NOT YET SCHEDULED FOR ORAL ARGUMENT

No. 22-5302

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

LEATRICE TANNER-BROWN, et al.,
Plaintiffs/Appellants,

v.

DEBRA A. HAALAND, et al.,
Defendants/Appellees.

Appeal from the United States District Court for the District of Columbia
No. 1:21-cv-565-RC (Hon. Rudolph Contreras)

RESPONSE BRIEF FOR FEDERAL APPELLEES

TODD KIM
Assistant Attorney General

WILLIAM B. LAZARUS
JOHN L. SMELTZER
AMANDA STONER
BENJAMIN W. RICHMOND
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-3977
benjamin.richmond@usdoj.gov

Of Counsel:

ROBERT J. MERRITT
SHANI N. SUMTER
VICTORIA A. CEJAS
Attorneys
Office of the Solicitor
U.S. Department of the Interior

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

A. Parties and Amici

Except for the following, all parties, intervenors, and amici appearing before the district court and in this Court are listed in Plaintiffs' Opening Brief: Scott de la Vega, former Acting Secretary of the Interior, appeared before the district court but does not appear before this Court.

B. Rulings Under Review

The rulings at issue are the district court's Order, [ECF 20], and Memorandum Opinion, [ECF 21], granting Defendant's Motion to Dismiss entered July 8, 2022, and Order, [ECF 33], and Memorandum Opinion, [ECF 34], denying Plaintiffs' Motion to Alter or Amend the Judgment entered October 28, 2022, by Judge Rudolph Contreras. The opinions are available as *Tanner-Brown v. Haaland*, No. CV 21-565 (RC), 2022 WL 2643556 (D.D.C. July 8, 2022), and *Tanner-Brown v. Haaland*, 639 F. Supp. 3d 1 (D.D.C. 2022). The orders have not been published.

C. Related Cases

There are no related cases within the meaning of Cir. R. 28(a)(1)(C).

/s/ *Benjamin W. Richmond*
BENJAMIN W. RICHMOND
Counsel for Federal Appellees

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INTRODUCTION

This case is Plaintiffs Leatrice Tanner-Brown and Harvest Institute Freedman Federation's (hereinafter "the Federation") most recent attempt to sue the Secretary of the Interior for alleged injuries to Cherokee Freedmen. Plaintiffs lack standing to bring this suit.

Cherokee Freedmen are persons of African descent who were enslaved by members of the Cherokee Tribe and emancipated at the end of the Civil War, and their descendants. As established through decades of litigation, the Cherokee Freedmen are entitled to all the rights of Cherokee citizenship. Plaintiffs have filed four unsuccessful suits over the past twenty years seeking damages and other remedies based on alleged injuries to Cherokee Freedmen. Most recently, this Court in 2017 affirmed the dismissal of a nearly identical suit for Plaintiffs' failure to establish standing. This Court should similarly affirm the district court's dismissal for Plaintiffs' lack of standing.

In the district court, Plaintiffs argued that they met their burden to establish Plaintiff Leatrice Tanner-Brown's standing because the Secretary had breached a fiduciary duty to protect the allotments of Tanner-Brown's ancestor, the Cherokee Freedman George Curls, from mismanagement. The district court dismissed for lack of standing because Plaintiffs failed to plead an injury to Curls associated with such mismanagement. Plaintiffs then filed a post-judgment motion arguing that

Tanner-Brown had suffered a procedural injury based on the Secretary's failure to provide Curls with an accounting under the Act of 1908, 35 Stat. 312, and did not need to plead any other injury to Curls to establish standing. The district court denied the motion because the Secretary does not owe Curls an enforceable trust duty for an accounting under the Act of 1908.

On appeal, Plaintiffs primarily repeat their new argument that Tanner-Brown has standing based on the Secretary's failure to provide George Curls with an accounting. But the Act of 1908 creates no enforceable trust duty for an accounting. Plaintiffs have similarly failed to allege any mismanagement of Curls' allotments sufficient to establish standing. The other Plaintiff in this suit, the Federation, lacks associational standing because, among other reasons, Plaintiffs rely on Tanner-Brown as the only named member of the Federation.

This Court should affirm the district court's dismissal of Plaintiffs' complaint for lack of standing. It may also affirm on the alternative grounds that Plaintiffs have failed to state a claim and the statute of limitations bars Plaintiffs' claims.

STATEMENT OF JURISDICTION

(A) Plaintiffs filed an action invoking the jurisdiction of the district court under 28 U.S.C. § 1331. [ECF 1, at 4]. But the district court correctly concluded

that it lacked subject matter jurisdiction because Plaintiffs failed to establish standing. [ECF 21, at 1–2].

(B) This Court has jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment that disposes of all parties' claims. [ECF 20, at 1].

(C) The district court entered its order dismissing Plaintiffs' claims on July 8, 2022, *id.*, and denied Plaintiffs' motion to amend the judgment on October 28, 2022, [ECF 33, at 1]. Plaintiffs timely filed their notice of appeal on November 18, 2022, twenty-one days after the denial of Plaintiffs' motion to amend the judgment. [ECF 35, at 1]; *see* Fed. R. App. P. 4(a)(1)(B), 4(a)(4)(A).

STATEMENT OF THE ISSUES

1. Whether Plaintiffs fail to meet their burden to demonstrate Tanner-Brown's standing because:
   a. the Secretary does not owe a trust duty to provide George Curls with an accounting under the Act of 1908; and
   b. Plaintiffs failed to plead an injury-in-fact associated with the mismanagement of George Curls' allotments.
2. Whether Plaintiffs fail to meet their burden to demonstrate associational standing for the Federation because Plaintiffs rely on Tanner-Brown as the only named member of the Federation and

Plaintiffs' requested accounting requires the Federation's individual members to participate in the case.

3. Whether Plaintiffs fail to state a claim because the Secretary owes no trust duty to George Curls under the Act of 1908, and the statute of limitations bars Plaintiffs' claims.

PERTINENT STATUTES AND REGULATIONS

All pertinent statutes are set forth in the Addendum following this brief.

STATEMENT OF THE CASE

A. Historical and factual background

1. The Five Tribes and the Cherokee Freedmen

Before European contact in North America, the Seminole, Cherokee, Choctaw, Creek, and Chickasaw Tribes resided in what is now the southeastern United States. *Harjo v. Kleppe*, 420 F. Supp. 1110, 1119 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). Because these Tribes developed institutions comparable to those of the colonists in the early United States, the Tribes have been known as the "Five Civilized Tribes." *Muscogee (Creek) Nation v. Hodel*, 851 F.2d 1439, 1441 n.2 (D.C. Cir. 1988).[1] In the early nineteenth century, the United States relocated the Five Tribes to "Indian

[1] We refer to the "Five Tribes" here. *See Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 90 n.3 (D.D.C. 2017).

Territory," an area that is now within the State of Oklahoma. *Cherokee Nation v. Nash*, 267 F. Supp. 3d 86, 95 (D.D.C. 2017); *see Harjo*, 420 F. Supp. at 1119.

This case concerns certain members of the Cherokee Tribe known as Cherokee Freedmen. The Cherokee Tribe has acknowledged that during the early nineteenth century, both in the southeastern United States and in Indian Territory, "[s]ome Cherokees . . . adopted the American institution of slavery." *Cherokee Nation*, 267 F. Supp. 3d at 95 (internal quotations omitted). And like many other tribes in the American South, the Cherokee aligned with the Confederate States of America during the Civil War. *Id.* at 97. After the Civil War, the United States and the Cherokee executed the Treaty of 1866. *See* Treaty with the Cherokee, July 19, 1866, 14 Stat. 799. The Treaty, among other things, abolished slavery in the Cherokee Nation and granted people formerly enslaved by the Cherokee "all the rights of native Cherokees." *Id.*; s*ee Cherokee Nation*, 267 F. Supp. 3d at 100. These individuals are known as "Cherokee Freedmen." *Id.* at 90.

Although the legal status of the Cherokee Freedmen and their descendants has at times been contested, both the U.S. District Court for the District of Columbia and the Supreme Court of the Cherokee Nation have confirmed that Cherokee Freedmen and their descendants are entitled to all the rights of native Cherokee. *See id.* at 140; *Effect of Cherokee Nation v. Nash*, No. SC-17-07, 2021 WL 2011566 (Cherokee Sup. Ct. Feb. 22, 2021).

