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

MUSCOGEE (CREEK) NATION, a federally recognized Indian tribe, HICKORY GROUND TRIBAL TOWN, and MEKKO GEORGE THOMPSON, individually and as traditional representative of the lineal descendants of those buried at Hickory Ground Tribal Town in Wetumpka, Alabama.

Plaintiffs,

v.

STEPHANIE A. BRYAN, individually and in her official capacity as Chair of the Poarch Band of Creek Indians Tribal Council; ROBERT R. MCGHEE, individually and in his official capacity as Vice Chair of Poarch Tribal Council and board member of PCI Gaming Authority; AMY BRYAN GANTT, in her official capacity as Treasurer of the Poarch Band of Creek Indians Tribal Council; CHARLOTTE MECKEL, in her official capacity as Secretary of the Poarch Band of Creek Indians Tribal Council; DEWITT CARTER, in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; SANDY HOLLINGER, individually and in her official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; KEITH MARTIN, individually and in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; ARTHUR MOTHERSHED, individually and in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council; JUSTIN STABLER, in his official capacity as At Large member of the Poarch Band of Creek Indians Tribal Council and board member of PCI Gaming Authority; BUFORD ROLIN, an individual; DAVID GEHMAN, an individual; GARVIS SELLS, an individual; BILLY BAILEY, in his official capacity as Acting Poarch Band of Creek Indians Tribal Historic Preservation Officer; TIMOTHY A. MANNING, in his official capacity as Chair of the board of the PCI Gaming Authority; TERESA A. POUST, in her official capacity as board member of the PCI Gaming Authority; BRICE MCGHEE, in his official capacity as board member of the PCI Gaming Authority; EDDIE L. TULLIS, individually and in his official capacity as board member of the PCI Gaming Authority; RACHEL HARRIS in her official

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capacity as board member of the PCI Gaming Authority; THE DEPARTMENT OF THE INTERIOR; BRYAN NEWLAND, in his official capacity as Assistant Secretary of Indian Affairs; DEB HAALAND, in her official capacity as Secretary of the United States Department of the Interior; CHARLES F. SAMS III in his official capacity as Director of the National Park Service; and AUBURN UNIVERSITY;

Defendants.

PLAINTIFFS' RESPONSE AND MEMORANDUM IN SUPPORT OF RESPONSE TO AUBURN UNIVERSITY'S MOTION TO DISMISS THIRD AMENDED COMPLAINT AND SUPPLEMENTAL COMPLAINT

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I. INTRODUCTION

Plaintiffs file this Response to Auburn University's ("Auburn") Motion to Dismiss (Doc. 278), Plaintiffs' Third Amended and Supplemental Complaint ("TASC") (Doc. 261). Auburn seeks to portray itself as an innocent bystander to the events that led to the current litigation. (*See* Doc. 278 at 7) (stating that up until now, "Auburn chose to allow the case to be developed by the real parties in interest."). Auburn's efforts to minimize its role in the desecration of the Hickory Ground Site fail in light of the allegations in the TASC and the documents already in the record.

In the early 1990s, Auburn archaeologists surveyed the grounds at Hickory Ground and concluded that their "investigations have demonstrated a greater complexity to the archaeological resources at this site than were previously suspected." (Doc. 271 at Ex. A, 31) (1990 Auburn Archaeologist Report). Through these investigations, Auburn documented "evidence of well[-]preserved archaeological remains still present beneath the disturbed plow zone." (*Id*. at Ex. A, 32); (*see also* Doc. 261-1 at Ex. V, 303) (2001 Bureau of Indian Affairs ("BIA") Briefing Statement) (stating that archaeological investigations in the 1990s revealed that there is "no area where such resources were totally absent" at Hickory Ground); (*id.* at Ex. V, 303) ("[T]he site was found to contain Indian burials."). Moreover, in the early 1990s, Auburn stated that the archaeological resources located at Hickory Ground were "associated with the Historic Upper Creek Indians of Central Alabama" (synonymous with the historic Muscogee (Creek) Nation ("Nation"))—and *not* the newly formed Poarch Band of Creek Indians ("Poarch"). (Doc. 271 at Ex. A, 32); (*see also* Doc. 261 at 15-16, ¶¶ 70-71).

And yet, when Poarch asked Auburn to excavate the Muscogee individuals buried at Hickory Ground (along with thousands of their sacred and personal funerary objects), Auburn agreed. (Doc. 261 at 36, ¶ 154). Auburn obtained the Archaeological Resources Protection Act ("ARPA") permit it knew it needed, as a non-Indian entity engaging in excavations on Indian

lands. (Doc. 261-1 at Ex. W, 307-08) (Auburn's Federal Archeological Permit). That permit explicitly required that any "[e]xcavation 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." (*Id.* at 308) (emphasis added). The permit that Auburn requested and received also stated that Auburn must undertake consultation with "*traditional religious leaders* of all Indian tribes and Native Hawaiian organizations that can reasonably be assumed to be *culturally associated with the cultural items*." (*Id.*) (emphasis added). Given that Auburn archaeologists previously concluded that the Nation is culturally affiliated with the archaeological resources located at Hickory Ground (*see* Doc. 271 at Ex. A, 32), the fact that Auburn never made a single attempt to speak to Mekko Thompson—or anyone from Hickory Ground Tribal Town or the Nation—prior to excavating 57 of their ancestors demonstrates that Auburn's past and present violations of federal law are not accidental or mere unintended consequences of otherwise good faith behavior. Auburn is not a mere bystander.

Auburn's past and present conduct exemplifies the kind of conduct Congress intended to eradicate with the passage of the Native American Graves Protection and Repatriation Act ("NAGPRA"). As one Senator recently reflected, it is "unconscionable . . . [that] universities continue to hold onto these sacred items in violation of everything that is right and moral and, more importantly, in violation of Federal law." 170 CONG. REC. S331-03, *334 (daily ed. Feb. 1, 2024) (statement of Senator Schatz) (Westlaw). Auburn is one of those universities.

And despite continuing to accept federal funds granted to universities to ensure compliance with NAGPRA and consultation with tribes, Auburn now tells this Court it cannot be held liable for its unlawful conduct under NAGPRA (and the First Amendment) because Auburn is entitled

to immunity under the Eleventh Amendment. As discussed in greater detail below, however, the question of whether Auburn is entitled to the State of Alabama's immunity under the Eleventh Amendment is a rather nuanced inquiry—one that Auburn's cursory arguments do not adequately address or cover. At this stage in the proceedings, none of Plaintiffs' claims against Auburn should be dismissed on sovereign immunity grounds without discovery regarding key jurisdictional facts in dispute between the parties.

Accordingly, nothing in Auburn's motion to dismiss warrants dismissal of Plaintiffs' claims against Auburn.

II. PROCEDURAL BACKGROUND

Plaintiffs incorporate by reference Section II, Procedural Background in Plaintiffs' Response to the Poarch Officials' Motion to Dismiss, filed Apr. 30, 2026.[1]

III. FACTUAL BACKGROUND

Plaintiffs incorporate by reference Section III, Factual Background, in Plaintiffs' Response to the Poarch Officials' Motion to Dismiss, filed Apr. 30, 2026.[2] Additionally, it is relevant that Auburn itself acknowledges that "[s]ome cultural items from Hickory Ground remain at Auburn." (Doc. 278 at 6).

[1] All pin cites to previously filed documents are to the ECF generated page number.

[2] The Poarch Officials include Stephanie A. Bryan, Robert R. McGhee, Amy Bryan Gantt, Charlotte Meckel, Dewitt Carter, Sandy Hollinger, Keith Martin, Justin Stabler, and Arthur Mothershed, in their official capacities as Poarch Tribal Council members ("**Tribal Council Officials**"); Timothy Manning, Teresa E. Poust, Brice McGhee, Eddie L. Tullis, Rachel Harris, Robert McGhee, and Justin Stabler, in their official capacities as PCI Gaming Authority members, and Eddie L. Tullis and Robert R. McGhee in their individual capacities ("**Gaming Officials**"); and Billy Bailey in his official capacity as the Tribal Historic Preservation Officer for Poarch ("**Poarch THPO**"); (collectively referred to as the "**Poarch Officials**").

IV. STANDARD OF REVIEW

Plaintiffs incorporate by reference the Rule 12(b)(6) standard set forth in Section V.A of Plaintiffs' Response to the Poarch Officials' Motion to Dismiss, filed Apr. 30, 2026. Auburn frames its Eleventh Amendment immunity defense as a facial attack under Rule 12(b)(1). In adjudicating a facial attack under Rule 12(b)(1), the Court asks only whether Plaintiffs have sufficiently alleged a basis for jurisdiction, and the allegations of the TASC must be accepted as true for purposes of this motion. *See Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). Plaintiffs therefore receive the same procedural safeguards under Rule 12(b)(1) as they receive under Rule 12(b)(6).

