15-1667-cv

15-1937-cv (CON)

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CAYUGA NATION AND JOHN DOES 1-20,

Plaintiffs-Appellants,

v.

HOWARD TANNER, VILLAGE OF UNION SPRINGS CODE ENFORCEMENT OFFICER, IN HIS OFFICIAL CAPACITY; EDWARD TRUFANT, VILLAGE OF UNION SPRINGS MAYOR, IN HIS OFFICIAL CAPACITY; CHAD HAYDEN, VILLAGE OF UNION SPRINGS ATTORNEY, IN HIS OFFICIAL CAPACITY; BOARD OF TRUSTEES OF VILLAGE OF UNION SPRINGS; AND VILLAGE OF UNION SPRINGS

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of New York (Hurd, J.)

BRIEF FOR PLAINTIFFS-APPELLANTS

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INTRODUCTION

The Village of Union Springs and its officers (Defendants-Appellees in this case, and collectively "the Village") are determined to shut down the Class II gaming facility that the Cayuga Nation operates under the regulatory oversight of the National Indian Gaming Commission ("NIGC"). The Village insists on doing so even though the Nation's gaming facility has caused no disruption for the Village, even though the facility represents a vital stream of revenue for the Nation, and—critically—even though the Village's actions are flatly preempted by the Indian Gaming Regulatory Act ("IGRA").

Confronting threats of imminent enforcement action by the Village, the Nation was left with no choice but to seek judicial recourse. Accordingly, the Nation (joined by "John Doe" employees and officials involved in its gaming activities) brought this action to enjoin the Village's efforts to shut the gaming facility down. That suit was authorized on the Nation's behalf by Clint Halftown, the Nation's federal representative long recognized by the United States Department of Interior for purposes of government-to-government relations.

The core question on appeal is whether the Village can oust the Nation from federal court by pointing to a dispute within the Nation concerning whether, as a matter of tribal law, the suit was properly authorized. The district court answered in the affirmative, and dismissed the case for lack of jurisdiction. It reasoned that

there was a disagreement under tribal law concerning whether the suit had been properly authorized; the suit could not proceed without resolving that contested question of tribal law; and the court had no jurisdiction to do so.

The district court had it backward. Once the Interior Department has recognized an Indian nation's federal representative—as it has done here—a federal court must treat that representative as authorized to bring suit on the Indian nation's behalf. The court should not entertain argument by a defendant that, as a matter of tribal law, the Nation's recognized federal representative acted without authority. Thus, the district court had jurisdiction to hear this case.

Underscoring the district court's error in this case is the fact that NIGC—the federal agency that administers IGRA and regulates Indian gaming—has consistently and routinely interacted with Mr. Halftown and his associates in regulating the Nation's gaming, including during this leadership dispute. NIGC has done so, moreover, even though it has authority to *close* a gaming facility not operated by a tribe's proper leadership. It is illogical to hold, as the district court did, that Mr. Halftown cannot bring suit on behalf of the Nation to vindicate the Nation's federal rights under IGRA, when NIGC has consistently interacted with Mr. Halftown regarding the Nation's exercise of those same rights.

The court was equally wrong to conclude that the individual plaintiffs lacked standing. The individual plaintiffs are Nation employees and officials involved in

the gaming activities that the Village has targeted for civil and criminal enforcement actions. Case law from this Court and the Supreme Court makes clear that this is more than enough to establish standing. The fact that the Village's threats have named only the Nation, and have not singled out any individuals, makes no difference. That is particularly true because the Village has repeatedly threatened *criminal* penalties for actions in connection with Lakeside Entertainment, and the only possible targets for those penalties would be the individuals involved in the gaming activities. Thus, the individual plaintiffs here plainly face a credible threat of enforcement action—all that is required for standing.

Once the district court's standing-based dismissals are corrected, it is clear that the district court's denial of preliminary injunctive relief cannot stand. As to the merits, the district court did not question that the Village's threatened enforcement efforts are plainly preempted by IGRA (among other legal defects). And in granting an injunction pending appeal, the district court itself found the remaining injunctive factors satisfied.

The district court's decisions should be reversed.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1362. On May 19, 2015, the district court entered a final judgment dismissing the case. Dkt.

51.[1] On May 20, 2015, the Nation filed a timely notice of appeal, which this Court docketed as No. 15-1667. Dkt. 53.

Also on May 20, 2015, the individual plaintiffs filed a motion for reconsideration and to alter or amend the judgment under Rule 59 of the Federal Rules of Civil Procedure. Dkt. 52. The district court denied that motion on June 11, 2015. Dkt. 65. On June 15, 2015, the individual plaintiffs filed a timely notice of appeal. Dkt. 66. This Court consolidated the appeals.

This Court has jurisdiction over the appeals pursuant to 28 U.S.C. § 1291 and 28 U.S.C. § 1292(a)(1).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court was correct to dismiss the Cayuga Nation's suit on the ground that determining whether it was properly authorized would have required the district court to make impermissible determinations of Cayuga Nation law.

2. Whether the individual plaintiffs had standing to sue, in view of the Village's repeated threats of civil and criminal enforcement as to gaming activities at Lakeside Entertainment.

3. Whether the Village should have been preliminarily enjoined from interfering with the plaintiffs' conduct of gaming activities at Lakeside Entertainment pursuant to the Indian Gaming Regulatory Act.

[1] Citations to "Dkt._" are to the district court docket below, *Cayuga Nation v. Tanner*, No. 14-1317-DNH-ATB (N.D.N.Y., Hurd, J.). Citations to "SA" are to the special appendix bound with this brief. Citations to "JA" are to the joint appendix.

STATEMENT OF THE CASE

As explained further below, Plaintiffs filed this action seeking injunctive and declaratory relief to prevent the Village from restricting Plaintiffs' IGRA-protected gaming activities. Dkt. 1. After issuing a temporary restraining order, the district court (Hurd, J.) granted the Village's motion to dismiss for lack of jurisdiction, vacated the temporary restraining order, and denied Plaintiffs' preliminary injunction motion as moot. *Cayuga Nation v. Tanner*, No. 5:14-CV-1317, 2015 WL 2381301 (N.D.N.Y. May 19, 2015). The individual plaintiffs moved for partial reconsideration, which the district court denied. *Cayuga Nation v. Tanner*, No. 5:14-CV-1317, --- F. Supp. 3d. ----, 2015 WL 3643501, at *3 (N.D.N.Y. June 11, 2015). It did, however, grant the Nation's motion for an injunction pending appeal. *Id.* at *8. Plaintiffs timely appealed from both orders.

A. The Nation's Federally Regulated Gaming Under Plaintiffs' Direction.

1. The Indian Gaming Regulatory Act

Congress enacted IGRA in 1988 to promote Indian economic development and self-sufficiency. *See* 25 U.S.C. §§ 2701–2702. IGRA sets forth a comprehensive scheme for regulation of gaming on tribal lands, with tribal gaming divided into three classes: Class I, Class II, and Class III. This case concerns Class II gaming, which includes bingo and electronic variants. 25 U.S.C. § 2703(7)(A)(i).

The conditions for Class II gaming are straightforward. IGRA permits Class II gaming on "Indian lands within such tribe's jurisdiction" if the "gaming is located within a State that permits such gaming for any purpose by any person," and "the governing body of the Indian tribe adopts an ordinance or resolution" that is approved by the Chairman of NIGC, an independent regulatory commission within the Interior Department. *Id.* § 2710(b); *see id.* § 2703(7)(A)(i). An Indian nation that satisfies these conditions may conduct and regulate Class II gaming on its lands. *Id*. §§ 2704, 2710. Its gaming activities, however, remain subject to NIGC's oversight. Among other things, NIGC retains the power to order closure of a gaming facility that, in its view, is not sanctioned by the Indian nation's governing body. *See Sac & Fox Tribe of the Miss. in Iowa Election Bd. v. Bureau of Indian Affairs*, 439 F.3d 832, 834 (8th Cir. 2006).

Importantly, IGRA's comprehensive federal regulation of Indian gaming preempts contrary state or local law. *See, e.g., Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 848 (8th Cir. 2003). In the particular context of Class II gaming, IGRA's preemptive effect means that state and local governments are absolutely barred from restricting or penalizing such gaming. *See, e.g., Wisconsin v. Ho-Chunk Nation*, 784 F.3d 1076, 1086 (7th Cir. 2015).

2. The Cayuga Nation And Its Gaming Activities

The Cayuga Nation is a federally recognized Indian nation. *See* Indian Entities Recognized and Eligible To Receive Services from the Bureau of Indian Affairs, 77 Fed. Reg. 47,868 (Aug. 10, 2012). The Nation's historic reservation is located within Cayuga and Seneca Counties and, as multiple courts have recognized, continues to exist today. JA343; *Cayuga Indian Nation of N.Y. v. Gould*, 930 N.E.2d 233, 240 (N.Y. 2010); *see Oneida Indian Nation of N.Y. v. Madison Cnty.*, 665 F.3d 408, 443-44 (2d Cir. 2011).

The Nation began its gaming under IGRA more than a decade ago. As envisioned by IGRA, in November 2003, the Nation Council—the Nation's governing body—adopted a Class II gaming ordinance. JA344, JA349. NIGC, in turn, approved the ordinance. JA344, JA369. The Nation then issued a license for a facility in Union Springs, within the boundaries of the Nation's historic reservation.[2] The Nation conducted Class II gaming at the facility—known as Lakeside Entertainment—until it voluntarily closed the facility in 2005. JA344.[3]

[2] IGRA's implementing regulations provide that any Class II gaming must operate pursuant to a facility license issued by the Indian nation in question. 25 C.F.R. § 559.1.

[3] The Nation also operated a second gaming facility in Seneca County, also called Lakeside Entertainment. That facility is not at issue in this case.

On July 3, 2013, the Nation resumed gaming at Lakeside Entertainment. JA345. To do so, it reconstituted its Class II Gaming Commission, with Clint Halftown, Tim Twoguns, and Gary Wheeler as members, and with Mr. Twoguns as Chairman. JA631. It also renewed the facility license for Lakeside Entertainment. JA344-45, JA631.

In connection with its resumption of gaming, the Nation also resumed its contact with NIGC. As required by IGRA, the Nation notified NIGC that it had reissued the facility license for Lakeside Entertainment. JA344-45, JA392-93. In addition, the Nation complied with NIGC's procedures concerning the licensing of "primary management officials" and "key employees"—procedures that entail extensive coordination between NIGC and an Indian nation. 25 U.S.C. § 2710(b)(2)(F); 25 C.F.R. § 559.3; JA345 (describing Nation's submission of fingerprint cards and other information to allow NIGC to perform background checks, as well as NIGC's provision of notice that it does not object to the Nation's licensing of particular individuals).

In overseeing the Nation's gaming activities, NIGC has consistently interacted with Mr. Halftown, as the Nation's federal representative, and Mr. Twoguns, as the Chairman of its Gaming Commission. *See, e.g.*, JA349-67 (Mr. Halftown's submittal of 2003 gaming ordinance to NIGC and NIGC's response to Mr. Halftown); JA632-33 (NIGC responses to criminal background checks directed to

Mr. Twoguns); *id.* (NIGC approval of request for access to restricted Tribal Access Portal submitted by Mr. Halftown and Mr. Twoguns); *id.* (NIGC official visits to Lakeside Entertainment); JA634 (September 30, 2014 "Dear Tribal Leader" notification from NIGC).

Income from Lakeside Entertainment has become critical to the Nation. Today, Lakeside Entertainment now accounts for the vast majority of the Nation's revenues. The Nation, in turn, uses those revenues to carry out myriad activities for the benefit of Nation citizens. SA21-22, JA346, JA661.

B. This Action And The Village's Motion To Dismiss.

Lakeside Entertainment has caused no disruption in the Village, and the Nation has from the outset sought to cooperate with local authorities. SA26, JA200-01, JA203-04. Nonetheless, the Village has sought to shut down Lakeside Entertainment right from the start. Immediately after the facility's reopening, the Village issued an "Order to Remedy Violations" stating that the Nation was in violation of the Village's Games of Chance Ordinance dated May 19, 1958, because it was "operating Bingo without a license [i]ssued by the Village of Union Springs."

JA284, JA293.[4] The Order to Remedy threatened civil and criminal penalties for noncompliance. JA293.

The Village's threats accelerated after the Nation moved from paper to electronic bingo on December 19, 2013. Within days, the Village issued further Orders to Remedy. Those orders again cited the Nation for violating the Village's Games of Chance Ordinance. JA285, JA333-35. Again, they stated that a failure to comply "may constitute an offense punishable by fine or imprisonment or both" and that the Village "may seek injunctive relief" in state court. *Id.*

Today, Lakeside Entertainment remains open and its employees remain free from prosecution only because of a series of standstill agreements and court orders. Shortly after the Village's December 2013 round of threats, the Nation informed the Village that it would seek a temporary restraining order, as well as preliminary and permanent injunctive relief, to preserve its right to conduct gaming pursuant to IGRA. JA196-97, JA285. Confronted with the Nation's willingness to seek judicial protection for its federally guaranteed rights, the Village entered a standstill agreement with the Nation. JA197. That agreement—subsequently extended in writing and orally—provided that the Village would take no action against

[4] The 1958 Ordinance (a copy of which appears at JA289-91) contemplates the issuance of licenses only in a narrow set of enumerated circumstances, none of which would apply to the Nation.

Lakeside Entertainment without providing 48 hours' notice to the Nation. JA197, JA664.

On October 27, 2014, the Village's outside counsel informed the Nation that the Village intended to act against Lakeside Entertainment. JA665. The next day, Plaintiffs filed this action in the U.S. District Court for the Northern District of New York (Hurd, J.), seeking injunctive and declaratory relief against the Village and certain of its officials. Dkt. 1. Plaintiffs included not just the Nation itself, but also Nation officers and employees who faced potential civil and criminal penalties from their gaming-related activities (and therefore sued as John Does). JA17-18. Plaintiffs' suit explained that IGRA preempts the Village's threatened enforcement action; that any criminal prosecutions are properly the domain of the federal government in any event; and that any action against the Nation would violate its sovereign immunity. JA30-33. Additionally, a declaration from Mr. Halftown confirmed that he, Mr. Twoguns, and Mr. Wheeler had authorized the litigation on the Nation's behalf. JA636; *see* JA751 (explaining that these three leaders are the only three active members of the Cayuga Nation Council).

On October 29, 2014, the district court entered a temporary restraining order in Plaintiffs' favor. Dkt. 7. Thereafter, the Village consented to the extension of this temporary restraining order "until such time as the Court rules on [Plaintiffs'] preliminary injunction motion." JA10. Meanwhile, the Village opposed the mo-

tion for a preliminary injunction and moved to dismiss. One ground for the Village's motion was that "[s]ince 2004, the Nation has been involved in a governance dispute," so that the court purportedly could not "determin[e] whether Plaintiffs are authorized to file the present action on behalf of the Nation" without making judgments about Cayuga Nation law that it lacked jurisdiction to address. Defts.' Mem. of L. in Support of Cross-Mot. to Dismiss at 9-10, Dkt. 32-6.

C. The Nation's Leadership Dispute And The Department Of Interior's Recognition Of Mr. Halftown.

The leadership dispute invoked by the Village has persisted virtually since Lakeside Entertainment's first opening. But throughout this time, Mr. Halftown has remained the Nation's federal representative, recognized by the Interior Department for government-to-government purposes.

As noted above, the Nation is governed by the Cayuga Nation Council. Mr. Halftown, Mr. Twoguns, and Mr. Wheeler—who have always overseen the gaming activities at issue here, and who authorized this action—are representatives on the Council. JA628. In 2003, the Council unanimously selected Mr. Halftown as the Nation's federal representative and Mr. Twoguns as the alternate federal representative. JA628, JA641. The Council duly forwarded that selection to BIA and the Department of Interior—the federal entities charged with managing the "complex relationship between the quasi-sovereign Indian tribes and the federal government." *Shenandoah v. U.S. Dep't of Interior*, 159 F.3d 708, 713 (2d Cir. 1998)

(quotation marks omitted). BIA "accepted [Mr.] Halftown as the Nation's representative for government-to-government purposes." *George v. E. Reg'l Dir., Bureau of Indian Affairs*, 49 IBIA 164, 169 (2009). Mr. Halftown, in turn, "acted in this capacity . . . without quarrel." *Id.* A resolution of the Nation Council separately authorized Mr. Halftown to pursue economic development on the Nation's behalf. JA639.

In 2005, however, a group of dissidents sought to persuade BIA that Mr. Halftown had been "removed" from the Nation Council and should no longer be recognized as the Nation's federal representative. JA629. BIA rejected the dissidents' claim and, instead, continued to recognize Mr. Halftown. JA630. The Interior Board of Indian Appeals ("IBIA") affirmed in 2009. *See George*, 49 IBIA at 192-93. No party sought judicial review of the IBIA's decision.

In 2011, the dissidents—now styling themselves the "Unity Council"—again undertook to convince the federal government to alter its recognition of Mr. Halftown. JA630. This time, the dissidents managed to convince BIA's Regional Director to withdraw recognition of Mr. Halftown. *Id.* Because Mr. Halftown appealed the Regional Director's decision to the IBIA, however, it did not become effective. *See* 43 C.F.R. § 4.314(a); 25 C.F.R. § 2.6(b).

Although Mr. Halftown's appeal vigorously challenged the Regional Director's decision on the merits, the IBIA vacated that decision for procedural reasons.