2. Federal law and policy on allotments

In the late nineteenth century, the United States sought to organize federally-held tribal lands, including the lands of the Five Tribes, into allotments deeded to individual tribe members. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2463 (2020). This reorganization effort aimed to "extinguish tribal sovereignty, erase reservation boundaries, and force the assimilation of Indians into the society at large." *Cnty. of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 254 (1992). Early allotment efforts often resulted in Indians quickly losing allotted lands through unfair or fraudulent transactions. *Id.*

The Indian General Allotment Act of 1887, ch. 119, 24 Stat. 388, also known as the "Dawes Act," allowed the United States to allot most tribal lands and restrict the alienation of individual allotments. *Cnty. of Yakima*, 502 U.S. at 254. But the Dawes Act did not apply to the Five Tribes based on treaty provisions and because the Tribes held their lands in fee simple. *Muscogee (Creek) Nation*, 851 F.2d at 1441. Congress thus created a "Dawes Commission" empowered to negotiate allotment agreements with the Five Tribes. *Id.*; *see also Woodward v. De Graffenried*, 238 U.S. 284, 295 (1915). Yet the Five Tribes refused to negotiate allotment agreements. *Muscogee (Creek) Nation*, 851 F.2d at 1441. They strongly opposed dividing their lands into individual allotments, which often resulted in tribal lands being opened to white settlement. *See id.*

Congress enacted the Act of June 28, 1898, ch. 517, 30 Stat. 495, also known as the "Curtis Act," in response to the Five Tribes' resistance to dividing their lands into individual allotments. *See Muscogee (Creek) Nation*, 851 F.2d at 1441. The Act coerced the Five Tribes into subdividing their lands by providing for "forced allotment and termination of tribal land ownership without tribal consent unless the tribe agreed to allotment." *Id.* Four years later, under the Act of July 1, 1902, ch. 1375, 32 Stat. 716, the United States provided for the allotment of the lands of the Cherokee and put certain restrictions on these allotments, including restrictions on alienability. *See Heckman v. United States*, 224 U.S. 413, 426 (1912).

3. The Act of 1908

In 1906, Congress authorized the merger of the Indian Territory and the Oklahoma Territory in order to form the State of Oklahoma. *See* Act of June 16, 1906, ch. 3335, 34 Stat. 267. Much of the land in this new state had been allotted to the Five Tribes, and was nontaxable and inalienable. *See* H.R. Rep. No. 60-1454, at 1–2 (1908) ("[T]here is a government, State and local, to support with practically no real estate upon which there may be a levy for taxable purposes.").

Congress enacted the Act of 1908, at issue here, to lift restrictions on the alienability and taxability of some of the Five Tribes' allotted lands. *See* Act of May 27, 1908, ch. 199, 35 Stat. 312. Section 1 of the Act provides that "[a]ll

lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions." *Id.* § 1. The Act thus released "particular Indian owners," including minors and Freedmen, from *all restrictions* on their allotments, "vesting in them full fee ownership." *Plains Com. Bank v. Long Family Land and Cattle Co.*, 554 U.S. 316, 331 (2008).

Under Section 2 of the Act, an adult could lease their allotment from which restrictions had not been removed for a period "not to exceed five years" unless a regulation promulgated by the Secretary created an exception. 35 Stat. 312, § 2. A "guardian or curator under order of the probate court" could similarly lease a minor or incompetent person's encumbered allotment. *Id.* The Act considers males to be minors until they reach twenty-one years. *Id.*

Plaintiffs' claim in this case is based on Section 6 of the Act, which gives the Secretary of the Interior certain discretionary powers to protect the Five Tribes' minor allottees. Section 6 confirms that "persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma." *Id.* § 6. It also "empower[s]" the Secretary of the Interior to appoint local representatives "as he may deem necessary to inquire into and investigate the

conduct of guardians or curators," appointed by the probate courts, who "hav[e] in charge the estates of [minor allottees]." *Id.*

If one of the Secretary's local appointed representatives or other "representatives of the Secretary" believe the estate of a minor is being mismanaged by a court-appointed "guardian or curator," the representative "shall have power and it shall be their duty to report" the conduct of the guardian to the appropriate Oklahoma probate court, "take the necessary steps to have such matter fully investigated, and go to the further extent of prosecuting any necessary remedy." *Id.* The representative will also "make full and complete reports" to the Secretary, which "shall become public records." *Id.*[2]

B. Plaintiffs' prior suits related to Freedmen

Plaintiffs Leatrice Tanner-Brown and the Federation have filed many actions over the past decade on behalf of Freedmen, and in particular minor Freedmen, all of which the courts have consistently dismissed.

1. Early suits

In 2006, the Federation sued the United States seeking damages based on the United States' alleged failure to enforce Freedmen's purported right to certain

[2] The Supreme Court has held that, notwithstanding the unconditional language in Section 1 removing all restrictions from Freedmen allotments, the provisions of Section 2 and 6 apply to the allotments of minors. *See Truskett v. Closser*, 236 U.S. 223, 229 (1915).

lands held by the Five Tribes under post-Civil War treaties. *Harvest Inst. Freedman Fed'n v. United States*, 80 Fed. Cl. 197, 199 (2008), *aff'd*, 324 F. App'x 923 (Fed. Cir. 2009). The Court of Federal Claims dismissed the suit because Plaintiffs' claims were barred by the statute of limitations, and the relevant treaties, including the United States' Treaty of 1866 with the Cherokee, did not create trust obligations owed to Freedmen. *Id.* at 199–200.

In 2010, Plaintiffs sued in the Southern District of Ohio, arguing that the yet-to-be-enacted Claims Resolution Act racially discriminated against Cherokee Freedmen. *See Harvest Inst. Freedman Fed'n v. United States*, No. 10-cv-00449 (S.D. Ohio May 25, 2010). The district court dismissed Plaintiffs' challenge as unripe because the Act had not been enacted when Plaintiffs filed their complaint. *See id.*

Congress later enacted the Claims Resolution Act of 2010, Pub. L. No. 111-291, 124 Stat. 3064, as part of a settlement in *Cobell v. Salazar*, 2011 WL 10676927 (D.D.C. July 27, 2011), *aff'd*, 679 F.3d 909 (D.C. Cir. 2012). In *Cobell*, the plaintiffs had brought a class action seeking to enforce trust duties owed by the United States to individual Indian trust beneficiaries regarding the management of funds derived from, among other sources, lands allotted under the Dawes Act. 573 F.3d 808, 809 (D.C. Cir. 2009).

Plaintiffs filed a new lawsuit in the Southern District of Ohio challenging the Claims Resolution Act after it had been signed into law. *See Harvest Inst. Freedman Fed'n v. United States*, No. 2:10-CV-1131, 2011 WL 13186125 (S.D. Ohio Jan. 31, 2011), *aff'd*, 478 F. App'x 322 (6th Cir. 2012). The court again dismissed Plaintiffs' suit, finding that Plaintiffs lacked standing because "[t]he legislation approving the *Cobell* settlement does not address Plaintiffs' claims." *Id.* at *3.

2. The 2014 suit

In 2014, Plaintiffs filed a suit styled as a class-action against Federal Defendants "on behalf of all persons who are or were descendants of Freedmen minor allottees of the Five Civilized Tribes." *Tanner-Brown v. Jewell*, 153 F. Supp. 3d 102, 105 (D.D.C. 2016), *aff'd sub nom. Tanner-Brown v. Zinke*, 709 F. App'x 17 (D.C. Cir. 2017) (internal quotations omitted). Plaintiffs alleged that Tanner-Brown's grandfather, George Curls, was enrolled in the Cherokee Tribe as a Cherokee Freedman when he was five years old, and received two allotment deeds in an oil and gas-rich area of Oklahoma when he was thirteen years old. *Id.* at 106. According to Plaintiffs, Section 6 of the Act of 1908 imposed a fiduciary duty for the Secretary of the Interior to "account for any royalties derived from any

leases on land allotted to minor Freedmen," including Curls, and the Secretary breached that duty through mismanagement of royalties. *Id.* at 105–06, 112, 114.[3]

The district court dismissed Plaintiffs' complaint for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1) because Plaintiffs failed to meet their burden to establish Article III standing. *Jewell*, 153 F. Supp. at 104. Plaintiffs claimed that Tanner-Brown suffered an injury-in-fact based on her hereditary relationship with George Curls. *Id.* at 108–09. However, the court "rejected the notion that a plaintiff can suffer an injury for purposes of constitutional standing simply by virtue of an injury suffered by her ancestors." *Id.* at 110.

