In the Supreme Court of the United States

DEADRIA FARMER-PAELLMANN, ET AL., Petitioners,

v.

SMITHSONIAN INSTITUTION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

PETITION FOR A WRIT OF CERTIORARI

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May 28, 2024Counsel for PetitionerSUPREME COURT PRESS•Boston, Massachusetts

QUESTIONS PRESENTED

1. Whether subject matter jurisdiction exists over the Smithsonian Institution's repatriation of artworks to a foreign state under an Ethical Return policy without using the rulemaking and public hearing processes under the Administrative Procedure Act, (APA), 5 U.S.C. § 552a, *et seq*.

2. Whether descendants of enslaved Africans in the United States have Article III standing to challenge the repatriation by the Smithsonian Institution of 29 of the "Benin Bronzes", artworks that were formed out of the metal ingots used by western slave traders to purchase enslaved persons from the Kingdom of Benin.

3. Whether the courts below improperly held the matter to be moot where nine of the Benin Bronzes had title transferred by the Smithsonian to Nigeria but remain in the United States on long-term loan, along with other Bronzes still in U.S. title but subject to future repatriation.

PARTIES TO THE PROCEEDINGS

Petitioners and Plaintiffs-Appellants below

- Deadria Farmer-Paellmann
- Restitution Study Group, Inc

Respondent and Plaintiff-Appellees below

• Smithsonian Institution

STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Petitioner Restitution Study Group, Inc. is a privately-owned entity. It has no parent corporation and there is no publicly held company that owns 10% or more of their stock.

LIST OF PROCEEDINGS

U.S. Court of Appeals, District of Columbia Circuit No. 23-5196

Deadria Farmer-Paellmann and Restitution Study Group, Inc., *Appellants* v. Smithsonian Institution, *Appellee*

Date of Final Order: December 28, 2023

Date of Rehearing Denial: February 29, 2024

U.S. District Court, District of Columbia No. 22-cv-3048 (CRC) Deadria Farmer-Paellmann, et al., *Plaintiffs*, v. Smithsonian Institution, *Defendant*. Date of Final Opinion: July 5, 2023

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OPINIONS BELOW

The ruling of the United States Court of Appeals for the D.C. Circuit dated December 28, 2023 granting summary affirmance of the decision of the District Court is included in the Appendix ("App.") at 1a. The memorandum decision of the United States District Court for the District of Columbia, dated July 5, 2023 is included at App.3a.



JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit denied a timely petition for rehearing on February 29, 2024 which is included at App.13a. U.S. Court of Appeals for the D.C. Circuit. This petition is timely under 28 U.S.C. § 2101 and Supreme Court Rule 13.1 because it is being filed within 90 days of the entry of the order sought to be reviewed. This court has jurisdiction to review the order of the United States Court of Appeals for the Second Circuit pursuant to 28 U.S.C. § 1254.

JUDICIAL RULES INVOLVED

The relevant provision of the Federal Rules of Civil Procedure is Fed. R. Civ. P. 12(b)(1) and (6).

Fed. R. Civ. P. Rule 12. (b)(1), (6)

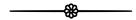
Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

[...]

- (b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:
 - (1) lack of subject-matter jurisdiction;

[...]

(6) failure to state a claim upon which relief can be granted;



STATEMENT OF THE CASE

Smithsonian Institution (Smithsonian) has engaged in the creation of a federal repatriation policy to return artworks, namely the Benin Bronzes (the Bronzes), to a foreign state. In so doing, Smithsonian has acted unilaterally and outside of any regulation under the Administrative Procedure Act (APA), 5 U.S.C. § 552a, *et seq*.

Under what it calls the "Shared Stewardship and Ethical Return Policy" (the "Ethical Return policy"), Smithsonian has transferred title to 29 Benin Bronzes, the well-known sculptural masks created in what was once the Benin Kingdom, now a part of Nigeria. The Bronzes were removed by Britain in 1897 during its colonial administration of Benin and found their way to various institutions, including Smithsonian. Of the twenty-nine (29) Bronzes, twenty (20) were moved to Nigeria during the District Court action while the remaining nine (9) had title transferred to Nigeria but remain in the U.S. under a nine-year "loan" to Smithsonian. App.43a-46a.