V. ARGUMENT

A. Plaintiffs relinquish their request for attorneys' fees from Auburn.

Plaintiffs do not agree that Auburn is entitled to the State of Alabama's Eleventh Amendment immunity for its past and ongoing violations of ARPA, NAGPRA, the Religious Freedom Restoration Act ("RFRA"), and the First Amendment. *See infra* Sections V.B, V.C, V.E.2, V.F.2. Auburn has consistently represented to the Court and Plaintiffs that "Auburn will follow any orders or directives of this court." (Doc. 73 at 5); (*see also* Doc. 278 at 7) ("Auburn has consistently affirmed 'its willingness to cooperate with and facilitate whatever relief measures may be ordered by this Court.'"). Auburn argues that the TASC changed the posture of this case, in part, because it requested attorneys' fees and costs from Auburn for the first time. (Doc. 278 at 7-8) (noting Auburn had previously not argued Plaintiffs' claims should be dismissed on sovereign immunity grounds, but "[t]hings changed dramatically with the filing of the Third Amended Complaint."); (*id.* at 8) (noting that the TASC, for the first time, "demands that attorneys' fees and costs be assessed against Auburn."); (*see also* Doc. 255 at 1) (taking issue with "Plaintiffs' inclusion of Auburn – for the first time in the twelve-plus-year history of this case – in their

demand for recovery of costs and attorneys' fees."). Plaintiffs therefore withdraw their request for attorneys' fees and costs from Auburn.

That withdrawal moots Auburn's arguments directed solely to attorneys' fees and costs. Auburn itself states that it "remains committed to following the Court's orders regarding the possession, custody, control, or relocation of the Hickory Ground cultural items in its possession." (Doc. 278 at 8). Plaintiffs' claims against Auburn (Counts XIII, XVI, XXIV, and XXV) all request equitable, non-monetary relief related to the remains and cultural resources in Auburn's possession. (Prayer for Relief, Doc. 261 at 134-35, ¶ (m)); (*id.* at 136, ¶ (p)); (*id*. at 140, ¶ (x)); (*id*. ¶ (y)). None of Plaintiffs' claims request relief beyond what Auburn has stated it remains committed to provide (if ordered to do so by the Court). The Court therefore need not address Auburn's arguments that the Equal Access to Justice Act does not apply to Auburn, that the National Historic Preservation Act ("NHPA") does not provide a basis for attorneys' fees against Auburn, or that the fee request should be stricken for delay. Those fee issues are now moot.

Plaintiffs withdraw their request for attorneys' fees from Auburn to streamline the Court's consideration of Auburn's motion. Plaintiffs' focus remains on repatriating their relatives and returning their funerary objects. Plaintiffs therefore address below the remaining grounds Auburn asserts for dismissal of Counts XIII, XVI, XXIV, and XXV.[3]

B. Auburn's Eleventh Amendment immunity is limited and claim specific.

Auburn does not contend that the TASC must be dismissed in full on sovereign immunity grounds. Auburn instead states that only "some" claims are barred by Eleventh Amendment

[3] The first footnote in Auburn's brief creates the appearance that although Auburn contends Plaintiffs' 2012 Complaint for Declaratory and Injunctive Relief ("Original Complaint") was a "shotgun pleading," Auburn does not currently contend that the TASC constitutes a "shotgun pleading." (Doc. 278 at 8, n.1). To the extent that Auburn files a reply brief arguing that the TASC is a "shotgun pleading," Plaintiffs incorporate by reference their arguments and authorities in Sections VI.A of Plaintiffs' Response to the Poarch Officials' Motion to Dismiss, filed Apr. 30, 2026.

immunity and that other claims fail because the statutory text does not authorize suit against Auburn. (Doc. 278 at 6). Auburn then organizes its motion to match that distinction, placing Counts XIII (NAGPRA) and XXV (First Amendment) in its Eleventh Amendment section and Counts XXIV and XVI in a separate section asserting only statutory merits defenses. (Doc. 278 at 9, 15). The Court should hold Auburn to the motion it filed and reject any effort to convert a partial immunity defense into a basis to dismiss every claim against Auburn. Given the Eleventh Circuit's instruction that sovereign immunity be asserted, challenged, and evaluated on a claim-by-claim basis, allowing Auburn to—for the first time—assert it is entitled to Eleventh Amendment sovereign immunity for Counts XXIV and XVI in a reply brief would be inappropriate, prejudicial, and in conflict with the Eleventh Circuit's guidance. (Doc. 234 at 14) (Eleventh Circuit opinion, Oct. 11, 2024) (concluding that arguments regarding "sovereign immunity" must be made "claim by claim.").[4]

Auburn's motion suggests that because it has been held to be entitled to Eleventh Amendment immunity in other cases, it must be treated the same here. (Doc. 278 at 14-15). However, whether a defendant acts as an arm of the State must be assessed in light of the particular function in which the defendant was engaged when taking the actions out of which liability is asserted to arise. *See Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003) (*en banc*). Auburn therefore must show that, with respect to each count and the conduct challenged there, it was acting as an arm of the state in a capacity entitled to Eleventh Amendment protection. Auburn's motion fails to demonstrate this.

[4] Doing so follows settled sovereign immunity principles, which require courts to analyze the applicability of the Eleventh Amendment and its exceptions on a claim-by-claim and defendant-by-defendant basis. *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 389-93 (1998); *Muscogee (Creek) Nation v. Rollin*, 119 F.4th 881, 887 (11th Cir. 2024). Where the State does not raise the matter, the Court can ignore it. *See Schacht*, 524 U.S. at 389 (1998).

Determining whether Auburn acted as an arm of the State when taking the actions alleged in the TASC requires balancing the four factors set forth in *Manders v. Lee*. Those factors include: (1) how state law defines the entity; (2) what degree of control the State maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity. *Manders*, 338 F.3d at 1309. As the entity invoking Eleventh Amendment immunity, Auburn bears the burden of showing that it qualifies as an arm of the State for the particular function at issue. *See Miller v. Advantage Behav. Health Sys.*, 677 F. App'x 556, 559 (11th Cir. 2017).

The most important *Manders* factor is whether the state treasury would be burdened by a judgment against the defendant. *Freyre v. Chronister*, 910 F.3d 1371, 1384 (11th Cir. 2018); *cf. Rosario v. Am. Corrective Counseling Servs., Inc.*, 506 F.3d 1039, 1046 (11th Cir. 2007). For each Count against Auburn, Plaintiffs seek only prospective, injunctive relief against the university itself, so the TASC cannot be read on its face to be against the State of Alabama or its treasury. (Doc. 261 at 134-35, ¶ (m)); (*id*. at 136, ¶ (p)); (*id.* at 140, ¶ (x)); (*id.* ¶ (y)). Thus, Auburn cannot sustain its facial attack that Plaintiffs have not sufficiently alleged a basis for jurisdiction under Rule 12(b)(1). *See Lawrence*, 919 F.2d at 1529 (holding that in a facial attack under Rule 12(b)(1), allegations in the complaint must be taken as true). And because Auburn itself chose not to brief Counts XXIV and XVI as immunity counts, the Court need not reach the *Manders* analysis as it pertains to those Counts. *See Schacht*, 524 U.S. at 389 (1998).

C. The Eleventh Amendment does not require dismissal of Count XIII (NAGPRA).

Auburn claims the Eleventh Amendment insulates it from liability under NAGPRA, but does not cite a single instance where a court has held that a state university is immune from suit for violations of NAGPRA. (Doc. 278 at 9-14).[5] This is because no federal court has definitively

[5] Auburn's brief makes reference to general principles with regard to the Rehabilitation Act of 1973, the Jones Act, the Age Discrimination in Employment Act, the Family Medical Leave Act and other such

found that the Eleventh Amendment insulates a state university like Auburn from liability for ongoing violations of NAGPRA. However, at least one court, in one of the most prominent NAGPRA cases to date, has suggested that NAGPRA itself may provide a waiver of sovereign immunity. *Bonnichsen v. United States*, 969 F. Supp. 614, 627 n.17 (D. Or. 1997) ("An argument can be made in favor of an implied waiver of sovereign immunity in § 3013, since a primary purpose of NAGPRA is the repatriation of remains and other items that are in the possession of federal agencies or that may be discovered on federal lands."). On Auburn's facial Rule 12(b)(1) motion, that uncertainty counsels against dismissal where the TASC plausibly alleges an ongoing NAGPRA violation by Auburn and seeks only declaratory and injunctive relief.[6]

Auburn fails to meet its burden to show that it qualifies as an "arm of the state" for purposes of Plaintiffs' NAGPRA claim. The arm of the state inquiry is function specific, so Auburn cannot claim it is entitled to Eleventh Amendment immunity based on court decisions that found it to be an arm of the state in other circumstances. Indeed, the allegations in the TASC demonstrate otherwise, and in a 12(b)(1) facial attack, those allegations must be accepted as true. *See Lawrence*, 919 F.2d at 1529.

