to dictate the Smithsonian's decisions regarding artifacts from one of the cultures from which she descends is spurious at best. 23andMe does not guarantee that its ethnicity percentages are an accurate depiction of the percentage of an individual's ancestry that descends from particular regions. *See* 23andMe, *Ancestry Composition*, <https://www.23andme.com/ancestry-composition-guide-pre-v5/> (last accessed Oct. 13, 2022) (acknowledging that "[s]ome genetic ancestries are inherently difficult to tell apart because the people in those regions mixed throughout history or have shared history").

Nor do 23andMe DNA results or even verified descendance from certain regions entitle an individual to a say in what happens to the treasures from those cultures. Plaintiffs offer no evidence to support the notion that the twenty-nine Benin Bronzes at issue here were made from metal received as payment for the enslavement of her ancestors. Plaintiffs do not identify the years in which these twenty-nine Benin Bronzes were forged and compare those to the years when her ancestors came across the Atlantic, which is an especially glaring omission here because the British raid in 1897 occurred long after the United States prohibited the importation of additional enslaved people from Africa (effective January 1, 1808). *See* Act Prohibiting Importation of Slaves of 1807, Pub. L. No. 9-22, 2 Stat. 426. Plaintiffs do not (and cannot) offer evidence that Plaintiff Farmer-Paellmann or the unidentified clients of Plaintiff Restitution Study Group, Inc., are descended from the specific individuals who were allegedly sold in exchange for metal that went into Benin Bronzes. Even if they could, Plaintiffs do not (and cannot) offer evidence that the laws of inheritance would have entitled them to inherit any items owed to their distant forebears. Even if



they could, Plaintiffs do not (and cannot) offer evidence that the laws of the Kingdom of Benin that were in force at the time would have given enslaved ancestors a legal claim on artwork subsequently prepared from the proceeds of their sale.

Further, “Plaintiffs do not seek to assert possessory rights or monetary claims to the Benin Bronzes” but rather simply seek to be able to observe the Benin Bronzes. Pls.’ Br. (ECF No. 2-1) at 6. As the Agreement makes clear, nine of the Benin Bronzes will remain on loan to the Smithsonian, for at least the next five years. Agreement at 3. As for the remainder, Plaintiffs will still be able to observe them by traveling to Benin City, Nigeria. Pls.’ Br. at 5. Plaintiffs, both based in New York, would need to travel either way to observe the Benin Bronzes. Compl. ¶¶ 16–17. Either way, Plaintiffs would need to incur costs to travel, and Plaintiffs’ voluntary and self-incurred travel costs do not suffice to give Plaintiffs standing. *See Food & Water*, 808 F.3d at 918–19 (rejecting argument that the “increased costs” that plaintiffs will voluntarily incur in response to agency action suffice to establish an injury in fact). Accordingly, Plaintiffs lack standing.

**B. Plaintiff’s Motion Should Be Denied Because the Complaint Fails to State a Viable Cause of Action.**

All four of Plaintiffs’ causes of action also fail on the merits.

*1. The Smithsonian Is Not Subject to the Administrative Procedure Act and Has Not Acted Ultra Vires.*

The Smithsonian is not an “agency” under either the Administrative Procedure Act, *see* 5 U.S.C. § 551(1), or the Privacy Act, *see* 5 U.S.C. § 552(f). *Dong*, 125 F.3d at 878–79. As the D.C. Circuit explained, “the Smithsonian lacks . . . the ‘authority’ necessary for it to qualify as an ‘authority of the government of the United States’ under § 551(1).” *Id.* at 883. Thus, Count I of the Complaint, which asserts that the Smithsonian has acted *ultra vires* and that its action should be set aside, is not a valid basis for a claim. Compl. ¶ 72.

