

ORAL ARGUMENT NOT YET SCHEDULED

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

STANDING ROCK SIOUX TRIBE,  
Plaintiff–Appellant,  
CHEYENNE RIVER SIOUX TRIBE,  
Intervenor for Plaintiff–Appellant,  
v.  
UNITED STATES ARMY CORPS  
OF ENGINEERS,  
Defendant–Appellee,  
DAKOTA ACCESS LLC,  
Intervenor for Defendant–Appellee.

Case No. 16-5259

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**MOTION BY DAKOTA ACCESS LLC TO  
DISMISS APPEAL AS MOOT OR FOR SUMMARY  
AFFIRMANCE IN THE ALTERNATIVE**

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\* Authorities on which this motion chiefly relies are marked with an asterisk.

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## INTRODUCTION

This interlocutory appeal presents a single issue: whether the district court abused its discretion in denying the Standing Rock Sioux Tribe (the “Tribe”) a preliminary injunction that would have prevented further construction of an oil pipeline that was already near completion at the time the Tribe requested the injunction. The Court should dispose of the appeal without further briefing and oral argument for two independent reasons.

First, the appeal is moot. On October 9, 2016, this Court denied the Tribe’s emergency motion to enjoin construction during the pendency of this appeal. *See* Add. 94–95.<sup>1</sup> The emergency motion sought to stop one of the remaining phases—the part of the pipeline that passes north of the Tribe’s reservation near Lake Oahe, North Dakota. After this Court denied that motion (and dissolved an earlier administrative injunction), work on the pipeline proceeded in a culturally sensitive manner. All construction relevant to the Tribe’s motion for preliminary injunctive relief has now been completed. *See* Add. 135 (Mahmoud Decl.). Regardless of whether that development moots the underlying lawsuit, it plainly renders an appeal of the denial of preliminary injunctive relief moot, because there is nothing left to enjoin. The Court should therefore dismiss this appeal for lack of jurisdiction.

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<sup>1</sup> For convenience, the opinions, orders, and other items relevant to this motion are reproduced in the attached Addendum (“Add.”).

Alternatively, summary affirmance is warranted because the Court has already decided the sole legal issue presented by this appeal. In this Court's October 9 Order it unanimously held, after full briefing and oral argument, that the Tribe failed to satisfy the legal requirements for an emergency injunction pending this appeal. *See* Add. 94–95. In reaching that result, this Court concluded that the Tribe failed to clearly show: (1) substantial likelihood of success on the merits; (2) irreparable harm; (3) that the equities favor injunctive relief; and (4) that injunctive relief will not negatively impact the public interest. The district court applied those same factors in coming to the same conclusion based on a record that is identical in all material respects. The issue at the merits stage is whether the district court abused its broad discretion in reaching the same conclusion that this Court *already* reached in rejecting emergency injunctive relief. To the extent this Court concludes it has jurisdiction over the appeal, summary affirmance is warranted.

### **BACKGROUND**

1. The Dakota Access Pipeline (sometimes called “DAPL”) is a \$3.8 billion, 1,172-mile-long project that will safely and efficiently transport roughly 570,000 barrels of oil per day from North Dakota to Illinois. Add. 98, 111, 118. Its construction has employed more than 10,000 workers, and the finished pipeline will allow American oil producers to remain competitive during a difficult time for the industry. Add. 118. Dakota Access has contracted to begin delivering oil in January

2017. Add. 125.

For more than two years Dakota Access has worked closely with state and federal regulatory authorities, as well as several Indian tribes, in planning the pipeline route. The vast majority of the pipeline, which runs underground, crosses private land in four States; none of it touches any Indian reservation. *See* Add. 4. Less than 1% of the pipeline's length crosses federally owned lands, and only 3% will cross land (both private and public) requiring permitting under federal environmental laws such as the Clean Water Act and the Rivers and Harbors Act. *See* Add. 4, 15.

2. One small section of the pipeline subject to federal review by the U.S. Army Corps of Engineers ("Corps") is the crossing at Lake Oahe in North Dakota. The Corps reviewed this crossing in carrying out its duties under Section 106 of the National Historic Preservation Act ("NHPA"), a provision that requires the Corps to consider, in consultation with the Tribe, the effects of certain undertakings on neighboring historic sites of religious or cultural significance. *See* 54 U.S.C. §§ 306108, 302706(b); *see also* Add. 105–07 (explaining the permitting requirements).

