To be argued by:
Margaret A. Murphy, Esq.
Time requested: 20 minutes

Appellant Division Docket Nos.: CA 17-01956 and CA 17-01957

State of New York
Court of Appeals

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

Plaintiff-Respondent,

v.

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,

DUSTIN PARKER,

Defendant,

and

COUNTY OF SENECA,

Defendant-Intervenor-Respondent

BRIEF ON BEHALF OF DEFENDANTS/APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Authority

Administrative Case Authority

Statutory Authority

JURISDICTIONAL STATEMENT

On July 25, 2018, the Clerk of the Appellate Division for the Fourth Judicial Department ("Fourth Department") entered the Memorandum and Order from which Defendants-Appellants has filed this appeal. (A.[1] 3-10). In a split 3-2 decision, a majority of the appellate panel affirmed the Order of Acting Supreme Court Justice Dennis F. Bender (A.3), which had denied the Defendants-Appellants' motion to dismiss and granted Plaintiff-Respondent's preliminary injunction. (R.[2] 11-13).

Because the Memorandum and Order is not an order that finally determines the action, a dissent by two justices on a question of law does not allow Defendants-Appellants to take an appeal to this Court as a matter of right. CPLR § 5601(a). Defendants-Appellants, therefore, moved before the Fourth Department for leave to appeal pursuant to Article 6, § 3 of the Constitution of the State of New York and CPLR § 5602(b)(1). (A. 1).

On September 28, 2018, the Fourth Department granted the motion for leave to appeal after finding "a question of law has arisen that ought to be reviewed by the Court of Appeals." (A. 1-2).

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[1] "A." refers to the Appellants' Appendix filed with this Court pursuant to Rule 500.14 (b) of this Court's Rules of Practice.

[2] "R." refers to the Record on Appeal filed in the Appellate Division for the Fourth Judicial Department and subsequently filed with this Court pursuant to Rule 500.14(a)(2).

QUESTION PRESENTED

In the Fourth Department's Memorandum and Order, the entire panel of justices agreed, it lacked subject matter jurisdiction to resolve the Cayuga Nation's leadership dispute or to intrude upon issues involving the Cayuga Nation's internal governance. (A. 6, 7). The panel, however, was divided on whether the Court could defer to a determination made by the United States Department of Interior, Bureau of Indian Affairs ("BIA"), recognizing one political faction for the purposes of granting and administering federal funds. (A. 7).

The majority held it "must defer" to the BIA's determination because the BIA, as part of the executive branch of the federal government, had the authority and right to resolve this long-standing dispute over which of two competing factions should have control of the Cayuga Nation (the "Nation"). (A. 6-7). While recognizing it lacked the authority to resolve internal governance disputes, the majority held it could "accord due deference to the BIA's conclusion" that had "resolved the [leadership] dispute in favor of plaintiff." (A. 6). Like the BIA, the majority accepted a mail-order survey, conducted in July of 2017, as evidence of the Cayuga people's support of the political faction known as the Halftown Council. (A. 7).

The five individuals, known as the Halftown Council, who are responsible for commencing this action on behalf of the Cayuga Nation Council, are neither

condoled chiefs nor clan mothers. (R. 282). These individuals now claim to be the Nation's lawful governing body "by virtue of a decision of the Bureau of Indian Affairs (BIA) that recognized those members" for purposes of granting and administering federal funds (A.7). The individual Defendants-Appellants, however, "include clan chiefs, clan mothers and clan representative who also claim to constitute" the Nation's lawful governing body "under its traditional laws" and who have been previously recognized by a previous BIA Regional Director as the members of the Nation's lawful governing body. (A. 7). This rival political faction is known as the Jacobs Council. (R. 54).

Based on these facts, the dissent rejected the notion that "once deference is afforded to the most recent BIA decision, Supreme Court has jurisdiction to resolve the claims in the complaint without impermissibly intruding into issues of the Nation internal governance." (A. 7). In the dissent's view, "the majority's assumption ignores the specific claims alleged in the complaint," for trespass, conversion, tortious interference with prospective business relations, replevin and ejectment. (A. 7-8). As the dissent observed, each of these claims "requires proof that the individual defendants acted without any authority or justification with respect to their use and possession of the [Cayuga] Nation's property." (A. 8).

