UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ESTHER VAN DER WERF, et al.

Plaintiffs,

v.

NATIONAL PARK SERVICE, et al.,

Defendants.

Civil Action No. 24-0639 (TJK)

DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

Defendants the National Park Service, its Director, Charles F. Sams, III, and the Department of the Interior, by and through undersigned counsel, reply as follows to Plaintiffs' opposition to their motion to dismiss.

The Complaint contends that an alleged program of the Park Service to accept only non-cash payment methods for park entrance fees is contrary to law and thus should be set aside under the Administrative Procedure Act ("APA"). As discussed in Defendants' motion, the Complaint should be dismissed on two threshold grounds. First, Plaintiffs fail to allege that they personally lack access to non-cash payment methods and thus have not plausibly alleged that they have been harmed by the challenged policy as is necessary to establish their standing to sue. Second, Plaintiffs have failed to state a claim on which relief can be granted because the statute on which they rely to characterize the alleged cashless program as unlawful, 31 U.S.C. § 5103, does not require the Park Service to accept cash for the services it provides. As discussed below, Plaintiffs' opposition has failed to meaningfully address either of these arguments.

Plaintiffs' assertion at the end of their opposition that "[i]n the event this Court determines Plaintiffs' complaint does not satisfy the pleading requirements under [Rule] 12(b)(1) or 12(b)(6),

it must afford Plaintiffs leave to amend" (Opp. at 13) is incorrect. Plaintiffs omit that futility is a basis to deny amendment, *Nat'l Wrestling Coaches Ass'n v. Dep't of Educ.,* 366 F.3d 930, 945 (D.C. Cir. 2004), and, regardless, they have not filed a motion for leave to amend and thus that question is not properly before the Court. *See Schmidt v. U.S.*, 749 F.3d 1064, 1069 (D.C. Cir. 2014) ("'Rule 15(a) – even as liberally construed – applies only when the plaintiff actually has moved for leave to amend the complaint; absent a motion, there is nothing to be freely given[.]'") For present purposes, because Plaintiffs have "elect[ed] to oppose a motion to dismiss on the merits" rather than seek leave to further amend their Complaint, they must defend against that motion based on the Complaint as pled. *See Nat'l Sec. Counselors v. CIA*, 960 F. Supp. 2d 101, 135 n.11 (D.D.C. 2013). Plaintiffs cannot oppose "a motion to dismiss on the merits (thereby forcing the court to resolve the motion to dismiss), and then, upon losing the motion, amend [their] complaint to correct the very deficiencies [they] refused to acknowledge previously." *Id.*

I. The Complaint Should Be Dismissed For Lack Of Standing.

Plaintiffs lack standing to challenge the alleged cashless entry program because they have not pled that they personally lack the ability to pay the entrance fee using accepted non-cash methods. Their alleged injury-in-fact—their failure to enter certain national parks on the few occasions identified in the Complaint—is based only on principle, a belief that they have a "lawful right" to pay in cash. Defendants expressed this understanding of Plaintiffs' claim in their motion to dismiss (ECF No. 13 at 6, citing Compl. ¶¶ 2-3) and, in their opposition, Plaintiffs do not take issue with that understanding. (Opp. at 6-8)

Plaintiffs have thus confirmed that, when they request as relief in their Complaint that the Court "restore entrance to NPS sites to those who cannot access non-cash payment methods" as well as to those "who choose not to" (Compl. ¶ 3), they personally fall within the latter category.

(Opp. at 6-8) They have not identified any allegation in their pleading that would raise a reasonable inference to the contrary. (*Id.*)

Article III standing, however, "screens out plaintiffs who might have only a general legal, moral, ideological, or policy objection to a particular government action" and thus "a citizen does not have standing to challenge a government regulation simply because the plaintiff believes that the government is acting illegally." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024). That is essentially what Plaintiffs are alleging here. They believe that the Park Service is acting illegally by declining to accept cash for entrance fees. Instead of paying the fee through available non-cash methods and entering the park, they are refusing to "waive" their perceived "legal right to use cash" and thereby voluntarily choosing not to enter. (Opp. at 7) The requirement of standing is not met in such circumstances.