As the district court recounted in great detail, the Corps afforded the Tribe "dozens" of opportunities to consult on the Dakota Access Pipeline, including possible effects on cultural sites at more than 200 locations. Add. 35. On the few oc-

casions when the Tribe took advantage of those opportunities, the dialogue was productive and produced tangible results, including use of “double-walled piping” and other new conditions. Add. 30. In most cases, however, the Tribe failed to respond, did not show up for scheduled meetings, or affirmatively declined opportunities to consult with the Corps. *See* Add. 31, 50–52. For other tribes that chose to participate in the process, Dakota Access addressed their concerns through changes in both the routing and the design of the pipeline. *See* Add. 31, 135. Ultimately, after consideration of extensive documentation and comments, the Corps concluded that the pipeline satisfied the relevant permitting requirements, and it issued findings to this effect on July 25, 2016. *See* Add. 35.

3. On July 27, 2016, two days after the Corps verified the pipeline’s compliance with permitting requirements, the Tribe filed this suit under the Administrative Procedure Act. As relevant here, the Tribe alleged that the Corps’s permitting process violated environmental laws as well as the NHPA. *See* Add. 4. Invoking only its NHPA claims, the Tribe moved for a preliminary injunction on August 4, 2016. *See* Mot. for Prelim. Inj., D.E. 5 (Aug. 4, 2016).<sup>2</sup> Initially, the Tribe asked the court to require the Corps to “withdraw” a nationwide permit (known as NWP 12) “as applied to the Dakota Access Pipeline” and to “withdraw verifications issued on July 25, 2016 for the Dakota Access Pipeline to discharge in federally regulated

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<sup>2</sup> “D.E.” refers to docket entries in the district court.



waters at 204 sites along the pipeline route,” including at Lake Oahe. *Id.* at 1. Dakota Access intervened in the lawsuit and advised the court that pipeline construction was already well underway. The Tribe then narrowed its request to “enjoin further construction activities” in “areas in which § 106 consultation would still be valuable.” Pl.’s Reply in Supp. of Mot. for Prelim. Inj., D.E. 24, at 1, 23–24 (Aug. 22, 2016).

Before the district court was able to issue a decision on the preliminary injunction motion, the Tribe requested a temporary restraining order to halt construction work 20 miles to the east and west of Lake Oahe. *See* Emergency Mot. for TRO, D.E. 30 (Sept. 4, 2016). The district court held a hearing on this request on September 6 and Dakota Access voluntarily abstained from construction activities between the area beginning about two miles west of Lake Oahe and continuing 20 miles east of it until the court ruled on the preliminary injunction motion. *See* Min. Order (Sept. 6, 2016).

Three days later, on September 9, 2016, the district court denied the Tribe’s motion for a preliminary injunction in a thorough, 58-page opinion. *See* Add. 3–60. The court began its analysis by setting forth in “significant detail” the Corps’s attempts to engage with the Tribe as part of the Section 106 consultation process. Add. 15. It explained that the Corps sought the Tribe’s input “dozens” of times, and that

Corps personnel made several visits to Lake Oahe to meet with tribal members regarding sites of cultural significance. Add. 35; *see* Add. 17–35. Colonel Henderson, the Corps’s District Commander for North Dakota, also met with tribal officials at least four times to discuss concerns about the pipeline. Add. 50–51. Rather than meaningfully respond to the Corps’s outreach, “the Tribe largely refused to engage in consultations.” Add. 50.

The district court concluded that Dakota Access likewise went to great lengths to address tribal concerns about possible effects on culturally sensitive sites along the entire pipeline route, including at Lake Oahe. Specifically, Dakota Access hired professionally licensed archaeologists, who coordinated with State Historic Preservation Officers, to survey the entire length of the pipeline in North and South Dakota. Add. 15–16. The court explained that Dakota Access modified the pipeline’s route 140 times in North Dakota alone to avoid disturbing potential cultural resources. Add. 16. As the court noted, the Corps also advised the Tribe “that Dakota Access was conducting cultural surveys along the entire route” and invited the Tribe to “let it ‘know if you have any knowledge or concerns regarding cultural resources . . . you would like the Corps to consider.’” Add. 22.

The district court further found that when the Tribe chose to engage in consultations about the pipeline, its concerns were meaningfully considered. The court

specifically noted that Dakota Access rerouted the pipeline at the James River crossing in response to the Tribe's concerns regarding burial sites at that location, and that the Corps committed to requiring double-walled piping at Lake Oahe in response to environmental concerns. Add. 30.

