APL-2018-00179
Appellate Division Docket Nos. CA 17-01956 and CA 17-01957

Court of Appeals
of the
State of New York

CAYUGA NATION, by and through its lawful governing body,
the CAYUGA NATION COUNCIL,

Plaintiff-Respondent,

– against –

SAMUEL CAMPBELL, CHESTER ISAAC, JUSTIN BENNETT, KARL HILL, SAMUEL GEORGE, DANIEL HILL, TYLER SENECA, MARTIN LAY, WILLIAM JACOBS, WARREN JOHN, WANDA JOHN, BRENDA BENNETT, PAMELA ISAAC, *et al.*,

Defendants-Appellants,

– and –

DUSTIN PARKER,

Defendant in Default,

– and –

COUNTY OF SENECA,

Defendant-Intervenor-Respondent.

BRIEF OF TONAWANDA SENECA NATION, TUSCARORA NATION, PROFESSOR LINDSAY ROBERTSON, AND PROFESSOR MICHAEL OBERG AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Sources

Introduction

In this action, Plaintiff-Respondent seeks to evict from Cayuga Nation properties Clan Mothers who are universally recognized as Cayuga Nation officials. Plaintiff-Respondent also seeks the eviction of Chiefs and other Nation officials whose leadership status is disputed within the Nation. Whether the named Cayuga Nation officials have governmental authority to use or occupy Nation properties depends wholly on Cayuga law. State courts cannot award relief without deciding the governmental dispute underlying Plaintiff-Respondent's claims. Because state courts lack jurisdiction over such matters of internal Indian nation self-government, the preliminary injunction issued below should be vacated and the order denying Defendants-Appellants' motion to dismiss should be reversed.

ARGUMENT

I. Resolution of the Cayuga Nation Internal Governance Dispute Requires Interpretation of Haudenosaunee Law

Like the Tuscarora Nation and the Tonawanda Seneca Nation, the Cayuga Nation follows the Haudenosaunee Great Law of Peace. *See, e.g., Samuel George v. Eastern Reg'l Dir.*, 49 IBIA 164, 167 (2009); *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 877 (2d Cir. 1996); *Cayuga Indian Nation of New York v. Pataki*, 165 F. Supp. 2d 266, 304 (2001), *rev'd on other grounds by Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005). For centuries, the Great Law has provided the framework for the governments of these

Nations and the processes by which these Nations' governmental officials are chosen. Governmental officials at each Nation include Clan Mothers, Clan Representatives, and Chiefs.

Pursuant to the Great Law of Peace, the will of the people is expressed through the Clans. *See, e.g.,* Clinton Rickard, *Fighting Tuscarora: The Autobiography of Chief Clinton Rickard* xxi (Barbara Graymont, ed., 1963) ("The clans form the political basis of the Six Nations Confederacy"). "Each clan appoints a clan mother, who in turn appoints an individual to serve as Chief. The clan mother retains the power to remove a Chief and, in consultation with members of the clan, provides recommendations to the Chief on matters of tribal government." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 877 (2d Cir. 1996). The Council of Chiefs is the "traditional governing institution of the [Haudenosaunee] Confederacy." *Id.* The Great Law provides no mechanism for appointing Council members independent of a Clan Mother; clans with no Clan Mother cannot be represented on Council. *Fighting Tuscarora* at xxi (explaining that the Eel clan "became extinct" at Tuscarora because "there was no woman left in the Eel clan to carry on the line.").

Traditional Haudenosaunee governance "is based on consensus." *Poodry* at 877. At each stage in the process of choosing governmental officials, Haudenosaunee law requires discussion and debate with the goal of reaching one

mind. R. 338. Consensus-decision-making avoids rash action and enhances governmental legitimacy. Cayuga Nation Chiefs serve for life, *Fighting Tuscarora* at xxii, while Clan Representatives serve as long as they are needed to fill a Chief's position. *George,* 49 IBIA at 167. The Clan Mother's monitoring and advising role is thus critical to the smooth functioning of the Nation's Council of Chiefs. Only a Clan Mother may remove a Chief, and only through the clan-based processes prescribed by Haudenosaunee law. "The[] chiefs are picked by the… clan mother of each clan and confirmed by the clan and Chiefs' Council of the tribe… Once installed in office, a man is chief for life unless he voluntarily resigns or is deposed by his clan mother." *Fighting Tuscarora* at xxi-xxxii. The clan structure provides a system of checks and balances essential to Haudenosaunee participatory democracy. "The clan mothers cannot disregard the views of the clan, nor can the Chiefs disregard the recommendations of the clan mothers." *Poodry* at 877.