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inapplicable acts. But Auburn identifies no case holding that a state university or university museum is immune from suit under NAGPRA, and Congress made clear that NAGPRA is a unique statute that cannot be compared or considered directly analogous with other statutes. *See* 25 U.S.C. § 3010 ("This chapter reflects the unique relationship between the Federal Government and Indian tribes … and should not be construed to establish a precedent with respect to any other individual, organization or foreign government.").

[6] Auburn's Administrative Procedure Act ("APA") argument misses the mark because Count XIII is not an APA claim. (Doc. 278 at 20). Plaintiffs do not allege that Auburn is a federal agency subject to the APA, nor does Count XIII depend on identifying a "final agency action" under 5 U.S.C. § 704. Count XIII is brought directly against Auburn under NAGPRA's own enforcement provision, which gives district courts jurisdiction over "any action brought by any person alleging a violation of this chapter" and authorizes the Court to issue such orders as may be necessary to enforce NAGPRA. 25 U.S.C. § 3013. Auburn is a federally funded institution subject to NAGPRA's possession, inventory, consultation, and repatriation requirements. (Doc. 261 at 95, ¶ 445). Accordingly, Auburn's adopted APA arguments regarding final agency action do not provide a basis to dismiss Count XIII.

Focusing on the specific function is critical under *Manders* because the most important factor in the arm-of-the-state analysis is whether a judgment would burden the state treasury. *See Freyre*, 910 F.3d at 1384; *cf. Rosario*, 506 F.3d at 1046. The TASC's Prayer for Relief requests non-monetary damages, including entry of: declaratory judgment that Auburn violated NAGPRA; injunctive relief compelling compliance with NAGPRA's statutory duties, including consultation, provision of complete and accurate inventories, and expeditious repatriation of human remains and cultural items; an order requiring return of remains and cultural items to Plaintiffs as lineal descendants or the primary culturally affiliated tribe; and any further equitable relief necessary to remedy the violations. (Doc. 261 at 134-35, ¶ (m)). The TASC therefore cannot be read on its face as seeking monetary relief from the State of Alabama or its treasury.

Moreover, the TASC sufficiently alleges that Auburn was not engaged in a traditional state sovereign function "when taking the actions out of which liability is asserted to arise." *See Manders*, 338 F.3d at 1308. When a federally funded state university possesses or controls Native American human remains in its archaeological collections, NAGPRA treats the university as a "museum" subject to federal inventory, consultation, and repatriation duties, rather than as a sovereign regulator exercising state police powers. 25 U.S.C. § 3001(8); *see also White v. Univ. of California,* 765 F.3d 1010, 1015, 1017 (9th Cir. 2014) (treating the University of California "[a]s a 'museum' subject to NAGPRA," where "the University has maintained custody of the La Jolla remains"); *Pueblo of San Ildefonso v. Ridlon*, 103 F.3d 936, 937 (10th Cir. 1996) (concluding that NAGPRA applies to "a federally-funded museum operated by the Regents of the University of California"). Consequently, when Auburn holds Native human remains and/or funerary objects in its anthropology collection, it is acting as a curator of a museum collection, *not* exercising any core sovereign powers of the State of Alabama protected by the Eleventh Amendment.

There is also support for the conclusion that Congress intended for NAGPRA to abrogate the immunity of state owned and operated universities. *See* 170 Cong Rec S 331-03, at *S334 (emphasis added) (stating that NAGPRA "require[s] museums and *universities* to quickly return the remains and items that they were holding that belonged to . . . American Indians," and identifying Harvard University, the University of California, Berkeley, and Indiana University as several institutions that hold ancestral remains subject to NAGPRA). Congress used broad, all-encompassing language regarding who could be subject to a lawsuit under NAGPRA, providing that: "The United States district courts shall have jurisdiction over **any action brought by any person** alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter." 25 U.S.C. § 3013 (emphasis added).[7] Courts have noted that this broad language contains *no* limitations. *See, e.g.*, *Bonnichsen*, 367 F.3d at 874 ("NAGPRA contains the broad 'any person' formulation and includes no textual limitation on federal court jurisdiction . . . 'Any person' means exactly that.").

Furthermore, Congress defined "museum" to include "any institution or State or local government agency (*including any institution of higher learning*) that receives Federal funds and has possession of, or control over, Native American cultural items."[8] 25 U.S.C. § 3001(8) (emphasis added). Auburn admits that it receives federal funds and that it has possession of Native American cultural items. (Doc. 194 at 2, ¶32). Its receipt of federal funds indicates acceptance of, and submission to, the federal statutory and regulatory framework governing the use of those

[7] 25 U.S.C. § 3009 also provides that: "Nothing in this chapter shall be construed to—(3) deny or otherwise affect access to any court[.]"

[8] Congress also enacted a good faith protection for museums that repatriate items. 25 U.S.C. § 3005(f). That protection makes little sense if federally funded state universities and museums may invoke sovereign immunity to block judicial enforcement of the repatriation duties Congress imposed on them in the first place.

funds, including compliance with statutorily imposed obligations designed to protect Native American cultural heritage. *See, e.g.*, *WATCH v. Harris*, 535 F. Supp. 9, 14 (D. Conn. 1981) (citing several federal and state cases that "have held that a local agency which receives urban renewal funds from the federal government is subject to the provisions of NHPA"). Thus, Congress spoke directly to the class of entities to which Auburn belongs.[9] As Senator Schatz recently confirmed, NAGPRA requires "***universities to quickly return*** the remains and the items that they were holding that belonged to Native Hawaiians, Alaska Natives, and American Indians." 170 Cong. Rec. S331-03, at *S334 (emphasis added). It would be absurd for Congress to intend for NAGPRA to require a state university to "quickly return" the Native American remains and funerary objects in its possession without intending for NAGPRA to allow for courts to ensure that compliance is possible.

Auburn's federal permit further underscores why Count XIII should proceed. Auburn voluntarily and willingly took on NAGPRA (and ARPA) duties and obligations when it requested, and received, an ARPA permit to undertake excavations at the Hickory Ground Site. (*See* Doc. 261-1 at Ex. W, 307). That permit provides in paragraph eight: "All permits are subject to the provisions of the Native American Graves Protection and Repatriation Act of 1990." (*Id.*). By requesting—and receiving—the ARPA permit, Auburn voluntarily agreed to comply with the affirmative obligations that NAGPRA imposes on museums and State institutions receiving federal funding, including:

- Compiling inventories of Native American human remains and cultural items (25 U.S.C. §§ 3003-3004);

[9] Congress continues to emphasize that NAGPRA was passed "[t]o remedy th[e] injustice . . . [that] "continues to this very day because these museums and ***universities*** continue to hold onto these sacred items in violation of everything that is right and moral…." 170 Cong. Rec. S 331-03, at *S334.

- Consulting with lineal descendants and/or culturally affiliated tribes (25 U.S.C. § 3005); and
- Expeditiously repatriating such items upon request (25 U.S.C. § 3005).

By voluntarily operating under the federal permit in conducting its excavation, by maintaining the excavated human remains and artifacts, and by accepting federal funding, Auburn voluntarily subjected itself to the statutory obligations imposed by NAGPRA. Auburn cannot accept the benefits of that permit and funding, continue to possess the remains and cultural items excavated under it, and then deny that this Court has authority under Section 3013 to enforce NAGPRA duties that govern that same conduct.

The TASC also alleges the type of ongoing violations of federal law that equitable and implied remedies are intended to address. (*See, e.g.*, Doc. 261 at 5, ¶ 15) ("Auburn continue[s] to unlawfully prevent and obstruct Plaintiffs' requested repatriation."). Specifically, Auburn is alleged to have failed to comply with permit conditions, excavated and retained human remains and cultural items without consultation or consent, failed to provide a complete and accurate inventory, obstructed return, mishandled and improperly stored remains and artifacts, and engaged in research and curation without consent. (*Id.* at 96, ¶ 447(a)-(g)). The TASC further alleges that Muscogee burials, associated funerary objects, and other cultural items remain in storage at Auburn and that Auburn's continued possession of those items continues to interfere with Plaintiffs' religious and cultural obligations to their ancestors. (*Id.* at 96-97, ¶¶ 448-49). Auburn also acknowledges that some Hickory Ground cultural items remain at Auburn and that Auburn was originally included in this case so the Court could provide complete relief regarding the possession, custody, control, or relocation of those items. (Doc. 278 at 6-8). Count XIII therefore seeks classic prospective relief directed to Auburn's ongoing violation of NAGPRA. This is relief against a state university that Congress intended for NAGPRA to address.