Moreover, the Smithsonian has not acted *ultra vires*. The Complaint attacks a red herring by noting that a statute applicable to a different Smithsonian Museum is inapplicable here. *Id.* ¶ 71 (citing 20 U.S.C. § 80q-9). This case concerns the Museum of African Art, and the statute regarding that museum explicitly permits the transfer of “any property of whatsoever nature acquired.” 20 U.S.C. § 80m(a)(2). Congress thus clearly delegated to the Smithsonian the authority to transfer works of art. *Id.*

Plaintiff misreads a separate subsection of 20 U.S.C. § 80m, while ignoring the applicable Section 80m(a)(2). Pls.’ Br. at 24 (citing 20 U.S.C. § 80m(a)(4)). Section 80m(a)(4) provides that, if the Smithsonian sells a work of art, then “the proceeds from the sale . . . shall be designated for the benefit of the Museum.” 20 U.S.C. § 80m(a)(4). Here, the Smithsonian transferred the Benin Bronzes; it did not sell them. The Smithsonian was permitted to do so. *Id.* § 80m(a)(2).

2. *The Smithsonian Is Not a Trustee for the People of the United States or United States Citizens Descended from West Africans.*

The Complaint confuses the fact that the Smithsonian is a trust instrumentality of the United States as somehow indicating that the Smithsonian is a trustee for the people of the United States generally (Count II) or the descendants of the enslaved specifically (Count III). Compl. ¶¶ 74, 85. “The Smithsonian is a cultural and research institution, established in 1846 pursuant to a trust bequest of James Smithson, and dedicated to ‘the increase and diffusion of knowledge among men.’” *Dong*, 125 F.3d at 882 (quoting 20 U.S.C. § 41). The “United States, as trustee, holds legal title to the original Smithson trust property and later accretions.” *Id.* at 883. Mr. Smithson’s will did not indicate that the Smithsonian would serve as trustee for all the people of the United States or U.S. citizens descended from West Africans; rather, it provided that Mr. Smithson would “bequeath the whole of [his] property subject to [one exception] to the United States of America, to found at Washington, under the name of the Smithsonian Institution, an

Establishment for the increase & diffusion of knowledge among men.” Smithsonian, *Last Will and Testament, October 23, 1826*, <https://siarchives.si.edu/history/featured-topics/stories/last-will-and-testament-october-23-1826> (last accessed Oct. 13, 2022).

It would have been particularly curious for Mr. Smithson, of all people, to care only about “the increase & diffusion of knowledge among” U.S. citizens or U.S. citizens of West African descent, when he never even visited the United States and had no special connection to our nation or to the enslaved. Natalie Hamilton, *Why Did James Smithson Leave His Fortune to the U.S. and More Questions from Our Readers*, Smithsonian Mag., July 2021, <https://www.smithsonianmag.com/smithsonian-institution/why-james-smithson-leave-fortune-to-united-states-180977959/>.

Perhaps then it is unsurprising that Mr. Smithson, a French-born, British-educated, Italian-deceased man of Europe, would make no distinction between citizens of the United States and citizens of other countries. Smithsonian, *James Smithson, Founding Donor*, <https://siarchives.si.edu/history/james-smithson> (last accessed Oct. 13, 2022).

The Smithsonian takes seriously its mission to increase and diffuse knowledge among all people. 20 U.S.C. § 41. The Smithsonian is doing precisely that by agreeing to transfer some (not all) of the Benin Bronzes and return them to their native home, where people who can affirmatively trace their descent to the individual sculptors of the Benin Bronzes live and breathe. Mayeni Jones, *Benin Bronzes: “My Great-Grandfather Sculpted the Looted Treasures”*, BBC News, Oct. 27, 2021, <https://www.bbc.com/news/world-africa-59065274>.

Perhaps recognizing the difficulties with their position, Plaintiffs argue that the Court should recognize a constructive trust in the absence of any evidence of a trust relationship. Pls.’ Br. at 22. The problems with this theory are myriad. A constructive trust is not an independent cause of action, but rather is a remedy that a court may devise after litigation. *United States v.*

*BCCI Holdings (Luxembourg), S.A.*, 46 F.3d 1185, 1190 (D.C. Cir. 1995) (“A constructive trust is a remedy that a court devises after litigation.”) (emphasis omitted); *accord Alemayehu v. Abere*, 199 F. Supp. 3d 74, 87 (D.D.C. 2016) (Contreras, J.). Plaintiffs do not (and cannot) allege that a court somewhere imposed a constructive trust as a remedy to another lawsuit and that the Smithsonian subsequently breached its obligations.