The court also held that Plaintiffs had failed to allege that Curls suffered a concrete, particularized injury traceable to the Secretary. *Id.* at 112. Plaintiffs failed to allege that there were any oil or gas leases on George Curls' allotted land, but argued that the presence of such leases could be inferred based on Curls' allotment being located "in the midst of oil rich Cherokee Country." *Id.* at 106. And none of the historical documents offered by Plaintiffs specifically stated or

[3] Generally speaking, an accounting is "[t]he act, practice, or system of establishing or settling financial accounts; esp., the process of recording transactions in the financial records of a business and periodically extracting, sorting, and summarizing the recorded transactions to produce a set of financial records." Black's Law Dictionary (11th ed. 2019). As for the United States management of Indian trust funds or lands, however, Congress would create the contours of any accounting duty. *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011).

suggested that "there were any oil and gas leases on land allotted to George Curls or that George Curls was owed royalties relating to any oil or gas on his land." *Id.* at 113.

The court further held that Plaintiffs failed to establish the Federation's associational standing. Plaintiffs did not demonstrate that at least one of the Federation's members would have standing on its own, or that the association's claim and requested relief did not require the participation of individual members. *Id.* at 113–14.

On appeal, this Court affirmed the judgment of the district court. *See Zinke*, 709 F. App'x at 20. The Court held that a notice Tanner-Brown received related to the *Cobell* litigation did not establish Tanner-Brown's injury in connection with the suit, and that Plaintiffs had failed to connect *Cherokee Nation v. Nash*, 267 F. Supp. 3d 87, the district court opinion concluding that Cherokee Freedmen had tribal citizenship rights equal to those of native Cherokee, to a coherent theory of standing in the case. *Zinke*, 709 F. App'x at 19.

The Court also held that Plaintiffs failed to meet their burden to demonstrate standing by alleging only that George Curls' land was in "oil rich territory" and providing "evidence of oil and gas leasing on the property of Curls's siblings." *Id.* Because Plaintiffs submitted documents to the court which demonstrated "that on Curls's specific allotment there was no oil," and "nothing of value" from George

Curls's allotments, Plaintiffs' complaint and other submissions did not "identify any facts to support [the] theory that [Tanner-Brown's] grandfather was owed but not afforded an accounting." *Id.* In addition, the "bare assertion" that Tanner-Brown was a descendant of Curls could not establish any concrete and particularized injury to Tanner-Brown. *Id.* at 20.

Finally, the Court held that the Federation lacked associational standing. *Id.* The complaint identified no members of the Federation other than Tanner-Brown and offered only "conclusory assertions about other [unidentified] members' standing," which could not establish that any of these members had "standing to sue in their own right." *Id.* The Federation's conclusory and "generalized assertions" that the suit would not require the participation of its individual members also did not establish standing. *Id.*

C. Plaintiffs' present suit

1. The complaint

In March 2021, Plaintiffs filed a new suit against the Secretary of the Interior, which set forth facts and claims substantially similar to those in Plaintiffs' 2014 suit. As the district court noted, much of Plaintiffs' 2021 complaint is "identical" to Plaintiffs' 2014 complaint, and Plaintiffs rely on largely the same historical documents as they did in the 2014 action. *See* [ECF 21, at 1 n.1]. The new allegations in Plaintiffs' 2021 complaint primarily attempt to establish

standing, although many portions of the complaint critical to the Court's standing analysis remain unchanged.

Whereas in the 2014 action Plaintiffs alleged only a hereditary connection between Tanner-Brown and her grandfather George Curls, Plaintiffs now allege that Tanner-Brown is the personal representative of George Curls' estate. [ECF 1, ¶ 8]. Plaintiffs also allege that Curls received his allotments "at a point in time when [he] was a minor," *id.*, rather than in 1910 when Curls was thirteen years old, *see Jewell*, 153 F. Supp. 3d at 106. Plaintiffs do, however, allege that Curls was enrolled as a Cherokee Freedmen in 1902 at five years old, indicating that Curls was a minor under the Act of 1908 until 1918, when he turned twenty-one years old. *Id.* [ECF 1, ¶ 8].

Plaintiffs' legal theory of standing, based on the Secretary's alleged failure to monitor the purported mismanagement of funds derived from Curls' allotments, remains the same as in the 2014 suit. Plaintiffs' complaint alleges that Tanner-Brown "has standing to sue the United States for breaches of trust related to losses and mismanagement of trust funds derived from [Curls'] allotted land." *Id.* Plaintiffs also allege that an individual named Rathburn Alden acted as the court-appointed guardian of George Curls and his siblings between 1907 and 1915, and that Alden managed the allotments by entering leases "on behalf" of the Curls

siblings. *Id.*[4] None of Plaintiffs' pleadings indicate how long Curls possessed his allotments.

Plaintiffs' allegations about the Federation also remain largely the same as in the prior 2014 suit. Plaintiffs assert that the Federation comprises "representatives of other now deceased Freedmen with a direct personal stake in receipt of damages for breach of fiduciary duties owed to them by Defendants." [*Id.* ¶ 9]. They also assert that Tanner Brown is a member of the Federation, but identify no other specific named members or further details. *Id.*

Plaintiffs present the same legal claim as they asserted in their 2014 complaint. They argue that "George Curls was injured by the failure of the Secretary of the Interior to protect him from exploitation of his allotment by his guardians and the Courts of Oklahoma." [ECF 1, ¶ 24]. They also assert that Federal Defendants have denied that they "owe any fiduciary duty whatsoever to Plaintiffs," which constitutes having "denied Plaintiffs' demand for an accounting." [*Id.* ¶ 39]. For remedy, Plaintiffs request that the Court certify a class action pursuant to Fed. R. Civ. P. 23(b), declare that the Secretary owes

[4] Unlike these factual allegations, the district court previously confirmed that Rathburn Alden's guardianship over the Curls children was terminated in 1908, "more than two years before George received his allotments." *Jewell*, 153 F. Supp. 3d at 112 n.7.

fiduciary duties to Freedman minors under the Act of 1908, and order the Secretary to provide Plaintiffs with "an accounting." [*Id.* § X].

2. The district court's dismissal for lack of standing

Federal Defendants moved to dismiss Plaintiffs' complaint for lack of standing, the expiration of the statute of limitations, and a failure to state a claim. [ECF 15, at 11]. The district court dismissed on standing pursuant to Fed. R. Civ. P. 12(b)(1), and did not reach the rest of Federal Defendants' arguments. [ECF 21, at 2].

As a preliminary matter, the district court noted that unlike in Plaintiffs' previous 2014 suit, where the "bare assertion" that Tanner-Brown was a descendant of Curls was insufficient to confer standing based on alleged injuries to Curls, [ECF 21, at 9], here Plaintiffs had supplied a "necessary link" between Curls and Tanner-Brown by alleging that Tanner-Brown is the personal representative of Curls' estate. *Id.* The court accordingly focused its standing analysis exclusively on Curls. *Id.*

However, the district court held that Plaintiffs failed to establish that Curls suffered a concrete and particularized injury fairly traceable to Defendants. [*Id.* at 10]. Plaintiffs asserted a theory of standing in their complaint based on Federal Defendants' alleged breach of a duty to prevent mismanagement of leases involving Curls' allotments. *See* [ECF 1, ¶ 8] (alleging "breaches of trust related

to losses and mismanagement of trust funds derived from [Curls'] allotted land."). But the district court held that Plaintiffs' pleadings did "not establish injury" because "Plaintiffs have not shown that [Curls'] leases were mismanaged in the first place." [ECF 21, at 10]. It also held that an injury related to mismanagement of Curls' leases was not fairly traceable to Federal Defendants, because Plaintiffs failed to allege that "had Federal Defendants fulfilled their purported statutory duty," Curls would have received "royalties or at least royalties in a greater amount than any that he did receive." *Id.* (citing *Jewell*, 153 F. Supp. 3d at 110 n.5).

The court further held that Plaintiffs failed to meet their burden to demonstrate that the Federation had standing. The Federation did not meet the first requirement for associational standing, that the organization's members would have standing to sue in their own right, [*id.* at 12–13], or the third requirement, that neither the claim asserted nor the relief requested required the participation of individual members in the lawsuit, [*id.* at 13].