JA631. BIA, the Board explained, has no authority to make a decision concerning an Indian nation's leadership in the abstract. Instead, it may render such a decision only if some separate and discrete "federal action"—for example, the renewal of a contract—requires one. *Cayuga Indian Nation of N.Y. v. E. Reg'l Dir., BIA*, 58 IBIA 171, 186 (2014). There had been no such federal action pending in 2011, so the IBIA vacated the Regional Director's determination. *See id.* The IBIA's 2009 decision reaffirming Mr. Halftown's status therefore remained the Interior Department's final word on the matter. *Cf. Liberty Media Corp. v. Vivendi Universal, S.A.*, 861 F. Supp. 2d 262, 266 (S.D.N.Y. 2012) (explaining that when an order is vacated, it is "as if the order never existed" (quotation marks omitted)); *Camreta v. Greene*, 131 S. Ct. 2020, 2035 (2011) (similar).

In April 2014, the "Unity Council" launched yet another campaign to convince BIA to alter its recognition of Mr. Halftown. JA633. On May 15, 2014, BIA's Regional Director solicited briefing on the matter. JA633, 643-46. The two sides responded with voluminous pleadings addressing whom BIA should recognize as the Nation's leadership. JA634. Mr. Halftown, Mr. Twoguns, and Mr. Wheeler urged that BIA should continue to recognize the same Nation Council that the IBIA had recognized in its 2009 decision—a Council whose composition "no party [had] directly challenge[d]." *George*, 49 IBIA at 188; JA634. This Council is known as the 2006 Nation Council, because its membership dates to that year,

and Mr. Halftown is its federal representative.[5] *George*, 49 IBIA at 184. The dissidents urged recognition of the "Unity Council," with Samuel George and William Jacobs as federal representatives. JA741.

On February 20, 2015, BIA issued a decision continuing to recognize the 2006 Nation Council as the Nation's governing body and Mr. Halftown as its federal representative. JA741. BIA found that there was "an urgent situation requiring a BIA decision" on the Nation's leadership—specifically, the need to release funds under a Community Services Contract pursuant to the Indian Self-Determination Act ("ISDA"). JA744. Accordingly, BIA recognized "the Nation 2006 Council" and "Clint Halftown as the Nation's representative" as "the last undisputed tribal leadership" "on an interim basis." JA741, JA745.

A month later, the "Unity Council" appealed BIA's decision to the IBIA. JA831-32. BIA—joined by Mr. Halftown, Mr. Twoguns, and Mr. Wheeler—moved to have the decision placed into immediate effect. The IBIA granted that motion on June 17, 2015.[6] The upshot is that Mr. Halftown has been the Nation's

[5] The 2006 Council consists of Mr. Halftown, Mr. Twoguns, and Mr. Wheeler, as well as William Jacobs, Chester Isaac, and Samuel George. *George*, 49 IBIA at 184. The latter three have now aligned with the "Unity Council."

[6] That decision is available at http://www.oha.doi.gov:8080/isysquery/d02108f3-c4a2-4f3d-9287-867e3ebf81bc/1/saveto/pdf/15-071%20IBIA%20Cayuga%20Order%202015-06-17.pdf.

recognized federal representative "for government-to-government purposes" from 2003 to this day.

D. The Decisions Below.

As noted above, BIA's February 20, 2015 decision recognized Mr. Halftown and the 2006 Council. Nonetheless, the district court relied on that decision to *dismiss* the action. Specifically, it held that (a) it could not determine whether the 2006 Council had properly authorized the suit; and (b) the action must therefore be dismissed for lack of jurisdiction. SA8, SA10.

The linchpin of the court's decision was its belief—apparently flowing from BIA's February 20 decision—that it had to determine, for itself, "[w]hether the Nation 2006 Council properly authorized this suit." SA8 n.6. The court acknowledged that Mr. Halftown is the Nation's federal representative recognized by BIA and the Department of Interior. SA7. It also noted Mr. Halftown's statement that the action had been properly authorized on the Nation's behalf. SA8. Nonetheless, the court took note of a declaration from the three "Unity-Council"-aligned members of the 2006 Nation Council—procured by the Village—claiming that the lawsuit had *not* been properly authorized. *Id.*; *see id.* (stating that "three members of the Nation 2006 Council support this lawsuit and three members oppose it").

In view of this disagreement, the court found it "unclear whether the action has been properly authorized pursuant to Cayuga Nation law." *Id.* Resolving the

disagreement, the court reasoned, "would necessarily require this Court to delve into, interpret, and apply Nation law." *Id.* And because federal courts do not have "subject matter jurisdiction" to resolve issues of tribal law, the court concluded that the disagreement over Nation law compelled the dismissal of the Nation's suit. SA10.

The district court did not believe that Mr. Halftown's status as federal representative altered this conclusion. Referring to BIA's February 20 decision, the court emphasized that the agency had recognized Mr. Halftown as the Nation's representative only "for purposes of administering existing ISDA contracts." SA9. And the court contended that "[t]here is nothing in the language of the BIA[']s February 20] decision that provides Halftown with the unilateral authority to initiate lawsuits or enter into *new* contracts on the Nation's behalf"; rather, "BIA supplied a practical temporary fix to the above noted need for a representative to administer *existing* contracts." *Id.* (emphasis in original).

The district court recognized that the standing of the individual plaintiffs presented a different question. In a footnote, however, the court concluded that they too lacked standing. The complaint had alleged that these "officers, employees, and/or representatives of the Nation . . . are at risk of criminal or civil penalties for conduct relating to the operation of the Lakeside Entertainment gaming facility." SA10 n.8 (quoting JA18). The Village, for its part, had not challenged the in-

dividual plaintiffs' standing or denied that they were at risk of prosecution. Nonetheless, the court deemed the complaint's allegations insufficient because "[s]uch vague allegations asserted on behalf of unnamed persons do not constitute a 'concrete, particularized, and actual or imminent' injury for purposes of Article III standing." *Id.* (quoting *Clapper v. Amnesty Int'l, USA*, 133 S. Ct. 1138, 1147 (2013)).

The John Doe plaintiffs asked the district court to reconsider its *sua sponte* dismissal and to alter or amend the judgment, and also sought leave to file an amended complaint identifying certain of them by name. SA15-16. The district court denied the motion on the ground that the Doe plaintiffs lacked standing. It recognized that even "a credible threat of prosecution" can give a plaintiff standing to mount a pre-enforcement challenge to a legal requirement. SA18 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010)). Yet it concluded that no such threat existed because, in its view, the John Doe plaintiffs themselves—as opposed to the Nation—had not been "personally threatened with criminal proceedings." *Id.* In so reasoning, the court likened the case to one in which a government official "state[s] that a statute prohibits a type of conduct in the abstract" and "states [his] intent to enforce the statutory prohibition against the public generally." SA19 (quotation marks omitted; second alteration in original).

Nonetheless, the court granted the Nation an injunction pending appeal, pursuant to Federal Rule of Civil Procedure 62(c). With respect to irreparable harm, the court found that the Nation had "credibly claim[ed] that not only would the Village's enforcement of its anti-gaming ordinance be an affront to its sovereignty, its citizens also depend heavily on the facility to provide funding for public services." SA21-22; *see* SA22 (observing that "the irreparable harm requirement is generally satisfied where enforcement of a statute or regulation threatens to infringe upon a tribe's right of sovereignty" (internal quotation marks omitted)). As for harm to the Village, the court found that this factor, too, weighed in the Nation's favor: "[T]he Nation and the Village appear to have had a relatively long-running 'Standstill Agreement,'" the court stressed, "before the Nation resorted to federal court to attempt to resolve the gaming issue." SA22. On the merits, the court found that it was an "open question" whether this Court would affirm or reverse. SA25. And finally, the court found that the public interest favored an injunction because of "the apparent lack of any ongoing disruptions" caused by the gaming facility. SA26.

SUMMARY OF ARGUMENT

I. The district court was wrong to dismiss the Nation's suit for lack of jurisdiction. Federal courts lack jurisdiction to resolve disputed issues of tribal law. Largely for this reason, courts defer to tribal leadership determinations made

by the executive branch. One application of this rule is that when the executive branch identifies an Indian nation's "federal representative" for purposes of government-to-government relations, courts treat that representative as authorized to act for the nation. They do not look behind the representative's status to determine whether particular actions—including the filing of a lawsuit—were properly authorized as a matter of tribal law.

Here, applying this rule should have been easy. Clint Halftown has been the Cayuga Nation's recognized federal representative since 2003. Because he authorized this lawsuit, the district court should have allowed it to proceed without entertaining any argument by the Village concerning whether the lawsuit was authorized as a matter of tribal law. Treating Mr. Halftown as authorized to act on behalf of the Nation in federal fora is particularly appropriate in this case: The Nation is seeking to vindicate its right to conduct Class II gaming under the oversight of NIGC, and NIGC has consistently interacted with Mr. Halftown and his colleagues.

No aspect of the district court's decision refutes the conclusion that jurisdiction existed here. The district court pointed to a dispute over whether the lawsuit had been properly authorized as a matter of Cayuga Nation law, and dismissed the case because it lacked jurisdiction to resolve that question. But courts defer to BIA's recognition decisions precisely to avoid confronting these sorts of tribal-law

questions altogether. And nothing in BIA's February 20 decision provides a basis for refusing to defer to the Nation's recognized federal representative.

II. The district court also was wrong to conclude that the individual plaintiffs lacked standing. Those plaintiffs are Nation employees and officials who are involved in the conduct of gaming activities at Lakeside Entertainment. The Village has threatened enforcement action directed at these very activities. Its threats have even encompassed criminal penalties, which could *only* be directed at individuals. Under these circumstances, the individual plaintiffs face a credible threat of enforcement action—which is all that is required for them to establish standing.

In the face of all of this, the district court believed standing was absent because the Village had not singled out particular individuals, and because its Orders to Remedy named only the Nation. But decisions from the Supreme Court and this Court alike make clear that explicit targeting of specific plaintiffs is not a prerequisite for standing; rather, as long as a plaintiff can establish a credible threat of prosecution, the plaintiff has standing to bring a pre-enforcement challenge. Dismissal of the individual plaintiffs was therefore erroneous.

III. Finally, with the erroneous jurisdiction-based dismissals set aside, the preliminary injunction motion should have been granted. Of course, this Court may elect to remand for the district court to address that motion's merits in the first

instance. But if this Court chooses to address the motion, it should direct entry of the preliminary injunction. The Village's efforts to shut down the Nation's gaming facility are flatly preempted by IGRA, among other legal defects. And the district court itself found that the plaintiffs had satisfied the remaining preliminary injunction factors—irreparable harm, balance of hardships, and public interest—for purposes of granting a preliminary injunction pending appeal.

STANDARDS OF REVIEW

This Court's review of the district court's dismissal for lack of jurisdiction is *de novo*. *See Donoghue v. Bulldog Investors General P'ship*, 696 F.3d 170, 173 (2d Cir. 2012). Regarding the district court's denial of the preliminary injunction, this court "review[s] the district court's legal holdings de novo and its ultimate decision for abuse of discretion." *Goldman, Sachs & Co. v. Golden Empire Sch. Financing Auth.*, 764 F.3d 210, 214 (2d Cir. 2014). Here, the district court denied a preliminary injunction solely based on its legal holding that jurisdiction was lacking. SA10. Accordingly, this Court's review is *de novo*. Finally, "denial of a party's motion to alter or amend judgment under Rule 59(e) is . . . reviewed for an abuse of discretion." *Munafo v. Metro. Transp. Auth.*, 381 F.3d 99, 105 (2d Cir. 2004).

ARGUMENT

I. The District Court Had Jurisdiction Over The Cayuga Nation's Suit.

The district court dismissed the Nation's suit on the ground that the two factions within the Cayuga Nation Council disagreed on whether the suit had been properly authorized as a matter of tribal law. SA8. In view of this internal tribal disagreement, the court believed that it could not permit the lawsuit to proceed without deciding who was right as a matter of Cayuga Nation law. SA9. And because the court lacked jurisdiction to make that determination, it dismissed the case for lack of standing. SA10.

The district court was wrong to dismiss the Nation's suit because of a tribal law dispute concerning authorization to sue. As the court observed, federal courts lack jurisdiction to decide disputed issues of tribal law. But for that very reason, a court cannot make a Nation's standing in federal court turn on a perceived disagreement concerning tribal law. Instead, the court must defer to the expert agency's determination of who is authorized to conduct government-to-government relations with the United States. Otherwise, federal courts risk embroiling themselves in internal tribal affairs: under the district court's holding, a Nation's standing to sue depends on a predicate judicial finding that there is no bona fide dispute *under tribal law* that the suit was authorized. Yet a federal court has no jurisdiction to make such a finding. Proper respect for an Indian nation's sovereignty re-

quires federal courts to steer clear of such internal tribal matters, and to defer to the Executive Branch's determination regarding who speaks for the tribe.

The district court's ruling was particularly illogical in this case. NIGC—the federal agency that regulates Indian gaming—has consistently interacted with Mr. Halftown and his colleagues, even though it is well aware of the ongoing leadership dispute. Yet under the district court's ruling, the same individuals are disabled from vindicating the Nation's rights under that federal regulatory scheme in federal court.

What is more, the district court's holding has drastic consequences for Indian nations' access to federal court. If the district court's decision is correct, then any disgruntled tribal official can squelch an Indian nation's lawsuit (perhaps even at the urging of the opposing party) simply by asserting that the lawsuit was not properly authorized under his or her nation's law, thus creating a threshold question beyond a court's power to adjudicate. An Indian nation could thereby be left without any means to remedy illegal action by local and state governments or otherwise vindicate its rights in federal court. Notably, the district court cited no case in which a federal court has declined to exercise jurisdiction over an Indian nation's suit because it could not determine whether the suit had been properly authorized as a matter of tribal law. Law and logic compel reversal.

A. Because Federal Courts Have No Jurisdiction To Resolve Disputed Matters Of Tribal Law, They Should Not Entertain Argument That An Indian Nation's Recognized Federal Representative Lacks Authority To Act Under Tribal Law.

Federal courts must treat an Indian nation's recognized federal representative as authorized to represent the Indian nation in federal court. That rule follows directly from the bedrock principle that courts must refrain from determining contested issues of tribal law. It is well settled, and undisputed here, that "questions of interpretation of . . . tribal law [are] not within the jurisdiction of [a federal] court." *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985). In particular, as this Court has explained, an "issue of [tribal] leadership . . . involves questions of tribal law [and] is not properly resolved by a federal court." *Shenandoah*, 159 F.3d at 712. This principle safeguards the autonomy of "quasi-sovereign Indian tribes" by avoiding the litigation of questions of tribal law and leadership in federal court. *Id.* at 713 (quotation marks omitted).

Rather than adjudicating competing claims under tribal law, federal courts instead are bound to follow executive branch determinations regarding who is authorized to act for an Indian nation. The relevant executive agencies have "special expertise and extensive experience in dealing with Indian affairs." *Id.* (quotation marks omitted). And they necessarily make leadership-related determinations as part of the government-to-government relationship between the United States and quasi-sovereign tribes—just as the executive branch does with respect to foreign

governments. *See Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983) (explaining that "[t]he BIA, in its responsibility for carrying on government relations with the Tribe, is obligated to recognize and deal with some tribal governing body" even in the midst of an internal tribal leadership dispute, and holding that a federal court exceeded the bounds of its jurisdiction when it intervened in the dispute itself instead of ordering BIA to do so); *cf. Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2084, 2086 (2015) (explaining that "the Nation must have a single policy regarding which governments are legitimate in the eyes of the United States and which are not," and that "[l]egal consequences follow formal recognition"); *Lafontant v. Aristide*, 844 F. Supp. 128, 132-33 (E.D.N.Y. 1994) (stating that "[r]ecognition of a government and its officers is the exclusive function of the Executive Branch," and that "the courts must defer to the Executive determination . . . [and] give [it] legal effect" (citation omitted)).

The rule that federal courts must follow the Interior Department's recognition decisions ensures that the courts can navigate treacherous waters: On the one hand, that rule avoids undue infringement on tribal sovereignty by preventing federal courts from intervening in internal tribal affairs. On the other hand, the rule ensures that an Indian nation can still access the courts to protect its rights, even when leadership or authority to act is contested under tribal law.

Indeed, the federal courts have held that the Department of Interior *must* recognize some entity within an Indian nation as authorized to act on the nation's behalf, even when there is an ongoing leadership dispute within the tribe, to avoid a hiatus in government-to-government relations with the United States. *See Goodface*, 708 F.2d at 339. And Congress, in expressly providing for Indian nations' right to sue, has directed the federal courts to abide by the Interior Department's recognition decisions. *See* 28 U.S.C. § 1362 (vesting the district courts with jurisdiction to entertain suits arising under federal law "brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior"); *see also Navajo Tribal Util. Auth. v. Ariz. Dep't of Rev.*, 608 F.2d 1228, 1232 (9th Cir. 1979) ("If the leadership of a tribe or band decides that litigation is necessary to protect the rights of the tribe or band, then section 1362 will provide federal court access to the tribe or band . . . ."). Absent deference to these recognition decisions, an Indian nation could routinely be deprived of access to the courts as long as the opposing party can conjure up some dispute as to whether, as a matter of tribal law, that Indian nation's suit was properly authorized. *Cf. Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 889 (1986) (rejecting rule that would "operate to effectively bar [a] Tribe from the courts").

Applying these principles, courts have routinely treated the Interior Department's recognition decisions as binding, despite underlying disputes under tribal

law regarding leadership or authority. In *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935 (D.C. Cir. 2012), a group purporting to lead the Timbisha Shoshone Tribe sued the Interior Secretary on the tribe's behalf. A second group within the tribe intervened to challenge the first group's authority to sue. While the case was on appeal, BIA recognized the second group as the tribe's leadership. Deferring to BIA's determination, the D.C. Circuit dismissed the case on the ground that the group that had sued lacked standing to do so. *Id.* at 938. BIA's leadership determination, the court determined, was binding on the judicial branch. *See id.* (explaining that, rather than delving into issues of tribal law, courts "defer[] to the judgment of the Executive Branch as to who represents a tribe").