> Here, although the complaint alleges that defendants' unlawful conduct began on April 28, 2014, the complaint also alleges that the "Nation's leadership dispute was [not] brought to a final resolution until the July 14, 2017 decision of the Acting Assistant Secretary of

> Indian Affairs . . . ." Thus, the court will be required to resolve issues of tribal law, specifically the parties' conflicting claims of their legitimate representation of the Nation, to the extent that the complaint seeks relief for defendants' actions prior to July 14, 2017. Indeed, the court expressly acknowledged that it will be required to determine if any individual defendants were acting in their official capacities as Nation representatives to determine whether the defense of sovereign immunity is available That intrusion into matters of tribal law falls outside the court's jurisdiction. (Citation omitted)

(*Id.*).

Moreover, the BIA undertook to resolve the leadership dispute for the sole purpose of "entering into a contract to provide the [] services' requested in the parties' competing 'Community Services 638' contract proposals." (*Id.*).

> In choosing between the two separate council for that purpose, the BIA made no findings that defendants lacked any colorable claim to the management of the Nation's affairs or that any individual defendant had been unlawfully acting on behalf of the Nation." Indeed, the BIA Regional Director stated that his reliance on the statement of support process [i.e. the mail-in survey] "should not freeze the Nation with its current configuration of leaders." He further recognized that "[g]oing forward, the meaning of the statement of support campaign is a question of Cayuga Nation law."

(*Id.*). For these and other reasons, the dissent would have reversed the lower court and dismissed Plaintiff-Respondent's complaint. (A. 9).

In an Order, entered on September 28, 2018, the Fourth Department granted Defendants-Appellants' motion for leave to appeal. (A. 9-10). In that Order, the Fourth Department certified the following question to this Court, "Was the order of [the Fourth Department] entered on July 25, 2018, properly made?

STATEMENT OF THE CASE

The Nation is a federally-recognized Indian nation, operating under a traditional form of government, governed by its Council of Chiefs. (R. 56). *See Cayuga Nation v. Tanner*, 824 F.3d 321, 323 (2d Cir. 2015); *George v. Eastern Regional Director,* 49 IBIA 164, 167 (2009). This appeal involves "a longstanding leadership dispute" between two feuding, political factions within the Nation's Council, each claiming a right to exercise dominion and control over the Nation's property and businesses. (R. 7, 54).

This action has been brought in the name of the Cayuga Nation, allegedly "by and through its lawful governing body, the Cayuga Nation Council." (R. 30). The complaint, however, does not identify the members of this lawful governing body. (R. 33-34 ¶¶16-19). The complaint does name, as defendants, condoled Heron Chief William Jacobs, condoled Bear Clan Chief Samuel George, Turtle Clan Mother Brenda Bennett, Bear Clan Mother Pamela Tallchief (f.n.a Pamela Isaac), and other individuals, selected by their clan mothers to serve as representatives on the Nation's Council. (R. 30, 119-120 ¶2).

Defendants-Appellants moved to dismiss the action on the grounds no state court has subject matter jurisdiction to hear an internal governance dispute involving a sovereign Indian nation. (R. 115). On September 18, 2017, Acting Supreme Court Justice Dennis F. Bender ("Justice Bender") issued an Order

denying the motion to dismiss. (R. 13). Justice Bender further directed Defendants-Appellants to vacate and surrender dominion and control over the Nation's property and businesses. (R. 12-13). That order has been automatically stayed, pursuant to CPLR § 5519(a)(6), pending appeal.

A. Factual Background of Dispute.

The Nation is governed by oral laws and traditions, known as the Great Law of Peace. *George,* 49 IBIA at 167. These traditional laws mirror the laws and traditions of the other traditional nations within the Haudenosaunee Confederacy (also known as the Six Nations or the Iroquois Confederacy), of which the Nation is a member. *Cayuga Indian Nation of New York v. Eastern Regional Director*, 58 IBIA 171, 172 (2014). The Haudenosaunee Great Law dictates the process for the selection of clan mothers and chiefs. *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 877 (2d Cir. 1996).