3. Post-judgment procedural history

Following the district court's dismissal, Plaintiffs moved to alter or amend the court's judgment pursuant to Fed. R. Civ. P. 59(e). *See* [ECF 24, at 1]. In the Rule 59(e) motion, Plaintiffs asserted a new theory of standing and argued for the first time that Tanner-Brown did not suffer an injury-in-fact based on "alleged mismanagement of the trust," but rather the Secretary's "failure to provide the

requested accounting." [*Id.* at 1].[5] Relying on common-law trust principles, Plaintiffs argued that "[a] beneficiary of a trust is entitled to an accounting, whether or not an injury is known in advance," and, "[u]ntil an accounting is provided, a beneficiary has no means to determining whether the res has been mismanaged." [*Id.* at 2].

On review of Plaintiffs' motion, the district court noted that "Plaintiffs have asserted a new version of their standing argument that they could have raised before the Court's July 8, 2022, decision," [ECF 34, at 5], and that a Rule 59(e) motion "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment," *id.* (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008)). Nevertheless, the court considered Plaintiffs' arguments "for purposes of facilitating the resolution of [the] case." [*Id.* at 6].

The Court held that "even assuming (without granting) that a trustee's failure to conduct an accounting creates a cognizable injury under Article III, Plaintiffs fail to show that the 1908 Act creates a trust relationship between Plaintiffs and the Secretary of the Interior." *Id.* It concluded that Section 6 of the

[5] It is often unclear whether, when discussing mismanagement, Plaintiffs are referring to the Secretary's alleged mismanagement of funds derived from Curls' allotments, or the Secretary's purported failure to monitor Curls' guardian's alleged mismanagement of funds derived from the allotments.

Act did not impose a trust duty for the Secretary to provide minor allottees with an accounting for at least two reasons. [*Id.* at 7]. First, the statute's language showed that the Secretary's duties are discretionary. [*Id.* at 7–8]. Second, even if the Act obligated the Secretary to oversee minor allottees in some capacity, that obligation did not create a trust relationship. [*Id.* at 8–9].

Finally, because Plaintiffs had failed to move to certify a class in the district court within the required time period, Plaintiffs moved for leave "to certify a class" if their Rule 59(e) motion was granted. [ECF 22, at 1]. But because the court had issued a final judgment on Plaintiffs' claims, it denied Plaintiffs' motion as moot. [ECF 34, at 10].

SUMMARY OF ARGUMENT

1. Plaintiffs have failed to meet their burden to demonstrate Tanner-Brown's standing because they cannot establish that Tanner-Brown suffered an injury-in-fact.

a. On appeal, Plaintiffs argue that Tanner-Brown suffered an injury-in-fact based on the Secretary repudiating a request for an accounting owed to George Curls under Section 6 of the Act of 1908. But Plaintiffs waived this argument on appeal by failing to raise it in the district court before the district court entered final judgment. Even if the Court reaches this argument, no enforceable trust duty exists between the Secretary and Curls. Section 6 of the Act of 1908

establishes at most the Secretary's discretionary power to investigate whether a guardian has mismanaged a minor allottees' property and take remedial measures to address that mismanagement. The Act contains no specific, express provisions that establish an enforceable trust duty requiring the Secretary to provide Plaintiffs with an accounting. And to the extent that Plaintiffs claim a breach of trust based on a purported violation of the Act of 1908, Plaintiffs have failed to plead the conditions precedent that could trigger an appointed representative's conditional responsibilities under the Act.

b. Plaintiffs argued in the district court that Tanner-Brown suffered an injury-in-fact based on the Secretary's failure to monitor purported mismanagement of funds derived from leases of Curls' allotments. Because Plaintiffs abandoned this argument on appeal, the Court should not reach it here. But if the Court does reach the argument, Plaintiffs fail to establish standing based on this theory. They point to no enforceable trust duty requiring the Secretary to protect Curls from mismanagement, and they fail to plead any injury-in-fact based on the breach of such a duty. The complaint identifies no specific lease executed on behalf of Curls, and makes only generalized and non-specific claims about the purported mismanagement of such a lease. Plaintiffs also fail to establish a causal connection between mismanagement and an injury suffered by Curls.

2. Plaintiffs have failed to demonstrate the Federation's associational standing. In their complaint, Plaintiffs rely on Tanner-Brown as the only named member of the Federation, but Tanner-Brown lacks standing as an individual. Plaintiffs' non-specific allegations about other members of the Federation identify no other named members of the Federation, let alone members who, like Tanner-Brown, act as appointed representatives of the estates of minor Freedmen and might establish standing as individuals. Plaintiffs' requested accounting would also require the individual participation of members of the Federation, which bars the Federation from establishing associational standing.

3. Finally, this Court may affirm the judgment of the district court on alternative grounds. Plaintiffs have failed to state a claim because they plead only a breach of trust claim based on the Act of 1908, and as explained the Act establishes no enforceable fiduciary duties as alleged by Plaintiffs. The statute of limitations also bars Plaintiffs' suit because a breach of trust claim brought on behalf of George Curls accrued around a century ago. Even if Plaintiffs' claim accrued when Federal Defendants repudiated Plaintiffs' alleged trust duties, Plaintiffs' complaint is still barred by the six-year statute of limitations.

STANDARD OF REVIEW

This Court reviews the district court's standing determinations de novo. *Williams v. Lew*, 819 F.3d 466, 471 (D.C. Cir. 2016). "To survive a motion to

dismiss for lack of standing, a complaint must state a plausible claim that the plaintiff has suffered an injury in fact fairly traceable to the actions of the defendant that is likely to be redressed by a favorable decision on the merits." *Humane Soc'y v. Vilsack*, 797 F.3d 4, 8 (D.C. Cir. 2015) (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992)).

The party "invoking federal jurisdiction bears the burden of showing" each of the elements of standing. *Cutler v. U.S. Dep't of Health & Hum. Servs.*, 797 F.3d 1173, 1179 (D.C. Cir. 2015). While the Court will "accept the factual allegations in the complaint as true," *id.*, the Court need not accept as true "a legal conclusion couched as a factual allegation," or inferences "unsupported by the facts set out in the Complaint," *Trudeau v. Fed. Trade Comm'n*, 456 F.3d 178, 193 (D.C. Cir. 2006) (quotations omitted).

ARGUMENT

The Court should affirm the district court's dismissal of Plaintiffs' complaint. Plaintiffs have failed to meet their burden to demonstrate Tanner-Brown's standing because the Secretary owes George Curls no trust duty for an accounting under Section 6 of the Act of 1908, and Plaintiffs fail to allege any injury to Curls based on the Secretary's purported mismanagement of Curls' property. Plaintiffs have also failed to meet their burden to demonstrate the Federation's standing because Plaintiffs identify only Tanner-Brown as a named

member of this organization and Plaintiffs' requested accounting requires the participation of individual members of the Federation. Finally, this Court may affirm the judgment of the district court on the alternative grounds that Plaintiffs have failed to state a claim and that the statute of limitations bars Plaintiffs' complaint.

I. Plaintiffs fail to meet their burden to establish Tanner-Brown's standing.

To establish Article III standing, a plaintiff must demonstrate: (1) an "injury in fact" that is (a) "concrete and particularized" and (b) "actual or imminent, not conjectural or hypothetical"; (2) that the injury is "fairly traceable to the challenged action of the defendant"; and (3) that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61 (cleaned up). As the district court correctly held, Plaintiffs fail to establish that Tanner-Brown suffered an injury-in-fact sufficient for standing because Section 6 of the Act of 1908 creates no enforceable trust duty for an accounting, and Plaintiffs fail to allege mismanagement of George Curls' allotments. *See* [ECF 21, at 10]; [ECF 34, at 6–9].[6]

[6] The district court held that Plaintiffs' assertion that Tanner-Brown is the personal representative of George Curls' estate provides a necessary link between Tanner-Brown's purported injuries and those of her grandfather, George Curls. [ECF 21, at 9]; *see* [ECF 1, ¶ 8].