After detailing the Corps's extensive outreach to the Tribe and the Tribe's repeated refusals to engage in the Section 106 consultation process, the court explained that the Tribe was unlikely to prevail on the merits of its NHPA claim. Although "the Tribe's legal theory" was "not entirely clear," the court identified and then fully considered and rejected "four separate arguments that the Corps' permitting of DAPL was unlawful." Add. 41.

First, the court found no error in the Corps's promulgation of Nationwide Permit 12, or in applying that permit to the pipeline. The court noted, as an initial matter, that "the Tribe's assertion that the Corps did not engage in any NHPA consultations prior to promulgating NWP 12 is false." Add. 42. In fact, the court explained, the Corps repeatedly reached out to the Tribe to discuss proposed NWP 12, but "[t]here is no indication in the record that the Tribe responded to the Corps' invitation to consult;" "in fact," the Tribe "concedes that it did not participate in the notice-and-comment for NWP 12 at all." Add. 42–43. Moreover, the court deemed "a belated facial attack against NWP 12 . . . unlikely to succeed" because the Corps

“made a reasonable effort to discharge its duties under the NHPA prior to promulgating NWP 12, given the nature of the general permit.” Add. 43. The court explained “it was reasonable for the Corps to engage in a general process at the time it promulgated NWP 12 and to defer site-specific NHPA determinations to a later time.” Add. 45.

Second, the court rejected the Tribe’s argument that the Corps improperly delegated authority to Dakota Access “to assess whether its activities will have a potential effect on historic properties.” Add. 45. The court was open to the Tribe’s argument that it could be arbitrary and capricious if the Corps were to rely “completely on the unilateral determination of a permittee that there is no potential cultural resource that will be injured by its permitted activity,” but concluded “that is not how the Corps interpreted and applied” the relevant permit condition to DAPL. Add. 46. The court determined, based on “extensive maps” and other record material, that the Corps itself made the relevant determination. Add. 46. “At no point,” moreover, did the Tribe “clearly point[]” the court to any crossing “where there is evidence that might indicate that cultural resources would be damaged,” and the court concluded that the Tribe “needs to offer more than vague assertions that some places in the Midwest around some bodies of water may contain some sacred sites that could be affected” by the pipeline. Add. 46–47; *see also* Add. 47 (“The Tribe has had more than a year to come up with evidence that the Corps acted unreasonably

in permitting even a single jurisdictional activity without a PCN [pre-construction notification], and it has not done so.”).

Third, the court rejected the Tribe’s “sweeping claim that the Corps was obligated” to “consider the impact on potential cultural resources from the construction of the entire pipeline.” Add. 47 Relying on this Court’s precedents addressing a comparable “stop, look and listen” requirement in the National Environmental Policy Act, the court concluded that the Corps properly focused its consideration on “construction activity in the federally regulated waterways – the direct effect of the undertaking – and in uplands around the federally regulated waterways – the indirect effect of the undertaking.” Add. 47–48 (internal quotation marks omitted). The court noted that the task of “determin[ing] the scope of the effects of construction activities at U.S. waterways” falls “squarely within the expertise of the Corps,” and that the Corps’s decision was “entitled to deference.” Add. 48–49.

Fourth, the court rejected the Tribe’s claim that “the Corps failed to offer it a reasonable opportunity to participate in the Section 106 process” for the construction activity that the Corps considered to be within its jurisdiction, because “[t]he factual proceedings recited in exhaustive detail” earlier in the opinion “tell a different story.” Add. 50. “Suffice it to say that the Tribe largely refused to engage in consultations.” Add. 50 (adding that “[i]n fact, on this record, it appears that the Corps exceeded its NHPA obligations at many of the PCN sites”). Based on its review of

the sizeable record, the court concluded that the Corps “gave the Tribe a reasonable and good-faith opportunity to identify sites of importance to it.” Add. 52.

The court then turned to the second requirement, holding that the Tribe could not show irreparable injury. The Tribe’s argument was based on the potential effects of pipeline activities, “specifically, grading and clearing of land,” on culturally significant sites that might be at those locations. Add. 52. The court explained that the Corps—the party whose conduct was the subject of the Tribe’s APA lawsuit and to whom an injunction would apply—can only stop activities “at the banks of a navigable U.S. waterway,” Add. 53, and, “[a]s Standing Rock acknowledges, Dakota Access has demonstrated that it is determined to build its pipeline right up to the water’s edge regardless of whether it has secured a permit to then build across.” Add. 54–55. Relatedly, the court explained that “for the vast majority of the pipeline,” an injunction would serve no purpose because the “clearing and grading” were complete. Add. 55 (the “notable exception” being “10% of the route in North Dakota, including at Lake Oahe”).