This Court applied the same principle in *Shenandoah*. There, the Oneida Nation's federal representative, Raymond Halbritter, had entered into a lease on that Nation's behalf. The plaintiffs, however—who claimed to be "the Nation's . . . leaders or official representatives"—argued that the lease approval was invalid because Mr. Halbritter lacked "authority . . . to enter into the transaction." 678 F.3d at 710, 712. This Court, in turn, made clear that the case turned on his federal-representative status: "[T]he critical issue," it explained, was "whether . . . [Mr.] Halbritter remains the Oneida Nation's representative" recognized by BIA. *Id.* at 712. If Mr. Halbritter retained that status, the lease was valid without any further inquiry. And because only BIA could resolve the question whether Mr. Halbritter

remained the Oneida Nation's federal representative, the Court found that the plaintiffs had "failed to exhaust their administrative remedies." *Id.* at 712-13 (quotation marks omitted).

Timbisha Shoshone and *Shenandoah* require reversal here. This case follows *a fortiori* from *Timbisha Shoshone*: There, the suit proceeded while there was an ongoing dispute over tribal leadership and authorization to sue—and the plaintiffs lost standing only when BIA determined that they were *not* the tribe's leadership. Here, Mr. Halftown has been the Nation's recognized federal representative since 2003 and remains so today, *see supra* at 14-15; consequently, the Nation's suit must proceed. *Shenandoah* compels the same result. Just as the court there treated Mr. Halbritter's federal-representative status as dispositive, it should do the same for Mr. Halftown's status here.

The district court here acknowledged that federal courts have no jurisdiction to resolve disputed matters of tribal law. SA8 n.6. Nevertheless, it stumbled over the question whether filing the present lawsuit was authorized as a matter of Cayuga law. SA8.[7] The district court erred by even entertaining that question. The

[7] In particular, members of the "Unity Council" claim that this suit was not properly authorized under Cayuga law because its filing purportedly required a consensus decision of the Nation Council that was absent here. SA8. Mr. Halftown contends that the "Unity Council's" claims are incorrect: Mr. Halftown was authorized to vindicate the Nation's rights under IGRA by virtue of his status as the Nation's federal representative; a 2002 decision of the Nation Council au-

principles that compel the rule of deference apply not just to questions of *who* is a tribe's proper leadership (as in *Timbisha Shoshone*), but also to questions of whether proper tribal procedures were followed—including what tribal procedures are necessary to authorize a lawsuit. No less than the question of who leads a tribe, these questions concern internal tribal matters and are beyond a federal court's capacity to address. *See Runs After*, 766 F.2d at 352.

Instead of dismissing, the district court should have bypassed these internal tribal issues altogether and simply deferred to the Executive Branch determination that Mr. Halftown represents the Nation in its dealings with the federal government. In *Shenandoah*, for example, this Court nowhere suggested that it might have to look behind Mr. Halbritter's status as the federal representative and inquire into whether he possessed the authority he claimed under tribal law. Instead, the "critical issue"—the only issue—was whether he "remain[d] the Oneida Nation's representative." 678 F.3d at 712.

So too here. The "critical issue" is whether Mr. Halftown remains the Nation's federal representative, notwithstanding the competing claims of others who also purport to be "the Nation's . . . leaders." *Id.* at 710-12. BIA has consistently

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thorizing him to pursue "economic development," including gaming, on the Nation's behalf; and the unanimous support of the active members of the BIA-recognized 2006 Council. JA628, JA639, JA636, JA750.

resolved this critical issue in Mr. Halftown's favor, and its determination is dispositive regarding his authority to sue for the Nation.

B. Deference To The Recognized Federal Representative Accords With IGRA's Regulatory Scheme.

The district court's failure to follow the Executive Branch's recognition decision was particularly misguided in the circumstances of this case. The Nation officials who authorized this litigation (including Mr. Halftown) did so to defend the legality of the gaming enterprise that they themselves have been operating for the benefit of the Nation. JA636. They operate that facility, moreover, under the oversight of NIGC—the federal body charged with regulating Indian gaming. NIGC, as noted above, has authority to shut down facilities that are not being operated by what it regards as Nation's proper leadership. *See Sac & Fox Tribe*, 439 F.3d at 834. But far from shutting down Lakeside Entertainment, NIGC has chosen to continue to deal with Mr. Halftown and the other Nation officials who authorized this litigation. JA632-34. NIGC has done so, moreover, despite being advised that the opposing faction within the Nation Council opposes the conduct of gaming. JA484. With NIGC having determined to regulate the conduct of gaming by Mr. Halftown and his allies as a Cayuga Nation enterprise, it would be strange indeed to hold that these same individuals cannot seek the protection of the federal courts to preserve that enterprise against unlawful interference.

Considerations of tribal sovereignty underscore that conclusion. As noted above, the principle that federal courts have no jurisdiction to resolve contested questions of tribal law rests on the noble ideal of respect for tribal sovereignty. Yet the Nation's conduct of gaming pursuant to IGRA is also an expression of that sovereignty; indeed, IGRA was meant to effectuate a congressional policy of "promot[ing] tribal economic development, tribal self-sufficiency, and strong tribal government." 25 U.S.C. § 2701(4). The Village's threat to shut down the Nation's gaming activities, in turn, represents a direct threat to that sovereignty. And the district court's decision here—despite acknowledging the importance of tribal sovereignty—strikes a direct blow at that sovereignty by depriving the Nation of federal judicial protection for its sovereign rights. *See Three Affiliated Tribes*, 476 U.S. at 889 (rejecting conditions for access to the courts that "may be met only at an unacceptably high price to tribal sovereignty"). By contrast, the principle outlined above—deference to the Nation's recognized federal representative—enables this suit to proceed without any need to delve into contested issues of tribal law, and thus enables the Nation to defend against threats to its sovereignty.

C. Nothing In BIA's February 20 Decision Requires A Different Result.

The district court, however, believed that its decision was supported—even commanded—by BIA's February 20 decision. That decision, as explained above, recognized the 2006 Nation Council on an interim basis, with Mr. Halftown as fed-

eral representative. The Village and the district court, at various points, identified four aspects of that decision as supporting dismissal: that the decision adverted to the importance of consensus under Cayuga law; that it disclaimed any opinion on the powers of the federal representative under Cayuga law; that recognition was limited to the particular purpose of ISDA funding; and that the decision was interim. In actuality, none of these points justifies the district court's decision.

First, and most important, the fact that BIA emphasized the importance of consensus in Cayuga Nation decisionmaking does not require dismissal of the Nation's suit. As explained above, there is a dispute (under Nation law) about whether a consensus of the Nation's Council was required to authorize this suit, and whether one occurred. *See supra* at 29 & n.7. But the dispositive principle, again, is that a federal court must defer to the recognized federal representative. Deferring to the federal representative obviates any need for a federal court to determine what procedures a tribe must follow internally, and whether those procedures were in fact followed in any particular instance. Here, the principle of deference to the federal representative means that the district court actually had *no need* to determine whether the principle of consensus means, as a matter of Cayuga Nation law, that a decision to initiate litigation must itself by authorized by consensus—and, if so, what "consensus" means in these circumstances.

If anything, in anchoring itself to the principle of consensus, the district court effectively decided contested issues of Cayuga Nation law—even as it purported to avoid doing just that. The district court's decision evidently rested on the notion that, because the Nation is broadly guided by the principle of consensus, a decision to initiate litigation must itself be supported by consensus. But that point in fact is deeply contested, and the district court had no warrant for weighing in on it. SA8.

Nor is it relevant that BIA's decision declined to address the powers that a federal representative has under Cayuga Nation law. BIA's decision disclaimed any intent to *ever* address that question, which it deemed a matter for the Nation to decide under its own law. *See* JA741 n.1 ("The scope of the powers of the federal representative is a question of Nation law not properly resolved by the Region."). But so long as the Executive Branch continues to recognize the federal representative, the courts must treat that representative as having authority to act for the Nation. That is not a decision that a representative possesses certain powers as a matter of tribal law; it simply gives effect to the fact that BIA has recognized a particular individual as speaking for the tribe. Notably, the district court pointed to no case—nor are we aware of any—in which a federal court has denied an Indian nation's federal representative the ability to sue on that nation's behalf.

Also irrelevant is the fact that BIA's decision, by its terms, recognizes Mr. Halftown as federal representative only for the limited purpose of receiving funds on the Nation's behalf under the Indian Self-Determination Act. *See* JA741. BIA's current policy is *always* to recognize tribal leadership only for a limited purpose. To avoid unwarranted encroachment on tribal sovereignty, BIA will not render a new leadership determination at all, unless some separate federal action requires it to make such a determination. *See Cayuga Indian Nation*, 58 IBIA at 180 (discussing cases). And when BIA *does* make such a determination, it couches that determination as relating only to that particular federal action—here, the need to provide the Nation with the ISDA funds to which it is entitled by statute. JA741, JA744. The fact that *BIA* may issue a leadership ruling for a particular purpose does not mean that, for any lawsuit relating to a *different* purpose, a federal court must throw up its hands. If that were the case, then any Indian nation subject to a leadership dispute could be frozen out of court for any purpose other than the one that prompted BIA's most recent leadership determination.[8]

[8] Indeed, if the purpose underlying BIA's most recent decision were dispositive, it would equally bar a suit in the Nation's name supported by *all* members of the 2006 Nation Council. That is because BIA's decision used that purpose to anchor its recognition not just of Mr. Halftown as federal representative, but also of the 2006 Council as the Nation's governing body. *See* JA741, JA744. Even the district court did not envision that BIA's February 2015 decision could have the effect of categorically barring the Nation from federal court. SA9.

Finally, the fact that BIA's decision is an interim one does not counsel a different result. The "interim" label signifies that the time period during which the recognition is in effect may be limited. But it does not restrict the consequences of the recognition during that time period. The interim nature of the recognition here flows from the fact that BIA did not purport to resolve the Nation's leadership dispute or make a leadership determination as a matter of Cayuga law. Instead, BIA continued to recognize the 2006 Council—with Mr. Halftown as federal representative—as the Nation's "last undisputed leadership," pending further resolution of the Nation's leadership dispute either by BIA or by the Nation itself through its own internal processes. JA741. In reaching this determination, BIA accommodated two potentially conflicting goals. On one hand, it avoided the potential encroachment on tribal sovereignty that might result from its resolution of contested matters of Nation law. *See* JA744; *Rosales v. Sacramento Area Dir.*, 32 IBIA 158, 166 (1998); *Poe v. Pac. Reg'l Dir.*, 43 IBIA 105, 112-13 (2006). On the other hand, it avoided creating an unlawful hiatus in the government-to-government relationship between the United States and the Cayuga Nation. *See* JA744; *Goodface*, 708 F.2d at 338-39. Indeed, the point of interim recognition is to preserve government-to-government relations between the United States and an Indian nation *despite* the existence of a tribal leadership dispute. *See, e.g.*, *Rosales*, 32 IBIA at 168 (explaining that, during the pendency of a leadership dispute, "BIA and other

Federal agencies need to know the identity of the persons with whom they can deal on a government-to-government basis"). Depriving BIA's decision of effect because of its "interim" label would effectively create the same unlawful hiatus that the decision sought to avoid.

D. The District Court's Decision Has Dangerous Consequences For Indian Nations' Access To Federal Courts.

The consequences of the district court's decision are not limited to the Cayuga Nation. Indian nations frequently clash with state and local governments over those governments' efforts to restrict or regulate tribal activities. Often, adjudication of the matter vindicates the Indian nation's position. *See, e.g.*, *Cayuga Indian Nation of N.Y. v. Gould*, 930 N.E.2d 233 (N.Y. 2010) (successful challenge to county sheriffs' unannounced raids on convenience stores); *Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 761 F.3d 218 (2d Cir. 2014) (successful challenge to tax foreclosure actions). If the district court is correct, however, an Indian nation seeking to challenge encroachments upon its rights can have its suit dismissed simply because a tribal member or official has raised questions regarding whether the suit was properly authorized as a matter of tribal law. State and local governments being sued by an Indian nation will have every incentive to unearth and even generate such questions. *Cf.* JA499 ("Unity Council" attorney's admission that he had had a "cooperative and productive" meeting, two days after issuance of the TRO in this action, with the Village's litigation counsel and two of the defendants). And

they may find it easy to do so, given the frequency with which Indian nations confront leadership disputes. *See, e.g.*, *Shenandoah*, 159 F.3d at 710-11 (Oneida Indian Nation); *Tarbell v. Dep't of Interior*, 307 F. Supp. 2d 409, 411 (N.D.N.Y. 2004) (Saint Regis Mohawk Tribe); *Bowen v. Doyle*, 880 F. Supp. 99, 105-06 (W.D.N.Y. 1995) (Seneca Nation), *superseded on other grounds by statute*, *Peters v. Noonan*, 871 F. Supp. 2d 218 (W.D.N.Y. 2012). The problem is only aggravated by the fact that tribal law—which, for the Cayugas and many other Indian nations, is largely unwritten—may lack the kind of precision that would allow a judge to easily determine whether a bona fide dispute exists.

To this, the Village may respond that the district court's decision actually threatens no such harm because it rests on the consensus principle that BIA's decision itself articulated, and that both sides in the leadership dispute agree is important to Cayuga Nation law. SA8. But as explained above, the meaning and application of the consensus principle are themselves hotly contested. For instance, do the consensus actions designating Mr. Halftown as federal representative and conferring authority to pursue economic development empower him to initiate the suit here? *See* JA741 n.1 (BIA's recognition that the "scope of the powers of the federal representative is a question of Nation law"). And even if a further consensus action of the Nation Council is required, is that requirement satisfied when the only three active Council members support the litigation? To the extent that the

district court dismissed the suit on the ground that consensus did not exist here, or even on the ground that it could not determine whether consensus had been achieved, it necessarily resolved disputed issues of Cayuga law—exactly what it sought to avoid doing.

II. The Individual Plaintiffs Have Standing Based On The Credible Threat Of Civil Enforcement And Criminal Prosecution Against Them.

The district court was wrong to conclude that the individual plaintiffs lacked standing because they supposedly had not shown a "'concrete, particularized, and actual or imminent' injury," as required by Article III. SA10 n.8 (quoting *Clapper*, 133 S. Ct. at 1147); *see* SA17. The Village's threats directed towards gaming activity at Lakeside Entertainment have plainly created a credible threat and realistic danger that these individuals may be targeted. Indeed, the Village has threatened criminal prosecution by imprisonment, for which individuals are the *only* possible targets. To establish standing, the law requires nothing more.

When a statute or ordinance subjects a plaintiff to civil penalties or criminal prosecution, his or her burden to establish standing is minimal. All that is required is a "credible threat of prosecution," *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 298 (1979), or "realistic danger" of enforcement, *American Booksellers Foundation v. Dean*, 342 F.3d 96, 101 (2d Cir. 2003) (quoting *Babbitt*,

442 U.S. at 298)).[9] As this Court has recently observed, these standards are "quite forgiving" to a plaintiff seeking to mount a legal challenge. *Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir. 2013) (quotation marks omitted); *see id.* (plaintiff must surpass only a "low threshold" to establish standing (quotation marks omitted)).

That standard is particularly forgiving in that it does not "place the burden on the plaintiff to show an intent by the government to enforce the law against it." *Hedges*, 724 F.3d at 197. Quite the contrary: that intent is *presumed*, unless there is an affirmative reason to conclude that it does not exist. *See id.* Thus, there need not be *any* statement that the government plans enforcement *against the plaintiff*, so long as the requisite "credible threat" otherwise exists. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010) (quotation marks omitted); *see id.* (finding standing despite absence of any express threat against plaintiffs).

The individual plaintiffs here readily satisfy the low bar that applies. The Village has declared that gaming activities at Lakeside Entertainment violate its 1958 anti-gambling ordinance, which contemplates civil and criminal punishment

[9] This Court has remarked that it is unclear which of these standards applies to non-First Amendment challenges. The Court had once suggested that the "slightly higher" standard of "realistic danger" governs non-First Amendment challenges. *Hedges v. Obama*, 724 F.3d 170, 196 n.152 (2d Cir. 2013) (quoting *Am. Booksellers*, 342 F.3d at 101). But then, *Humanitarian Law Project* applied the "credible threat of prosecution" to challenges under both the First and Fifth Amendments. *Id.* (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 15 (2010)). The distinction is immaterial here because the individual plaintiffs satisfy either standard.

against those in violation. *See* JA290 ("The unauthorized conduct of a bingo game . . . shall constitute and be punishable as a misdemeanor."); JA17-18; SA19. Further, the Village has declared that it will enforce the ordinance with respect to gaming activities at Lakeside Entertainment. *See, e.g.*, JA24 (Board of Trustees' enforcement decision); JA27 (threats made in press); JA29 (intent to enforce communicated through counsel); JA293, JA329, JA333-35, JA339. The individual plaintiffs, for their part, are "officers, employees, and/or representatives" involved in gaming activities at Lakeside Entertainment. JA18; *see* JA22 (plaintiffs include "primary management officials" and "key employees" of the facility licensed under NIGC regulations). In view of the ordinance's content and the Village's threats of enforcement, the individual plaintiffs here have well exceeded their burden to allege a "credible threat," *Babbitt*, 442 U.S. at 298-99, or "realistic danger," *Am. Booksellers*, 342 F.3d at 101 (quotation marks omitted), that the Village will seek to enforce its 1958 gaming ordinance against them. It follows that the plaintiffs have standing.