Because they follow the Great Law of Peace, the Cayuga Nation, the Tuscarora Nation and the Tonawanda Seneca Nation have never used mail-in surveys or elections to determine the composition of their Councils. *See, e.g., George* at 165 (finding that "the Nations have always relied on the authority of the Clan Mothers to appoint and remove Council members based on the will of the

people of each clan."). While other Indian tribes use a wide range of mechanisms to select leaders, Nations following the Great Law do not.

Some successor governments to the historic Six Nations have abandoned traditional government structures in favor of other frameworks. *See, e.g., Poodry* at 877 (distinguishing non-traditional government of Seneca Nation of Indians from traditional government of Tonawanda Seneca Nation). The right to preserve or alter governmental structures remains the exclusive province of each Indian Nation. *See Cohen's Handbook of Federal Indian Law* s. 4.01[2][a] (N. Newton ed., 2012) ("A quintessential attribute of [an Indian nation's] sovereignty is the power to constitute and regulate its form of government").

Whether the Cayuga people have authorized dramatic alterations to their well-established governmental structures lies at the heart of the current leadership dispute and remains fiercely contested on the ground at Cayuga. *See, e.g.*, R. 68 (Interior Department finding that contracting decision did not resolve this dispute and noting that "[i]t is now the Nation's right, and responsibility, to determine how its governance will operate moving forward – whether via the Nation's traditional consensus process, through some form of election process, or however else."). Because the courts lack jurisdiction to resolve the internal governance dispute underlying the matter on appeal, *infra*, Plaintiff-Respondent's claims should be dismissed and the preliminary injunction issued below should be vacated.

II. Courts Lack Jurisdiction to Interfere in the Cayuga Nation's Internal Dispute Over Governmental Authority

Internal Indian Nation disputes over governmental authority lie beyond the jurisdiction of state courts to resolve. *Bowen v. Doyle*, 880 F. Supp. 99, 112 (W.D.N.Y. 1995). *See also Healy Lake Vill. v. Mt. McKinley Bank*, 322 P.3d 866, 877 (Alaska 2014) (state courts lack jurisdiction where claims would require the court to resolve a tribal self-governance dispute); *First Bank & Tr. Co. v. Cheyenne & Arapaho Tribes*, No. 110,909, 2015 WL 1029945, at *4 (Okla. Civ. App. Feb. 23, 2015) (state court lacks jurisdiction to decide the tribal leadership dispute underlying claims for relief); *Becerra v. Huber*, No. A144214, 2019 WL 912147, at *6 (Cal. Ct. App. Feb. 25, 2019) (state courts lack subject matter jurisdiction over cases that "require the state court to apply tribal law to determine the outcome of a tribal election dispute") (internal quotation marks omitted).

The right of Indian nations to determine their leadership and make decisions for their people has particular force within treaty-protected Nation territory. The Cayuga Nation properties at issue in this matter lie within the treaty-protected Cayuga Reservation. *Cayuga Nation v. Gould*, 14 N.Y.3d. 614 (2010). In *Gould*, this Court found that the term "qualified reservation" in N.Y. § 470(16)(a) refers to "any reservation recognized by the federal government," *id.* at 637, and determined that the reservation created for the Cayuga Nation by the 1794 Treaty of Canandaigua had never been diminished or disestablished by Congress. *Id.* at 640

(noting that the United States government continues to recognize the existence of the Nation's treaty-confirmed reservation).

This Court has acknowledged the critical importance that decisions about land and territory have to the governance and sovereignty of Indian Nations. *See Spota v. Jackson*, 10 N.Y. 3d 46 (2008). As this Court held in *Spota*, "Indian tribes are unique aggregations possessing whatever attributes of sovereignty over both their members and their territory have not been implicitly divested..., including the right to self-government and territorial management. Essential to this retained right to self-government and territorial management is tribes' power to make their own law on internal matters." *Id.* at 53 (internal citations and quotation marks omitted).