The District Court held that the matter was moot despite plaintiffs' claims that as to the nine Bronzes remaining in the U.S. a remedy could still be effected reversing the transfer of title. In addition, plaintiffs argued that approximately Forty (40) more Bronzes remain in the Smithsonian and can still be made subject to the Ethical Return policy, giving rise to a continuing ripe controversy. The lower courts rejected both claims to ripeness. App.2a, App.4a.

The District Court also held that Smithsonian was not obligated or subject to the APA and did not have to provide a public forum prior to its adoption of the Ethical Return policy and that plaintiffs lacked standing to raise such issues. App.10a.

In the District Court, Smithsonian made it clear that the repatriation of the Bronzes was a governmental policy, going so far as to tell the District Court that interference with the transfer "would vitiate a contract between two sovereign nations." Government Response at 19 [emphasis added]. In this same vein, Smithsonian told the District Court it had "entered into an agreement with an arm of the Nigerian government," *id.* at 20, and that plaintiffs should not be permitted to "disturb an agreement *between sovereign nations* to return home antiquities originating in Nigeria." *Id.* [emphasis added] By such concessions, Smithsonian acknowledged it created a governmental policy but one that was implemented without recourse to the rulemaking provisions of the APA.

In execution of the repatriation, the U.S. Department of State viewed the return of the Bronzes as an official act, placing the return within the context of a January 2022 agreement between the United States and Nigeria to prevent the looting and trafficking of Nigeria's cultural property. *See* U.S. Mission Nigeria, *30 Benin Bronzes Returned to Nigeria* (Oct. 17, 2022), https://ng.usembassy.gov/30-benin-bronzes-returnedto-nigeria/.1

Repatriation was also treated as a diplomatic act. Nigeria's Minister of Education and Culture, Lai Mohammed, attended the transfer of ownership ceremony at the National Museum of African Art on October 11, 2022. Moreover, the U.S. embassy high-

¹ Notably, that "agreement" does not authorize Smithsonian to engage in any repatriation of the U.S. collection and speaks only to aspirations between the two governments to fight art object trafficking. Smithsonian should still have made use of the APA to create the repatriation policy since it is plainly a new governmental initiative. Even if it were authorized under a Congressional mandate, the nature of the repatriation program would ordinarily require resort to the APA and its public hearing processes.

lighted the repatriation on its website. See U.S. Mission Nigeria, 30 Benin Bronzes Returned to Nigeria (Oct. 17, 2022), https://ng.usembassy.gov/30-benin-bronzes-returned-to-nigeria/.²

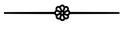
By every reasonable measure, Smithsonian's repatriation of the Bronzes has been treated as national policy but Smithsonian contends it was not subject to the APA or any federal jurisdiction in the creation of what amounts to a federal art repatriation initiative, a shocking aggregation of agency power.

Citing a Privacy Act case, the District Court agreed with Smithsonian and held, in part, that it had no subject matter jurisdiction because Smithsonian is not an "agency" under the APA and there is no basis for judicial review under 5 U.S.C. § 702.5. App.10a (citing *Dong v. Smithsonian Inst.*, 125 F.3d 877, 883 (D.C. Cir. 1997)).

Congress never authorized repatriation to a foreign state by *any* agency, let alone Smithsonian that is a trustee of the United States collection. In creating what amounts to federal policy, Smithsonian should be deemed subject to the APA and create such policy only by public hearings and the public rulemaking process. In the absence of such public process, the Ethical Return policy and decisions based upon the policy are *ultra vires* and should be deemed void.

² Nigeria's President also recognized the repatriation as a governmental act in a proclamation dated March 23, 2023 headed "Recognition of Ownership, and an Order Vesting Custody and Management of the Repatriated Looted Benin Artifacts in the Oba of Benin Kingdom, 2023." (Ex. 2), https://dailysceptic.org/ wp-content/uploads/2023/05/2023-03-28-re-Oba-Federal-Republic-Of-Nigeria-Official-Gazette.pdf.