Even if Count II and Count III of the Complaint were reframed to seek the imposition of a constructive trust, rather than to address the breach of a constructive trust that has not been imposed, *but see* Compl. ¶¶ 73–89, these claims would still fail. “Courts impose a constructive trust to redress the injustice that would otherwise occur when one person has fraudulently or wrongfully obtained the property of another.” *United States v. Taylor*, 867 F.2d 700, 703 (D.C. Cir. 1989). Here, Plaintiffs do not allege that the Smithsonian, which is the defendant in this action, obtained the Benin Bronzes fraudulently or wrongfully. *See* Compl. ¶ 63 (simply stating that the Smithsonian acquired the Benin Bronzes at some point after 1897). Plaintiffs instead take issue with the initial creation of the Benin Bronzes, which is an act that the Smithsonian is not alleged to have participated in. Accordingly, the Court may not impose a constructive trust. Nor has the Smithsonian waived its sovereign immunity for such a claim. *See Beck v. United States*, 777 F. App’x 525, 526 (D.C. Cir. 2019) (*per curiam*) (summarily affirming the district court that concluded that the Smithsonian had not waived its sovereign immunity for plaintiff’s claim).

### 3. *Plaintiffs’ Unjust Enrichment Claim Fails.*

Plaintiffs’ unjust enrichment claim fares no better. “[T]he fundamental characteristic of unjust enrichment is ‘that the defendant has been unjustly enriched by receiving something . . . that properly belongs to the plaintiff[, thereby] forcing restoration to the plaintiff.’” *Rapaport v. Dep’t of Treas.*, 59 F.3d 212, 217 (D.C. Cir. 1995) (alterations in original) (quoting Dobbs, *Law of Remedies* § 4.1(2)). The “typical” elements of such a claim under the common law are: “(1) the

plaintiff conferred a benefit upon the defendant; (2) the defendant accepted and retained the benefit; and (3) it would be unjust for the defendant not to pay the plaintiff the value of the benefit.” *Id.*; see also *Alemayehu v. Abere*, 298 F. Supp. 3d 157, 171 (D.D.C. 2018) (Contreras, J.) (“Under D.C. law, ‘unjust enrichment has three elements: (1) the plaintiff conferred a benefit upon the defendant; (2) the defendant accepted and retained the benefit; and (3) it would be unjust for the defendant not to pay the plaintiff the value of the benefit.’”) (quoting *Sununu v. Philippine Airlines, Inc.*, 792 F. Supp. 2d 39, 53–54 (D.D.C. 2011) (Lamberth, J.)).

Here, Plaintiffs’ claim fails because they do not allege that they conferred a benefit upon the Smithsonian, nor that the Smithsonian accepted and retained the benefit, nor even that it would be unjust for the Smithsonian not to pay Plaintiffs the value of the benefit. Instead, Plaintiffs appear to claim that Plaintiff Farmer-Paellmann’s unknown ancestors may have conferred a benefit upon the Kingdom of Benin, if her ancestors were sold by the Kingdom of Benin to slave traders, and that it would be unjust for the Smithsonian to transfer the rights of the Benin Bronzes to the descendants of individuals who may have been complicit in the slave trade. But an unjust enrichment claim must ask whether the plaintiff has conferred a benefit that the defendant accepted and retained. Plaintiffs’ theory does not fit the elements of the claim.