The Village's issuance of Orders to Remedy merely confirms that conclusion. *See* JA24-25, JA27, JA292, JA333-34; *see also* JA784 (additional orders issued after district court's dismissal and before issuance of injunction pending appeal). Those Orders constitute formal directives to come into compliance with the

1958 gaming ordinance.[10] Although they are directed to the Nation itself, they threaten both civil penalties and criminal penalties, including imprisonment. JA24-25 (failure to comply may "constitute an offense punishable by fine or imprisonment or both"); JA27 (similar); JA784 (similar); *see* JA293, JA333-34. Again, the result is a "credible threat" and a "realistic danger" of enforcement.

The district court's decisions do nothing to dispel the conclusion that the individual plaintiffs have standing. The district court's initial decision simply stated, in a footnote, that the complaint's "vague allegations asserted on behalf of unnamed persons do not constitute a 'concrete, particularized, and actual or imminent' injury for purposes of Article III standing." SA10 n.8. And in response to the reconsideration motion, the district court amplified its reasoning by stressing that the Village's citations were addressed to the Nation, without naming any of the individuals. SA18. As to the individuals, the court therefore deemed this case no different from one in which a government official states "that a statute prohibits a type of conduct in the abstract" and that he intends "to enforce the statutory prohibition against the public generally." SA19 (quoting *Jones v. Schneiderman*, ---

[10] Although the Orders also cite the failure to obtain a Certificate of Occupancy for the facility, plaintiffs demonstrated below—and defendants never disputed—that the Village's only reason for denying a Certificate of Occupancy was the conduct of gaming activities at the facility. *See* Pl.'s Mem. in Opp. to Defts.' Cross-Mot. to Dismiss at 6 n.3 (Jan. 14, 2015), Dkt. 42.

F. Supp. 3d ----, No. 11–CV–8215, 2015 WL 1454529, at *4 (S.D.N.Y. Mar. 31, 2015)). The court was wrong.

First, the district court's reasoning founders on its premise—namely, that this case is like one in which a government official announces an intent to enforce a statute "against the public generally." SA19. The Village's enforcement threats plainly have *not* been directed "at the public generally." Rather, they have been directed towards activities taking place at one specific facility—Lakeside Entertainment—that the individual plaintiffs operate. Not only that, but those threats have included criminal prosecution, which could only be directed at the individual plaintiffs.

Second, as explained above, this Court's cases—and those of the Supreme Court—require only that a plaintiff face a "credible threat" or "realistic danger" of enforcement. They do not require *any* express statement of intent by government officials, much less one that names the plaintiff specifically. *See, e.g.*, *Humanitarian Law Project*, 561 U.S. at 15-16 (upholding standing despite the absence of express threats of enforcement); *Pacific Capital Bank N.A. v. Connecticut*, 542 F.3d 341, 350 (2d Cir. 2008) (same). Here, regardless of whether the Orders to Remedy named individuals or only the Nation, the requisite threat plainly existed by virtue of the Village's repeated statements that it planned to enforce its ordinance *with*

respect to gaming at Lakeside Entertainment—an undertaking in which all of the John Does are involved.

Third, and relatedly, the district court's decision effectively reversed the presumption that governs the inquiry whether a plaintiff has shown standing. As shown above, the plaintiff need not "show an intent by the government to enforce the law against it." *Hedges*, 724 F.3d at 197. Rather, in the absence of a reason to conclude it does not exist, that intent is presumed. *See id*. With the plaintiffs having shown a credible threat and realistic danger of enforcement, the district court's determination—that the individual plaintiffs cannot sue because the Orders to Remedy and other threats identified only the Nation—amounts to an impermissible reversal of that presumption.

Finally, throughout this litigation, the Village has never disavowed an intent to enforce its anti-gaming ordinance against individual Nation employees and officials (as opposed to the Nation itself). From the start of this suit, the plaintiffs have urged that, as individuals who participate in the conduct of gaming at Lakeside Entertainment, they are subject to potential criminal and civil penalties if the Village. *Cf.* SA20 ("[T]he Village has done a fair amount of saber-rattling in its submissions during this case . . . ."). Not once has the Village suggested otherwise—a fact that only confirms the individual plaintiffs' standing. *See Humanitarian Law Project*, 561 U.S. at 16 (stressing that "[t]he Government has not argued

to this Court that plaintiffs will not be prosecuted if they do what they say they wish to do"); *see also Vermont Right to Life Comm., Inc. v. Sorrell*, 221 F.3d 376, 383-84 (2d Cir. 2000) (finding standing even where government had disclaimed any intention to enforce law against plaintiff). The district court's rulings concerning the individual plaintiffs' standing therefore should be reversed.

III. Plaintiffs Are Entitled To A Preliminary Injunction.

Once this Court reverses the district court's standing-based dismissal, Plaintiffs are entitled to the preliminary injunction they sought below. Of course, this Court may elect to remand for the district court to address that motion's merits in the first instance. But if this Court chooses to address the motion, it should direct entry of the preliminary injunction. To obtain such relief, the movant must "show (a) irreparable harm and (b) either (1) likelihood of success on the merits or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary relief," including consideration of the "public interest." *Citigroup Global Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 (2d Cir. 2010) (internal quotation marks omitted). Here, Plaintiffs are overwhelmingly likely to succeed on the merits; the Village's threatened actions would deprive an Indian nation of the revenues on which its self-sufficiency hinges,

among other irreparable harms; and any harm to the Village would be minimal. An injunction is fully warranted.[11]

A. Plaintiffs Are Likely to Succeed on the Merits.

For three reasons, Plaintiffs are likely to succeed on the merits. IGRA authorizes the gaming at Lakeside Entertainment and so preempts the Village's threatened enforcement actions in full. Insofar as the Village threatens criminal prosecution, 18 U.S.C. § 1166 is an independent bar because it provides for exclusive federal jurisdiction. And insofar as the Village targets the Nation, sovereign immunity applies.

1. IGRA Preempts The Village's Threatened Actions In Full.

As this Court has recognized, "IGRA preempts . . . state regulations affecting the governance of gaming." *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 469-70 (2d Cir. 2013); *see, e.g.*, *Gaming World Int'l, Ltd. v. White Earth Band of Chippewa Indians*, 317 F.3d 840, 848 (8th Cir. 2003) ("IGRA com-

[11] When the moving party seeks an injunction that will affect "government action taken in the public interest pursuant to a statutory or regulatory scheme," the court "should not apply the less rigorous ['serious questions'] standard" but should instead require "along with irreparable injury, a likelihood [of success] on the merits." *Citigroup*, 598 F.3d at 35 n.4 (quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995) (first alteration in original)). Plaintiffs do not believe that this more stringent standard applies, because the enforcement actions here are not "in the public interest," nor are they actually "pursuant to a statutory or regulatory scheme." *Id.* (quoting *Able*, 44 F.3d at 131). Regardless, Plaintiffs easily satisfy the more stringent standard.

pletely preempts state law with respect to Indian gaming."). Indeed, in passing IGRA, Congress made explicit its broad preemptive intent. S. Rep. No. 100-446, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076 ("[IGRA] is intended to expressly preempt the field in the governance of gaming activities on Indian lands."). Thus, when IGRA authorizes a Nation's gaming, state law cannot touch it.

Here, IGRA authorizes the gaming at issue—denominated "Class II," and including bingo and variants—when three requirements are met: (1) the state "permits such gaming for any purpose by any person, organization, or entity"; (2) the Nation "adopts an ordinance or resolution" authorizing the gaming, which ordinance is approved by NIGC's Chairman; and (3) the gaming occurs on "Indian lands within such tribe's jurisdiction." 25 U.S.C. § 2710(b).

Here, the Village has never disputed the first two of these requirements. New York allows bingo by some people in some circumstances, and Federal law does not prohibit such gaming.[12] Lakeside Entertainment's gaming also occurs pursuant to a Nation-adopted and NIGC-approved ordinance. JA344, JA349-69.

[12] *See, e.g.*, N.Y. Const. art. I, § 9(2) ("[A]ny city, town or village within the state may . . . authorize, subject to state legislative supervision and control, the conduct of . . . games of chance commonly known as . . . bingo or lotto [by] . . . bona fide religious, charitable or non-profit organizations of veterans, volunteer firefighter and similar non-profit organizations . . . .").

As to the third requirement, the Village has not disputed that Lakeside Entertainment is on "Indian lands." 25 U.S.C. § 2710(b). Such lands include "all lands within the limits of any Indian reservation," 25 U.S.C. § 2703(4)(A), and Lakeside Entertainment is on the Nation's historic reservation. JA343-44. That reservation was established by the United States in the 1794 Treaty of Canandaigua and has never been disestablished or diminished by Act of Congress. It therefore remains in existence. *See, e.g.*, *Solem v. Bartlett*, 465 U.S. 463, 470 (1984) (an Indian nation's reservation exists until it is disestablished by Congress); *Cayuga Indian Nation of N.Y. v. Village of Union Springs*, 317 F. Supp. 2d 128, 131-33 (N.D.N.Y. 2004) (recounting history), *vacated on other grounds*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005).[13] Indeed, the New York Court of Appeals—as well as "every federal court" to consider the question—has held that the Nation's reservation remains intact. *Gould*, 930 N.E.2d at 247 (collecting authorities).[14]

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[13] The United States—with the authorization of the Solicitor General—has filed multiple amicus briefs recognizing the same thing. *See* Brief of United States as Amicus Curiae in Support of Appellant [the Nation] at 4-6, *Cayuga Indian Nation of N.Y. v. Gould*, 886 N.Y.S.2d 63 (App. Div. 4th Dept. Mar. 12, 2009) (No. 08-02582) (JA68-70); Brief of United States as Amicus Curiae in Support of Respondent [the Nation] at 5–8, *Cayuga Indian Nation of N.Y. v. Gould*, 930 N.E.2d 233 (N.Y. Jan. 29, 2010) (No. 74) (JA103-06).

[14] This Court's decision in *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005), is not to the contrary. The Court there held that under *City of Sherrill*, laches barred the Nation's "possessory land claim," which sounded in "federal common law," and sought "ejectment" of the residents currently occupying the Nation's historic reservation or its equivalent in money damages. *Id.* at

Lakeside Entertainment likewise satisfies the third requirement's second component—that the lands be "within such tribe's jurisdiction." 25 U.S.C. § 2710(b)(2). *First*, as NIGC has repeatedly recognized, the function of IGRA's requirement that lands be "within *such tribe's* jurisdiction," 25 U.S.C. § 2710(b)(1) (emphasis added), is merely to effectuate Congress's "inten[t] that gaming on any specific parcel of Indian lands not be conducted by any Indian tribe, but only by *the specific tribe or tribes* with jurisdiction over that land." Memorandum from Cindy Shaw, Senior Attorney, NIGC to NIGC Acting General Counsel, at 10 (Mar. 14, 2005) (emphasis added) (JA122).[15] Because these are indisputably Cayuga lands—and not, for instance, Seneca lands—the "within such tribe's jurisdiction" requirement is satisfied.

268, 270. The Court did not discuss or decide anything about the status of the Nation's reservation. This Court, moreover, repeatedly has confirmed that the reservation of the Oneida Indian Nation continues to exist in undiminished form within New York State. *See Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 167 (2d Cir. 2003), *rev'd on other grounds*, 544 U.S. 1057 (2005); *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 605 F.3d 149, 157 n.6 (2d Cir. 2010), *subsequently vacated as moot*, 562 U.S. 42 (2011); *Oneida Indian Nation of N.Y.*, 665 F.3d at 443-44. This is important because the Cayuga and Oneida reservations have materially identical histories.

[15] *See also* Letter from Penny J. Coleman, NIGC Acting General Counsel, to Judith Kammins Albietz, Attorney for Buena Vista Rancheria of Me-Wuk Indians, at 11-12 (June 30, 2005) (JA134-35); Letter from Penny J. Coleman, NIGC Acting General Counsel, to Bonnie Akaka-Smith, Chairwoman of Pyramid Lake Paiute Tribe, and Brian Sandoval, Attorney General of Nevada, at 4 (Sept. 27, 2005) (JA140); Memorandum from Heather L. Corson, Staff Attorney, to NIGC Chairwoman at 11 (July 18, 2013) (JA155).

Second, even if the phrase "within such tribe's jurisdiction" requires an exercise of government power, the Nation still satisfies that requirement. Here, the Nation plainly has concurrent governmental authority over its reservation land, even though it concededly must comply with local zoning laws. For instance, the Nation provides housing for Nation citizens, including housing financed by a grant from the United States Department of Housing and Urban Development; employs a security force and Conservation Officer responsible for monitoring activities on Nation lands; has its own building code with requirements that are at least as stringent as the State's; and participates in federal government-to-government programs such as the Indian Roads Program. JA25-26, JA344.[16]

To be sure, there are many respects in which state and local governments *also* exercise governmental authority over the lands in question. But as the First Circuit has held, even a tribe's *concurrent* jurisdiction is enough to satisfy IGRA. In *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994), the Court held that despite a broad federal grant of jurisdiction to the state, the Narragansett Tribe "retain[ed] concurrent jurisdiction" over the lands at issue, and that "concurrent jurisdiction is sufficient to satisfy" IGRA's jurisdiction requirement. *Id.* at

[16] The United States, for its part, has expressly recognized that on its reservation, the Nation retains the right to "exercise tribal sovereign powers consistent with [local governments'] concurrent authority." Brief for the United States as Amicus Curiae at 4 n.1, *Cayuga Indian Nation of New York v. Seneca County*, No. 12-3723 (2d Cir. Sept. 30, 2013) (JA164).

701. Put differently, it was "sufficient to satisfy [IGRA's] 'having jurisdiction' prong" that the Narragansetts "retain that portion of jurisdiction they possess by virtue of their sovereign existence as a people." *Id.* at 702; *see, e.g.*, *id.* at 701 (explaining that Indian nations exercise jurisdiction via their "power . . . to make and enforce their own substantive law in internal matters, including matters such as membership rules, inheritance rules, and the regulation of domestic relations").

The Supreme Court's decision in *City of Sherrill* does not change any of this. Applying federal common law, the Court there held that "in light of the long history of state sovereign control" over parcels of land that the Oneida Indian Nation had reacquired within its historic reservation, laches and other equitable principles barred the Nation from asserting immunity from state property taxation. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 214, 220-21 (2005). That decision thus established that state and local governments could exercise a particular type of jurisdiction over the Oneida's reservation, and it is what requires the Cayuga Nation to comply with certain local zoning laws on its reservation lands (which share the same history as the Oneida reservation). *See Union Springs II*, 390 F. Supp. 2d at 206. But *City of Sherrill* does not change the dispositive fact here: that the Cayuga Nation, like the Oneida, retains *its own* concurrent jurisdiction over its reservation lands. That concurrent jurisdiction is what brings these lands within the scope of IGRA's preemptive guarantee. Notably, NIGC specifi-

cally reaffirmed—after *City of Sherrill*—that it did not plan to require the Oneida Nation to stop gaming at its Turning Stone Casino and would continue to actively regulate gaming there. Letter from Penny J. Coleman, Acting General Counsel, NIGC to Richard Platkin, Counsel to the Governor, State of New York (Oct. 27, 2005) at 1 (JA184). There is no reason for a different result here.

2. The Village's Threats Of Criminal Prosecution Are Impermissible Under 18 U.S.C. § 1166.

Even if IGRA did not authorize the Nation's gaming, it would still bar any state or local criminal prosecution for those activities. That is because, as this Court has explained, the "statutory mechanism providing for the enforcement of the IGRA establishes exclusive *federal* jurisdiction over criminal prosecutions for violations of state [gambling] laws." *United States v. Cook*, 922 F.2d 1026, 1034 (2d Cir. 1991) (emphasis added).

Under 18 U.S.C. § 1166, "[t]he United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country," unless a tribal-state compact provides otherwise. *Id.* § 1166(d). That jurisdictional exclusivity is sweeping. Section 1166 covers "*all* State laws pertaining to the licensing, regulation, or prohibition of gambling." *Id.* § 1166(a) (emphasis added). And "Indian country" is a term of art that includes all land within a federally recognized Indian reservation. *See* 18 U.S.C. § 1151(a); *see also DeCoteau v. District Cnty. Court for Tenth Judi-*

cial Dist., 420 U.S. 425, 427–28 (1975) ("[Whether] lands are 'Indian country' … depends upon whether the lands retained reservation status . . . ."); *see also City of Sherrill*, 544 U.S. at 223 (Stevens, J., dissenting) (observing that the Court was not "questioning the accuracy of [the] conclusion" that the property in question was "Indian country").

In effect, "Section 1166 makes a State's gambling laws applicable 'in Indian country' as federal law, and then gives the Federal Government 'exclusive jurisdiction over criminal prosecutions' for violating those laws." *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2033 n.5 (2014). The federal government may then prosecute violations of state gambling laws, except insofar as IGRA preempts those laws by authorizing Indian gaming. *See* 18 U.S.C. § 1166(c); *Gaming Corp.*, 88 F.3d at 543. Thus, even if IGRA did not preempt the Village's laws, the Village would have no right to bring a criminal action for their violation. *See, e.g., United States v. E.C. Invs., Inc.*, 77 F.3d 327, 330–31 (9th Cir. 1996) ("Since the section effectively grants the federal government exclusive jurisdiction over California's gambling laws regarding Class III gaming conducted on Indian lands without a Tribal-State compact, California lacks the jurisdiction to prosecute a violation of [state law] on the . . . Reservation.").