A. Plaintiffs do not establish injury-in-fact based on a purported trust duty to provide an accounting.

Plaintiffs argue on appeal that under Section 6 of the Act of 1908, "the Secretary has a duty" to provide George Curls with an "accounting" concerning "the management of his allotment." Opening Br. 11. They contend that "[a]n accounting is due regardless of whether an injury to [Curls'] allotment has been established," *id.*, and that they have established an injury sufficient for standing based on the Secretary's "failure to provide the requested accounting," *id.* at 6. Plaintiffs waived this argument by failing to raise it in the district court before the district court entered judgment. Even if the Court reaches this argument, Plaintiffs cannot establish an enforceable fiduciary duty for an accounting under Section 6 of the Act of 1908. To the extent that Plaintiffs argue that the Secretary breached such a trust duty by violating some aspect of the Act, they fail to plead facts necessary for such a claim.[7]

1. Plaintiffs waived the argument that Tanner-Brown has standing based on a claim for an accounting.

In their complaint and opposition to Federal Defendants' motion to dismiss, Plaintiffs argued that Tanner-Brown suffered an injury-in-fact based on the alleged

[7] "In evaluating a petitioner's standing" this Court "must assume it will prevail on the merits of its claims." *Wynnewood Ref. Co., LLC v. Env't Prot. Agency*, 77 F.4th 767, 777 (D.C. Cir. 2023). If the Court deems arguments that Plaintiffs lack a trust duty to be better stated as merits arguments, the Court should affirm on that basis.

mismanagement of funds owed to George Curls. *See* [ECF 1, ¶ 24] (alleging "the failure of the Secretary of the Interior to protect [Curls] from exploitation of his allotment by his guardians and the Courts of Oklahoma."); [ECF 18, at 24] (arguing that "Defendants had an explicit fiduciary duty to protect [Curls] from waste and exploitation of land allotments under the 1908 Act."). Plaintiffs then asserted for the first time in their post-judgment Rule 59(e) motion that the Secretary's repudiation of a request for an accounting was sufficient for standing. *See* [ECF 24, at 1] (arguing that the "injury for standing purposes is the Trustee's failure to provide the requested accounting").

Because "issues not raised before judgment in the district court are usually considered to have been waived on appeal," Plaintiffs have waived the argument that Tanner-Brown established standing based on the Secretary's alleged repudiation of a request for an accounting. *Whelan v. Abell*, 48 F.3d 1247, 1251 (D.C. Cir. 1995). Waiver is also particularly appropriate here because Rule 59(e) "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping*, 554 U.S. at 485 n.5 (internal quotations omitted). Plaintiffs did exactly that by using their Rule 59(e) motion to assert "a new version of their standing

argument" that they could have raised before the district court's entry of judgment. [ECF 34, at 5].[8]

2. There is no enforceable trust duty for an accounting under Section 6 of the Act of 1908.

But in any event, Plaintiffs' new standing argument fails. Even if a fiduciary's failure to conduct a requested accounting could create an injury-in-fact, any such claim would have to be based on the Secretary owing Curls, the minor Freedman who Tanner-Brown purports to represent, an enforceable trust duty for an accounting. Plaintiffs here fail to demonstrate that Section 6 of the Act of 1908 creates any such enforceable trust duty.

Although there is a "undisputed existence of a general trust relationship between the United States and the Indian People," *United States v. Mitchell*, 463 U.S. 206, 225 (1983), that relationship alone does not impose an actionable fiduciary duty on the United States, *see United States v. Navajo Nation*, 537 U.S. 488, 506 (2003) ("*Navajo I*"); *Arizona v. Navajo Nation*, 143 S. Ct. 1804, 1814 (2023) ("*Navajo III*"). To establish a breach of trust claim, "[Plaintiffs] must establish, among other things, that the text of a treaty, statute, or regulation imposed certain duties on the United States." *Navajo III*, 143 S. Ct. at 1813. The

[8] Even though this Court's standing analysis is jurisdictional, the Court's waiver rule applies "to standing, as much as to the merits." *Huron v. Cobert*, 809 F.3d 1274, 1280 (2016).

United States "owes judicially enforceable duties to a tribe 'only to the extent it expressly accepts those responsibilities.'" *Id.* (citing *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011)). "Whether the Government has expressly accepted such obligations 'must train on specific rights-creating or duty-imposing' language in a treaty, statute, or regulation." *Id.* (quoting *Navajo I*, 537 U.S. at 506).

Contrary to Plaintiffs' arguments, *see* Opening Br. 13–14, Section 6 of the Act of 1908 does not establish any specific fiduciary duty for the Secretary to provide George Curls with an accounting. For one, the Act nowhere mentions an accounting, let alone one to be provided by the Secretary. Instead, under the statute, the Secretary of the Interior is "empowered" to appoint local representatives "as he may deem necessary to inquire into and investigate the conduct" of minor Freedman's guardians. 35 Stat. 312, § 6. Only if an appointed local representative or other representative of the Secretary is "of the opinion" that the estate of a minor has been mismanaged, *then* that representative has a duty to prepare a report for the Secretary, report the matter "to the proper probate court" in Oklahoma, and take additional remedial or enforcement actions he deems "necessary." *Id.* "Said representatives" have a duty to "counsel and advise" allottees, and take "necessary" steps to help the allottee acquire and retain their lands. *Id.*

Even setting aside the lack of an any accounting duty in the statutory text, Section 6 also cannot establish any *specific* enforceable trust duty for an accounting when the language of the statute confers—at most—discretionary powers. The Secretary is "empowered" to appoint representatives to monitor the estates of minors, but the statute does not *require* the Secretary to appoint such a representative. *Id.* The statute also permits the Secretary to appoint representatives "as he may deem necessary," and affords the Secretary discretion in how, if at all, to appoint representatives "under rules and regulations to be prescribed by him." *Id.* Plaintiffs contend that Section 6 of the Act identifies a "further duty" for representatives to "make full and complete reports to the Secretary," Opening Br. 14 (citing 35 Stat. 312, § 6), but this responsibility is conditioned on representatives being "of the opinion" that a minor's estate has been mismanaged, 35 Stat. 312, § 6; *see Drake v. F.A.A.*, 291 F.3d 59, 72 (D.C. Cir. 2002) (providing that "of the opinion . . ." language gives the FAA "virtually unbridled discretion over such decisions"). The Secretary's discretionary powers do not entail any specific, express responsibilities that create an enforceable trust duty, as alleged by Plaintiffs. *See Jicarilla*, 564 U.S. at 177; *Ute Indian Tribe of Uintah & Ouray Rsrv. v. U.S. Dep't of Interior*, 560 F. Supp. 3d 247, 260–61 (D.D.C. 2021) (holding that discretionary provisions of 1899 Act did not create enforceable trust duty).

Plaintiffs attempt to compare this case to *Mitchell*, 463 U.S. 206, *see* Opening Br. 20–22, but the Act of 1908 does not create a trust duty through statutory language providing for the Secretary's "full responsibility to manage Indian resources," *Mitchell*, 463 U.S. at 224. In *Mitchell*, the Supreme Court found an enforceable trust duty where statutes and regulations provided for, among other things, the government's "literal[] daily supervision over the harvesting and management of tribal timber," *id.* at 222 (quoting *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 147 (1980)), and "elaborate control over forests and property belonging to Indians," *id.* at 225.[9] Here—even if management alone could create enforceable trust duties—Section 6 subjects minor Freedmen's estates "to the jurisdiction of the probate courts of the State of Oklahoma," not the Department of the Interior or any other federal agency. 35 Stat. 312, § 6. The statute at most allows for the Secretary to exercise her discretion to investigate a court-appointed guardian's management of a minor allottee's property. *See id.* Unlike the statutes and regulations in *Mitchell*, the Act of 1908 does not provide for specific fiduciary duties through a system of elaborate control over the allotments of Freedmen, let alone an enforceable accounting duty. *See id.*

[9] The Supreme Court later made clear that, in cases of alleged breach of trust, "[t]he Federal Government's liability cannot be premised on control alone." *United States v. Navajo Nation*, 556 U.S. 287, 301 (2009) ("*Navajo II*").

Plaintiffs analogize this case to *United States v. White Mountain Apache Tribe*, 537 U.S. 465 (2003), *see* Opening Br. 21–22, but that comparison also fails. In *White Mountain Apache*, the Supreme Court concluded that a statute authorizing federal officials to occupy and use buildings on land "held by the United States in trust" imposed enforceable trust obligations on the United States to maintain the buildings so occupied. 537 U.S. at 474–75. But the Act of 1908, unlike the statute in *White Mountain Apache*, does not place federal officials in any direct role where they may use (and as a result must preserve) the allotments of minor Freedmen. To the contrary, the statute acknowledges that it is court-appointed guardians, not the Department of the Interior, that will administer minors' allotments. *See* 35 Stat. 312, §§ 1, 2, 6. Nor does the Act even mention a "trust," "beneficiary," or "fiduciary." *See id.* § 6.