Nor may courts pierce the sovereign immunity of Indian nations or Indian nation officials, absent waiver or express congressional authorization. "Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers." *Sue/Perior Concrete & Paving, Inc. v. Lewiston Golf Course Corp.*, 24 N.Y.3d 538, 546 (2014); *Saratoga Cty. Chamber of Commerce v. Pataki*, 100 N.Y.2d 801, 819 (2003). Indian Nation sovereign immunity extends to the Nation's governmental officials. *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997); R. 49 (Bender, J., confirming with respect to Cayuga Nation Chiefs and Clan Mothers that "sovereign immunity does apply when the individuals are being named because of actions being taken in their apparent

official capacities," *citing Catskill Dev't LLC v. Park Place Entm't Corp.*, 206 F.R.D. 78 (S.D.N.Y. 2002), *reconsideration denied,* 204 F. Supp. 2d 647 (S.D.N.Y. 2002)). Plaintiff-Respondent's claims here directly challenge the Chiefs' and Clan Mother's governmental authority; they are "named because of actions being taken in their apparent official capacities." *Id.*

The ongoing self-governance dispute at Cayuga turns on whether the Cayuga people will abandon a centuries-old governmental framework based on participatory democracy in favor of an ad hoc approach unmoored from Haudenosaunee law. The gravity and significance of this internal governmental question is akin to that of the question whether the United States should retain or abandon the electoral college. Because the present action would require this Court to pass judgment on the Nation's ongoing leadership dispute and the validity of Plaintiff-Respondent's claims to leadership under Haudenosaunee law, as well as to affirm relief against Nation officials with respect to the Nation's treaty-confirmed territory, the Court should vacate the injunction issued below.

III. The Bureau of Indian Affairs' Decision to Award the Halftown Group A Federal Contract Did Not Resolve the Cayuga Internal Governance Dispute

In recent years, Plaintiff-Respondent has repeatedly attempted to restructure the Cayuga Nation's government in order to abolish the processes used by the Nation for centuries; expel the traditional Chiefs; and eliminate the authority of the

Clan Mothers. Defendants-Appellants have opposed and continue to oppose these attempts. The Bureau of Indian Affairs (BIA) has never passed judgment on whether Plaintiff-Respondent's efforts have restructured the Nation's government under Cayuga law. Nor could the BIA itself restructure the Nation's government. R. 64.

In 2012 and 2014, Plaintiff-Respondent asked the Bureau of Indian affairs ("BIA") to support and "verify" its efforts to restructure the Nation's government. R. 216-218. The BIA declined, citing longstanding federal law and policy that recognizes the authority of the Cayuga Nation Clan Mothers and Chiefs and supports the Nation's right to continue its traditional governmental practices without federal interference. R. 188 (significance of mail-in survey process "is purely a matter of Nation law and policy, upon which it would not be appropriate for BIA to intrude."). In 2016, however, in the context of a federal contracting dispute, the BIA abruptly reversed course and embraced Plaintiff-Respondent's purported restructuring of the Nation's government in order to award Plaintiff-Respondent federal funds under the Indian Self-Determination and Education Assistance Act (ISDEAA), also known as a "638 contract."

The BIA explained that its decision was required "to identify a tribal representative for purposes of executing a 638 contract." R. 59. The BIA limited its decision to the contract applications, not the question whether the Nation's

government had been restructured pursuant to Nation law. "Ultimately, all BIA can do is decide whether either of the entities that has submitted a proposal for a 638 Community Services contract has provided adequate evidence that they represent the Cayuga Nation… Going forward, the meaning of the [mail-in survey] is a question of Cayuga law." R. 67-68. The BIA made plain that the contracting decision itself did not reform the Nation's government or resolve its internal governance dispute. "Nothing in the [contracting decision] demands that the Nation… permanently discard its traditional governing structure." R. 68.