The Nation is comprised of five clans: the Heron, Bear, Turtle, Wolf and Snipe Clans. *George,* 49 IBIA at 167. The Snipe Clan currently has no members. (R. 276). Each clan appoints a clan mother, who in turns selects a male clan member to serve as a clan representative who works on becoming a Chief. *George,* 49 IBIA at 167. The clan member must next be approved by his clan (R. 277), and then completes training and a condolence ceremony before the Grand Council for the Haudenosaunee Confederacy before serving as a Chief. *George,*

49 IBIA at 167. In the absence of a condoled chief, a clan mother may appoint a "seatwarmer" or representative to temporarily serve on the Council. *Id.* The clan mother retains the power to remove a Chief or a representative, and in consultation with members of the clan, provide recommendations to the Council on matters of tribal government. *Poodry*, 85 F.3d at 877.

Under the Great Law, the five individuals, constituting the members of the Halftown Council, do not qualify to serve on the Nation's lawful governing body. These individuals include Wolf Clan Member Michael Barringer, Bear Clan Member Donald Jimerson, Turtle Clan Members Gary Wheeler and Tim Twoguns and Heron Clan Member Clint Halftown. (R. 54 fn.1, 282).

Two of the self-proclaimed clan representatives on the Halftown Council, Michael Barringer and Donald Jimerson, were never nominated by a clan mother. (R. 54, fn. 1, 59, 203, 282; A. 34). Even the Halftown Council acknowledges these individuals would not qualify as duly appointed clan representatives on the Nation's Council. (R. 277, IV ¶1). Michael Barringer, identified as being from the Wolf Clan, was never appointed to the Council due to the fact the Wolf Clan has no clan mother. (R. 139 ¶¶69-71, 231, 278; A. 34).

Appellant Bear Clan Mother Pamela Tallchief declared, under oath, Donald Jimerson was never nominated and designated by the Bear Clan as its Council representative. (R. 140 ¶72, 283 ¶7; A. 34). According to Tallchief, the Bear Clan

is currently represented on the Nation's Council by Sachem Chief Samuel George and Clan Representative Alan George. (R. 283 ¶6). Sachem Chief George is one of the Appellants. Clan Representative George was never named as a defendant in this action. (R. 28).

The three remaining members of the Halftown Council have been removed and replaced by their clan mothers. (R. 158, 165-166; A. 34). Gary Wheeler and Tim Twoguns were originally appointed by Turtle Clan Mother Lena Pierce to serve as temporary clan representatives (i.e. seatwarmers). (R. 158, 165). Following the death of their clan mother, Wheeler and Twoguns were later removed and replaced by the new Turtle Clan Mother, Brenda Bennett, who is also an Appellant in this matter. (*Id.*; A. 34). The Turtle Clan is now duly represented by Appellants, Martin Lay and Tyler Seneca. (R. 119 ¶2(d), 273, 303 ¶3, 334¶¶14-15).

Finally, Clint Halftown was appointed, but later removed by his Clan Mother Bernadette Hill as the Heron Clan representative. (R. 158, 182; A. 34). *George,* 49 IBIA at 170. Clan Mother Hill subsequently replaced Halftown with Clan Representative Karl Hill, who is an Appellant. (R. 158, 182). William Jacobs was also appointed to the Council by Heron Clan Mother Hill and had served, at one time, on the Council as a Clan Representative, along with Halftown. (R. 158). Jacobs, however, is now a condoled chief for the Heron Clan, who is one

of the Appellants to this appeal. (R. 119). Since the death of Bernadette Hill, "there has not been an agreement regarding who would replace her." (A. 34).

No member of the Halftown Council is a condoled chief or has the support of any condoled chief or clan mother. (A. 34). To recognize these individuals as clan representatives on the Nation's Council would require the Nation to abandon its ancient customs, laws and traditions embodied in the Great Law of Peace.