And Plaintiffs may not rely on common law principles to establish an enforceable trust duty for an accounting. Plaintiffs primarily cite authorities that merely suggest that a common law *cause of action* (such as an accounting) could arise out of a trustee's control of trust assets. *See* Opening Br. 20, 22–28. In an attempt to establish a trust relationship between the Secretary and minor allottees under Section 6 of the Act of 1908—which Plaintiffs argue (and we do not concede) might give rise to a duty to account—Plaintiffs also cite *Cobell v. Norton*,

240 F.3d 1081 (D.C. Cir. 2001), arguing that the common law somehow "fill[s] in" a trust relationship. Opening Br. 18–19; *see also id.* at 22.

But the Supreme Court has repeatedly emphasized that "[t]he trust obligations of the United States to the Indian tribes are established and governed by statute rather than the common law." *Jicarilla*, 564 U.S. at 165; *see also Navajo III*, 143 S. Ct. at 1813 (establishing *Jicarilla* as the rule involving claims for injunctive relief). Although "[t]raditional trust principles may help illuminate the meaning of a 'specific, applicable, trust-creating statute or regulation' . . . those background principles cannot be used to 'override' the language of statutes and regulations 'defin[ing] the Government's . . . obligation[s]' to a tribe or tribal members." *Fletcher v. United States*, 730 F.3d 1206, 1208 (10th Cir. 2013) (citing *Jicarilla*, 564 U.S. at 183–86). Nothing in *Cobell* either does or could provide otherwise. Indeed, *Cobell* only instructs courts to use "settled meaning under either equity or the common law" when a court is determining the meaning of terms in a statute or treaty. 240 F.3d at 1099. Stated differently, there must be statutory language evincing an intent to establish a specific trust duty before the court can look to the common law as an aid in interpreting the intended scope of that duty.

Because Plaintiffs fail to point to any statutory or regulatory provisions that establish specific fiduciary duties between the Secretary and minor Freedmen

under Section 6 of the Act of 1908, Plaintiffs' attempts to invoke the common law to establish that relationship fails. And without any such statutory language establishing a trust duty in the first place, Plaintiffs' invocation of common-law trust principles to establish the requisite fiduciary relationship is wholly misplaced. *See United States v. Navajo Nation*, 556 U.S. 287, 302 (2009) ("*Navajo II*") (holding that when "the Tribe cannot identify a specific, applicable, trust-creating statute or regulation that the Government violated, . . . neither the Government's 'control' over [Indian assets] nor common-law trust principles matter.").

Finally, Plaintiffs' citation to cases applying the Act of 1908 establish no enforceable trust duty under Section 6. *See* Opening Br. 19. In *Truskett*, 236 U.S. at 229, the Supreme Court confirmed that Section 2 and 6 of the Act of 1908 apply to the allotments of minors, but mentioned no trust duties owed to minor Freedmen. In *Self v. Prairie Oil & Gas Co.*, 28 F.2d 590 (8th Cir. 1928), the court confirmed that under the Act "leases and extensions of prior leases of minor allottees . . . could only be made in the manner permitted by the act," but again did not confirm or recognize any trust duty. *Id.* at 593.

3. Plaintiffs fail to plead any violation of the Act of 1908.

Plaintiffs argue that they have satisfied the injury-in-fact requirement based on the existence of a purported "fiduciary duty" to protect George Curls and other Freedmen, and that the Secretary allegedly "breached" that duty "completely."

Opening Br. 12. To the extent that Plaintiffs are here arguing that Tanner-Brown suffered an injury-in-fact based on the violation of some requirement in the Act of 1908 (rather than arguing standing based on the denial of a request for an accounting), Plaintiffs have failed to plead facts supporting such a claim.

Section 6 of the Act of 1908 requires, at most, representatives of the Secretary to, after making findings about a guardians' mismanagement of the estate of a minor allottee, notify the Secretary and Oklahoma Courts of such mismanagement. *See* 35 Stat. 312, § 6. But Plaintiffs did not allege that the Secretary appointed a representative to investigate the conduct of Curls' guardian, nor did they plead that a representative formed an opinion on the negligence, carelessness, or incompetency of Curls' guardian or curator, or even that any specific guardian mismanaged Curls' estate. Absent such pleadings, Plaintiffs have not alleged any injury-in-fact related to a supposed breach of duty by the Secretary under the Act. *See id.*[10]

[10] Plaintiffs incorrectly suggest that this Court's "substantial likelihood" test for traceability bolsters their case for standing. *See* Opening Br. 14. This Court has held that "[f]or standing purposes, petitioners need not prove a cause-and-effect relationship with absolute certainty; substantial likelihood of the alleged causality meets the test." *Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113 (D.C. Cir. 1990). But this standard is irrelevant here where Plaintiffs fail to establish injury-in-fact.

B. Plaintiffs cannot establish that Tanner-Brown suffered an injury-in-fact based on mismanagement.

Plaintiffs alleged in their complaint, and argued in the district court, that Tanner-Brown had standing to sue based either on the Secretary's alleged failure to monitor for the mismanagement of funds derived from George Curls' allotments, or perhaps the Secretary's own mismanagement of funds derived from Curls' allotments. *See* [ECF 1, ¶ 29]; [ECF 18, at 12]. Plaintiffs have forfeited these arguments on appeal by failing to raise them in their Opening Brief. *See Fox v. Gov't of D.C.*, 794 F.3d 25, 30 (D.C. Cir. 2015) ("[W]here a litigant has forfeited an argument by not raising it in the opening brief, we need not reach it."). They instead argue in this appeal that Tanner-Brown suffered an injury based on the Secretary's "failure to provide an accounting." Opening Br. 11. Nevertheless, to the extent that Plaintiffs seek to argue on appeal that Tanner-Brown has standing based on the Secretary's failure to fulfill a fiduciary duty to protect Curls from mismanagement, they have failed to do so.

First, Plaintiffs establish no enforceable trust duty for the Secretary to monitor or prevent mismanagement of Curls' allotments. Plaintiffs must "identif[y] a substantive source of law" to establish such a trust duty. *El Paso Nat. Gas Co. v. United States*, 750 F.3d 863, 892 (D.C. Cir. 2014). But as demonstrated above, the Act of 1908 provides the Secretary with purely discretionary powers involving minor Freedmen's allotments. *See supra*, I.A.2. These discretionary

powers do not include any affirmative enforceable trust duty to protect Curls' allotments from mismanagement or to monitor such allotments. *See Jicarilla*, 564 U.S. at 177; *Ute Indian Tribe*, 560 F. Supp. 3d at 260–61.

Second, Plaintiffs' non-specific allegations about leases executed on behalf of Curls are too generalized to establish that Tanner-Brown suffered an injury-in-fact due to the breach of some duty related to mismanagement of such leases. Plaintiffs' complaint alleges injury "related to losses and mismanagement of trust funds derived from his allotted land," and makes blanket allegations that Curls' land was "leased for oil and gas drilling, and agricultural purposes," and "generated substantial revenue." [ECF 1, ¶ 8].[11] Yet these pleadings do not allege any injury based on the mismanagement of a *specific* lease executed *on behalf of Curls*, which falls short of the requirements for a concrete and particularized injury under Article III. *See Summers v. Earth Island Inst.*, 555 U.S. 488, 495 (2009) (noting "a failure to allege that any particular timber sale or other project claimed to be unlawfully subject to the regulations will impede a specific and concrete plan of [plaintiff's] to enjoy the national forests").

[11] Plaintiffs' allegation that certain unnamed "oil and gas leases and agriculture leases were entered into by Guardian Ratherburn Alden on behalf of" George Curls references no specific lease. [ECF 1, ¶ 8]. Plaintiffs also allege that "leases were entered into with the Willard Oil Company, the Prairie Oil Company, and the Minnesota Mining Company," but that allegation conspicuously fails to assert that any such leases were executed on behalf of George Curls. *Id.*

If the Court considers materials beyond the pleadings to draw further inferences regarding leases, these materials fail to demonstrate the existence of leases executed in favor of Curls. This Court already concluded that many of the documents Plaintiffs cite on appeal, *see* Opening Br. 32–39, establish that "on Curls's specific allotment there was no oil," and that records of oil and gas income from Curls' siblings' land indicate "nothing of value from George Curls," *Zinke*, 709 F. App'x at 19 (D.C. Cir. 2017) (cleaned up).