3. Sovereign Immunity Forbids Action Against The Nation.

Entirely apart from IGRA, Plaintiffs are also likely to succeed on their claims that the Village's threatened enforcement actions would violate the Nation's sovereign immunity. Tribes have long been recognized as possessing "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Bay Mills*, 134 S. Ct. at 2030 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978)). This means that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). Moreover, the Nation enjoys immunity from suit even for activity the State is entitled to regulate. As the Supreme Court has explained, "[t]o say substantive state laws apply to [certain] conduct . . . is not to say that a tribe no longer enjoys immunity from suit." *Kiowa*, 523 U.S. at 755. This Court has repeatedly enforced that distinction in concluding that, even though *City of Sherrill* allows New York to impose property taxes on Indian nations, sovereign immunity prohibits tax foreclosure actions. *See Oneida Indian Nation*, 605 F.3d at 149; *Cayuga Indian Nation*, 761 F.3d at 220. Likewise here, even if state or local anti-gambling laws could be applied to the Nation's activities, the Nation's sovereign immunity to suit still bars these laws' enforcement in court against the Nation. *Cf.* SA18 (observing that each

"Order to Remedy Violation" "has been addressed to the 'Cayuga Nation' of New York").

B. Plaintiffs Will Suffer Irreparable Harm, And No Countervailing Consideration Justifies Denying An Injunction.

It is equally clear that Plaintiffs satisfy the remaining requirements for a preliminary injunction: irreparable harm absent an injunction, a favorable balance of the equities, and service of the public interest. *Citigroup*, 598 F.3d at 34. The fact that the district court granted an injunction pending appeal, despite having dismissed Plaintiffs' action, underscores just how heavily these factors favor Plaintiffs. SA26. Indeed, the grave irreparable harm threatened here only highlights the troubling consequences of the district court's view that Plaintiffs entirely lacked standing to bring this action in the first place.

First, the Village's threatened actions would undermine the sovereignty of an Indian nation and endanger its economic self-sufficiency. Threats to an Indian nation's sovereignty always constitute irreparable harm. *See, e.g.*, *Wyandotte Nation v. Sebelius*, 443 F.3d 1247, 1255 (10th Cir. 2006) (finding irreparable injury from an affront to tribal sovereignty); *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1077 (9th Cir. 2001) (same); *see also* 25 U.S.C. § 2702(1) (affirming IGRA's purpose to safeguard "gaming by Indian tribes as a means of promoting tribal economic development, self-sufficiency, and strong tribal governments"). That is especially true here, where the Nation depends so heavily on revenue from

Lakeside Entertainment. Lakeside Entertainment is one of only two significant revenue-producing facilities operated by the Nation, and it accounts for the vast majority of the Nation's revenue. JA661. The revenues it generates are essential to the functioning of the Nation's government and to the Nation's provision of various services to its citizens. *Id.*; *see* JA346; SA21-22 (district court's finding that Nation citizens "depend heavily on the facility to provide funding for public services"). If the Village shuts down the facility, the Nation would lose these essential revenues. And because Nation citizens depend on the governmental activities that those revenues support, the irreparable harm would persist even if the Nation could ultimately recoup its lost income—an eventuality that, in any event, is far from certain. *Cf. Entergy Nuclear Vermont Yankee, LLC v. Shumlin*, 733 F.3d 393, 423 (2d Cir. 2013) (irreparable harm present where plaintiff might "be unable to recover monetary damages" due to immunity or other barriers).

Lakeside Entertainment also faces irreparable harm purely as a business. This Court has squarely held that where a defendant seeks to "shut down" an enterprise, as the Village does here, the plaintiff faces irreparable harm "because the right to continue a business is not measurable entirely in monetary terms." *Entergy Nuclear Vermont Yankee*, 733 F.3d at 423 (quotation marks omitted). Moreover, the Village's threatened actions would damage the goodwill that Lakeside Entertainment has worked hard to create, would cause reputational harm,

and would result in "[m]ajor disruption of [the Nation's] business." *Nemer Jeep-Eagle, Inc. v. Jeep-Eagle Sales Corp.*, 992 F.2d 430, 435 (2d Cir. 1993); JA286. Harms like these are indisputably irreparable. *See Ticor Title Ins. v. Cohen*, 173 F.3d 63, 68-69 (2d Cir. 1999); *Nemer Jeep-Eagle*, 992 F.2d at 435.

In the face of all of this, "the Village has not demonstrated it would suffer substantial injury if an injunction were entered" or that an injunction would disserve the public interest—as the district court found. SA23. Lakeside Entertainment has now operated continuously—and without causing harm to the Village—for more than two years, including two periods during which the Village *consented* to the facility remaining open. *See* SA2; JA5; JA663-65 (describing standstill agreement). A preliminary injunction here would merely preserve that settled status quo. In any event, in passing IGRA, Congress determined that promoting tribal economic development was of overriding importance and takes precedence over the interest in enforcing state or local anti-gambling laws. 25 U.S.C. § 2702. As Congress explained, "Federal courts should not balance competing Federal, State, and tribal interests to determine the extent to which various gaming activities are allowed." S. Rep. 100-446, at 6, *reprinted in* 1988 U.S.C.C.A.N. at 3076. Thus, assuming that Plaintiffs have shown a sufficient likelihood of success on the merits—which they have—there is no basis for denying a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgments below and, if it chooses to address the merits of the preliminary injunction motion, should direct the entry of a preliminary injunction in Plaintiffs' favor.

July 28, 2015

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(B), I hereby certify that this brief contains 13,636 words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule 32(a)(7)(B)(iii). This brief uses a proportionally spaced typeface, Times New Roman, and the size of the typeface is 14 points, in compliance with Rules 32(a)(5)(A) and (a)(6).

/s/ David W. DeBruin

July 28, 2015

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of July, 2015, a true and correct copy of the foregoing brief of Appellee was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) and (2).

/s/ David W. DeBruin

SPECIAL APPENDIX

Cayuga Nation v. Tanner
Special Appendix
Nos. 15-1667, 15-1937

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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CAYUGA NATION and JOHN DOES 1-20,

Plaintiffs,

-v- 5:14-CV-1317

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his Official Capacity; EDWARD TRUFANT, Village of Union Springs Mayor, in his Official Capacity; CHAD HAYDEN, Village of Union Springs Attorney, in his Official Capacity; BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK; and VILLAGE OF UNION SPRINGS, NEW YORK,

Defendants.

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DAVID N. HURD
United States District Judge

MEMORANDUM–DECISION and ORDER

I. INTRODUCTION

On October 28, 2014, plaintiffs Cayuga Nation and John Does 1–20 ("plaintiffs") filed this action against defendants Howard Tanner, Code Enforcement Officer for the Village of Union Springs, New York ("the Village"); Edward Trufant, Mayor of the Village; Chad Hayden, the Village Attorney; the Board of Trustees of the Village; and the Village itself (collectively "defendants"). Also on that date, plaintiffs filed a motion for preliminary injunction and requested a temporary restraining order.

Generally, plaintiffs claim the federal Indian Gaming Regulatory Act, 25 U.S.C. §§ 2701–2721 ("IGRA"), preempts the Village's efforts to enforce local anti-gaming laws. They seek to enjoin defendants from restricting, interfering with, punishing, or otherwise penalizing any actions taken by the Cayuga Nation in furtherance of Class II gaming activities at Lakeside Entertainment, a gaming facility in the Village.

On October 29, 2014, an order was issued directing defendants to appear and show cause why a preliminary injunction should not be entered granting plaintiffs' requested relief. That order also temporarily restrained defendants from penalizing the Cayuga Nation for continuing the gaming operations at Lakeside Entertainment. Thereafter, defendants consented "to the extension of the currently-entered Temporary Restraining Order pursuant to Fed. R. Civ. P. 65(b)(2) until such time as the Court rules on the presently pending preliminary injunction application." ECF No. 19. Defendants also filed a cross-motion to dismiss to the complaint.

Both motions are fully-briefed, and oral argument was heard on January 28, 2015, in

Utica, New York.[1] Decision was reserved, and the parties were directed to notify this Court when the United States Department of the Interior, Bureau of Indian Affairs ("BIA") issued a decision regarding the leadership dispute within the Cayuga Nation. The parties have submitted the BIA's February 2015 decision as well as additional briefing on this issue.

II. FACTUAL BACKGROUND

The following facts have been gleaned from the complaint. In November 2003 the Cayuga Nation—a federally recognized Indian tribe—adopted a Class II gaming ordinance pursuant to IGRA. The National Indian Gaming Commission ("NIGC") subsequently approved the ordinance. In 2004, the Cayuga Nation opened Lakeside Entertainment on land it claims to be within the limits of its reservation. The facility closed in October 2005.

Cayuga Nation members Clint Halftown, Tim Twoguns, and Gary Wheeler began orchestrating the reopening of the facility in 2010. They obtained an architect's report stating that the use of Lakeside Entertainment for Class II gaming complied with state and local zoning, land use, and building codes. They also received a legal opinion letter from "Dorsey & Whitney, LLP," reportedly confirming the legality of Lakeside Entertainment's operation. They further sent a letter to various state and local officials announcing their intent to reopen the facility, which formally reopened on July 3, 2013.

Code Enforcement Officer Tanner visited the facility on the day it reopened and expressed his opinion that the gaming activities were illegal and required a Certificate of Occupancy. The Village Board of Trustees met in executive session shortly thereafter and

[1] The hearing was delayed because the Cayuga Nation Unity Council ("the Unity Council") sought to intervene as a defendant in this action. The Unity Council's motion was denied on December 19, 2014. ECF No. 38.

decided to enforce a 1958 anti-gaming ordinance ("the 1958 Ordinance") against the Cayuga Nation.[2] On July 9, 2013, the Village served plaintiffs with an "Order to Remedy Violations" charging the Cayuga Nation with conducting bingo without a license in violation of the 1958 Ordinance as well as unspecified violations of the Village zoning code. Compl., Ex. C. The Cayuga Nation's attorney responded in late July, advising Village attorney Hayden that the gaming activities complied with IGRA.

Betty Jane Radford, manager of Lakeside Entertainment, submitted a completed application for a Certificate of Occupancy to Code Enforcement Officer Tanner on August 8, 2013. Tanner requested additional information such as construction documents and site plans. The Cayuga Nation retained an architect and provided the Village with additional architectural reports in December 2013. Plaintiffs also installed eighty-six (86) additional electronic bingo machines in the facility at that time and contemporaneously notified state and local officials of same.

On December 23, 2013, the Cayuga Nation received two more Orders to Remedy Violations, which were signed by Tanner and alleged violations of the 1958 Ordinance and portions of the Village zoning code, as well as a failure to comply with a state regulation requiring a Certificate of Occupancy. The Cayuga Nation informed the Village that it intended to file a lawsuit seeking injunctive relief. Thereafter, on December 30, 2013, the parties entered into a "Standstill Agreement" through which Lakeside Entertainment remained open without interference from Village authorities. In March 2014, Tanner

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[2] This ordinance states, in pertinent part: "No person, firm, association, corporation or organization, other than a bona fide religious, charitable or non-profit organization of veterans, volunteer firemen and similar non-profit organizations licensed under the provisions of this ordinance shall be permitted to conduct [games of chance, such as bingo]." Compl., Ex. B.

reportedly advised that he would issue a Certificate of Occupancy, but he subsequently reneged and sent a letter expressing his opinion that Lakeside Entertainment continued to violate the 1958 Ordinance. The Standstill Agreement expired on May 30, 2014. Nonetheless, plaintiffs have continued to operate the gaming facility. Likewise, defendants have refused to issue a Certificate of Occupancy.

On October 27, 2014, counsel for the Village advised the Cayuga Nation that it intended to bring an enforcement action pursuant to the 1958 Ordinance. Plaintiffs filed this action and the motion for preliminary injunction the following day. Halftown, Twoguns, and Wheeler authorized the filing of this action. Plaintiffs claim Lakeside Entertainment remains in full compliance with the requirements of IGRA and regulations of NIGC.

III. DISCUSSION

Plaintiffs claim the Village's efforts to enforce the 1958 Ordinance and local zoning laws are preempted by IGRA. They seek a preliminary injunction prohibiting defendants from restricting, interfering with, punishing, or otherwise penalizing any actions taken by the Cayuga Nation in furtherance of Class II gaming activities at Lakeside Entertainment. Defendants argue that the complaint must be dismissed because: (1) Plaintiffs lack standing to bring this action; and (2) the action is barred by the doctrine of *res judicata*.

Before reaching the merits of the parties' respective motions, the threshold matter of Article III standing must be addressed. See Clapper v. Amnesty Int'l, USA, __ U.S. __, 133 S. Ct. 1138, 1146 (2013) ("One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." (internal quotation marks omitted)).

Defendants argue that plaintiffs lack standing to bring this lawsuit on behalf of the

Cayuga Nation due to an ongoing internal dispute regarding the leadership of the tribe.[3] Defendants claim Halftown, Twoguns, and Wheeler were removed from leadership positions within the Cayuga Nation in 2005 and 2011 and, therefore, have no authority to represent the Nation or file lawsuits on its behalf. Plaintiffs report that the BIA and the NIGC continue to interact with and recognize Halftown, Twoguns, and Wheeler as representatives of the Cayuga Nation. The leadership issue has been the subject of recent proceedings before the BIA. A brief summary of the most recent developments in this saga is warranted.

On August 19, 2011, Franklin Keel, Director of the Eastern Region of the BIA, issued a decision acknowledging the removal of Halftown, Twoguns, and Wheeler from the Nation's Council and recognizing "new representatives of the Nation for government-to-government purposes." See Cayuga Indian Nation v. E. Reg'l Dir., 58 IBIA 171, 171 (2014). Halftown, Twoguns, and Wheeler appealed to the Interior Board of Indian Appeals ("IBIA").

On January 16, 2014, the IBIA vacated the Regional Director's decision as an impermissible infringement on the sovereign right of the Cayuga Nation to resolve its internal leadership dispute. Specifically, the IBIA vacated the decision "without expressing any view on the merits of the underlying dispute, the current leadership of the Nation, or the identity or scope of authority of any individual to represent or take action on behalf of the Nation." Id. at 172. Regional Director Keel subsequently requested briefing from the two leadership factions addressing their respective views on several matters raised by the IBIA's order. At oral argument in this federal case, the parties advised that the matters before the BIA were

[3] Plaintiffs note that this action is also brought on behalf of twenty unidentified "officers, employees, and/or representatives of the Nation who are at risk of criminal or civil penalties for conduct relating to the operation of Lakeside Entertainment." Compl. ¶ 6. Defendants do not make any legal argument regarding the standing of John Does 1–20.

fully briefed, and the parties were awaiting a recognition decision.

On February 20, 2015, the BIA issued a decision regarding the leadership dispute. The BIA noted that "[w]hen an intra-tribal dispute has not been resolved and the BIA must deal with a tribe for government-to-government purposes, the BIA may recognize the last undisputed tribal leadership on an interim basis." ECF No. 45-1, 6 (citing Poe v. Pac. Reg'l Dir., 43 IBIA 105, 112–13 (2006); Rosales v. Sacramento Area Dir., 32 IBIA 158, 167 (1998)). In accordance therewith, the BIA concluded, in pertinent part:

> The Region has determined that under these circumstances, it will on an interim basis recognize the Nation 2006 Council as the last undisputed leadership of the Nation, with Clint Halftown as the Nation's representative for purposes of administering existing ISDA [Indian Self-Determination Act] contracts. As explained below, this *interim* recognition decision is intended to provide the Nation with additional time to resolve this dispute without BIA interference.

ECF No. 45-1, 2.[4] The Nation 2006 Council is comprised of Halftown, Twoguns, Wheeler, William Jacobs, Chester Isaac, and Samuel George. ECF No. 45-1, 2.

Not surprisingly, the parties offer opposing interpretations and draw different conclusions from this decision. Plaintiffs claim the decision establishes the Nation 2006 Council—of which Halftown, Twoguns, and Wheeler are a part—as the recognized representatives of the Cayuga Nation and, thereby, provides them with standing to prosecute this action. Defendants argue that three of the six members of the Nation 2006 Council,

[4] As the BIA explained, the need for the Nation's designees to "sign contract modifications adding funds for this fiscal year and draw down the funds provided under the Community Services Contract and the Nation's other ISDA contract" necessitated the leadership decision. Id. at 5. This justification distinguishes the current BIA decision from the August 2011 decision, which the IBIA subsequently vacated. As stated by the IBIA, "there was no separate matter pending before BIA that independently required or warranted BIA action which, in turn, made it necessary for BIA to address the internal [leadership] dispute" in August 2011. Cayuga Indian Nation, 58 IBIA at 172.

specifically Jacobs, Isaac, and George,[5] do not support this action and oppose gaming on the Nation's land. Therefore, defendants conclude, there is a lack of consensus among the recognized leadership.[6]

According to the parties, Cayuga Nation law requires a consensus among its leaders to authorize certain actions, such as filing this lawsuit. As three members of the Nation 2006 Council support this lawsuit and three members oppose it, it is unclear whether the action has been properly authorized pursuant to Cayuga Nation law. The resolution of this issue would necessarily require this Court to delve into, interpret, and apply Nation law.[7]

For example, plaintiffs maintain that Nation 2006 Council members Jacobs, Isaac, and George refused to attend scheduled leadership meetings of which they received timely notification, making a six-member consensus impossible. They argue that Halftown, Twoguns, and Wheeler—the only members to attend the leadership meetings—reached a consensus on issues related to the operation of Lakeside Entertainment and the initiation of this lawsuit.

In response, George has submitted a declaration in which he testifies that: (1) The

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[5] In fact, Jacobs, Isaac, and George are currently members of the six-person Unity Council that sought to intervene as a defendant in this action.

[6] Defendants also seize on the interim nature and cautionary language of the BIA decision and conclude that it does not definitively determine the current leadership of the tribe. Such is unpersuasive. Federal courts "owe deference to the judgment of the Executive Branch as to who represents a tribe." Timbisha Shoshone Tribe v. Salazar, 678 F.3d 935, 938 (D.C. Cir. 2012); see also Shenandoah v. U.S. Dep't of Interior, 159 F.3d 708, 712 (2d Cir. 1998) ("[I]n the absence of an initial determination by the Department, the issue of Oneida leadership, which involves questions of tribal law, is not properly resolved by a federal court."). At this juncture, the BIA recognizes the Nation 2006 Council as the undisputed leader of the Cayuga Nation. Whether the Nation 2006 Council properly authorized this suit is an altogether separate matter.