Defendants-Appellants appealed the rejection of its contract application pursuant to 25 C.F.R. Part 900, which governs appeals from ISDEAA contract denials. R. 61. The Acting Assistant Secretary-Indian Affairs moved to assume jurisdiction over the appeal and "affirm[ed] the Regional Director's decision to award the 638 Community Services contract to the Halftown Council and return as unauthorized the contract proposed by [the Jacobs Council]." R. 81. Like the BIA, the agency limited its decision to the contracting matter being appealed, and expressly disclaimed interference in the Nation's ongoing governance dispute. "It is now the Nation's right, and responsibility, to determine how its governance will operate moving forward – whether via the Nation's traditional consensus process, through some form of election process, or however else." R. 68. Federal officials further noted "there is a true division between the Halftown Council and the Jacobs

Council supporters regarding the requirements of Cayuga law with respect to how Council members are chosen and under what circumstances they can be removed from the Nation Council." R. 65. That division persists today. It is unresolved and unresolvable by the federal contracting decision.

A federal district court recently affirmed the limited nature of the agency actions, finding them to have been made "for the purposes of certain contractual relationships between that Nation and the United States federal government." *Cayuga Nation v. Bernhardt*, No. 12-1923, 2019 WL 1130445, at *1 (D.D.C. March 12, 2019). While the court ruled that Defendants-Appellants here did not establish violations of federal law by federal agencies and officers, the court clarified the limited scope of the agency decisions. *See, e.g., id.* at *2 (nature of agency decisions was to "recognize[e] [the Halftown Council] as the governing body of the Cayuga Nation *for purposes of certain contractual relationships* between the Nation and the United States federal government") (emphasis added); *id.* at *8 ("[BIA] recognized [the Halftown Council] as the Nation's governing body *for purposes of the ISDEAA contract*") (emphasis added); *id.* at *16 ("none of Plaintiffs' arguments establish that it was unreasonable or contrary to law for Defendants to recognize [the Halftown Council] as the rightful Nation Council *for purposes of federal contracting*") (emphasis added); *id.* at *21 (agencies "decided that it was time to recognize, through the SOS process, a new Cayuga Nation

Council *for purposes of federal contracting*") (emphasis added); *id.* at *22 (given dueling federal contracting proposals, "the Court finds it reasonable that [the agencies] decided to reverse policy and acknowledge a new Nation Council *for purposes of federal contracting*") (emphasis added).

The United States did not take action to restructure the Nation's government or to resolve the Nation's internal governmental dispute. That dispute continues today independent of the federal contracting decision, and remains within the province of the Nation to resolve. *See, e.g., Bowen* at 112 (W.D.N.Y. 1995). The injunction issued below should be vacated.

IV. Resolution of the Cayuga Governance Dispute Requires Interpretation of Haudenosaunee Law, Which Proscribes Plaintiff-Respondent's Claim to Authority

Plaintiff-Respondent claims governmental authority at Cayuga based on the mail-in survey conducted just prior to submission of its federal ISDEAA contract application. *See* Merits Brief of Defendants-Appellants at 14-15; Reply Brief of Defendants-Appellants at 4-10. That survey neither accurately gauged the will of the Cayuga people nor complied with Cayuga law. As the BIA noted, the survey process "lacked mechanisms to safeguard transparency and accuracy," A-37, and conflicted with both the Clan Mothers' sworn statements regarding appointments and with Plaintiff-Respondent's own description of the Clan Mothers' role. A-34.

The mail-in survey initiative relied on a "membership roll" Plaintiff-Appellant created and shielded from public scrutiny, including scrutiny by recognized Nation officials. R. 76 (Interior Department official stating concern that "[t]here are multiple estimates of Cayuga citizenship, and… even a slight difference in membership could change the results of the election… [T]he Jacobs Council credibly alleged that they were denied permission to independently review and cross-verify the membership roll used for the purposes of the Initiative, which was created by and remained in the custody of the Halftown Council.").

Cayuga citizens who participated in the survey received cash payments from Plaintiff-Respondent prior to receiving the survey. R. 79-80 (95% of Cayugas received cash payments within three weeks of survey distribution). The survey did not offer a choice between two competing Councils or provide information on the Chiefs' condolences or the Clan Mothers' existing appointments to Council. R. 78; R. 282. The survey used "biased language" disparaging Defendants-Appellants Chiefs and Clan Mothers and lauding Plaintiff-Respondent. R. 78. There was no mention in the survey of any processes by which condoled Chiefs not listed in the slate had been removed from Council or by which Clan Mother appointments, which were made pursuant to clan members' views, had been reversed or somehow overridden. *Id.* There were no clan meetings held to discuss the implications of the

survey with citizens and no opportunity for the Clan Mothers to play any role in shaping the slate of leaders promoted by the survey.