Finally, Auburn attacks a claim Plaintiffs do not bring. Auburn emphasizes that a museum that violates NAGPRA may be assessed a civil penalty by the Secretary of the United States Department of the Interior ("Secretary"). (*Id.* at 11-12) (citing 25 U.S.C. § 3007). But Plaintiffs do not ask this Court to impose civil penalties. Plaintiffs seek declaratory and injunctive relief under NAGPRA's enforcement provision, which states that "[t]he United States district courts shall have jurisdiction over any action brought by any person alleging a violation of this chapter and shall have the authority to issue such orders as may be necessary to enforce the provisions of this chapter." 25 U.S.C. § 3013. The TASC alleges that Auburn continues to violate NAGPRA by failing to provide a complete and accurate inventory, obstructing repatriation, mishandling and improperly storing remains and cultural items, and continuing to retain items subject to Plaintiffs' repatriation requests. (Doc. 261 at 96-97, ¶¶ 447-49). Auburn's effort to recast Count XIII as a request for civil penalties under Section 3007 should therefore be rejected.

For all of these reasons, Auburn has not shown on this facial record that Count XIII should be dismissed on Eleventh Amendment grounds. Allowing Auburn and other similarly situated universities to invoke Eleventh Amendment immunity would effectively exempt a substantial portion of the nation's museum collections from the statute Congress enacted specifically to regulate them. Therefore, Auburn's Motion to Dismiss Count XIII should be denied.[10]

[10] Auburn does not make any independent arguments of its own addressing the legal merits of Count XIII; instead, Auburn incorporates the arguments and authorities in the Federal Defendants' Motion to Dismiss. (*See* Doc. 278 at 20) (incorporating Doc. 275 at 23-28) (arguing that NAGPRA does not contain a private right of action and, therefore, Plaintiffs must demonstrate a "final agency action" to bring suit). Accordingly, Plaintiffs incorporate by reference their arguments made and the authorities cited in Section V.A of Plaintiffs' Response to the Federal Defendants' Motion to Dismiss, filed Apr. 30, 2026. Next, Auburn incorporates the Poarch Officials' argument that Plaintiffs lack standing to bring a claim under NAGPRA. (*See* Doc. 278 at 20) (incorporating Doc. 270 at 73-85) (arguing Plaintiffs lack standing to bring a claim under NAGPRA because they are not lineal descendants and Poarch owns the land where Auburn excavated Hickory Ground Tribal Town's relatives). Accordingly, Plaintiffs incorporate their response to the arguments made and the authorities Plaintiffs cited in Section VI.J.4 of Plaintiffs' Response to the Poarch Officials' Motion to Dismiss, filed Apr. 30, 2026.

D. Plaintiffs state a claim under RFRA against Auburn (Count XXIV).

1. Auburn acted under delegated federal authority when substantially burdening Plaintiffs' religious exercise.

Auburn is a federally funded Alabama institution that has exercised, and continues to exercise, possession or control over cultural items excavated at Hickory Ground, including human remains and associated funerary objects. (Doc. 261 at 13, ¶ 59).

Auburn argues that Count XXIV fails because RFRA does not apply to "state actors such as Auburn." (Doc. 278 at 15-16) (citing *City of Boerne v. Flores*, 521 U.S. 507 (1997); *Wiley v. Glover*, No. 1:05-cv-1156-MEF, 2009 WL 67657 (M.D. Ala. Jan. 9, 2009); *Shakur El-Bey v. Menefee*, No. 3:14-CV-47-WKW, 2014 WL 6633544 (M.D. Ala. Oct. 27, 2014), report and recommendation adopted in part, 2014 WL 6633484 (M.D. Ala. Nov. 21, 2014); and *Muhammed v. Bethel-Muhammad*, No. 11-0690-WS-B, 2013 WL 5531397 (S.D. Ala. Oct. 7, 2013)). It is true that in the seminal case *City of Boerne*, the Supreme Court held that RFRA is unconstitutional as applied to state and local law because it was beyond Congress's remedial power to regulate States under Section 5 of the Fourteenth Amendment to the Constitution. 521 U.S. at 536. And following that precedent, *Wiley*, *Muhammed* and *Shakur* merely addressed RFRA claims against defendants sued as state actors in that capacity, not as actors under color of federal law. *See Wiley*, 2009 WL 67657, at *1 n.1; *Muhammed*, 2013 WL 5531397, at *5. *Shakur*, 2014 WL 6633544, at *17.

But unlike those cases involving allegations of state actors acting under color of state or local law, Count XXIV proceeds against Auburn squarely under RFRA's definition of government, which includes an "official (*or other person acting under color of law*) of the United States." 42 U.S.C. § 2000bb-2(1) (emphasis added). The face of the TASC alleges as much. (Doc. 261 at 127, ¶ 584). RFRA therefore does not categorically exclude a nonfederal entity from suit where the challenged conduct is alleged to have been undertaken under color of federal law.

Indeed, a nonfederal entity acting as an "instrumentality" of the federal government may be subject to suit under RFRA. *See Walden v. Ctrs. for Disease Control & Prevention*, 669 F.3d 1277, 1291 (11th Cir. 2012) (assuming contractor acted as an "instrumentality" of the federal government and therefore "may be subject to suit under RFRA"); *see also Davis v. Wigen*, 82 F.4th 204, 213 (3d Cir. 2023) (holding RFRA applied to private prison defendants because, by operating a prison for federal inmates, they acted as "instrumentalities" of the federal government). So while *City of Boerne* bars RFRA actions for violations of state or local laws, those are not the allegations here. RFRA applies to any person acting under color of federal law, and Auburn's argument that RFRA categorically bars actions against any state entity is without merit.

RFRA's applicability to any person acting under color of federal law is supported by the Supreme Court's explanation that RFRA's phrase "official (or other person acting under color of law)" carries the same meaning as in the civil rights context. *Tanzin v. Tanvir*, 592 U.S. 43, 50-52 (2020). In the analogous Section 1983 context, any actor is under color of law when they exercise power possessed by virtue of governmental authority or when their challenged conduct is fairly attributable to the government. *See West v. Atkins*, 487 U.S. 42, 49-50, 54-57 (1988); *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295-96 (2001). In the Eleventh Circuit, those principles are commonly analyzed through the public function, state compulsion, and nexus or joint action tests. *See Focus on the Fam. v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1277-79 (11th Cir. 2003); *Nat'l Broad. Co. v. Commc'ns Workers of Am.*, 860 F.2d 1022, 1026-27 (11th Cir. 1988). The color of law standard is met if the actor falls within any of those three frameworks, and the TASC plausibly alleges actions that meet each of them.

The TASC also alleges Auburn falls within RFRA's definition of "government" because it acted under color of federal law by participating in federally regulated excavation activities

authorized under ARPA and NAGPRA, assuming custody of remains and cultural items under federal statutes and deciding disposition and repatriation under federal law, and receiving federal funding and grants related to those activities. (Doc. 261 at 127, ¶ 584). It alleges Auburn participated in federally regulated excavation activities authorized by federal agencies acting pursuant to ARPA and NAGPRA, including effectuating the excavation of human remains and cultural items from the Hickory Ground Site. (*Id.* ¶ 584(a)). The TASC further alleges Auburn assumed custody of human remains and cultural items excavated from the Hickory Ground Site under federal statutes, including NAGPRA, and is currently deciding the disposition and repatriation of those items in accordance with federal law. (*Id.* ¶ 584(b)). The TASC further alleges Auburn received federal funding and grants related to these federally regulated activities, thereby subjecting it to federal law and RFRA's requirements. (*Id.* ¶ 584(c)).

Indeed, Auburn's ARPA permit for archaeological work and excavation at Hickory Ground imposed special federal conditions, including consultation before excavation or removal of Native American human remains, funerary objects, sacred objects, and objects of cultural patrimony. (*Id.* at 37-38, ¶ 161); (Doc. 261-1 at Ex. W, 308). The TASC further alleges that, when Auburn excavated human remains and cultural items pursuant to its permit, it failed to comply with federal law and the permit's requirements, including consultation requirements. (Doc. 261 at 38, ¶¶ 162-63). It alleges Auburn then assumed and continues to exercise custody over those remains and cultural items under federal statutes, including NAGPRA, and continues to make decisions affecting disposition and repatriation under federal law. (*Id.* at 127, ¶ 584(b)). It then alleges Auburn continues to obstruct return, continues to mishandle and improperly store remains and artifacts, and continues to substantially burden Plaintiffs' religious exercise through that ongoing custody and control. (*Id.* at 128, ¶¶ 588-90).

Accepting the TASC's allegations as true, the TASC plausibly alleges Auburn exercised traditional federal authority when it engaged in the excavation challenged here, which is sufficient to meet the public function test. *See West*, 487 U.S. at 54-57. The allegations meet the compulsion framework because the federal government has coerced or significantly encouraged the challenged conduct. *See Focus on the Fam.*, 344 F.3d at 1277. The allegations also meet the nexus or joint action framework because the government has "so far insinuated itself into a position of interdependence" with Auburn that it was a joint participant in the challenged conduct. *Id*. at 1277. Count XXIV therefore plausibly alleges that Auburn acted under color of federal law within RFRA's definition of "government" when it substantially burdened Plaintiffs' religious exercise.