Even if the Court were to ignore the elements of unjust enrichment and instead just consider justice from a more ethereal perspective, Plaintiffs fail to demonstrate that it would be unjust for the Smithsonian to proceed. Plaintiffs’ argument ignores the fact that the United States encouraged many individuals who had been enslaved and their descendants to be sent back to West Africa and that the African descendants of these individuals would have just as much of a claim as Plaintiffs do. For instance, the Compensated Emancipation Act of 1862, which ended slavery in Washington, DC, sought to encourage the removal of African Americans by appropriating

\$100,000 (worth almost \$3 million today) “to aid in the colonization and settlement of such free persons of African descent now residing in said District, including those to be liberated by this act, as may desire to emigrate to the Republics of Hayti or Liberia, or any such other country beyond the limits of the United States as the President may determine.” Compensated Emancipation Act of 1862, 37 Cong. Ch. 54, § 11, 12 Stat. 376, 378. With slavery officially ending in the United States more than 150 years ago, the descendants of the enslaved have spread across the globe.

Lastly, even if Plaintiffs could somehow surmount their failure to meet any of the elements of an unjust enrichment claim, Plaintiffs cannot demonstrate that the Smithsonian has waived its sovereign immunity for an unjust enrichment claim. *See Spadone v. McHugh*, 864 F. Supp. 2d 181, 192 (D.D.C. 2012) (“Spadone’s claim for unjust enrichment fails to allege a viable waiver of sovereign immunity, or, frankly, any viable jurisdictional basis.”). Accordingly, Plaintiffs’ unjust enrichment claim is barred.

## **II. Plaintiffs Will Not Suffer Irreparable Injury.**

A party moving for a preliminary injunction must demonstrate that he or she is “likely to suffer irreparable harm in the absence of preliminary relief.” *Abdullah v. Obama*, 753 F.3d 193, 197 (D.C. Cir. 2014); *Wis. Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (per curiam) (“The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies”) (citations and quotations omitted). A court may not issue “a preliminary injunction based only on a possibility of irreparable harm . . . [since] injunctive relief [i]s an extraordinary remedy that may only be awarded upon a clear showing that the plaintiff is entitled to such relief.” *Winter*, 555 U.S. at 22.

The “standard for irreparable harm is particularly high in the D.C. Circuit.” *Fisheries Survival Fund v. Jewell*, 236 F. Supp. 3d 332, 336 (D.D.C. 2017) (Chutkan, J.). If a party makes no showing of imminent irreparable injury, the Court may deny the motion for injunctive relief

without considering the other factors. *CityFed Fin. Corp. v. Off. of Thrift Supervision*, 58 F.3d 738, 747 (D.C. Cir. 1995); *Wis. Gas*, 758 F.2d at 674 (explaining that because movants could not establish irreparable harm, the court need not address any of the other applicable factors). A movant must substantiate that the irreparable injury is “likely” to occur in the absence of relief. *See, e.g., Nat’l Parks Conservation Ass’n v. U.S. Forest Serv.*, Civ. A. No. 15-1582 (APM), 2016 WL 420470, at \*8 (D.D.C. Jan. 22, 2016) (“The movant bears the burden of substantiating, with evidence, that the injury is certain, imminent, great, and beyond remediation”). The Local Civil Rules underscore the need for the movant to present such proof, requiring that “[a]n application for a preliminary injunction . . . be supported by all affidavits on which the plaintiff intends to rely” and prohibiting the filing of “[s]upplemental affidavits” without “permission of the Court.” *See id.* (citing LCvR 65.1(c)). “Bare allegations of what is likely to occur are of no value” because the district court must make the determination of “whether the harm will *in fact* occur.” *Wis. Gas*, 758 F.2d at 674 (emphasis in original).

Here, Plaintiffs do not meet their burden to demonstrate irreparable harm. The harm Plaintiffs reference is the diminished “ability of descendants of the victims of the slave trade emanating from the Kingdom of Benin to access artifacts that evidence their ancestors’ enslavement.” Pls.’ Br. at 26. By Plaintiffs’ own admission, the Smithsonian’s National Museum of African Art has not elected to transfer all its Benin Bronzes to Nigeria, with ten Benin Bronzes (separate from the twenty-nine at issue in this case) remaining in its holdings. Compl. ¶ 65. As for the twenty-nine Benin Bronzes subject to the Agreement, nine of them will remain on loan at the Smithsonian for at least the next five years, subject to renewal. Agreement at 3. As for the remaining twenty, Plaintiffs have noted that they will be displayed in the Edo Museum of West African Art in Benin City, Nigeria. Pls.’ Br. at 5. At most, Plaintiffs allege that they will be

subject to increased travel costs if they voluntarily choose to visit the museums, but that increased travel cost does not suffice to establish irreparable harm. *Wis. Gas*, 758 F.2d at 674 (“It is also well settled that economic loss does not, in and of itself, constitute irreparable harm.”). Accordingly, the Court should deny Plaintiffs’ motion.