[7] The Cayuga Nation does not have written law, making such a task exceptionally difficult. As Hon. Dennis F. Bender, Supreme Court, Seneca County, lamented only one year ago: "Reliance upon oral tradition and ruling by consensus, however that is defined by the Cayuga Nation, may have served the Nation well in pre-colonial or colonial times. It is clearly ill suited for the twenty-first century." Cayuga Nation v. Jacobs, 986 N.Y.S.2d 791, 796 (Sup. Ct. 2014) (internal quotation marks, citation, and alterations omitted).

meeting notices sent by Halftown, Twoguns, and Wheeler were invalid under Nation law; (2) the meetings were intentionally scheduled at times when Jacobs, Isaac, and George could not attend, such as during periods of Haudenosaunee ceremonies when such business is not permitted to be conducted; (3) meetings of only three leaders are not authorized and cannot produce a binding consensus; and (4) Nation law requires a consensus of all six leaders.

Federal courts do not have jurisdiction to resolve such intra-tribal disputes that involve Nation law. See Runs After v. United States, 766 F.2d 347, 352 (8th Cir. 1985) ("We believe the district court correctly held that resolution of such disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court."); Winnemucca Indian Colony v. United States, 837 F. Supp. 2d 1184, 1190 (D. Nev. 2011) ("[P]urely intra-tribal cases where litigants dispute the results of a tribal election between themselves do not give rise to federal jurisdiction.").

In an effort to avoid the above intra-tribal dispute, and the dismissal of this lawsuit for lack of subject matter jurisdiction, plaintiffs point to the BIA's recognition of "Clint Halftown as the Nation's representative for purposes of administering existing ISDA contracts." ECF No. 45-1, 2. Plaintiffs argue this language provides an independent basis for standing and permits the Court to avoid delving into questions of Cayuga Nation law. This argument is without merit. There is nothing in the language of the BIA decision that provides Halftown with the unilateral authority to initiate lawsuits or enter into new contracts on the Nation's behalf. Instead, the BIA supplied a practical temporary fix to the above noted need for a representative to administer existing contracts. Indeed, the BIA specifically noted that "[t]he scope of the powers of the federal representative is a question of Nation law not properly resolved by the Region." Id. n.1. Nor is it properly resolved by a district court.

IV. CONCLUSION

As a threshold issue of subject matter jurisdiction, plaintiffs must establish standing under Article III of the Constitution. Clapper, 133 S. Ct. at 1146; Lujan v. Defenders of Wildlife, 504 U.S. 555, 561 (1992) (the parties seeking to invoke federal jurisdiction bear the burden of demonstrating that they have standing). They fail to meet this burden.[8] Whether the Nation 2006 Council—which is the recognized leadership entity of the Cayuga Nation—properly authorized this lawsuit is an issue that necessarily requires the interpretation and application of internal Nation law. Therefore, this Court lacks subject matter jurisdiction.

Therefore, it is

ORDERED that

1. Defendants' cross-motion to dismiss is GRANTED;

2. Plaintiffs' motion for a preliminary injunction is DENIED as moot;

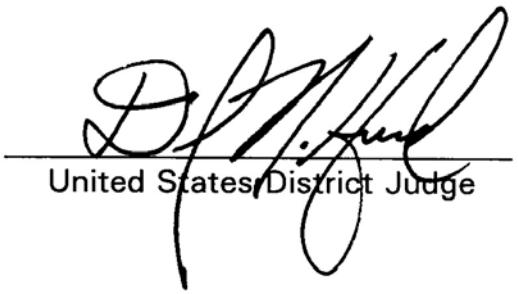
3. The complaint is DISMISSED in its entirety; and

4. The Temporary Restraining Order is VACATED.

IT IS SO ORDERED.

The Clerk of the Court is directed to enter judgment accordingly and close the case.

[8] Plaintiffs also fail to establish the standing of John Does 1–20 to bring this lawsuit. The complaint merely alleges that these "unknown officers, employees, and/or representatives of the Nation . . . are at risk of criminal or civil penalties for conduct relating to the operation of the Lakeside Entertainment gaming facility." Compl. ¶ 6. Such vague allegations asserted on behalf of unnamed persons do not constitute a "concrete, particularized, and actual or imminent" injury for purposes of Article III standing. See Clapper, 133 S. Ct. at 1147 (noting that the "threatened injury must be *certainly impending* to constitute injury in fact and that allegations of *possible* future injury are not sufficient" (internal quotation marks and alteration omitted)).



United States District Judge

Dated: May 19, 2015
Utica, New York.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

JUDGMENT IN A CIVIL CASE

Cayuga Nation and
John Does 1-20
Plaintiffs,

v.

CASE NUMBER: 5:14-CV-1317 (DNH/ATB)

Howard Tanner,
Edward Trufant,
Chad Hayden,
Board of Trustees of the Village of Union Springs, New York and
Village of Union Springs, New York
Defendants.

Decision by Court. This action came to a hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

That Defendants' Cross-Motion to Dismiss is GRANTED. Plaintiffs' Motion for Preliminary Injunction is DENIED as moot. The Complaint is DISMISSED in its entirety and the Temporary Restraining Order is VACATED.

All of the above pursuant to the order of the Honorable Judge David N. Hurd, dated the 19th day of May, 2015.

DATED: May 19, 2015

Lawrence K. Baerman
Clerk of Court

s/ Michelle Coppola
Deputy Clerk

Federal Rules of Appellate Procedure
Rule 4. Appeal as of Right

(a) Appeal in a Civil Case.

1. (1) *Time for Filing a Notice of Appeal.*

(A) In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after entry of the judgment or order appealed from.

(B) The notice of appeal may be filed by any party within 60 days after entry of the judgment or order appealed from if one of the parties is:

(i) the United States;
(ii) a United States agency;
(iii) a United States officer or employee sued in an official capacity; or
(iv) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf — including all instances in which the United States represents that person when the judgment or order is entered or files the appeal for that person.

(C) An appeal from an order granting or denying an application for a writ of error *coram nobis* is an appeal in a civil case for purposes of Rule 4(a).

(2) *Filing Before Entry of Judgment.* A notice of appeal filed after the court announces a decision or order—but before the entry of the judgment or order—is treated as filed on the date of and after the entry.

(3) *Multiple Appeals.* If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this Rule 4(a), whichever period ends later.

(4) *Effect of a Motion on a Notice of Appeal.*

(A) If a party timely files in the district court any of the following motions under the Federal Rules of Civil Procedure, the time to file an appeal runs for all parties from the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54 if the district court extends the time to appeal under Rule 58;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is filed no later than 28 days after the judgment is entered.

(B)(i) If a party files a notice of appeal after the court announces or enters a judgment—but before it disposes of any motion listed in Rule 4(a)(4)(A)—the notice becomes effective to appeal a judgment or order, in whole or in part, when the order disposing of the last such remaining motion is entered.

(ii) A party intending to challenge an order disposing of any motion listed in Rule 4(a)(4)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal—in compliance with Rule 3(c)—within the time prescribed by this Rule measured from the entry of the order disposing of the last such remaining motion.

(5) *Motion for Extension of Time.*

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by this Rule 4(a) expires; and

(ii) regardless of whether its motion is filed before or during the 30 days after the time prescribed by this Rule 4(a) expires, that party shows excusable neglect or good cause.

(B) A motion filed before the expiration of the time prescribed in Rule 4(a)(1) or (3) may be ex parte unless the court requires otherwise. If the motion is filed after the expiration of the prescribed time, notice must be given to the other parties in accordance with local rules.

(C) No extension under this Rule 4(a)(5) may exceed 30 days after the prescribed time or 14 days after the date when the order granting the motion is entered, whichever is later.

(6) *Reopening the Time to File an Appeal.* The district court may reopen the time to file an appeal for a period of 14 days after the date when its order to reopen is entered, but only if all the following conditions are satisfied:

(A) the court finds that the moving party did not receive notice under Federal Rule of Civil Procedure 77 (d) of the entry of the judgment or order sought to be appealed within 21 days after entry;

(B) the motion is filed within 180 days after the judgment or order is entered or within 14 days after the moving party receives notice under Federal Rule of Civil Procedure 77 (d) of the entry, whichever is earlier; and

(C) the court finds that no party would be prejudiced.

(7) *Entry Defined.*

(A) A judgment or order is entered for purposes of this Rule 4(a):

(i) if Federal Rule of Civil Procedure 58 (a) does not require a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79 (a); or

(ii) if Federal Rule of Civil Procedure 58 (a) requires a separate document, when the judgment or order is entered in the civil docket under Federal Rule of Civil Procedure 79(a) and when the earlier of these events occurs:

• the judgment or order is set forth on a separate document, or

• 150 days have run from entry of the judgment or order in the civil docket under Federal Rule of Civil Procedure 79 (a).

(B) A failure to set forth a judgment or order on a separate document when required by Federal Rule of Civil Procedure 58 (a) does not affect the validity of an appeal from that judgment or order.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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CAYUGA NATION and JOHN DOES 1-20,

Plaintiffs,

-v- 5:14-CV-1317

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his Official Capacity; EDWARD TRUFANT, Village of Union Springs Mayor, in his Official Capacity; CHAD HAYDEN, Village of Union Springs Attorney, in his Official Capacity; BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK; and VILLAGE OF UNION SPRINGS, NEW YORK,

Defendants.

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DAVID N. HURD
United States District Judge

MEMORANDUM–DECISION and ORDER

I. INTRODUCTION

This latest pair of motions are another chapter in the long-running dispute between plaintiff Cayuga Nation (the "Nation") and defendant Village of Union Springs (the "Village" or "Union Springs") over Lakeside Entertainment, a Nation-controlled gaming facility located in Union Springs.

The Nation, along with John Does 1-20 (the "Does"), recently filed suit against the Village and a laundry list of its officials claiming the federal Indian Gaming Regulatory Act ("IGRA") pre-empted the Village from enforcing its local anti-gambling laws against the Nation and its establishment. The Nation moved for a preliminary injunction and the Village cross-moved to dismiss the complaint. A temporary restraining order was entered in the interim.

On May 19, 2015, a Memorandum-Decision and Order issued granting the Village's cross-motion to dismiss—the Nation, embroiled in an internal dispute over its leadership, was unable to establish standing to bring the pre-emption suit; the unnamed Does, alleging only vague possibilities of possible future harm to their persons, were unable to demonstrate imminent injury. Cayuga Nation v. Tanner, 2015 WL 2381301 (N.D.N.Y. May 19, 2015) (the "May 19 Decision"). The temporary restraining order was vacated and this case was closed.

Two emergency motions were filed the very next day. First, the Does moved for reconsideration of the May 19 Decision to the extent it dismissed them from the suit. Second, the Nation, which has appealed, moved for a preliminary injunction pending the

outcome of its appeal. Orders to show cause issued and a second temporary restraining order was entered. The motions were fully briefed and oral argument was heard on June 4, 2015 in Utica, New York. Decision was reserved.

II. DISCUSSION[1]

A. Motion for Reconsideration

The Does seek reconsideration of the May 19 Decision's sua sponte dismissal for lack of standing and entry of judgment dismissing the complaint. They request leave to file an amended complaint identifying Does 1-3 as Clint Halftown ("Halftown"), Timothy Twoguns ("Twoguns") and Gary Wheeler ("Wheeler") and ask for restoration of the temporary restraining order pending a resolution of the merits of their original request for a preliminary injunction.

"The filing of an amended complaint is not permissible once a judgment is entered unless the judgment is set aside or vacated pursuant to Rule 59 of the Federal Rules of Civil Procedure." In re Assicurazioni Generali, S.P.A., 592 F.3d 113, 120 (2d Cir. 2010) (citing Nat'l Petrochemical Co. v. M/T Stolt Sheaf, 930 F.2d 240, 244 (2d Cir. 1991). "Generally, district courts will only amend or alter a judgment pursuant to Rule 59 to correct a clear error of law or prevent manifest injustice." Id. (citation and internal quotation marks omitted).

The Does, citing the May 19 Decision, note that the Village did not initially contest their standing to sue and therefore they had no reason to identify themselves or otherwise

[1] A thorough discussion of the relevant factual background is available in the May 19 Decision and will not be repeated here.

elaborate on their standing to bring suit at that time.[2] Rather, they claim to have initially proceeded under a pseudonym to avoid being subjected to criminal or civil penalties from the Village. They again allege standing based on the Village's threatened enforcement activity and argue that they, as officers, employees, and/or representatives of the Nation involved in Lakeside Entertainment's gaming activities, would be directly subjected to those penalties.

"Whether a claimant has standing is the threshold question in every federal case, determining the power of the court to entertain the suit." United States v. Cambio Exacto, S.A., 166 F.3d 522, 526 (2d Cir. 1999) (citations and internal quotation marks omitted). This "irreducible constitutional minimum" requires an injury that is "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." Clapper v. Amnesty Int'l, USA, –U.S.–, 133 S. Ct. 1138, 1146 (2013) (citations omitted). "Although imminence is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes—that the injury is certainly impending." Id. In other words, "[a]llegations of *possible* future injury are not sufficient." Id. (citations and internal quotation marks omitted).

The Does argue they "had every reason to believe that they personally were, and remain, at risk of civil or even criminal liability in connection with their role in facilitating the Nation's gaming activities." Pl.'s Mem., ECF No. 52-1, 5.[3] The Does support this claim of imminent injury by pointing out that attached to the Complaint are multiple instances of an

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[2] The issue of standing implicates a district court's subject matter jurisdiction and can therefore be raised sua sponte. See, e.g., Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C., 433 F.3d 181, 198 (2d Cir. 2005).

[3] Pagination corresponds with that assigned by CM/ECF.

"Order to Remedy Violations" issued by Union Springs as well as Village Code Enforcement Officer Tanner's March 24, 2014 letter addressed personally to Mrs. B.J. Radford. See Compl., Exs. C, F, & G, ECF No. 1, 27-29, 40-45.

As an initial matter, the Does seem to have glossed over at least one detail of these claims—Mrs. Radford, presumably one of the imminently threatened but as-yet-unidentified Does, no longer appears to be involved in the gaming facility's operation. Pl.'s Mem. at 5 (noting letter "addressed personally to B.J. Radford, then a Nation employee, was a strong indication that the Village would pursue legal action against the officers and employees of the Nation, and not only against the Nation itself" (emphasis added)). More relevant to this analysis, however, is the fact that this particular letter does not actually threaten any civil or criminal action; rather, Officer Tanner's letter to Mrs. Radford simply indicates he would be unable to grant a certificate of occupancy to Lakeside Entertainment until the ongoing zoning issues were resolved.

Of course, "a credible threat of prosecution" can act to excuse the sort of pre-enforcement bar to standing that often exists, since a plaintiff "should not be required to await and undergo a criminal prosecution as the sole means of seeking relief." Holder v. Humanitarian Law Project, 561 U.S. 1, 15 (quoting Babbitt v. Farm Workers, 442 U.S. 289, 298 (1979)). However, a second review of the "Order to Remedy Violations" notices supplied by the Does confirms that each, which identifies various civil zoning issues, has been addressed to the "Cayuga Nation" of New York, not any of the Does themselves.

Further, the allegations in the complaint that might explain how the Does have been personally threatened with criminal proceedings are nothing more than general speculation. See, e.g., Compl. ¶ 53 (noting the Village "intends to proceed with enforcement action"

against the gaming facility). And the Proposed Amended Complaint would do little to rehabilitate this deficiency. See Powers Decl. Ex. B, ECF No. 52-4, ¶¶ 57-58 (additionally alleging the Village served Orders to Show Cause "directed at the Lakeside Entertainment facility" one day after issuance of the May 19 Decision).

In fact, the strongest argument to support a claim that the Does themselves are under any credible threat of criminal enforcement is the Village's original anti-gaming resolution, enacted in 1958, that makes a "willful violation of any provision" of the ordinance "punishable as a misdemeanor." But even then, this Village resolution would only begin to establish a credible threat of enforcement when viewed in conjunction with the complaint's allegation of a July 2013 resolution by the Village to enforce this provision against the Nation. Compl. ¶ 38 & Ex. B, ECF No. 1, 24.

"A government official's statement that a statute prohibits a type of conduct in the abstract—even where the official also states [his] intent to enforce the statutory prohibition against the public generally—is usually insufficient, without more, to establish that prosecution is imminent against a particular plaintiff." Jones v. Schneiderman, –F. Supp. 3d–, 2015 WL 1454529, at *4 (S.D.N.Y. Mar. 31, 2015) (comparing cases); see also Rincon Band of Mission Indians v. San Diego Cnty., 495 F.2d 1, 4 (9th Cir. 1974), cert. denied, 419 U.S. 1008 (1974) (holding that government officials' statements to plaintiffs that gambling was impermissible on tribal land "under [a] county ordinance," and that "all the laws of the county would be enforce," failed to establish a sufficient "threat of prosecution" for standing purposes).

Therefore, at the very least, Cayuga Nation's conclusion—that vague assertions of possible future enforcement action directed against the Does in particular, as opposed to the

Nation's Lakeside Entertainment facility generally, were an insufficient basis on which to confer standing—was not a clear error of law.[4] See Hedges v. Obama, 724 F.3d 170, 195 ("The Supreme Court's jurisprudence regarding how imminent a threat must be in order to support standing, however, has been less than clear."). To be sure, the Village has done a fair amount of saber-rattling in its submissions during this case, but representations made in legal memoranda cannot confer standing. Accordingly, the Does' motion for reconsideration will be denied.[5]

B. Injunction Pending Appeal

The Nation also seeks an injunction pending the outcome of its appeal. Federal Rule of Civil Procedure 62(c) provides that a court "may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights" during an appeal from a "final judgment that grants, dissolves, or denies an injunction." FED. R. CIV. P. 62(c).