2. The TASC plausibly alleges that Auburn substantially burdened Plaintiffs' religious exercise.

Plaintiffs incorporate by reference Sections VI.F.1-2 of their Response to Federal Defendants' Motion to Dismiss, filed Apr. 30, 2026.[11] As explained there, the TASC plausibly alleges religious exercise within RFRA's meaning because Hickory Ground is a sacred site of unique and irreplaceable religious significance to Plaintiffs. (Doc. 261 at 19, ¶ 87); (*id.* at 127, ¶ 585). Plaintiffs also allege specific religious duties concerning their ancestors' remains, burial grounds, ceremonial grounds, and access to the Site. (*Id.* at 21, ¶¶ 93-98); (*id*. at 66-67, ¶¶ 285-89); (*id.* at 127-28, ¶ 587). Those allegations apply equally to Count XXIV against Auburn.

The TASC also plausibly alleges that Auburn substantially burdened that religious exercise. Count XXIV alleges that Auburn participated in the excavation of Plaintiffs' ancestors' remains and funerary objects without consulting Plaintiffs or obtaining their consent, thereby

[11] Federal Defendants include the United States Department of the Interior ("**Interior**"); National Park Service ("**NPS**"); **BIA**; Deb Haaland, in her official capacity as **Secretary**; Bryan Newland, in his official capacity as Assistant Secretary – Indian Affairs; and Charles F. Sams III, in his official capacity as Director of the NPS.

making it difficult—if not impossible—for them to exercise their religious duty to care for their ancestors' graves. (Doc. 261 at 128, ¶ 588(a)). The TASC alleges that Auburn failed to follow ARPA and NAGPRA consultation and repatriation requirements in a manner that respects Plaintiffs' religious obligations and priorities. (*Id.* ¶ 588(b)). It alleges that Auburn continues to retain custody of human remains, associated funerary objects, and cultural items excavated from Hickory Ground, thereby preventing Plaintiffs from fulfilling their religious obligations to return those items to their proper resting places. (*Id.* ¶ 588(c)). It also alleges ongoing mistreatment of the remains and artifacts in Auburn's custody, including allowing them to remain in plastic bins and accumulate mold. (*Id.* ¶ 588(d)). In summation, all of these allegations demonstrate that Plaintiffs' ability to exercise their religion has been burdened by Auburn's actions. (*Id.* at 66, ¶ 283) ("Plaintiffs' ability to practice their religion is directly tied to their ability to access, maintain, and protect Hickory Ground in accordance with their religious beliefs."); (*see also id.* at 67-68, ¶ 292-93).[12]

Under Eleventh Circuit law, those allegations are more than sufficient at the pleading stage. A substantial burden exists where government action places substantial pressure on an adherent to modify behavior and violate beliefs, or where it prevents conduct that religion requires. *Midrash Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1227 (11th Cir. 2004); *Davila v. Gladden*, 777 F.3d 1198, 1205 (11th Cir. 2015). And as the Eleventh Circuit later made clear, *Midrash* did not announce an exclusive rule requiring government conduct to "completely prevent" religious exercise or force a person to "completely surrender" religious beliefs. *Thai Meditation Ass'n of Ala., Inc. v. City of Mobile*, 980 F.3d 821, 830-31 (11th Cir. 2020). Those were examples, not the

[12] The other Auburn-specific allegations appear throughout the TASC and underscore the burden alleged in Count XXIV is ongoing. (*See, e.g.*, Doc. 261 at 95-97, ¶¶ 445-49); (*id.* at 103, ¶¶ 479-80).

outer boundary of the test. *Id*. at 830. "Modified behavior, if the result of government coercion or pressure, can be enough." *Id.* at 831. Auburn also adopts Federal Defendants' and Poarch Officials' arguments to the extent applicable. (Doc. 278 at 19) (incorporating Doc. 275, 24-29); (*Id*.) (incorporating Doc. 270, 92-104). To the extent Auburn seeks to import narrower out-of-circuit formulations through that adoption, *Thai Meditation* supplies the governing standard here.

Measured against that standard, the TASC plainly alleges an ongoing and substantial burden on Plaintiffs' religious exercise. The TASC alleges that Auburn's ongoing possession and control of Plaintiffs' ancestors' remains and sacred items have placed those ancestors in a state of unrest and caused ongoing religious and spiritual harm. (Doc. 261 at 128, ¶ 589). It alleges that Auburn's actions make it substantially more difficult for Plaintiffs to fulfill their duties and practice ceremonies in accordance with their religious beliefs while enduring the continued desecration of their sacred Site. (*Id.* ¶ 590). Those allegations plausibly allege a substantial burden under *Thai Meditation*.

3. Auburn cannot establish RFRA's strict scrutiny defense at the pleading stage.

Plaintiffs incorporate by reference Section VI.F.3 of their Response to Federal Defendants' Motion to Dismiss, filed Apr. 30, 2026. Auburn's RFRA section does not attempt to show that the burdens alleged in Count XXIV further a compelling governmental interest through the least restrictive means. Auburn argues only that RFRA does not apply to Auburn. (Doc. 278 at 10-12). Once Plaintiffs plausibly allege a prima facie RFRA claim, however, the burden shifts to Auburn to make that showing. 42 U.S.C. § 2000bb-1(b); *United States v. Grady*, 18 F.4th 1275, 1285 (11th Cir. 2021); *Davila*, 777 F.3d at 1204. That burden is "exceptionally demanding." *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728. It must be carried with respect to the particular burden imposed on these Plaintiffs, not at the level of generalities. *Gonzales v. O Centro Espírita Beneficente União do Vegetal*, 546 U.S. 418, 430-31 (2006).

The TASC alleges Auburn cannot demonstrate that these substantial burdens further a compelling governmental interest or represent the least restrictive means. (Doc. 261 at 129, ¶ 591). The TASC also alleges obvious less restrictive means, including the consultation required by federal law, compliance with repatriation obligations, return of remains and funerary objects, and treatment of ancestors' remains in a manner consistent with Plaintiffs' religious obligations. (Doc. 261 at 37-38, ¶¶ 161-64; *id.* at 95-97, ¶¶ 445-49; *id.* at 128, ¶ 588). That is enough at the pleading stage.

Count XXIV therefore should not be dismissed. The TASC plausibly alleges that Auburn acted under color of federal law within RFRA's meaning and that, through its excavation, continued possession, obstruction of repatriation, and ongoing mishandling of remains and cultural items, Auburn substantially burdened Plaintiffs' religious exercise. That is sufficient to defeat Auburn's Rule 12(b)(6) challenge at this stage.[13]

E. Plaintiffs state a claim under the First Amendment against Auburn (Count XXV).

1. The TASC plausibly alleges protected religious exercise and nonneutral interference with that exercise.

Plaintiffs incorporate by reference Sections VI.F.1-2 of their Response to Federal Defendants' Motion to Dismiss, filed Apr. 30, 2026, establishing Plaintiffs' exercise of religion, and furthermore, the burden Auburn's actions impose on that exercise.

RFRA and the Free Exercise Clause are not coextensive. RFRA requires a "substantial burden." The Free Exercise Clause also forbids the government from discriminating among religious believers, departing from neutrality, or applying a legal framework in a manner that

[13] Auburn did not raise an Eleventh Amendment immunity defense for this claim, so it is not independently addressed in this response. *See Schacht*, 524 U.S. at 389-93; *Rollin*, 119 F.4th at 887; *see also supra* Section V.B.

prefers one religious framework over another. *See Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533-34 (1993); *Trinity Lutheran Church of Columbia, Inc. v. Comer*, 582 U.S. 449, 458-61 (2017); *Fulton v. City of Philadelphia*, 593 U.S. 522, 532-34 (2021). Facial neutrality alone is not enough because the Free Exercise Clause "forbids subtle departures from neutrality" and "covert suppression of particular religious beliefs." *Lukumi*, 508 U.S. at 534. A law is not generally applicable when it invites discretionary, individualized exemptions or when it burdens religious conduct while permitting comparable secular conduct that undermines the government's asserted interests in a similar way. *See Fulton*, 593 U.S. at 534-36; *Lukumi*, 508 U.S. at 542-43. And where the government singles out religious observers for unequal treatment because of their religious character or status, strict scrutiny applies. *See Lukumi*, 508 U.S. at 543-46. Those cases make clear that religious observers are protected not only from outright coercion, but also from unequal treatment.