Third, even if the Court assumes that some unspecified lease executed in favor of George Curls exists, Plaintiffs still fail to plead any specific mismanagement of such a lease. Plaintiffs' complaint alleges that "none of the defendants or their predecessors made any attempt to effectively monitor or respond to mistreatment and exploitation of Freedmen minor allotments." [ECF 1, ¶ 31]. But this allegation includes no assertion specific to a claim that *Curls* was exploited or mistreated. "[M]ere conclusory statements," cannot support claims of standing. *Arpaio v. Obama*, 797 F.3d 11, 19 (D.C. Cir. 2015) (cleaned up). The complaint discusses historical examples of exploitation of Indians and Freedmen, but includes no specific allegation that Curls was similarly exploited. [ECF 1, ¶¶ 25–28]. As in their prior suit, Plaintiffs have failed to plead specific mismanagement of leases executed on behalf of Curls. *See Jewell*, 153 F. Supp. 3d at 107 n.3, 112–13.

Finally, if Plaintiffs seek to maintain standing based on alleged mismanagement, Plaintiffs have failed to plead, like in their prior suit, that an injury suffered by Tanner-Brown is "directly traceable to Defendants' action or inaction." *Id.* at 110 n.5. As the district court stated in the 2014 litigation, even if Plaintiffs adequately alleged an injury based on mismanagement, they would also need to plead "that had Defendants fulfilled their purported statutory duty, Mr. Curls would have received royalties or at least royalties in a greater amount than any that he did receive." *Id.* Without any such pleadings in their complaint, Plaintiffs cannot establish even a substantial likelihood that an injury to Tanner-Brown "is directly traceable to Defendants' action or inaction." [ECF 21, at 10] (quoting *Jewell*, 153 F. Supp. 3d at 110); *cf. Competitive Enter. Inst. v. Nat'l Highway Traffic Safety Admin.*, 901 F.2d 107, 113 (D.C. Cir. 1990) (applying "substantial likelihood" test in standing analysis).

II. Plaintiffs fail to meet their burden to establish the Federation's standing.

The district court concluded below that the Federation lacked standing as an organization to sue on its own behalf and lacked associational standing to sue as a representative of its members. [ECF 21, at 11–12]. Now on appeal, Plaintiffs argue that the Federation meets the requirements for associational standing. *See*

Opening Br. 15.[12] Plaintiffs are incorrect. The district court properly concluded that the Federation lacks associational standing. *See* [*id.* at 12–13].

"An association only has standing to bring suit on behalf of its members when [1] its members would otherwise have standing to sue in their own right, [2] the interests it seeks to protect are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Fund Democracy, LLC v. S.E.C.*, 278 F.3d 21, 25 (D.C. Cir. 2002) (citing *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)).

Plaintiffs fail to allege facts sufficient to show that the Federation meets the first requirement for associational standing, that at least one of the Federation's members "would otherwise have standing to sue in their own right." *Id.* Plaintiffs' complaint identifies Tanner-Brown as the sole named member of the Federation. *See* [ECF No. 1, ¶ 9] ("Harvest is comprised of members, including Plaintiff Leatrice Tanner-Brown, and representatives of other now deceased Freedmen with a direct personal stake in receipt of damages for breach of fiduciary duties owed to them by Defendants."). But as explained above, Plaintiffs fail to meet their burden to demonstrate Tanner-Brown's standing, and so cannot establish that at least one

[12] Plaintiffs have forfeited the argument that the Federation has standing to sue as an organization on its own behalf by failing to raise the issue in their Opening Brief. *See Fox*, 794 F.3d at 30.

of the Federation's members would have standing to bring suit herself. *See supra*, § I.

Beyond Tanner-Brown, Plaintiffs argue that the Federation brings suit on behalf of "Freedmen who, like [] Tanner-Brown, have a right to participate in this litigation but prefer to be represented by Harvest," and "have standing to sue in their own right." Opening Br. 15. Yet Plaintiffs fail to plead the names and identities of these unnamed members of the Federation, establish that these members of the Federation are personal representatives of the estates of specific deceased Freedmen, and demonstrate that those deceased Freedmen were injured by the breach of a purported trust duty. Plaintiffs' conclusory, threadbare pleadings cannot establish the standing of even one individual member of the Federation. *Cf. Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977) (finding associational standing based on one member).[13]

On the face of Plaintiffs' complaint, the Federation also fails to meet the third requirement of the test for associational standing, that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Fund Democracy*, 278 F.3d at 25. Plaintiffs' complaint sought "an accounting of funds generated from leases on restricted land held by George Curls

[13] Although the complaint mentions Curls' siblings, Plaintiffs do not allege that the siblings or their representatives are members of the Federation. *See* [ECF 1, ¶¶ 9, 26].

and similarly situated persons." [ECF 1, ¶ 5]. But even assuming the Secretary has a nondiscretionary duty to conduct an accounting (which as shown above she does not), conducting an accounting on behalf of these unidentified different individuals requires "the consideration of [] individual circumstances," and accordingly the participation of individual members of the Federation as the personal representatives of these various Freedmen. *Ctr. for Sustainable Econ. v. Jewell*, 779 F.3d 588, 597 (D.C. Cir. 2015).

On appeal, Plaintiffs argue that the Federation does not "request relief of an individualized nature" and that an accounting would be "common" to all minor Freedmen subject to the Act of 1908. Opening Br. 16. But that allegation is mere speculation, and an accounting is "[t]he act, practice, or system of establishing or settling financial accounts." Black's Law Dictionary (11th ed. 2019). It would be impossible to conduct an accounting without examining the circumstances of different minor Freedmen, each of whom would have to be represented by one of the Federation's members.

Plaintiffs also cite *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 557 (1996), but that decision simply highlights the prudential nature of this portion of the third prong of the associational standing

test. *See* Opening Br. 16. It does not lessen the conclusion that the Federation's requested relief would require the participation of individual members.[14]

III. This Court may affirm the district court's dismissal on alternative grounds.

This Court may "affirm a judgment on any basis adequately preserved in the record below." *United States ex rel. Heath v. AT & T, Inc.*, 791 F.3d 112, 123 (D.C. Cir. 2015). If the court does not affirm the district court's judgment for lack of standing, it should still do so for at least two other reasons, both briefed by Federal Defendants in the district court.

First, Plaintiffs fail to state a claim for which relief could be granted because the Secretary does not owe the alleged trust duties to George Curls. *See* Fed. R. Civ. P. 12(b)(6); [ECF 15, at 28–33]. Plaintiffs' complaint pleaded a breach of trust claim for an accounting. *See* [ECF 1, ¶¶ 36–39]. In order to adequately plead their claim, Plaintiffs must "identif[y] a substantive source of law establishing specific fiduciary duties." *El Paso Nat. Gas Co.*, 750 F.3d at 892. But as explained above, Plaintiffs fail to identify an enforceable duty to provide Curls with an accounting under the Act of 1908. *See supra*, I.A.2, 3. Thus, the judgment

[14] Plaintiffs' reference to the Privileges and Immunities Clause is a non-sequitur. *See* Opening Br. 17.

of the district court may be affirmed for Plaintiffs' failure to state a claim. *See* Fed. R. Civ. P. 12(b)(6).[15]

Second, Plaintiffs' suit is time-barred because the statute of limitations for Plaintiffs' trust claim has expired. Civil actions against the United States are barred unless a plaintiff files a complaint within six years after the cause of action accrues. 28 U.S.C. § 2401(a); *see John R. Sand & Gravel v. United States*, 552 U.S. 130, 132–35 (2008). And a cause of action generally accrues "when all the events have occurred which fix the alleged liability of the defendant and entitle the plaintiff to institute an action." *Hopland Band of Pomo Indians v. United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988).