As to Lake Oahe—“the sole permitting that the Tribe might arguably show is likely to cause harm to cultural or historical sites of significance to it”—the court identified “[s]everal unique factors” that prevented the Tribe from meeting “its burden to show that DAPL-related work is likely to cause damage.” Add. 58–59 (noting that the Corps and the Tribe conducted “multiple visits . . . to identify sites that might

be harmed;” the sites the Tribe identified “are located away from the activity required for the DAPL construction;” the North Dakota State Historic Preservation officer “concurred in this opinion after having toured the site as well;” the area had been subject to previous surveying for other utility projects; DAPL “will run parallel, at a distance of 22 to 300 feet, to an already-existing natural-gas pipeline under the lake;” the drill method for DAPL will be “less-invasive” with “less disturbance to the land;” and “there are several protective measures in place to assure that the Tribe and others will be able to monitor the construction activity to protect any previously unidentified resources”).

The district court noted that it “does not lightly countenance any depredation of lands that hold significance to the Standing Rock Sioux.” Add. 60. But because the Tribe failed to establish that it was likely to succeed on the merits of its NHPA claims, or that the denial of a preliminary injunction would result in irreparable injury, the court denied the Tribe’s motion. Add. 60.

4. The Tribe appealed the district court’s decision and moved in the district court for an injunction pending appeal. *See* Mot. for Inj. Pending Appeal, D.E. 42 (Sept. 9, 2016). Dakota Access advised again that it would voluntarily hold off construction in the area at issue, this time until a September 16 status conference. The district court denied the motion for injunction pending appeal. *See* Min. Order (Sept. 12, 2016).

On September 12, 2016, the Tribe moved this Court for an injunction pending appeal. *See* Emergency Mot. for Inj. Pending Appeal, Doc. 1635228, at 2 (Sept. 12, 2016) (“Tribe Mot.”). The motion relied on the same theories that the district court rejected as unlikely to succeed, including the argument that the Corps’s use of a general permit violated the NHPA, *id.* at 6–9; *see* Add. 42–50, and that the Tribe was likely to show that the Corps’s Section 106 analysis was too narrowly drawn, *id.* at 10–14; *see* Add. 50–53. The Tribe’s motion asked the Court to “prohibi[t] construction for 20 miles on either side of Lake Oahe.” Tribe Mot. 2. The Court entered an administrative injunction temporarily granting this relief until it could consider full briefing and hear oral argument on the motion. *See* Add. 92.

Oral argument on October 5, 2016, lasted more than an hour and a half. On October 9, the Court unanimously denied an injunction pending appeal and dissolved the administrative injunction. *See* Add. 94–95. The Order explained:

Our precedent requires the party seeking an injunction to clearly show (1) a substantial likelihood of success on the merits; (2) the existence of irreparable harm absent injunction; (3) the equities favor injunctive relief; and (4) injunctive relief will not negatively impact the public interest. *See Davis v. Pension Ben. Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009); *Cobell v. Norton*, 391 F.3d 251, 258 (D.C. Cir. 2009). We find the Tribe has not carried its burden of persuasion on these factors, and so we deny the motion.

Add. 94. The Court expressed “hope” that “the spirit of Section 106” would “prevail” during Dakota Access’s construction in “the limited portion of pipeline corridor not yet cleared.” Add. 95.



5. Dakota Access resumed construction on that limited portion of the pipeline—*i.e.*, in the vicinity of Lake Oahe. Consistent with the sentiment expressed by this Court, Dakota Access facilitated and participated in a site visit with a representative of the Tribe and federal and state authorities. Add. 95; *see* Add. 137 (Mahmoud Decl.). In addition, Dakota Access's Unanticipated Discovery Plan worked as intended when previously undocumented potential cultural materials were located in the pipeline right-of-way. Based on that discovery, Dakota Access re-routed the pipeline yet again. Add. 136 (Mahmoud Decl.).

Dakota Access has now completed clearing, grading, trenching, and stringing of the pipe on all portions of the pipeline route, including the part leading up to the edge of Lake Oahe. *See* Add. 135 (Mahmoud Decl.). All that remains is to drill deep into the ground from private land near the lake so that the pipeline can be installed more than 90 feet below the bed of Lake Oahe. Dakota Access's right to commence that drilling now is the subject of a cross-claim being litigated in the district court. None of the remaining work will require further disturbance of land affected by the Tribe's NHPA claim. *Id.*

## ARGUMENT

The sole question presented by this interlocutory appeal is whether the district court abused its discretion in denying the Tribe a preliminary injunction to stop further grading and clearing of land for the construction of the Dakota Access Pipeline.