Here, the TASC alleges that Plaintiffs are the lineal descendants of those buried at Hickory Ground under the Muscogee (Creek) traditional matrilineal kinship system; Mekko Thompson brings this suit as the traditional representative of those lineal descendants, and that Poarch's modern-day members have no ancestral lineage or cultural connection to Hickory Ground. (Doc. 261 at 7, 16, 18, ¶¶ 24-26, 71-72, 82-83). The TASC further alleges that, under NAGPRA, Poarch never had ownership or the right of control over the excavated human remains and associated funerary objects, while Mekko Thompson, as representative of the lineal descendants under the Muscogee (Creek) traditional kinship structure, does have that ownership and right of control. (*Id.* at 44, ¶ 205). Auburn, however, continues to refuse to repatriate the ancestors and funerary objects they dug up at Hickory Ground to Mekko Thompson and the actual present-day Hickory Ground

Tribal Town asserting that as "the tribal landowner, the Poarch Band of Creek Indians, has a priority claim and priority rights over such cultural items . . . ." (Doc. 278 at 20).

This position contradicts NAGPRA, which gives first priority to the "lineal descendants" of the "cultural items which are excavated or discovered on Federal or tribal lands," 25 U.S.C. § 3002(a)(1), and the TASC plausibly alleges that Mekko Thompson and all members of Hickory Ground Tribal Town are the lineal descendants of the Hickory Ground members Auburn excavated. (Doc. 261 at 7, ¶¶ 25-26). Auburn's refusal to repatriate Plaintiffs' relatives has imposed a significant burden on the exercise of Plaintiffs' religion. (Doc. 261 at 129-30, ¶ 597). Accepted as true, those allegations plausibly describe a non-neutral application of federal law and unequal treatment of Plaintiffs' religious framework and kinship structure.

For those reasons, Count XXV states a plausible claim under the First Amendment and should not be dismissed.

2. The Eleventh Amendment does not require dismissal of Count XXV at this stage.

Plaintiffs incorporate by reference their arguments and authorities regarding Alabama law regarding when and how a university may claim sovereign immunity as an arm of the State. *See supra* Section V.B. Here, Auburn has not carried its burden to show that Eleventh Amendment immunity bars Plaintiffs' Free Exercise claim in Count XXV. The arm-of-the-state inquiry is function-specific, *see Manders*, 338 F.3d at 1308-09, and Auburn fails to show how it is acting as an arm of the state when it excavates human remains, destroys a ceremonial ground, desecrates a burial ground, and unlawfully retains custody of Plaintiffs' ancestors.[14] Auburn acknowledges that

[14] Plaintiffs allege that Auburn continues to retain custody of human remains, cultural items, associated funerary objects, and archaeological artifacts, some of which have never been reburied, but continue to be mishandled and improperly stored by Auburn, and that Auburn continues to prevent and obstruct Plaintiffs' requested repatriation. (Doc. 261 at 129-30, ¶ 597). Plaintiffs further allege Auburn is preventing Plaintiffs from fulfilling their religious obligations to return those items to their proper resting places, and that Auburn

some Hickory Ground cultural items remain at Auburn and that Auburn was originally included in this case so the Court could provide complete relief regarding the possession, custody, control, or relocation of those items. (Doc. 278 at 6-8). In contrast, Count XXV challenges Auburn's role in federally regulated excavation activities, Auburn's continued custody of human remains and cultural items under federal law, and Auburn's continued obstruction of repatriation. (Doc. 261 at 129-30, ¶¶ 595, 597, 599). On the face of the TASC, Auburn was not acting as Alabama's sovereign regulator when it took the actions out of which Count XXV arises.

Further, the most important *Manders* factor is also absent here. *See Freyre v. Chronister*, 910 F.3d 1371, 1384 (11th Cir. 2018) (noting that the most important *Manders* factor is whether the requested relief requires payment out of the State treasury). Plaintiffs do not seek monetary damages against Auburn on Count XXV. Instead, Plaintiffs only seek declaratory and injunctive relief. (Doc. 261 at 140-41, ¶ (y)). The TASC, therefore, cannot be read on its face as seeking relief from the State of Alabama or its treasury. *See Freyre*, 910 F.3d at 1384; *cf. Rosario*, 506 F.3d at 1046. On Auburn's facial Rule 12(b)(1) motion, those allegations must be accepted as true. *See Lawrence*, 919 F.2d at 1529.

Auburn seeks dismissal of Count XXV on the premise that Plaintiffs' Free Exercise claim is a routine Section 1983 action against a state university. (Doc. 278 at 15 n.6). Auburn then relies on *Edelman v. Jordan*, 415 U.S. 651 (1974), *Quern v. Jordan*, 440 U.S. 332 (1979), and *Flood v. State of Ala. Dep't of Indus. Relations*, 948 F. Supp. 1535 (M.D. Ala. 1996), for the proposition that the Eleventh Amendment bars a First Amendment claim against a state agency under Section 1983. (Doc. 278 at 14-15). But Plaintiffs are not bringing a Section 1983 claim. Instead,

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continues to mistreat the remains and artifacts in its custody by allowing them to remain in plastic bins and accumulate mold. (*Id.* at 130, ¶ 599(c)-(d)).

Plaintiffs allege that Auburn violated Plaintiffs' First Amendment rights while acting under color of federal law and pursuant to federal delegated authority, thereby placing Count XXV outside the realm of Section 1983. (Doc. 261 at 129, ¶ 595). Specifically, the TASC alleges Auburn participated in federally regulated excavation activities authorized by federal agencies, assumed custody of human remains and cultural items under federal statutes, and made decisions regarding the disposition and repatriation of those items under federal law. (Doc. 261 at 129, ¶ 595). Count XXV further alleges that Auburn continues to retain remains and cultural items from Hickory Ground, continues to obstruct requested repatriation, and continues to mistreat the remains and items in its custody, thereby burdening Plaintiffs' religious exercise. (*Id.* at 129-31, ¶¶ 597-601). Auburn's Section 1983 argument is a red herring and is no ground for dismissal of this count.

Count XXV also presents a substantial federal question that cannot be dismissed on Auburn's sweeping immunity theory. *See Bell v. Hood*, 327 U.S. 678, 681-85 (1946). Plaintiffs seek equitable relief to stop ongoing conduct alleged to violate the Free Exercise Clause of the United States Constitution. (Doc. 261 at 140-41, ¶ (y)). The purpose behind Eleventh Amendment immunity disappears when the relief sought is not monetary damages, but instead focuses only on prospective, injunctive relief. *See Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 440 (5th Cir. 1985) ("One of the most important goals of the immunity of the Eleventh Amendment is to shield states' treasuries. . . . The purpose of the immunity therefore largely disappears when a judgment against the entity does not entail a judgment against the state."). Injunctive relief remains the traditional means of preventing entities acting under federal authority from continuing unconstitutional conduct. *See Corr. Servs. Corp. v. Malesko*, 534 U.S. 61, 74 (2001).

Auburn's facial Eleventh Amendment motion does not resolve the federal-law allegations set out in Count XXV or eliminate the equitable relief Plaintiffs seek to curb Auburn's ongoing conduct. For all of these reasons, Auburn has failed to demonstrate that Count XXV is subject to dismissal on Eleventh Amendment grounds. The motion to dismiss Count XXV should be denied.

F. Plaintiffs state a claim under ARPA against Auburn (Count XVI).

1. The TASC plausibly alleges that Auburn violated ARPA.

Next, Auburn suggests it cannot be held liable for its violations of ARPA because the BIA issued Auburn an ARPA permit for the excavations Auburn performed at the Hickory Ground Site, and second, ARPA does not permit individuals to bring private actions against entities that violate ARPA. (Doc. 278 at 17-18). Neither argument warrants dismissal of Count XVI at this stage.[15]

First, although the BIA issued an ARPA permit to Auburn (Doc. 261-1 at Ex. W, 307-08), the TASC alleges numerous ways in which Auburn violated the permit. (*See e.g.,* Doc. 261 at 103, ¶ 479(c)-(e)) (failing to consult with the Nation prior to conducting excavations, desecrating burial grounds and destroying archaeological resources, and maintaining possession of archaeological resources and failing to curate them in accordance with ARPA requirements). The permit issued to Auburn required Auburn to, after completing its excavations, leave "the area in as or near to original condition as is practicable." (Doc. 261-1 at Ex. W, 308). Auburn's failure to do this constitutes an ongoing violation of ARPA. The existence of a permit does not defeat Count XVI where Plaintiffs plausibly allege that Auburn failed to comply with the permit's conditions and with ARPA's substantive requirements.

[15] Auburn did not raise an Eleventh Amendment immunity defense for this claim, so it is not independently addressed in this response. *See Schacht*, 524 U.S. at 389-93; *Rollin*, 119 F.4th at 887; *see also supra* Section V.B.