This case is analogous to *Weissman v. National Railroad Passenger Corporation*, 21 F. 4th 854 (D.C. Cir. 2021), where plaintiffs sought to prevent Amtrak from imposing an arbitration requirement on rail passengers by including a mandatory arbitration provision as a term of rail passage. They attempted to rely on cases holding that consumers have standing to challenge government action that prevents "'consumers from purchasing a desired product,'" which in their case was purchasing rail tickets on "the terms they would prefer" rather than those imposed on them by Amtrak. *Id*. at 857. The plaintiffs alleged that they were "prevented from purchasing their desired product because an Amtrak rail ticket without an arbitration clause is no longer on the market as a result of Amtrak's new term of service." *Id*. at 859. The Court rejected this argument because the "desired product" at issue "is only distinguished from the available alternative by an ancillary term: the arbitration provision" rather than by a "core" feature of the product. *Id.* In the Court's view, the applicable "concrete consumer interest"—or "core" feature

of the product—was traveling on Amtrak, "not in purchasing an Amtrak ticket without an arbitration provision." *Id*. at 860. Because the plaintiffs "assert[ed] only one cognizable interest, the interest in purchasing tickets to travel by rail," the new ancillary term of service did "not meaningfully abridge[] that interest" as would be required to establish standing. *Id.* at 861.

Here, the applicable "concrete consumer interest" is in visiting national parks. The ancillary requirement associated with that access, namely, an alleged cashless entrance fee requirement, does not "meaningfully abridge[] that interest" because Plaintiffs have not pled that they personally lack access to noncash methods of payment. Their preference to visit national parks by paying the entrance fee in cash is insufficient for the same reason the preference to purchase an Amtrack ticket without an arbitration clause was found wanting in *Weissman*. Standing cannot be established "simply by redefining any sweeping 'gripe' as the inability to obtain a product that negates that 'gripe.'" *Weissman*, 21 F. 4th at 860. Or, stated another way, standing is unavailable to plaintiffs who have only a "general legal, moral, ideological, or policy objection to a particular government action" but are not otherwise harmed by it in a particularized, concrete manner. *All. for Hippocratic Med*., 602 U.S. at 381.

Just as the plaintiffs in *Weissman* lacked standing to the extent they declined to purchase a rail ticket with the objectionable arbitration provision, and thereby were unable to travel on Amtrak as a result of that personal choice, the Plaintiffs here lack standing to the extent they chose not to enter a national park by declining to utilize available noncash methods of payment. Any alleged harm to Plaintiffs from their lack of access to national parks is not the result of the alleged cashless entry program but personal choice. Alleged harm resulting from personal choice is neither a cognizable "injury", nor is it "fairly traceable to the defendant's challenged conduct." *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Gonzales*, 468 F.3d 826, 831 (D.C. Cir. 2006). Thus,

the Complaint should be dismissed for lack of standing.

II. Section 5103 Does Not Require the Acceptance of Cash.

Plaintiffs assert a claim under the APA on the sole basis that the alleged cashless entry program by the Park Service violates 31 U.S.C. § 5103 and thus should be set aside as contrary to law pursuant to 5 U.S.C. § 706(2)(A). (Compl. at 8) But, as established in Defendants' motion, "[t]here is simply no legal support for the idea that '[section] 5103 requires . . . any . . . entity[] to accept payment in cash.'" *Erdberg v. On Line Info. Servs., Inc*., Civ. A. No. 12-3883, 2013 U.S. Dist. LEXIS 145760, at *13-14 (N.D. Ala. Oct. 9, 2013) (collecting cases).

Plaintiffs cite no authority to the contrary in the context at issue here, namely, where the government is acting as a provider of goods or services as opposed to a taxing authority or collecting a debt owed under a contract. *See generally* James Steven Rogers, *The New Old Law of Electronic Money*, 58 SMU L. Rev. 1253, 1275 (2005). Only the latter are encompassed by section 5103 as its legislative history demonstrates. The original version of the statute applied "only to debts, in the strict sense of that term"—that is debts arising from contractual obligations—and not to obligations arising from taxes, as was noted in *Hagar v. Reclamation Dist. No. 108*, 111 U.S. 701, 706 (1884) (holding that the original legal tender statute applied to debts arising from contracts and not to a tax assessed by a reclamation district).