That question is now moot because the construction activity that the Tribe seeks to enjoin has already been completed. Alternatively, summary affirmance is warranted because when this Court concluded that the Tribe did not meet the four requirements for an emergency injunction pending appeal, it necessarily decided that the district court did not abuse its discretion when it applied the same four requirements to deny the motion that is the subject of this appeal.

**I. This Appeal Should Be Dismissed As Moot Because The Construction The Tribe Seeks To Enjoin Is Now Complete.**

Article III of the Constitution “permits federal courts to adjudicate only ‘actual, ongoing controversies.’” *McBryde v. Comm. to Review Circuit Council Conduct & Disability Orders of the Judicial Conference of the U.S.*, 264 F.3d 52, 55 (D.C. Cir. 2001) (quoting *Honig v. Doe*, 484 U.S. 305, 317 (1988)). “If events outrun the controversy such that the court can grant no meaningful relief, the case must be dismissed as moot.” *Id.* (citing *Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992)). This requirement “applies independently to each form of relief sought,” *id.* (citing *Friends of the Earth v. Laidlaw*, 528 U.S. 167, 185 (2000)), and “subsists through all stages of federal judicial proceedings, trial and appellate,” *id.* (quoting *Lewis v. Cont’l Bank Corp.*, 494 U.S. 472, 477 (1990)).

For these reasons, a “request for injunctive relief remains live only so long as there is some present harm left to enjoin.” *Taylor v. Resolution Tr. Corp.*, 56 F.3d 1497, 1502 (D.C. Cir. 1995); *see id.* (noting that a “motion for an injunction” can

“becom[e] moot”). This Court accordingly has “no jurisdiction over a moot claim” for injunctive relief. *Taylor v. FDIC*, 132 F.3d 753, 768 (D.C. Cir. 1997). “[A]n appeal should . . . be dismissed as moot when, by virtue of an intervening event, a court of appeals cannot grant any effectual relief whatever in favor of the appellant.” *Kessler v. Surface Transp. Bd.*, 637 F.3d 369, 372 (D.C. Cir. 2011) (quoting *Calderon v. Moore*, 518 U.S. 149, 150 (1996)).

The preliminary injunction requested by the Tribe sought to stop “ongoing construction of the pipeline” that the Tribe believed might “damage and destroy sites of great historic, religious, and cultural significance to the Tribe.” D.E. 5, at 1. The emergency motion further specified that the Tribe was seeking to preserve the opportunity for added consultation under the NHPA before the pipeline right of way could be “cleared and graded.” Tribe Mot. 2. After this Court declined to enter an emergency injunction, Dakota Access took part in a site visit near Lake Oahe with members of the Tribe, the Cheyenne River Sioux Tribe, the Corps, and federal and state government officials, to address the Tribe’s concerns. Add. 137 (Mahmoud Decl.). Since that visit, Dakota Access has completed the clearing and grading phase. Add. 135 (Mahmoud Decl.). The construction that was the subject of the preliminary injunction motion has therefore occurred.<sup>3</sup>

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<sup>3</sup> The one step that remains is horizontal directional drilling more than 90 feet below the bed of Lake Oahe. That step does not involve any additional clearing, grading, or trenching. *See* Add. 135 (Mahmoud Decl.). Instead, the drill equipment will

The Tribe itself has acknowledged that “construction could render moot any relief that this Court could grant” in the appeal. Tribe Mot. 2. Because this “intervening circumstance” has “deprive[d] the [Tribe] of a personal stake in the outcome” of this appeal, the appeal “can no longer proceed and must be dismissed as moot.” *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013) (quotation marks omitted).

## **II. Alternatively, Summary Affirmance Is Warranted Because This Court Has Already Resolved The Sole Issue In This Appeal Against The Tribe.**

Even if this Court disagrees that the appeal is moot, affirmance without further briefing and argument is warranted because the Court has already resolved the sole issue in this appeal: whether the Tribe was entitled to a preliminary injunction barring further pipeline construction.