Second, the TASC alleges that Auburn's permit authority did not cover the full period during which Auburn conducted Phase III excavations at Hickory Ground. (*Id.* at 307-08) (ARPA permit for 2003 to 2005); (Doc. 261 at 103, ¶ 479(a)) (alleging Auburn undertook excavations without an ARPA permit); (*Id.* at 36, ¶ 155) (noting that Auburn engaged in Phase III excavations until 2011); (*Id.* at 100, ¶ 463) (alleging that Auburn "obtained some permits under section 470cc of Title 16, but such permits did not cover the full time period during which the Phase III excavations were performed."). The excavations Auburn undertook without a valid permit violated ARPA.[16]

Auburn also contends that "ARPA does not authorize private litigants, such as Plaintiffs, to pursue a claim for relief under the statute." (Doc. 278 at 17-18). The only case Auburn cites for this proposition is a District Court decision from the District of Colorado. (*Id.*) (citing *Cheavins v. Pub. Serv. Corp. of Co*., 176 F. Supp. 3d 1088, 1094 (D. Colo. 2016)). *Cheavins*, however, has no application here. In *Cheavins*, the District Court concluded that the defendant was entitled to ARPA's public lands exemption in 43 C.F.R. § 7.5(b)(1) (an exemption not applicable here and not claimed by Auburn), and further, in *Cheavins*, the "Plaintiff concede[d] that [the defendant was] not subject to the permit requirements." 176 F. Supp. 3d at 1094. Additionally, any consideration of whether ARPA is enforceable by private litigants was, at best, dicta—and only concerned Section 6 of ARPA, section 470ee(a). *See id.* In this case, Plaintiffs do not seek enforcement of Section 470ee(a), and thus *Cheavins* is in no way applicable. That case did not address a claim like Count XVI, where Plaintiffs seek equitable relief based on alleged permit

[16] Auburn states that it incorporates the Federal Defendants' arguments that a permit under ARPA was not required because the excavations were conducted on land held in trust for Poarch. (Doc. 278 at 20). In response to Auburn's incorporation, Plaintiffs incorporate by reference Section VI.D of their Response to Federal Defendants' Motion to Dismiss, filed Apr. 30, 2026, regarding the requirements for Auburn, as non-Indian, to obtain an ARPA permit for the excavations it carried out on "Indian lands."

noncompliance, unlawful excavation activity, and Auburn's continuing possession and curation of removed human remains and cultural resources.

Auburn has not provided any binding precedent concluding that *none* of ARPA's provisions can be enforced by a private litigant in a civil action. Notably, Plaintiffs are not seeking the imposition of ARPA's civil fines, but rather, are asking this Court to simply enjoin Auburn from continuing to curate Plaintiffs' relatives' remains and cultural resources absent any consultation with Plaintiffs. (Doc. 261 at 136, ¶ (p)). Ordering defendants to ensure their curation of human remains complies with ARPA is relief that federal courts have found private litigants can pursue in civil actions. *See, e.g.*, *Bonnichsen*, 217 F. Supp. 2d at 1162 ("given this court's finding that ARPA applies, Defendants must curate the remains in conformance with that Act."). Indeed, the legislative history of ARPA makes clear that Congress never intended for the criminal provisions to preclude private litigants from enforcing ARPA's other general provisions. *See* H.R. Rep. No. 96-311, at 11 (1979), *reprinted in* 1979 U.S.C.C.A.N. 1709, 1714 (acknowledging that ARPA contains "criminal penalties for those who knowingly commit one of the prohibited acts[,] . . . [but] there is no intent to preclude action under [ARPA's] general provisions . . . under appropriate circumstances.").[17]

Auburn also adopts an argument from Federal Defendants' Motion to Dismiss that any challenge to the permit is outside the statute of limitations. (Doc. 278 at 20). But Count XVI is not a challenge to the issuance of Auburn's 2003 permit. Rather, Count XVI alleges that Auburn

[17] NAGPRA also provides a cause of action for Auburn's ARPA violations. NAGPRA does not merely require one to obtain an ARPA permit, it requires that the items be excavated or removed "pursuant to" that permit, 25 U.S.C. § 3002(c)(1)—in other words, with a permit and in accordance with the requirements of that permit. And as discussed *supra* Section V.C, NAGPRA broadly authorizes the district courts to "issue such orders as may be necessary" to enforce its provisions, which include the incorporated ARPA requirements. 25 U.S.C. § 3013.

violated ARPA by conducting excavation activity after the permit expired, by failing to comply with permit conditions, by failing to consult Plaintiffs, and by continuing to retain, curate, and refuse to preserve and return human remains and cultural resources removed from Hickory Ground. (Doc. 261 at 103, ¶ 479). Those allegations concern ongoing conduct and the continued failure to repatriate human remains and cultural resources. (Doc. 261 at 103, ¶¶ 479-80).[18] Therefore, Auburn's conclusory statement that Plaintiffs' ARPA claim is time-barred because it is simply an attack on the 2003 issuance of a permit is baseless. At a minimum, Auburn's motion does not show that Count XVI fails as pleaded, where Plaintiffs seek prospective declaratory and injunctive relief tied to Auburn's alleged permit violations, excavation outside valid permit authority, continued possession, and continued curation of removed human remains and cultural resources. The motion to dismiss Count XVI should be denied. *See Lawrence*, 919 F.2d at 1529.

2. The Eleventh Amendment does not require dismissal of Count XVI at this stage.

Auburn has not demonstrated in fact or in law that Count XVI should be dismissed on Eleventh Amendment grounds. Auburn did not separately develop or articulate that defense as it might relate to ARPA. The TASC alleges conduct that is distinct from Count XIII and must be analyzed on its own terms, and Plaintiffs seek only prospective relief. At this stage in the proceedings, the allegations must be accepted as true on Auburn's facial motion.

Auburn did not separately brief an Eleventh Amendment defense to Count XVI. Auburn chose to address Count XVI in its Rule 12(b)(6) section, arguing that ARPA does not authorize a

[18] Likewise, Auburn's argument adopted from the Federal Defendants' Motion to Dismiss that ARPA permit enforcement is committed to federal discretion is also baseless. Count XVI is directed to Auburn's own ongoing conduct, not to discretionary federal enforcement decisions. (Doc. 261 at 103, ¶¶ 479-80). Thus, Auburn's adopted argument about agency enforcement discretion does not provide a basis to dismiss the claim.

private claim, but then added a single sentence stating that, even if ARPA could be construed to include a private right of action, Congress did not abrogate Auburn's immunity, and then cross-referenced Auburn's NAGPRA section. (Doc. 278 at 18). Such briefing is insufficient to carry Auburn's burden on a claim-specific immunity defense, especially where the Eleventh Amendment inquiry depends on the particular claim, the particular conduct, and the particular relief at issue. *See Schacht*, 524 U.S. at 389-95; *Rollin*, 119 F.4th at 887. Auburn cannot simply incorporate its NAGPRA discussion and assume the result is the same for Count XVI.

Such is especially true because Count XVI rests on different allegations than the analysis Auburn points to with respect to other counts. With respect to Count XVI, the TASC alleges Auburn violated ARPA by conducting excavation and removal of archaeological resources, including human remains and funerary objects, without ensuring compliance with valid permits, by conducting excavations without the required permits, by failing to consult with Plaintiffs, by participating in activities that desecrated burial sites and destroyed archaeological resources, by continuing to retain possession of and curate archaeological resources without compliance with ARPA's procedural requirements, and by failing to preserve and return the removed human remains and cultural resources to Plaintiffs. (Doc. 261 at 103, ¶ 479(a)-(f)). The TASC further alleges that Auburn's actions "have caused and continue to cause irreparable harm" through the destruction and desecration of burial sites and archaeological resources and Auburn's continued failure to preserve and repatriate human remains and cultural resources removed from the Site. (*Id.* at 103, ¶ 480). Those allegations must be accepted as true in evaluating Auburn's facial Rule 12(b)(1) motion. *See Lawrence*, 919 F.2d at 1529.

Auburn has also failed to show that it was acting in a capacity entitled to Eleventh Amendment protection for purposes of Count XVI. The arm-of-the-state inquiry is function

specific. *See Manders*, 338 F.3d at 1308-09. Count XVI challenges Auburn's conduct as a federal permit-holder engaged in excavation on Indian lands, Auburn's receipt, transport, curation, and continued possession of archaeological resources, and Auburn's continued refusal to preserve and return those resources. (Doc. 261 at 103, ¶¶ 479-80). On the face of the TASC, Auburn has not shown that, when it undertook the federally permitted excavation, transport, curation, and continued possession alleged in Count XVI, it was acting in a state government capacity entitled to Eleventh Amendment protection. The most important *Manders* factor also does not support immunity here. Plaintiffs do not seek money damages against Auburn for Count XVI. They seek only declaratory and injunctive relief. The TASC, therefore, cannot be read on its face as seeking relief from the State of Alabama or its treasury. *See Freyre*, 910 F.3d at 1384; *Rosario*, 506 F.3d at 1046.