These claims were novel and required extended argument but the Court of Appeals dismissed the appeal on all issues by a truncated and highly limited summary affirmance. App.1a.



REASONS FOR GRANTING THE PETITION

Despite the evidence of a new policy initiative, the District Court held that Smithsonian is not an agency exercising the "authority of the government of the United States" under § 551(1) and lacks the executive department status necessary under § 552(f) to engage the mandatory APA public process. App.10a, *citing Dong, supra* at 882-883. However, such assumption is not absolute and Smithsonian falls under federal judicial authority when the *factual* basis of its acts give rise to jurisdiction. *See e.g. O'Rourke v. Smithsonian Inst. Press*, 399 F.3d 113 (2d Cir. 2005) (holding that Smithsonian is considered "the United States" in the context of copyright infringement).³

³ District Courts have not hesitated to recognize jurisdiction over Smithsonian in a variety of factual contexts. *Williams v. Smithsonian Inst.*, 177 F.Supp.3d 377 (D.D.C. 2016) (denying motion to dismiss employee's retaliation claim); *Norden v. Samper*, 503 F.Supp.2d 130 (D.D.C. 2007) (granting summary judgment against Smithsonian Institution for failure to accommodate an employee's handicap under the Rehabilitation Act of 1973 and retaliation in firing the employee); *Colhoun v. Smithsonian Inst.*, 659 F.Supp. 1551 (D. Md. 1987) (asserting jurisdiction over claim against Smithsonian for specific performance of an option agreement); *Crowley v. Smithsonian Inst.*, 462 F. Supp. 725 (D.D.C. 1978) (denying a claim under the U.S. Constitution's Establishment Clause that the Smithsonian's exhibits on the sub-

In connection with the Benin Bronzes, Smithsonian has exercised the "authority of the United States" via what Smithsonian admitted below is an agreement "between sovereign nations"; as such, Smithsonian should have had resort to the APA process and its public participation component, an important element of speech and redress under the First Amendment. The lower courts erred by failing to recognize the factual distinction between the Smithsonian's ordinary function as a museum and its policymaking innovation in the form of repatriation of the Bronzes.

In the complaint below, plaintiffs asserted historical, cultural, aesthetic, and symbolic interests that are peculiar to plaintiff Farmer-Paellmann and Restitution Study Group that advocate for the collective interests of descendants of enslaved Africans. App.16a-17a, 19a-24a, 35a-37a. Plaintiffs fall within "the zone of interests", see e.g. NCUA v. First Nat'l Bank & Trust Co., 522 U.S. 479, 492 (1998), of descendants of enslaved Africans to claim standing to object to the removal of the Bronzes that have symbolic meaning, having been created out of the metal ingots used by western slave traders as the currency to purchase Africans from the Benin kingdom.

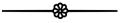
A symbolic tie exists between the Bronzes and descendants of enslaved persons so as to create a nexus with the Smithsonian's decision to "repatriate" the Bronzes. Since the Ethical Return policy remains in force and has not been revoked, these plaintiffs continue to have a "personal stake in the outcome" of the

ject of evolution were outside its statutory authority and violated the First Amendment).

lawsuit. Los Angeles v. Lyons, 461 U.S. 95, 101 (1983) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

Plaintiffs demonstrated sufficient Article III standing to seek injunctive relief to reverse title in the nine Bronzes still in the U.S. and to seek declaratory relief as to the others (approximately 40) subject to future invocation of the Ethical Return policy. See e.g. Lewis v. Continental Bank Corp., 494 U.S. 472, 477 (1990); Allen v. Wright, 468 U.S. 737, 750-751 (1984); Valley Forge Christian College v. Americans United for Separation of Church & State, Inc., 454 U.S. 464, 471-473 (1982). Plaintiffs presented a real and not "a hypothetical state of facts." Cf. Aetna Life Insurance Co. v. Haworth, 300 U.S. 227, 241 (1937)).

Finally, by limiting its summary affirmance solely to the mootness question, App.1a-2a, the Court of Appeals failed to consider the important policy questions presented by plaintiffs as to Smithsonian's creation of federal policy without resort to the public hearing process under the APA.



CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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May 28, 2024