B. Prior State Court Action.

In 2014, the Halftown Council commenced an action before Justice Bender seeking the same relief as sought in this case: an order directing the Jacobs Council to vacate and surrender Nation properties and enjoining the Jacobs Council from taking any action to disrupt the Halftown Council in its commercial activities. *Cayuga Nation v. Jacobs*, 44 Misc.3d 389 (Seneca Co. Sup. Ct. 2014) *appeal dismissed* 132 A.D.3d 1264 (4th Dep't. 2015). "Most, if not all, of the individual parties [to this appeal] were before [Justice Bender] in 2014. Then as now, the dispute was fundamentally over control of Nation property." (R. 7).

In that prior case, Justice Bender ruled that because:

> the underlying allegations in this law suit are fundamentally founded upon the longstanding question of who has the right to lead the Nation, no determination could be made by this Court without interfering with tribal sovereignty and self government. Accordingly, [the] Court lacks subject matter jurisdiction of the preliminary question in the case.

44 Misc.3d at 394. At that time, even though the BIA had listed Clint Halftown as

the Nation's "federal representative," Justice Bender correctly stated Halftown's "authority is defined and controlled by the Nation and not by the BIA. *Id.* at 393 *citing George* 49 IBIA at 65. Consequently, Justice Bender dismissed the prior action "because the seminal question of who had the right to lead the Nation, was one which the Court found it lacked jurisdiction to determine." (R. 7).

C. The Current Action Pending on Appeal.

This longstanding leadership dispute is before Justice Bender once again. However, instead of dismissing this action for lack of subject matter jurisdiction, Justice Bender has now issued a preliminary mandatory injunction ordering Appellants to "immediately vacate" and deliver possession and control of certain parcels of real property and to surrender all dominion" over the Nation's personal property to the Halftown Council. (R. 12-13). That order has been automatically stayed, pursuant to CPLR § 5519(a)(6), pending appeal.

In his Decision, entered on September 8, 2017, Justice Bender was under the belief the Nation's leadership dispute had been brought to a final resolution by the determination by the BIA involving "competing Indian Self-Determination and Education Assistance Act (ISDA) 638 proposals from the Jacobs and Halftown Councils." (R. 8). Justice Bender wrote:

> There must be an end to litigation and the BIA is much better versed in guiding the Nation to reach a determination as to who should be recognized as the federal representative for Nation activities. As noted, this dispute has been ongoing since 2004, and the Nation

> members, unable to resolve the dispute amongst themselves, appropriately looked to the BIA for assistance.

(R. 8).

The Halftown Council sought "assistance" from the BIA to spearhead an "Initiative" asking the Cayuga citizens to sign a "Statement of Support." (R. 59). In the Statement of Support, Cayuga citizens were asked to sign and mail a statement opposing efforts by the Unity Council (also known as the Jacobs Council) to "involve persons outside the Cayuga Nation in our Nation's internal affairs." (R. 282). Ironically, it has been the Halftown Council, not the Jacobs Council, which brought this state court action, asking Justice Bender to resolve a dispute involving the Nation's internal affairs.

D. The Mail-In Survey Initiative & Statement of Support.

The Plaintiff-Respondent successful argued before the Fourth Department the Initiative spearheaded by the five individuals who make up the Halftown Council showed a significant majority of Cayuga citizens had stated their support for the Halftown Council and thereby constituted a resolution of the leadership dispute by a tribal mechanism. (A. 5-6). In the statement of support, Cayuga citizens were told the Unity Council (also known as the Jacobs Council) had "inappropriately adopted the name of the Nation's Council" in "its attempt to take over our government" by involving "persons outside of the Cayuga Nation in our Nation's internal affairs." (R. 282). The BIA Regional Director acknowledged

"the language used in the statement of support is not neutral, clearly favoring the Halftown Council." (A. 35). Importantly, Cayuga citizens were never told the names of the chiefs and clan representatives forming the Unity or Jacobs Council. (R. 203, 276-282).