ARPA's text fits the conduct alleged against Auburn. Congress enacted ARPA to "protect[] archaeological resources and sites on public lands and Indian lands." 16 U.S.C. § 470aa(b). ARPA prohibits excavating, removing, damaging, altering, or defacing archaeological resources on public or Indian lands without a valid permit, and it separately prohibits transporting or receiving archaeological resources excavated or removed in violation of ARPA or in violation of "any provision, rule, regulation, ordinance, or permit in effect under any other provision of Federal law." 16 U.S.C. § 470ee(a)-(b). Human skeletal materials and graves fall within ARPA's definition of "archaeological resource." 16 U.S.C. § 470bb(1). Count XVI tracks those prohibitions. It alleges not only excavation-related violations, but continued violations related to Auburn's possession, curation, transport, and failure to preserve and return resources that Auburn allegedly helped remove from Hickory Ground unlawfully or in violation of the permit. (Doc. 261 at 103, ¶¶ 479(a)-(f)).

Auburn's federal archaeological permit further underscores why Count XVI should not be dismissed on immunity grounds. Auburn acknowledges that it conducted archaeological work at Hickory Ground pursuant to an Interior federal archaeological permit. (Doc. 278 at 6). The TASC likewise alleges Auburn obtained federal permit authority to excavate at Hickory Ground and that the permit imposed federal conditions governing Auburn's conduct. (Doc. 261 at 103, ¶ 479(a)). Auburn, therefore, voluntarily undertook federally regulated excavation activity on Indian lands under a federal permit and is alleged to remain in possession of archaeological resources excavated under that authority. (*Id.* at 103, ¶¶ 479(e)-(f), 480). Auburn cannot accept the benefits of federal permit authority, continue to possess resources excavated under that permit, and then invoke a generalized claim of sovereign immunity without addressing the capacity in which it acted and continues to act with respect to those resources. Even Federal Defendants acknowledge the unique limitations of a permit issued pursuant to ARPA's statutory requirements. (*See, e.g.*, Doc. 261-1 at Ex. V, 304) (stating when the BIA issues an ARPA permit "for excavation and removal," the permit must be carried out "in accordance with the purposes of ARPA – i.e. furthering archeological knowledge in the public interest. Anything else constitutes site damage . . . ."). Auburn's one sentence incorporation of an immunity argument from elsewhere does not address ARPA's distinct statutory framework or how Auburn was acting as a state agency when it went beyond "archeological knowledge in the public interest" and instead engaged in significant "site damage."

The TASC alleges ongoing violations and ongoing harm. Count XVI is not limited to completed excavation work from years ago. It alleges Auburn "[c]ontinu[es] to retain possession of and curate archaeological resources without compliance with ARPA's procedural requirements" and continues to "[f]ail[] to preserve and return the removed human remains and cultural resources

to Plaintiffs." (Doc. 261 at 103, ¶¶ 479(e)-(f)). It further alleges Auburn's actions "continue to cause irreparable harm." (*Id.* at 103, ¶ 480). Auburn's own brief confirms that some Hickory Ground cultural items remain at Auburn and that Auburn was originally included in the case so the Court could provide complete relief regarding possession, custody, control, or relocation of those items. (Doc. 278 at 6, 8). Count XVI seeks prospective relief directed at Auburn's ongoing conduct, not retrospective monetary relief.

For all of these reasons, Auburn has not demonstrated in fact or in law that Count XVI should be dismissed on Eleventh Amendment grounds. Auburn did not separately develop or articulate that defense as it might relate to ARPA, the TASC alleges conduct that is distinct from Count XIII and must be analyzed on its own terms, Plaintiffs seek only prospective relief, and the allegations must be accepted as true on Auburn's facial motion. Auburn's Motion to Dismiss Count XVI on Eleventh Amendment grounds should be denied.

G. Dismissal on Eleventh Amendment grounds would be premature without jurisdictional discovery and, at a minimum, any dismissal should be count-specific and without prejudice.

If, despite Plaintiffs' arguments above, the Court is nevertheless inclined to dismiss any claim against Auburn on Eleventh Amendment grounds, Plaintiffs respectfully request, before dismissal, a limited period of jurisdictional discovery directed to the factual issues Auburn has put in play. The Eleventh Circuit has recognized both that district courts have the power to order discovery necessary to determine jurisdiction and that plaintiffs have a qualified right to conduct jurisdictional discovery when the relevant jurisdictional facts are genuinely in dispute. *Eaton v. Dorchester Dev., Inc.*, 692 F.2d 727, 729-31 (11th Cir. 1982). The Eleventh Circuit has concluded that the Federal Rules of Civil Procedure entitle a plaintiff to obtain material through discovery before a claim is dismissed for lack of jurisdiction. *Id.* at 731. Such is especially true when, as here, the jurisdictional issue overlaps with the very conduct giving rise to the federal claims. *Id.* at

733-34. More recently, the Eleventh Circuit reiterated that plaintiffs generally should have an opportunity to conduct jurisdictional discovery before dismissal where the jurisdictional facts are disputed. *See Nat'l Ass'n of the Deaf v. Florida*, 980 F.3d 763, 775-76 (11th Cir. 2020).

If the Court decides that the TASC's allegations are insufficient to overcome Auburn's Eleventh Amendment immunity claims (they are sufficient), limited discovery is warranted here because Auburn possesses information bearing directly on its immunity defense that is not fully available to Plaintiffs. For example, Auburn has admitted that it receives federal funds. (Doc. 194 at 2, ¶ 32). Auburn's own public materials suggest that its NAGPRA work has been supported by federal funding. Additionally, Auburn maintains a NAGPRA program and personnel responsible for NAGPRA compliance. Discovery is warranted into the nature and scope of Auburn's receipt of federal funds, any grants received under 25 U.S.C. § 3008, the conditions attached to those funds, the extent to which Auburn's NAGPRA work is federally supported or supervised, and the authority exercised by Auburn personnel over inventory, custody, curation, handling, and repatriation of the remains and cultural items at issue.[19] These facts bear directly on the function-specific immunity inquiry Auburn invokes and on the capacity in which Auburn was acting when it undertook the conduct challenged in the TASC.

Similar discovery is warranted with respect to Auburn's federal archaeological permit. The record includes the permit itself, but the Scope of Work attached to that permit is missing. (*See* Doc. 261-1 at Ex. W, 307-08). The complete permit file, including the Scope of Work and any attachments, conditions, correspondence, or related federal approvals and/or authorizations, is likely in Auburn's possession or readily accessible to Auburn. Those materials may further

[19] NAGPRA provides that: "The Secretary is authorized to make grants to museums for the purpose of assisting the museums in conducting the inventories and identification required under sections 3003 and 3004 of this title." 25 U.S.C. § 3008(b).

illuminate the federal conditions Auburn accepted, the limits placed on Auburn's authority, the extent of federal oversight, and the capacity in which Auburn was acting when it excavated, curated, and retained the remains and cultural items now at issue. Plaintiffs should not be required to litigate Auburn's immunity defense on an incomplete record when Auburn holds key jurisdictional facts.

Dismissals based on Eleventh Amendment immunity are jurisdictional and therefore must be entered without prejudice. *See Dupree v. Owens*, 92 F.4th 999, 1007 (11th Cir. 2024). Accordingly, at a minimum, if the Court concludes that any claim against Auburn must be dismissed on Eleventh Amendment grounds, that dismissal should be without prejudice.

H. Auburn's sweeping incorporation of other Defendants' arguments by reference is impermissibly vague, ambiguous, and provides no discernible basis for dismissal.

Finally, Auburn states that "Plaintiffs' claims against Auburn are further barred by defenses set forth in the respective briefs of the Federal Defendants and the [Poarch Officials]. To the extent those defenses are applicable to Auburn, Auburn adopts and incorporates the arguments of these defendants." (Doc. 278 at 19). That statement is too broad and too indefinite to preserve any additional, unidentified grounds for dismissal. Auburn does not specify which arguments or "defenses" out of the 192 pages of briefing offered by Poarch Officials and Federal Defendants it contends to apply to Auburn, nor does it explain how any such arguments map onto Counts XIII, XVI, XXIV, or XXV. Accordingly, for purposes of Auburn's motion to dismiss, Auburn should not be permitted to rely on any arguments not specifically identified or developed in its brief.

VI. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Auburn University's Motion to Dismiss Plaintiffs' Third Amended and Supplemental Complaint. Plaintiffs

agree they will not request the Court to enter an order requesting Auburn to pay attorneys' fees, regardless of whether Plaintiffs succeed in their claims brought against Auburn.

Respectfully submitted this 30th day of April, 2026.

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Certificate of Service

I hereby certify that on the 30th day of April, 2026, I electronically filed the foregoing document with the Clerk of Court using the CM/ECF system which will send notification of such filing to all counsel of record.

s/ Stewart Davidson McKnight, III

Counsel