The statute of limitations for Plaintiffs' claim expired around a century ago. Plaintiffs here allege a claim for an accounting based on a purported enforceable trust duty under the Act of 1908. *See* Opening Br. 11–12; [ECF 1, ¶¶ 36–39]. If such a claim did exist, it would have accrued when the Secretary's alleged duties to Curls as a minor expired and Curls knew that he had not been provided with a final accounting. *See Bussineau v. President & Directors of Georgetown Coll.*, 518

[15] To the extent that Plaintiffs attempt to establish some other specific fiduciary duty, they identify no portion of the Act granting the Secretary authority to manage Curls' allotments, to execute or approve leases of the allotments, to control funds derived from the leases, or to hold such funds in accounts on Curls' behalf. 35 Stat. 312. The Act does not direct the Secretary act as a trustee with nondiscretionary duties to manage a trust corpus involving minor Freedmen. *Id.*

A.2d 423, 430 (D.C. 1986) ("[T]he discovery rule is designed to prevent the accrual of a cause of action before an individual can reasonably be expected to discover that he has a basis for legal redress."). Accordingly, a claim for an accounting would have accrued in 1918, when Curls turned twenty-one. *See* [ECF 1, ¶ 8]. And any claim against the United States would have expired six years later, in 1924. *See* 28 U.S.C. § 2401(a).

Even were that not so, Plaintiffs' claim previously accrued and the limitations period has already run because Federal Defendants have taken several actions inconsistent with an alleged trust duty towards Freedmen minors. In their 2007 motion to dismiss Plaintiffs' complaint in *Harvest Inst. Freedman Fed'n v. United States*, 80 Fed. Cl. 197, Federal Defendants stated they owed no trust duty to Plaintiffs. *See* Mem. in Support of Mot. to Dismiss 10–16, ECF 19. Federal Defendants similarly moved to dismiss Plaintiffs' complaint in the prior 2014 suit based on, among other things, the absence of a trust duties owed to Freedmen. *See* Defs.' Mem. of P. & A. in Supp. of Mot. to Dismiss 32–38, ECF 13, *Jewell*, 153 F. Supp. 3d at 104. These actions were inconsistent with Plaintiffs' claim of supposed trust duties, such that Plaintiffs would have been on notice that a claim for an accounting accrued at least in 2007 and at the very latest in 2014. *See Wolfchild v. United States*, 731 F.3d 1280, 1291 (Fed. Cir. 2013) (when there is a repudiation of the trust, claimant is on notice of the accrual of their claim). As a

result, Plaintiffs' trust claim, filed in 2021, is barred by the statute of limitations. *See* [ECF 1-2, at 2]; 28 U.S.C. § 2401(a).

Plaintiffs appear to argue that the Court should not address the expiration of the statute of limitations because the issue could benefit from further factual development. *See* Opening Br. 24. Plaintiffs cite *Cobell v. Babbitt*, 30 F. Supp. 2d 24 (D.D.C. 1998), where the district court declined to rule on the statute of limitations at the motion to dismiss stage "[g]iven the factual nature" of an inquiry into when plaintiffs' cause of action had accrued. *Id.* at 45. But here, unlike in *Cobell*, no further discovery or factual development is necessary. Plaintiffs' claim must have accrued, at the latest, when Federal Defendants disclaimed an accounting duty in 2014 and, given the nature of the alleged duty, likely accrued more than a century ago when Curls did not receive the accounting to which Tanner-Brown now claims he was entitled.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ *Benjamin W. Richmond*
TODD KIM
Assistant Attorney General

WILLIAM B. LAZARUS
JOHN L. SMELTZER
AMANDA STONER
BENJAMIN W. RICHMOND
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 514-3977
benjamin.richmond@usdoj.gov

Of Counsel:

ROBERT J. MERRITT
SHANI N. SUMTER
VICTORIA A. CEJAS
Attorneys
Office of the Solicitor
U.S. Department of the Interior

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CERTIFICATE OF COMPLIANCE

1. This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f) and Cir. R. 32(e)(1), this document contains 10,512 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ *Benjamin W. Richmond*
BENJAMIN W. RICHMOND
Counsel for Federal Appellees

ADDENDUM

28 U.S.C. § 2401 - Time for commencing action against United States

(a) Except as provided by chapter 71 of title 41, every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues. The action of any person under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases.

* * *

Act of May 27, 1908 – An Act For the removal of restrictions from part of the lands of allottees of the Five Civilized Tribes, and for other purposes.

Be it enacted by the Senate and Hause of Representatives of the United States of America inn Congress assembled; That from and after sixty days from the date of this Act the status of the lands allotted heretofore or hereafter to allottees of the Five Civilized Tribes shall, as regards restrictions on alienation or incumbrance, be as follows: All lands, including homesteads, of said allottees enrolled as intermarried whites, as freedmen, and as mixed-blood Indians having less than half Indian blood including minors shall be free from all restrictions. All lands, except homesteads, of said allottees enrolled as mixed-blood Indians having half or more than half and less than three-quarters Indian blood shall be free from all restrictions. All homesteads of said allottees enrolled as mixed-blood Indians having half or more than half Indian blood, including minors of such degrees of blood, and all allotted lands of enrolled full-bloods, and enrolled mixed-bloods of three-quarters or more Indian blood, including minors of such degrees of blood, shall not be subject to alienation, contract to sell, power of attorney, or any other incumbrance prior to April twenty-sixth, nineteen hundred and thirty-one, except that the Secretary of the Interior may remove such restrictions, wholly or in part, under such rules and regulations concerning terms of sale and disposal of the proceeds for the benefit of the respective Indians as he may prescribe. The

Secretary of the Interior shall not be prohibited by this Act from continuing to remove restrictions as heretofore, and nothing herein shall-be construed to impose restrictions removed from land by or under any law prior to the passage of this Act. No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

Section 2. That all lands other than homesteads allotted to members lands , of the Five Civilized Tribes from which restrictions have not been removed may be leased by the allottee if an adult, or by guardian or curator under order of the proper probate court if a minor or incompetent, for a period not to exceed five years, without the privilege of renewal: *Provided*, That leases of restricted lands for oil, gas or other mining purposes, leases of restricted homesteads for more than one year, and leases of restricted lands for periods of more than five years, may be made, with the approval of the Secretary of the Interior, under rules and regulations provided by the Secretary of the Interior, and not otherwise: *And provided further*,

That the jurisdiction of the probate courts of the State of Oklahoma over lands of minors and incompetents shall be subject to the foregoing provisions, and the term minor or minors, as used in this Act, shall include all males under the age of twenty-one years and all females under the age of eighteen years.

* * *

Section 6. That the persons and property of minor allottees of the Five Civilized Tribes shall, except as otherwise specifically provided by law, be subject to the jurisdiction of the probate courts of the State of Oklahoma. The Secretary of the Interior is hereby empowered, under rules and regulations to be prescribed by him, to appoint such local representatives within the State of Oklahoma who shall be citizens of that State or now domiciled therein as he may deem necessary to inquire into and investigate the conduct of guardians or curators having in charge the estates of such minors, and whenever such representative or representatives of the Secretary of the Interior shall be of opinion that the estate of any minor is not being properly cared for by the guardian or curator, or that the same is in any manner being dissipated or wasted or being permitted to deteriorate in value by reason of the negligence or carelessness or incompetency of the guardian or curator, said representative or representatives of the Secretary of the Interior shall have power and it shall be their duty to report said matter in full to the proper probate court and take the necessary steps to have such matter fully investigated,

and go to the further extent of prosecuting any necessary remedy, either civil or criminal, or both, to preserve the property and protect the interests of said minor allottees; and it shall be the further duty of such representative or representatives to make full and complete reports to the Secretary of the Interior. All such reports, either to the Secretary of the Interior or to the proper probate court, shall become public records and subject to the inspection and examination of the public, and the necessary court fees shall be allowed against the estates of said minors. The probate courts may, in their discretion, appoint any such representative of the Secretary of the Interior as guardian or curator for such minors, without fee or charge.

And said representatives of the Secretary of the Interior are further restricted lands, authorized, and it is made their duty, to counsel and advise all allottees, adult or minor, having restricted lands of all of their legal rights with reference to their restricted lands, without charge, and to advise them in the preparation of all leases authorized by law to be made, and at the request of any allottee having restricted land he shall, without charge, except the necessary court and recording fees and expenses, if any, in the name of the allottee, take such steps as may be necessary, including the bringing of any suit or suits and the prosecution and appeal thereof, to cancel and annul any deed, conveyance, mortgage, lease, contract to sell, power of attorney, or any other encumbrance of any kind or

character, made or attempted to be made or executed in violation of this Act or any other Act of Congress, and to take all steps necessary to assist said allottees in acquiring and retaining possession of their restricted lands.

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