### **III. Considerations of Irreparable Harm and the Equities Strongly Favor the Smithsonian.**

Plaintiffs must show that the balance of equities tips in their favor and that the injunction is in the public interest. *Winter*, 555 U.S. at 20. The Court “should pay particular regard for the public consequences” of injunctive relief. *Id.* at 24 (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982)). These factors strongly favor the Smithsonian.

If the Court were to enjoin the Smithsonian, it would vitiate a contract between two sovereign nations. *See generally* Agreement. It would deprive Nigerians of sculptures created by their forebears. It would ignore the lasting damage that slavery caused, not just in the United States and the Americas, but in Africa as well. The Smithsonian continues to fulfill its mission to ensure “the increase and diffusion of knowledge” among all people. 20 U.S.C. § 41. Plaintiffs’ America-first focus improperly seeks to limit the scope of that mission.

### **IV. Plaintiffs’ Delay in Bringing This Lawsuit Improperly Created the “Emergency.”**

The Court should deny Plaintiffs’ emergency motion because Plaintiffs “created an emergency of their own making” by failing to bring this lawsuit in a timely manner. *Cavasoz v. Zinke*, Civ. A. No. 18-0891 (CKK), 2019 WL 121210, at \*7 (D.D.C. Jan. 7, 2019); *see also Perry v. Judd*, 471 F. App’x 219, 225–26 (4th Cir. 2012) (“Inviting delayed challenges like the one before us today would leave this court with only the most infirm evidentiary basis upon which to grant the relief requested.”). Plaintiffs have averred that they knew, on March 8, 2022, that the Smithsonian “reached a decision to repatriate . . . Benin bronzes to Nigeria to be displayed in a



museum in Benin City.” Pl.’s Decl. (ECF No. 2-2) ¶ 3. The Smithsonian formally reached a decision to repatriate the Benin Bronzes on June 13, 2022, and announced that decision on the same day. *See* Smithsonian, *Smithsonian Board of Regents Votes To Return 29 Benin Bronzes to Nigeria*, June 13, 2022, <https://www.si.edu/newsdesk/releases/smithsonian-board-regents-votes-return-29-benin-bronzes-nigeria>. Plaintiffs have averred that they knew of this decision no later than June 15, 2022. Pl.’s Decl. ¶ 22. Plaintiffs brought this lawsuit on October 7, 2022.

Plaintiffs’ only explanation for their delay is that, on October 6, 2022, Plaintiffs received another email from the Smithsonian that yet again confirmed the Smithsonian’s decision. *Id.* ¶ 28. By that point, as Plaintiffs have averred, the parties’ positions had long been made clear. Even the email in question notes that the Smithsonian “know[s] that [Plaintiffs] have a different perspective regarding to whom these works should be returned,” and that the Smithsonian “made its decision.” *Id.* The Smithsonian’s position remained unchanged. *Id.* ¶ 3. To justify their delay, Plaintiffs cannot rely on a later email that simply informed Plaintiffs again of the decision that Plaintiffs already knew that the Smithsonian had reached, especially in the absence of any statutory or regulatory exhaustion requirement.

At this point, the Smithsonian has already entered into an agreement with an arm of the Nigerian government. Even were Plaintiffs able to surmount the other barriers to prevailing here, they delayed too long in bringing this action and should not be allowed at the eleventh hour to disturb an agreement between sovereign nations to return home antiquities originating in Nigeria.

\* \* \*

**CONCLUSION**

For the foregoing reasons, Defendant requests that the Court deny Plaintiffs' emergency motion and dismiss this action.

Dated: October 13, 2022

Respectfully submitted,

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