Independent of its inaccuracy, the survey process violated Haudenosaunee law. Clan Mothers who are Defendants-Appellants here have attested that Chiefs and Clan Representatives appointed pursuant to the consensus approval of their Clans were summarily excised from Council. A-34. Despite the fact the Wolf Clan had no Clan Mother and by Plaintiff-Respondent's own admission no individual qualified to sit on Council, a Wolf Clan representative was put on Council. *Id.*; *cf. Fighting Tuscarora* at xxi (no clan representative or chief can be appointed to Council without a Clan Mother). Individuals the Clan Mothers had never considered for Council membership, much less discussed as candidates with their clan members, were mysteriously appointed. A-34. While the BIA relied on the survey process for its contracting decision, it found that "[g]iven the important role of the Clan Mothers, it is of concern to BIA that the Cayuga Nation Clan Mothers do not agree with the statement of support process and do not agree that the Council members that were named in the statement of support process are on the Council with the support of their clan mothers in accordance with Cayuga Nation law." *Id.*

Severing the connection between Council members and Clan Mothers would implicate far more than simply who holds appointment power and under what

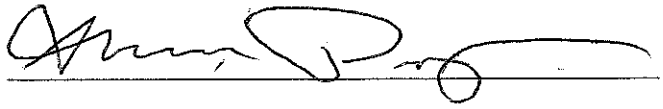
circumstances Chiefs and Council members may be appointed. The Clan Mothers act as a voice for Clan members in shaping their Council members' actions and, where necessary, in carrying out removals. *See, e.g.*, *Poodry* at 877 ("The clan mother retains the power to remove a Chief and, in consultation with members of the clan, provides recommendations to the Chief on matters of tribal government."). By purporting to appoint Council members with no Clan Mother, the survey process would remove the governmental oversight mechanism prescribed by Haudenosaunee law, and unmoor Cayuga governmental processes from their foundations in participatory democracy. Because this Court lacks jurisdiction to rule on the question whether the Cayuga Nation has so altered its government, the injunction issued below should be vacated and Defendants-Appellants' motion to dismiss should be granted.

Conclusion

The governmental dispute underlying the matter before this Court turns on a question fundamental to Cayuga Nation sovereignty and sovereign governmental authority: whether the Cayuga Nation will jettison or retain the processes prescribed by Haudenosaunee law for choosing governmental officials. These processes have served the Nation well for over two centuries and continue to serve the thriving traditional governments at the Tonawanda Seneca Nation and Tuscarora Nation. Since time immemorial, the Nation's democracy has operated

through clan structures overseen by Clan Mothers. The Nation's Council has always been comprised of Chiefs and Clan representatives appointed by the Clan Mothers pursuant to the will of the citizens of the clan. Under Haudenosaunee law, Plaintiff-Respondent has no governmental authority to seek a State Court order evicting Clan Mothers or Council members from Nation properties. Defendants-Appellants include Cayuga Nation officials, including Clan Mothers, who seek to uphold Haudenosaunee law and processes at Cayuga. Plaintiff-Respondent seeks to override that law with something new. Neither this Court nor the courts below may rule on the merits of Plaintiff-Respondent's claims without taking sides in this dispute. Because the courts lack jurisdiction to resolve the internal governance dispute underlying the matter on appeal, this Court should vacate the preliminary injunction issued below and order Defendants-Appellants' motion to dismiss be granted.

Date: 4/8/19



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NEW YORK STATE COURT OF APPEALS

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to 22 NYCRR PART 500.1(j) that the foregoing brief was prepared on a computer using Microsoft Word.

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Dated: 4/8/19

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STATE OF NEW YORK)
COUNTY OF MONROE) SS:

The Undersigned hereby swears that he is a person of such age and discretion as to be competent to serve papers.

That on Monday, May 13, 2019, she did file eight (8) copies of the *Amicus Brief* with the Court of Appeals. In addition, she did serve two (2) copies of the *Amicus Brief* upon the person hereinafter named by placing them in a sealed box in the exclusive care of the Federal Express (FedEx) for overnight delivery to the place and address stated below, which is the last known address.

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