A court considering entering such an injunction must consider whether: (1) the movant will suffer irreparably injury absent the stay; (2) a party will suffer substantial injury if a stay is issued; (3) the movant has demonstrated a substantial possibility, although less than a likelihood, of success on appeal; and (4) public interests may be affected. LaRouche v. Kezer, 20 F.3d 68, 72 (2d Cir. 1994).

"As the standard makes clear, a grant of injunctive relief pending appeal does not

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[4] The Village also argues Halftown's purported status as federal representative is not an independent basis on which to find standing. The Does expressly disavow this claim in their reply memorandum. Does' Reply Mem, ECF No. 61, 7 ("The individual plaintiff have never argued anything like that").

[5] This denial would not preclude plaintiffs from seeking to amend the complaint in the event Cayuga Nation is reinstated following the appeal.

depend solely or even primarily on a consideration of the merits." LaRouche, 20 F.3d at 72. Indeed, "the degree to which [any one] factor must be present varies with the strength of the other factors, meaning that 'more of one [factor] excuses less of the other.'" In re World Trade Ctr. Disaster Site Litig., 503 F.3d 167, 170 (2d Cir. 2007) (quoting Thapa v. Gonazales, 460 F.3d 323, 334 (2d Cir. 2006)). Accordingly, "the factors are viewed on a sliding scale, and [t]he necessary level or degree of possibility of success will vary according to the court's assessment of the other stay factors." Seneca Nation v. Paterson, No. 10-CV-687A, 2010 WL 4027795, at *1 (W.D.N.Y. Oct. 14, 2010) (citation and internal quotation marks omitted).

1. Irreparable Harm

The Nation argues permitting the Village to enforce its anti-gaming ordinance would result in irreparable harm to the Nation, whose citizens depend on the revenue stream generated by the gaming facility to provide essential community services. See, e.g., Halftown Decl., ECF No. 5-8, ¶¶ 3, 12. The Village responds that any harm the Nation might suffer on that basis is self-inflicted, since such harm can be traced back to the Nation's "ill-advised decision to reopen the bingo hall eight years after this Court unequivocally held that the Nation could not assert immunity from the Village's laws and ordinances." Def.'s Mem., ECF No. 60, 16.

The Nation has the better part of this argument. An irreparable harm is a harm for which "a monetary award cannot be adequate." Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979). Ill-advised or not, the Nation credibly claims that not only would the Village's enforcement of its anti-gaming ordinance be an affront to its sovereignty, its citizens also depend heavily on the facility to provide funding for public

services. Indeed, the irreparable harm requirement is generally satisfied where "enforcement of a statute or regulation threatens to infringe upon a tribe's right of sovereignty." Seneca Nation, 2010 WL 4027795, at *2 (collecting cases). And much like the tax law amendments at issue in Seneca Nation, "[t]he potential loss of an entire economy that currently supports many of each Nation's members and services is a harm that cannot be measured by monetary damages alone." Id. Accordingly, the threat of irreparable harm favors granting the Nation's motion.

2. Substantial Injury to other Parties

The Nation next argues the Village will not suffer any substantial injury if a stay were issued primarily because it has largely consented to maintaining the status quo—allowing the gaming facility to remain open—during the run up to, and course of, this litigation. The Village responds that the reopening of Lakeside Entertainment has given rise to violence necessitating police intervention, road closures, and hospitalizations. The Nation replies that the Village's own evidence indicates there has been no "unrest" on Cayuga lands since at least November 2014. George Decl., ECF No. 61-2, ¶¶ 12-13.

This factor also weighs in the Nation's favor. Although counsel for the Village lamented that "no good deed goes unpunished," the Nation and the Village appear to have had a relatively long-running "Standstill Agreement" before the Nation resorted to federal court to attempt to resolve the gaming issue. See Seneca Nation, 2010 WL 4027795, at *3 (concluding state defendant was unable to show substantial injury where it "voluntarily chose to forebear" enforcing the tax at issue "for many years" and concluding the "minimal, additional delay pending appeal" was insignificant when weighed against the potentially irreparable damage to the Seneca Nation's economy). The same balance exists in this case,

especially given the apparent lack of any ongoing hostilities. Accordingly, the Village has not demonstrated it would suffer substantial injury if an injunction were entered.

3. Likelihood of Success

The Nation asserts that the May 19 Decision, which simply "misunderstood the significance of certain language in the Bureau of Indian Affairs' ("BIA") February 20, 2015 decision," provides a troubling roadmap to success for any disgruntled tribal faction seeking to disable a tribe's access to federal court. Pl.'s Mem. at 12.

There is little doubt that courts "owe deference to the judgment of the Executive Branch as to who represents a tribe." Timbisha Shoshone Tribe v. Salazar, 678 F.3d 935, 938 (D.C. Cir. 2012) (citation and explanatory parenthetical omitted). To that end, the Nation argues Cayuga Nation "asked the wrong question" when focusing on the BIA's statements about Halftown's authority being limited to administering certain pre-existing contracts, since the "BIA will not issue a recognition decision *except* when tied to [ ] a discrete request," such as resolving the issue of authority under a particular contract. Pl.'s Mem. at 12.

It is true that the BIA takes a decidedly circumspect approach to issues of tribal governance. This approach makes good sense, especially given that the Nation, a sovereign entity, retains the sole authority to actually resolve its internal leadership disputes. See California Valley Miwok Tribe v. United States, 515 F.3d 1262, 1263 (D.C. Cir. 2008) ("Since the days of John Marshall, it has been a bedrock principle of federal indian law that every tribe is capable of managing its own affairs and governing itself." (citation and internal quotation marks omitted)).

Indeed, "principles of tribal sovereignty and self-determination [ ] serve to constrain BIA's intrusion into internal tribal disputes, unless it is truly necessary as an incident to

satisfying some separate Federal obligation." Cayuga Indian Nation v. E. Reg'l Dir., 58 IBIA 171, 178 (Jan. 16, 2014). "[D]isfunctionality [*sic*] or even paralysis within a tribal government, standing alone, does not . . . trigger some free-standing obligation for BIA to end the stalemate." Id. at 179. Simply put, "[i]f there is no separate need for Federal action during the Nation's tribal government dispute, BIA is not required to recognize anyone as the Nation's representation or any composition of the Council, nor would it be appropriate for BIA to do so." Id. at 181 n. 7.

The BIA's most recent correspondence indicates it has chosen to recognize the 2006 Council, the last undisputed tribal leadership, on an "interim" basis as part of its decision regarding how funding will be provided under certain community services contracts. See Poitra Letter, ECF No. 45-1, 2. But this letter also notes, consistent with the BIA's general principles of deference, that the Nation's ongoing leadership dispute is not an excuse for the BIA to "throw up its hands and conduct all government-to-government relations with the Nation 2006 Council indefinitely." Id. at 7. Indeed, the BIA expressly stated that it planned to "request a consensus resolution of the Nation 2006 Council before entering into subsequent contracts" with the Nation. Id.

This circumspect recognition language is the same stumbling block noted in Cayuga Nation. 2015 WL 2381301 at *4 n.6 ("At this juncture, the BIA recognizes the Nation 2006 Council as the undisputed leader of the Cayuga Nation. Whether the Nation 2006 Council properly authorized this suit is an altogether separate matter."). Much as in Salazar, "[t]he fact is that we have a letter from the Executive Branch recognizing [a particular tribal faction], and we must not turn a blind eye to facts in assessing jurisdiction." 678 F.3d at 939.

But although this particular Executive Branch letter identifies the Nation 2006 Council

as the appropriate leadership, it remains entirely unclear whether that body—with its requirement of unanimous consent as a prerequisite to Council action—authorized filing this lawsuit in the first place. Cayuga Nation, 2015 WL 2381301 at *4 ("As three members of the Nation 2006 Council support this lawsuit and three members oppose it, it is unclear whether the action has been properly authorized . . . .").

Likewise, despite the Nation's insistence to the contrary, the BIA's most recent letter also failed to articulate whether the scope of Halftown's status as federal representative covered unilaterally authorizing lawsuits, especially where three members of the 2006 Council actively oppose the suit and further dispute whether Halftown's authority to act on the Nation's behalf even includes filing such an action. Accord George v. E. Reg'l Dir., 49 IBIA 164, 193 (May 4, 2009) (noting Halftown's role as "tribal representative to the Federal government . . . . is defined in the 2003 Designation Letter," but expressly disclaiming any decision on "the precise contours of the authority defined in that letter" or on "Halftown's authority beyond the scope of that letter"). Given these ongoing disputes between the 2006 Council members, the May 19 Decision concluded this action could not go forward.

Nevertheless, "[i]t remains an open question as to whether the Second Circuit will agree with [Cayuga Nation's] determination" and consequently "there is some possibility of success on appeal." Seneca Nation, 2010 WL 4027795, at * 3; see also N. Mariana Islands v. Millard, 287 F.R.D. 204, 215 (S.D.N.Y. 2012) (noting argument had "sufficient force amidst admittedly murky concepts to eventually have a fair chance of success on the merits" and granting an injunction pending appeal). According, this factor weighs slightly in favor of granting the Nation's request.

4. Public Interest

Finally, the Nation argues that granting the injunction and preserving the status quo best furthers the public interest. The Village, for its part, argues the public interest is better served by authorizing it to enforce its local ordinances and zoning restrictions. Although the public certainly has an interest in the routine enforcement of valid laws, neither party's argument is particularly convincing. Given the apparent lack of any ongoing disruptions, the public interest will be best served by taking a cautious approach in this case. See Seneca Nation, 2010 WL 4027795, at *3 ("[T]he Court finds that granting a stay pending appeal is in the public interest because it will simply preserve the status quo . . . ."). Accordingly, this factor weighs slightly in favor of granting the Nation's request.

5. Weighing the Factors

"To obtain a stay pending appeal, the movant need not always show a probability of success on the merits; instead, the movant need only present a substantial case on the merits when a serious legal question is involved and show that the balance of the equities weighs heavily in favor of granting the stay." Seneca Nation, 2010 WL 4027795, at *2 (citation and internal quotation marks omitted). The Nation has done so here. Accordingly, the Nation's motion for an injunction pending appeal will be granted.[6]

C. Final matters

"The court has discretion whether or not to require a successful applicant to post a

[6] The Nation has represented it would not oppose a request by the Village to expedite the appeal. ECF No. 62. The Village responds by citing a recent empirical study of Second Circuit's Expedited Appeals Calendar and suggesting the term "expedited appeal" is a bit of a misnomer. ECF No. 63. However, the study itself notes that parties were often able to "return to the district court in a much shorter interval than would have elapsed in the absence of the [expedited calendar." Id. at 9. In any event, even mindful of the sometimes tortuous appeals process, the balance of factors here favor maintaining the current status quo.

bond to secure the appellee's interests pending appeal." Exxon Corp. v. Esso Worker's Union, Inc., 963 F. Supp. 58, 60 (D. Mass. 1997) (citing FED. R. CIV. P. 62(c)). Although "requiring the moving party to post a bond before granting a stay pending appeal may be the 'usual rule,'" it would be inappropriate here. Safeco Ins. Co. of Am. v. M.E.S., Inc., 2010 WL 5437208, at *6 (E.D.N.Y. Dec. 17, 2010) (citation omitted).

In particular, the Village does not request the posting of a bond but rather seeks a condition of the injunction pending appeal that would result in disgorgement of the Nation's profits if the appeal is ultimately resolved in favor of the Village. Frommert v. Conkright, 639 F. Supp. 2d 305, 313-14 (W.D.N.Y. 2009) (declining to require bond where "plaintiffs do not raise any arguments about the appropriate size of the bond; they argue only that the motion for a stay should be denied outright"). However, the only issue to be resolved on appeal is that of the Nation's standing to bring its IGRA pre-emption claim, not a final adjudication of the merits of that argument. Notwithstanding the broad authority of a trial court to impose terms that work to "secure the opposing party's rights," the Village has not articulated a sufficient basis for such a drastic remedy and this request is declined.

Finally, the Village's request for sanctions against the Nation for this latest round of motion practice is also rejected. At the very least, the Nation cannot be faulted for thoroughly briefing the nuanced interplay between the BIA's circumspect treatment of the ongoing tribal leadership dispute and the constitutional requirements of standing.

III. CONCLUSION

The Does' motion for reconsideration is denied. However, the Nation's motion for an injunction pending the outcome of its appeal of the May 19 Decision is granted.

Therefore, it is

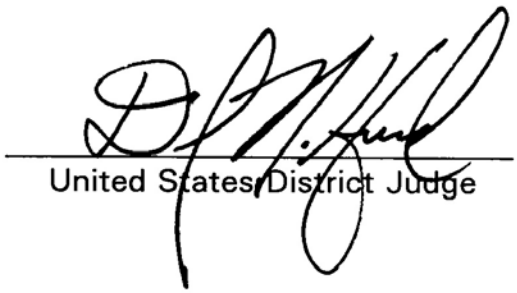
ORDERED that

1. The Does' motion for reconsideration is DENIED;

2. The Nation's motion for an injunction pending appeal is GRANTED;

3. Pending the disposition of plaintiff Cayuga Nation's appeal, defendant Village, its agents, servants, and employees and any person acting in concert with them are enjoined from taking any steps to restrict, interfere with, punish, or otherwise penalize any actions taken by the Cayuga Nation, its officers, its employees, or its other representatives in furtherance of Class II gaming activities at Lakeside Entertainment, including but not limited to any effort to enforce the 1958 "Games of Chance" Ordinance or the Union Springs Zoning Ordinance or to penalize noncompliance with the Orders to Remedy that have been issued.

IT IS SO ORDERED.



Dated: June 11, 2015.
Utica, New York.

18 U.S.C. § 1151

§ 1151. Indian country defined

Except as otherwise provided in sections 1154 and 1156 of this title, the term "Indian country", as used in this chapter, means (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1166

§ 1166. Gambling in Indian country

(a) Subject to subsection (c), for purposes of Federal law, all State laws pertaining to the licensing, regulation, or prohibition of gambling, including but not limited to criminal sanctions applicable thereto, shall apply in Indian country in the same manner and to the same extent as such laws apply elsewhere in the State.

(b) Whoever in Indian country is guilty of any act or omission involving gambling, whether or not conducted or sanctioned by an Indian tribe, which, although not made punishable by any enactment of Congress, would be punishable if committed or omitted within the jurisdiction of the State in which the act or omission occurred, under the laws governing the licensing, regulation, or prohibition of gambling in force at the time of such act or omission, shall be guilty of a like offense and subject to a like punishment.

(c) For the purpose of this section, the term "gambling" does not include--

(1) class I gaming or class II gaming regulated by the Indian Gaming Regulatory Act, or

(2) class III gaming conducted under a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act that is in effect.

(d) The United States shall have exclusive jurisdiction over criminal prosecutions of violations of State gambling laws that are made applicable under this section to Indian country, unless an Indian tribe pursuant to a Tribal-State compact approved by the Secretary of the Interior under section 11(d)(8) of the Indian Gaming Regulatory Act, or under any other provision of Federal law, has consented to the transfer to the State of criminal jurisdiction with respect to gambling on the lands of the Indian tribe.

25 U.S.C. § 2703

§ 2703. Definitions

For purposes of this chapter--

(1) The term "Attorney General" means the Attorney General of the United States.

(2) The term "Chairman" means the Chairman of the National Indian Gaming Commission.

(3) The term "Commission" means the National Indian Gaming Commission established pursuant to section 2704 of this title.

(4) The term "Indian lands" means--

> (A) all lands within the limits of any Indian reservation; and
>
> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

(5) The term "Indian tribe" means any Indian tribe, band, nation, or other organized group or community of Indians which--

> (A) is recognized as eligible by the Secretary for the special programs and services provided by the United States to Indians because of their status as Indians, and
>
> (B) is recognized as possessing powers of self-government.

(6) The term "class I gaming" means social games solely for prizes of minimal value or traditional forms of Indian gaming engaged in by individuals as a part of, or in connection with, tribal ceremonies or celebrations.

(7)(A) The term "class II gaming" means--

> (i) the game of chance commonly known as bingo (whether or not electronic, computer, or other technologic aids are used in connection therewith)--
>
> (I) which is played for prizes, including monetary prizes, with cards bearing numbers or other designations,
>
> (II) in which the holder of the card covers such numbers or designations when objects, similarly numbered or designated, are drawn or electronically determined, and

(III) in which the game is won by the first person covering a previously designated arrangement of numbers or designations on such cards,

including (if played in the same location) pull-tabs, lotto, punch boards, tip jars, instant bingo, and other games similar to bingo, and

(ii) card games that--

(I) are explicitly authorized by the laws of the State, or

(II) are not explicitly prohibited by the laws of the State and are played at any location in the State,

but only if such card games are played in conformity with those laws and regulations (if any) of the State regarding hours or periods of operation of such card games or limitations on wagers or pot sizes in such card games.

(B) The term "class II gaming" does not include--

(i) any banking card games, including baccarat, chemin de fer, or blackjack (21), or

(ii) electronic or electromechanical facsimiles of any game of chance or slot machines of any kind.

(C) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes those card games played in the State of Michigan, the State of North Dakota, the State of South Dakota, or the State of Washington, that were actually operated in such State by an Indian tribe on or before May 1, 1988, but only to the extent of the nature and scope of the card games that were actually operated by an Indian tribe in such State on or before such date, as determined by the Chairman.