In 1965, the statute was amended into substantially its current form. Pub. L. 89–81, § 102. In 1982, when it was recodified into Title 31 of the U.S. Code, the phrase "public charges, taxes, duties, and dues" was initially omitted on the assumption that those terms were already encompassed within the term "debts" and were thus redundant. *See* Pub. L. 97–258; *see also* 31 U.S.C. § 5103 Historical and Revision Notes, 1982 Act ("The words 'public charges, taxes, duties, and dues' are omitted as included in 'debts.'") The omission of that phrase in favor of the term "debts" standing alone confirms that Congress understood the statute as being limited to the

discharge of debts as that term is ordinarily understood, that is, the discharge of an outstanding financial obligation arising under law.

In 1983, in recognition of the narrow definition of "debts" that had been applied in *Hagar* (i.e., limiting the term to financial obligations arising from contracts and not taxes), the phrase "public charges, taxes, and dues" was reinserted. *See* Pub. L. 97–452, §1(19); see also 31 U.S.C. § 5103 Historical and Revision Notes, 1983 Act (stating that the amendment "restores to 31:5103 the reference to public charges, taxes, and dues because they are not considered to be debts," citing *Hagar*). The 1983 revision thus confirmed the application of the statute to all forms of debts, to include debts as narrowly defined in *Hagar* as well as debts arising from other legal obligations such as taxes of the sort assessed in *Hagar* but deemed by that case to fall outside a strict definition of the term. Nothing in the legislative history nor anywhere else suggests that the statute can apply to anything beyond the discharge of debts however defined.

The payment of an entrance fee to access a national park is not a debt under any definition of that term. Instead, it is a contemporaneous payment for a good or service.[1] Thus, Plaintiffs misstate the issue by relying on the conclusion of an IRS legal memorandum that section 5103 requires Taxpayer Assistance Centers "to accept cash from taxpayers for the payment of taxes." (Opp. at 4; *see* https://www.irs.gov/pub/lanoa/pmta01942_7439.pdf (last visited July 3, 2024) Equally misplaced is Plaintiffs' excerpt from the Federal Reserve website (Opp. at 3), interpreting section 5103 to "mean[] that all U.S. money as identified [in the statute] is a valid and legal offer of payment for debts when tendered to a creditor." See

[1] Entrance fees are used to improve the visitor experience and recreation opportunities in national parks and on other federal lands. See https://www.nps.gov/aboutus/fees-at-work.htm#:~:text=Why%20does%20the%20National%20Park,and%20on%20other%20federal%20lands. (last visited July 3, 2024). They are paid by visitors to the park (not the public at large) in exchange for receiving a good or service, an improved visitor experience at the park.

https://www.federalreserve.gov/faqs/currency_12772.htm (last visited July 3, 2024). Again, neither scenario—taxes owed the government or debts owed to a creditor—is applicable here.

Although Plaintiffs assert that section 5103 "eviscerates" Defendants' position (Opp. at 1), Plaintiffs fail to identify any authority that supports their interpretation of the statute. In response to the extensive case authority cited by Defendants in their motion (ECF No. 13-1 at 7), Plaintiffs assert only that the federal government was not a party to the transactions in those cases. (Opp. at 5) But that is no answer given that the statute itself is not focused on the entity involved in the transaction, but the nature of the financial obligation to be discharged (i.e., to satisfy a tax or debt on a contract).

As section 5103 is the sole basis for Plaintiffs' APA claim, Count I should be dismissed for failure to state a claim. Moreover, because the Declaratory Judgment Act does not provide an independent cause of action, *Ali v. Rumsfeld*, 649 F.3d 762, 778 (D.C. Cir. 2011), Count II should be dismissed for the same reason.

CONCLUSION

For the foregoing reasons, and those set forth in Defendants' motion, this action should be dismissed.

Respectfully submitted,

MATTHEW M. GRAVES, D.C. Bar #481052
United States Attorney

BRIAN P. HUDAK
Chief, Civil Division

By: */s/ Jeremy S. Simon*
JEREMY S. SIMON, D.C. Bar #447956
Assistant United States Attorney
601 D. Street, N.W.
Washington, D.C. 20530
(202) 252-2528
Jeremy.Simon@usdoj.gov

Attorneys for the United States of America