The Jacobs Council opposed the Initiative to solicit the support of Cayuga citizens on behalf of the Halftown Council, rejected the notion that this mail-in support campaign was consistent with the Great Law's process of reaching consensus, and played no role in the method by which Cayuga citizens were solicited to participate in this support campaign. (R. 57; A, 34-35). The Halftown Council sought assistance from the Regional Director to BIA to launch the Initiative and to review the so-called enrollment list of adult citizens to whom the Statement of Support would be given. (R. 206, 339-340¶¶38-49). The Jacobs Council was never given the opportunity to review the so-called enrollment list or to oversee the tabulation of these support statements that were mailed directly to the Halftown Council. (R. 131 ¶38, 137 ¶61(f), 146 ¶86(f)). More importantly, the solicitation of support statements conflicts with the process of reaching consensus embodied by the Great Law of Peace. (R. 240, 250, 271).

Under Cayuga law, the process of reaching consensus involves a deliberative process of listening, questioning, discussing and exchanging ideas before reaching a decision. (R. 338 ¶33). These deliberations are facilitated by clan mothers.

(*Id.*). Federal and state courts use this same deliberative, consensus process in jury deliberations. However, no court would ever ask a juror to deliberate alone or to take home a mail-in verdict sheet.

Even the BIA Regional Director expressed concerns as to the legitimacy of the Initiative.

> Given 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. The concern is essentially that the Halftown Council is describing itself as working in accordance with traditional processes that some of the people who are named as participating in that Council were apparently not chosen in accordance with those processes, and there is controversy over whether others were removed by their Clan Mothers.

(A. 34). Specifically, the Regional Director noted "that Michael Barringer is identified as being from the Wolf Clan and there is no Wolf Clan Mother according to the mailings sent by the Halftown Council, and Donald Jimerson is not accepted by the Bear Clan Mother as the serving on the Council." (*Id.*). The Regional Director further noted the three remaining members of the Halftown Council had been removed by their Clan Mothers. (*Id.*).

Despite these concerns and over the strenuous objections of the Jacobs Council, the BIA accepted the results of this Initiative offered by these five men who form the Halftown Council. The BIA offered the following justification:

> But to reject the principle that a statement of support campaign could be valid would be to hold that the Cayuga Nation's citizens lack the right to choose a government that reflects their choices – that the power of the Cayuga Nation Council to govern its citizens does *not* derive from the consent of the governed. Nothing in federal or tribal law authorizes me to deny the Nation's citizens their fundamental human rights to have a say in their own government.

(A. 31).

Acceptance of this politically-motivated campaign of support initiated by one political faction amounts to nothing more than legal genocide of the ancient customs, laws and traditions that have governed the Nation for centuries and which predates the ratification of the Constitution of the United States. More importantly, the Great Law of Peace establishes a participatory form of government through a clan system.

Early New England settlers mimicked and adopted these traditions through town hall meetings, a practice that continues today. The method employed by the Nation to select its leaders under the Great Law of Peace is as democratic as the method by which citizens of the United States select its President. After all, the President of the United States is not elected by popular or majority vote of U.S. citizens, but by state electors who are members of the Electoral College. U.S. Const, art. II, § 1.

"[M]indful that important tensions remain for the Cayuga to work through" (A. 38), the BIA found that "under these specific circumstances" it would accept

the "limited nature of the Initiative" for the purpose of deciding "whether either of the entities that [had] submitted a proposal for a 638 Community Services contract [had] provided adequate evidence that they represent the Cayuga Nation," leaving "future Cayuga Nation decisions . . . in the hands of the Cayuga citizens and leaders." (R. 67-68; A. 38). "Ultimately, all BIA [could] do [was] decide" which feuding, political faction would be awarded the federal grant. (*Id.*). "Going forward," however "the meaning of the statement of support is a question of Cayuga Nation law." (*Id.*). "[W]hile BIA may interpret tribal law in the limited circumstances discussed *supra*, Federal officials must still be cautious to defer to the tribe's interpretation of its own laws and its ability to internally resolve its disputes." (R. 68).