This Court will grant summary affirmance when “the merits of the parties’ positions are so clear that expedited action is justified and further briefing unnecessary.” *Gray v. Poole*, 243 F.3d 572, 575 (D.C. Cir. 2001); *see also* D.C. CIRCUIT

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create a tunnel deep beneath the shores of the lake and the bed of the lake itself, where the work has no potential to affect cultural or historical remains. Add. 135 (Mahmoud Decl.) The Tribe has claimed it was not consulted before soil-bore testing at this location, but that inaccurate assertion is also moot; the testing was completed before it filed suit. Add. 18–21. As for the remainder of the horizontal directional drilling work, apart from the absence of any potential effect on cultural or historical sites, counsel for the Tribe admitted to this Court that “there was consultation regarding the section of the pipeline that crosse[s] the water.” Tr. of Oral Arg., Oct. 5, 2016, at 5.

HANDBOOK OF PRACTICE & INTERNAL PROCEDURES 35 (2016) (“Summary affirmance is appropriate where the merits are so clear as to justify summary action.”). The Court considers “the utility of further briefing and argument” when deciding whether summary disposition is justified. *Ambach v. Bell*, 686 F.2d 974, 979 (D.C. Cir. 1982).

Here, there is no utility in requiring further briefing and argument. The district court denied the Tribe’s motion for a preliminary injunction after applying the familiar four-part test under which the plaintiff “must establish,” through a “clear showing,” “[1] that he is likely to succeed on the merits, [2] that he is likely to suffer irreparable harm in the absence of preliminary relief, [3] that the balance of equities tips in his favor, and [4] that an injunction is in the public interest.” Add. 39 (quoting *Winter v. NRDC*, 555 U.S. 7, 20, 22 (2008)) (internal quotation marks omitted). The district court concluded that the Tribe was “unable to show either irreparable injury or a likelihood of success on the merits.” Add. 40 (“Standing Rock fails on both grounds”). This Court applied the same test when it denied the Tribe’s emergency motion to enjoin pipeline construction pending the appeal. *See* Add. 94 (concluding that the Tribe failed to “clearly show (1) a substantial likelihood of success on the merits; (2) the existence of irreparable harm absent injunction; (3) the equities favor injunctive relief; and (4) injunctive relief will not negatively impact the public interest”).

The Tribe acknowledges that this is the right test, *see* Tribe Mot. 3, and indeed the cases this Court cited in denying an injunction pending appeal each involved orders granting or denying preliminary injunctions, *see Davis v. Pension Benefit Guar. Corp.*, 571 F.3d 1288, 1291 (D.C. Cir. 2009); *Cobell v. Norton*, 391 F.3d 251, 256 (D.C. Cir. 2004). After full briefing and a lengthy oral argument, this Court applied those cases to hold that the Tribe had “not carried its burden of persuasion on these factors.” Add. 94.

That ends the matter. The standard the Tribe needed to satisfy in the district court is the same standard this Court has already held it fails to meet. Because this Court reached that holding after full briefing and oral argument—indeed, the Tribe *added* alleged facts on the issue of irreparable harm when it moved for an injunction pending appeal, *see* D.E. 42-2 (King. Decl.)—the merits of this interlocutory appeal indisputably “have been given the fullest consideration necessary to a just determination,” *Sills v. Bureau of Prisons*, 761 F.2d 792, 794 (D.C. Cir. 1985), and summary affirmance is therefore warranted.

Summary affirmance is all the more appropriate because the standard of review applicable to this appeal is highly deferential. The Court did not invoke deferential review in its October 9 Order—in fact, the Tribe introduced facts on the irreparable harm requirement that the district court’s opinion did not consider. At the merits stage of this appeal, however, there is no question that this Court reviews “the

district court's ultimate decision to deny injunctive relief, as well as its weighing of the preliminary injunction factors, for abuse of discretion." *In re Navy Chaplaincy*, 697 F.3d 1171, 1178 (D.C. Cir. 2012); *see also, e.g., Ambach*, 686 F.2d at 979 ("It is well settled that whether a preliminary injunction shall be awarded rests in the sound discretion of the trial court."). Because this Court has independently determined that the Tribe fails to meet the requirements for a preliminary injunction, it follows *a fortiori* that the district court did not abuse its broad discretion when it reached the same conclusion.

### CONCLUSION

The Court should dismiss the appeal as moot. Alternatively, it should summarily affirm the district court's order denying the Tribe a preliminary injunction.

Dated: November 25, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of November, 2016, I electronically filed the foregoing document with the Clerk of the Court for the U.S. Court of Appeals for the D.C. Circuit using the CM/ECF system. Service was accomplished by the CM/ECF system on the following counsel:

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