(D) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on October 17, 1988, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requests the State, by no later than the date that is 30 days after October 17, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(E) Notwithstanding any other provision of this paragraph, the term "class II gaming" includes, during the 1-year period beginning on December 17, 1991, any gaming described in subparagraph (B)(ii) that was legally operated on Indian lands in the State of Wisconsin on or before May 1, 1988, if the Indian tribe having jurisdiction over the lands on which such gaming was operated requested the State, by no later than November 16, 1988, to negotiate a Tribal-State compact under section 2710(d)(3) of this title.

(F) If, during the 1-year period described in subparagraph (E), there is a final judicial determination that the gaming described in subparagraph (E) is not legal as a matter of State law, then such gaming on such Indian land shall cease to operate on the date next following the date of such judicial decision.

(8) The term "class III gaming" means all forms of gaming that are not class I gaming or class II gaming.

(9) The term "net revenues" means gross revenues of an Indian gaming activity less amounts paid out as, or paid for, prizes and total operating expenses, excluding management fees.

(10) The term "Secretary" means the Secretary of the Interior.

25 U.S.C. § 2710

§ 2710. Tribal gaming ordinances

(a) Jurisdiction over class I and class II gaming activity

(1) Class I gaming on Indian lands is within the exclusive jurisdiction of the Indian tribes and shall not be subject to the provisions of this chapter.

(2) Any class II gaming on Indian lands shall continue to be within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter.

(b) Regulation of class II gaming activity; net revenue allocation; audits; contracts

(1) An Indian tribe may engage in, or license and regulate, class II gaming on Indian lands within such tribe's jurisdiction, if--

(A) such Indian gaming is located within a State that permits such gaming for any purpose by any person, organization or entity (and such gaming is not otherwise specifically prohibited on Indian lands by Federal law), and

(B) the governing body of the Indian tribe adopts an ordinance or resolution which is approved by the Chairman.

A separate license issued by the Indian tribe shall be required for each place, facility, or location on Indian lands at which class II gaming is conducted.

(2) The Chairman shall approve any tribal ordinance or resolution concerning the conduct, or regulation of class II gaming on the Indian lands within the tribe's jurisdiction if such ordinance or resolution provides that--

(A) except as provided in paragraph (4), the Indian tribe will have the sole proprietary interest and responsibility for the conduct of any gaming activity;

(B) net revenues from any tribal gaming are not to be used for purposes other than--

(i) to fund tribal government operations or programs;

(ii) to provide for the general welfare of the Indian tribe and its members;

(iii) to promote tribal economic development;

(iv) to donate to charitable organizations; or

(v) to help fund operations of local government agencies;

(C) annual outside audits of the gaming, which may be encompassed within existing independent tribal audit systems, will be provided by the Indian tribe to the Commission;

(D) all contracts for supplies, services, or concessions for a contract amount in excess of $25,000 annually (except contracts for professional legal or accounting services) relating to such gaming shall be subject to such independent audits;

(E) the construction and maintenance of the gaming facility, and the operation of that gaming is conducted in a manner which adequately protects the environment and the public health and safety; and

(F) there is an adequate system which--

(i) ensures that background investigations are conducted on the primary management officials and key employees of the gaming enterprise and that oversight of such officials and their management is conducted on an ongoing basis; and

(ii) includes--

(I) tribal licenses for primary management officials and key employees of the gaming enterprise with prompt notification to the Commission of the issuance of such licenses;

(II) a standard whereby any person whose prior activities, criminal record, if any, or reputation, habits and associations pose a threat to the public interest or to the effective regulation of gaming, or create or enhance the dangers of unsuitable, unfair, or illegal

practices and methods and activities in the conduct of gaming shall not be eligible for employment; and

(III) notification by the Indian tribe to the Commission of the results of such background check before the issuance of any of such licenses.

(3) Net revenues from any class II gaming activities conducted or licensed by any Indian tribe may be used to make per capita payments to members of the Indian tribe only if--

(A) the Indian tribe has prepared a plan to allocate revenues to uses authorized by paragraph (2)(B);

(B) the plan is approved by the Secretary as adequate, particularly with respect to uses described in clause (i) or (iii) of paragraph (2)(B);

(C) the interests of minors and other legally incompetent persons who are entitled to receive any of the per capita payments are protected and preserved and the per capita payments are disbursed to the parents or legal guardian of such minors or legal incompetents in such amounts as may be necessary for the health, education, or welfare, of the minor or other legally incompetent person under a plan approved by the Secretary and the governing body of the Indian tribe; and

(D) the per capita payments are subject to Federal taxation and tribes notify members of such tax liability when payments are made.

(4)(A) A tribal ordinance or resolution may provide for the licensing or regulation of class II gaming activities owned by any person or entity other than the Indian tribe and conducted on Indian lands, only if the tribal licensing requirements include the requirements described in the subclauses of subparagraph (B)(i) and are at least as restrictive as those established by State law governing similar gaming within the jurisdiction of the State within which such Indian lands are located. No person or entity, other than the Indian tribe, shall be eligible to receive a tribal license to own a class II gaming activity conducted on Indian lands within the jurisdiction of the Indian tribe if such person or entity would not be eligible to receive a State license to conduct the same activity within the jurisdiction of the State.

(B)(i) The provisions of subparagraph (A) of this paragraph and the provisions of subparagraphs (A) and (B) of paragraph (2) shall not bar the continued operation of an individually owned class II gaming operation that was operating on September 1, 1986, if--

(I) such gaming operation is licensed and regulated by an Indian tribe pursuant to an ordinance reviewed and approved by the Commission in accordance with section 2712 of this title,

(II) income to the Indian tribe from such gaming is used only for the purposes described in paragraph (2)(B) of this subsection,

(III) not less than 60 percent of the net revenues is income to the Indian tribe, and

(IV) the owner of such gaming operation pays an appropriate assessment to the National Indian Gaming Commission under section 2717(a)(1) of this title for regulation of such gaming.

(ii) The exemption from the application of this subsection provided under this subparagraph may not be transferred to any person or entity and shall remain in effect only so long as the gaming activity remains within the same nature and scope as operated on October 17, 1988.

(iii) Within sixty days of October 17, 1988, the Secretary shall prepare a list of each individually owned gaming operation to which clause (i) applies and shall publish such list in the Federal Register.

(c) Issuance of gaming license; certificate of self-regulation

(1) The Commission may consult with appropriate law enforcement officials concerning gaming licenses issued by an Indian tribe and shall have thirty days to notify the Indian tribe of any objections to issuance of such license.

(2) If, after the issuance of a gaming license by an Indian tribe, reliable information is received from the Commission indicating that a primary management official or key employee does not meet the standard established under subsection (b)(2)(F)(ii)(II) of this section, the Indian tribe shall suspend such license and, after notice and hearing, may revoke such license.

(3) Any Indian tribe which operates a class II gaming activity and which--

(A) has continuously conducted such activity for a period of not less than three years, including at least one year after October 17, 1988; and

(B) has otherwise complied with the provisions of this section1

may petition the Commission for a certificate of self-regulation.

(4) The Commission shall issue a certificate of self-regulation if it determines from available information, and after a hearing if requested by the tribe, that the tribe has--

(A) conducted its gaming activity in a manner which--

(i) has resulted in an effective and honest accounting of all revenues;

(ii) has resulted in a reputation for safe, fair, and honest operation of the activity; and

(iii) has been generally free of evidence of criminal or dishonest activity;

(B) adopted and is implementing adequate systems for--

(i) accounting for all revenues from the activity;

(ii) investigation, licensing, and monitoring of all employees of the gaming activity; and

(iii) investigation, enforcement and prosecution of violations of its gaming ordinance and regulations; and

(C) conducted the operation on a fiscally and economically sound basis.

(5) During any year in which a tribe has a certificate for self-regulation--

(A) the tribe shall not be subject to the provisions of paragraphs (1), (2), (3), and (4) of section 2706 (b) of this title;

(B) the tribe shall continue to submit an annual independent audit as required by subsection (b)(2)(C) of this section and shall submit to the Commission a complete resume on all employees hired and licensed by the tribe subsequent to the issuance of a certificate of self-regulation; and

(C) the Commission may not assess a fee on such activity pursuant to section 2717 of this title in excess of one quarter of 1 per centum of the gross revenue.

(6) The Commission may, for just cause and after an opportunity for a hearing, remove a certificate of self-regulation by majority vote of its members.

(d) Class III gaming activities; authorization; revocation; Tribal-State compact

(1) Class III gaming activities shall be lawful on Indian lands only if such activities are--

(A) authorized by an ordinance or resolution that--

(i) is adopted by the governing body of the Indian tribe having jurisdiction over such lands,

(ii) meets the requirements of subsection (b) of this section, and

(iii) is approved by the Chairman,

(B) located in a State that permits such gaming for any purpose by any person, organization, or entity, and

(C) conducted in conformance with a Tribal-State compact entered into by the Indian tribe and the State under paragraph (3) that is in effect.

(2)(A) If any Indian tribe proposes to engage in, or to authorize any person or entity to engage in, a class III gaming activity on Indian lands of the Indian tribe, the governing body of the Indian tribe shall adopt and submit to the Chairman an ordinance or resolution that meets the requirements of subsection (b) of this section.

(B) The Chairman shall approve any ordinance or resolution described in subparagraph (A), unless the Chairman specifically determines that--

(i) the ordinance or resolution was not adopted in compliance with the governing documents of the Indian tribe, or

(ii) the tribal governing body was significantly and unduly influenced in the adoption of such ordinance or resolution by any person identified in section 2711(e)(1)(D) of this title.

Upon the approval of such an ordinance or resolution, the Chairman shall publish in the Federal Register such ordinance or resolution and the order of approval.

(C) Effective with the publication under subparagraph (B) of an ordinance or resolution adopted by the governing body of an Indian tribe that has been approved by the Chairman under subparagraph (B), class III gaming activity on the Indian lands of the Indian tribe shall be fully subject to the terms and conditions of the Tribal-State compact entered into under paragraph (3) by the Indian tribe that is in effect.

(D)(i) The governing body of an Indian tribe, in its sole discretion and without the approval of the Chairman, may adopt an ordinance or resolution revoking any prior ordinance or resolution that authorized class III gaming on the Indian lands of the Indian tribe. Such revocation shall render class III gaming illegal on the Indian lands of such Indian tribe.

(ii) The Indian tribe shall submit any revocation ordinance or resolution described in clause (i) to the Chairman. The Chairman shall publish such ordinance or resolution in the Federal Register and the revocation provided by such ordinance or resolution shall take effect on the date of such publication.

(iii) Notwithstanding any other provision of this subsection--

(I) any person or entity operating a class III gaming activity pursuant to this paragraph on the date on which an ordinance or resolution described in clause (i) that revokes authorization for such class III gaming activity is published in the Federal Register may, during the 1-year period beginning on the date on which such revocation ordinance or resolution is published under clause (ii), continue to operate such activity in conformance with the Tribal-State compact entered into under paragraph (3) that is in effect, and

(II) any civil action that arises before, and any crime that is committed before, the close of such 1-year period shall not be affected by such revocation ordinance or resolution.

(3)(A) Any Indian tribe having jurisdiction over the Indian lands upon which a class III gaming activity is being conducted, or is to be conducted, shall request the State in which such lands are located to enter into negotiations for the purpose of entering into a Tribal-State compact governing the conduct of gaming activities. Upon receiving such a request, the State shall negotiate with the Indian tribe in good faith to enter into such a compact.

(B) Any State and any Indian tribe may enter into a Tribal-State compact governing gaming activities on the Indian lands of the Indian tribe, but such compact shall take effect only when notice of approval by the Secretary of such compact has been published by the Secretary in the Federal Register.

(C) Any Tribal-State compact negotiated under subparagraph (A) may include provisions relating to--

(i) the application of the criminal and civil laws and regulations of the Indian tribe or the State that are directly related to, and necessary for, the licensing and regulation of such activity;

(ii) the allocation of criminal and civil jurisdiction between the State and the Indian tribe necessary for the enforcement of such laws and regulations;

(iii) the assessment by the State of such activities in such amounts as are necessary to defray the costs of regulating such activity;

(iv) taxation by the Indian tribe of such activity in amounts comparable to amounts assessed by the State for comparable activities;

(v) remedies for breach of contract;

(vi) standards for the operation of such activity and maintenance of the gaming facility, including licensing; and

(vii) any other subjects that are directly related to the operation of gaming activities.

(4) Except for any assessments that may be agreed to under paragraph (3)(C)(iii) of this subsection, nothing in this section shall be interpreted as conferring upon a State or any of its political subdivisions authority to impose any tax, fee, charge, or other assessment upon an Indian tribe or upon any other person or entity authorized by an Indian tribe to engage in a class III activity. No State may refuse to enter into the negotiations described in paragraph (3)(A) based upon the lack of authority in such State, or its political subdivisions, to impose such a tax, fee, charge, or other assessment.

(5) Nothing in this subsection shall impair the right of an Indian tribe to regulate class III gaming on its Indian lands concurrently with the State, except to the extent that such regulation is inconsistent with, or less stringent than, the State laws and regulations made applicable by any Tribal-State compact entered into by the Indian tribe under paragraph (3) that is in effect.

(6) The provisions of section 1175 of Title 15 shall not apply to any gaming conducted under a Tribal-State compact that--

(A) is entered into under paragraph (3) by a State in which gambling devices are legal, and

(B) is in effect.

(7)(A) The United States district courts shall have jurisdiction over--

(i) any cause of action initiated by an Indian tribe arising from the failure of a State to enter into negotiations with the Indian tribe for the purpose of entering into a Tribal-State compact under paragraph (3) or to conduct such negotiations in good faith,

(ii) any cause of action initiated by a State or Indian tribe to enjoin a class III gaming activity located on Indian lands and conducted in violation of any Tribal-State compact entered into under paragraph (3) that is in effect, and

(iii) any cause of action initiated by the Secretary to enforce the procedures prescribed under subparagraph (B)(vii).

(B)(i) An Indian tribe may initiate a cause of action described in subparagraph (A)(i) only after the close of the 180-day period beginning on the date on which the Indian tribe requested the State to enter into negotiations under paragraph (3)(A).

(ii) In any action described in subparagraph (A)(i), upon the introduction of evidence by an Indian tribe that--

> (I) a Tribal-State compact has not been entered into under paragraph (3), and
>
> (II) the State did not respond to the request of the Indian tribe to negotiate such a compact or did not respond to such request in good faith,

the burden of proof shall be upon the State to prove that the State has negotiated with the Indian tribe in good faith to conclude a Tribal-State compact governing the conduct of gaming activities.

(iii) If, in any action described in subparagraph (A)(i), the court finds that the State has failed to negotiate in good faith with the Indian tribe to conclude a Tribal-State compact governing the conduct of gaming activities, the court shall order the State and the Indian Tribe2 to conclude such a compact within a 60-day period. In determining in such an action whether a State has negotiated in good faith, the court--

> (I) may take into account the public interest, public safety, criminality, financial integrity, and adverse economic impacts on existing gaming activities, and
>
> (II) shall consider any demand by the State for direct taxation of the Indian tribe or of any Indian lands as evidence that the State has not negotiated in good faith.

(iv) If a State and an Indian tribe fail to conclude a Tribal-State compact governing the conduct of gaming activities on the Indian lands subject to the jurisdiction of such Indian tribe within the 60-day period provided in the order of a court issued under clause (iii), the Indian tribe and the State shall each submit to a mediator appointed by the court a proposed compact that represents their last best offer for a compact. The mediator shall select from the two proposed compacts the one which best comports with the terms of this chapter and any other applicable Federal law and with the findings and order of the court.

(v) The mediator appointed by the court under clause (iv) shall submit to the State and the Indian tribe the compact selected by the mediator under clause (iv).

(vi) If a State consents to a proposed compact during the 60-day period beginning on the date on which the proposed compact is submitted by the

mediator to the State under clause (v), the proposed compact shall be treated as a Tribal-State compact entered into under paragraph (3).

(vii) If the State does not consent during the 60-day period described in clause (vi) to a proposed compact submitted by a mediator under clause (v), the mediator shall notify the Secretary and the Secretary shall prescribe, in consultation with the Indian tribe, procedures--

(I) which are consistent with the proposed compact selected by the mediator under clause (iv), the provisions of this chapter, and the relevant provisions of the laws of the State, and

(II) under which class III gaming may be conducted on the Indian lands over which the Indian tribe has jurisdiction.

(8)(A) The Secretary is authorized to approve any Tribal-State compact entered into between an Indian tribe and a State governing gaming on Indian lands of such Indian tribe.

(B) The Secretary may disapprove a compact described in subparagraph (A) only if such compact violates--

(i) any provision of this chapter,

(ii) any other provision of Federal law that does not relate to jurisdiction over gaming on Indian lands, or

(iii) the trust obligations of the United States to Indians.

(C) If the Secretary does not approve or disapprove a compact described in subparagraph (A) before the date that is 45 days after the date on which the compact is submitted to the Secretary for approval, the compact shall be considered to have been approved by the Secretary, but only to the extent the compact is consistent with the provisions of this chapter.

(D) The Secretary shall publish in the Federal Register notice of any Tribal-State compact that is approved, or considered to have been approved, under this paragraph.

(9) An Indian tribe may enter into a management contract for the operation of a class III gaming activity if such contract has been submitted to, and approved by, the Chairman. The Chairman's review and approval of such contract shall be governed by the provisions of subsections (b), (c), (d), (f), (g), and (h) of section 2711 of this title.

(e) Approval of ordinances

For purposes of this section, by not later than the date that is 90 days after the date on which any tribal gaming ordinance or resolution is submitted to the Chairman, the Chairman shall approve such ordinance or resolution if it meets the requirements of this section. Any such ordinance or resolution not acted upon at the end of that 90-day period shall be considered to have been approved by the Chairman, but only to the extent such ordinance or resolution is consistent with the provisions of this chapter.