ARGUMENT

I

THE CAYUGA NATION HAS EXCLUSIVE JURISDICTION OVER ITS INTERNAL AFFAIRS AND GOVERNANCE

It is well-settled that the right of self-government is a right held by Indian nations in their capacity as sovereign entities. *Bowen v. Doyle,* 880 F.Supp. 99, 112 (W.D.N.Y. 1995). Under federal law, an Indian nation is a "distinct political society . . . capable of managing its own affairs and governing itself." *Id. citing Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831) and *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 556 (1832); *Tanner*, 824 F.3d. at 327. By entering into treaties, Indian nations did not "surrender [their] independence—[their] right to self-government." *Bowen,* 880 F. Supp. at 112 *citing Worcester,* 31 U.S. at 561. To the contrary, "[i]mplicit in these treaty terms . . . was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed." *Williams v. Lee*, 358 U.S. 217, 221-22 (1959). It is now a bedrock principle of federal Indian law that Indian nations have exclusive authority to resolve disputes over internal affairs. *Bowen,* 880 F. Supp. at 112-13; *Tanner*, 824 F.3d. at 327.

The basis for this bedrock principle "is the rule that Indian tribes, as sovereign entities, retain all rights not specifically withdrawn by treaty or federal law." *Bowen,* 880 F. Supp. at 113. *See, also, United States v. Wheeler*, 435 U.S.

313, 323 (1978). Because an Indian nation retains all inherent attributes of sovereignty not withdrawn by treaty or federal law, the proper inference from congressional silence is that the sovereign power remains intact. *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 149 (1982).

A. Federal and State Courts Lack Jurisdiction to Resolve Disputes between Feuding Political Factions within the Nation's Council.

Federal courts have continued to apply the rule that Indian nations have the right to control tribal affairs on its reservation, free from federal and state court interference. *Tanner*, 824 F.3d. at 327 ("First, and most significantly, federal courts lack authority to resolve internal disputes about tribal law."); *Bowen,* 880 F. Supp. at 115 ("Indeed, it is difficult to imagine a more intrusive intervention into the internal affairs of the Nation than that which results from the Orders issued by the State Court.").

In *Bowen,* the United States District Court for the Western District of New York rejected the assertion that 25 U.S.C. § 233 was a congressional grant of jurisdiction to state courts to hear disputes over the internal governance of a Indian nation. *Id.* The district court held there existed no "clear and plain" showing that Congress intended to interfere with an Indian nation's exclusive authority over internal affairs and governance. *Id.* at 116.

> Nowhere in the language of § 233 is there a "clear and plain" statement that § 233 abrogates the Nation's treaty rights to self-government and exclusive jurisdiction over its internal affairs. Indeed,

> the Treaty of 1794 is not even mentioned. Nor does the legislative history of § 233 show that Congress intended to abrogate the Nation's treaty rights. To the contrary, the legislative history contains an express disclaimer of any intention to affect treaty rights. S.Rep. No. 1836, 81st Cong., 2d Sess. 2 (1950) ("This proposed legislation expressly subjects the Indians in the State of New York to the civil laws of that State, without impairing any ... rights under existing treaties with the United States.").

Id. Accordingly, the federal court held Congress never intended state courts "to become embroiled in internal political disputes amongst officials of the [Indian] Nation's government." *Id.* at 118.

Since Congress enacted 25 U.S.C. § 233 in 1950, federal and state courts have uniformly held Haudenosaunee nations have the ***exclusive*** authority to resolve internal disputes relating to governance, land, and the interpretation of their laws. *See, e.g., Tanner*, 824 F.3d at 327; *Bowen,* 880 F. Supp. at 115; *Ransom v. St. Regis Mohawk Educ. & Community Fund, Inc.,* 86 N.Y.2d 553, 560 fn. 3 (1995) (observing "25 U.S.C. § 233 grants the courts of New York jurisdiction over private disputes, but not disputes involving a sovereign Indian nation"); *Alexander v. Hart,* 64 A.D.3d 940, 942 (3d Dep't. 2009)("State courts do not violate an Indian nation's sovereign right to self-government by exercising jurisdiction over disputes between private civil litigants on matters that have no bearing on the internal affairs of the tribal nation's government"); *Seneca v. Seneca*, 293 A.D.2d 56, 58-59 (4th Dep't. 2002)(finding a state court exercising subject matter jurisdiction over a dispute that does not implicate the internal affairs

of an Indian nation does not violate the Nation's right to self-government); *Jacobs*, 44 Misc.3d 389 (Seneca Co. Sup. Ct. 2014); *Bennett v. Fink Construction Co., Inc.*, 47 Misc.2d 283, 285 (Erie Co. Sup. Ct. 1965)(Justice Matthew J. Jasen finding an Indian nation "has the power of self government and in its capacity of a sovereign nation, is not subservient to the orders and directions of the courts of New York State.").

B. The BIA Has No Role in Selecting the Nation's Leaders.

Congress has not given the BIA any authority or obligation to intervene or resolve the internal disputes of a sovereign Indian nation. *Cayuga Indian Nation*, 58 IBIA at 179. To the contrary, principles of tribal sovereignty and self-determination serve to constrain the BIA from intruding upon the Nation's internal affairs. *Id.* at 178.

Since no federal statute or regulation imposes a free-standing obligation or right for the BIA to intervene in an internal dispute involving the Nation's land or governance, *id.* at 179, any decision or determination rendered by the BIA must be read narrowly so as not to infringe upon the Nation's right of self-government and exclusive jurisdiction over its internal affairs. *Bowen,* 880 F.Supp. at 112; *Cayuga Indian Nation*, 58 IBIA at 180; *George*, 49 IBIA at 187 ("principles of tribal sovereignty and self-determination will require BIA to refrain from interpreting tribal law, and to recognize a tribal official on an interim basis, pending resolution

of a dispute in an appropriate tribal forum"). No decision or determination by the BIA should be read "as an independent determination of the composition of the Council or its proper organization among the clans, which remains a matter for the Nation to decide." *George*, 40 IBIA at 188.

However, "when an intra-tribal dispute has not been resolved and the [BIA] must deal with the tribe for government-to-government purposes, the [BIA] may need to recognize certain individuals as tribal officials on an interim basis, pending final resolution by the tribe." *Id.* at 186 *citing LaRocque v. Aberdeen Area Director*, 29 IBIA 201, 203 (1996).

> Recognition is not required in the abstract. BIA "is not required to make *any* recognition decision during a tribal leadership dispute, if interim recognition is not needed for government-to-government purposes.

George, 49 IBIA at 186.

On July 13, 2017, the BIA Acting Assistant Secretary, Michael S. Black, issued an administrative decision for the federal purpose of resolving a dispute over "competing Indian Self-Determination and Education Assistance Act (ISDA) 638 proposals from the Jacobs and Halftown Councils." (R. 54). This administrative decision (the "Black Decision") specifically recognized the "bedrock principle of federal Indian law that every tribe is 'capable of managing its own affairs and governing itself.'" (R. 64 *citing Cal. Valley Miwok Tribe v. United*

States, 515 F.3d 1262, 1263 (D.C. Cir. 2008), *quoting Cherokee Nation*, 30 U.S. (5 Pet.) at 16). It further noted that:

> While the BIA may at times be obliged to recognize one side in a dispute ***as part of its responsibilities for carrying on government relations with the Tribes***, such recognition is made ***only on an interim basis***. (Emphasis added).

(R. 64 *citing Attorney's Process & Investigation Servs. v. Sac & Fox Tribe*, 609 F.3d 927, 943 (8th Cir. 2010)). The BIA cautioned that while it may interpret tribal law under the limited circumstances, "Federal officials must still be cautious to defer to the tribe's interpretation of its own laws and its ability to internally resolve its disputes." (R. 68).

Prior to the submission of these "competing" ISDA 638 proposals from the Jacobs and Halftown Councils, the BIA had refused to review or resolve these internal disputes because "circumstances [did] not warrant a decision on the merits of Nation law regarding who should be recognized." (R. 75). In one prior decision, the BIA did note "those circumstances" could change in the future, "conceivably when the time comes for the Nation to renew an ISDA contract." (*Id.*). The Black Decision, therefore, was issued for the limited purpose of resolving two competing proposals for federal funding. (R. 81). Nothing in the Black Decision, however, purported to resolve internal disputes over the control

and operation of the Nation's businesses or properties.[3] (R. 64, 68, 81).

The BIA has no authority to "serve as the arbiter for tribal disputes for the convenience of other agencies or third parties." *Cayuga Indian Nation,* 58 IBIA at 182. For that matter, such determinations have no binding effect on matters pending before other BIA officials. *Id.* at 183. (R. 68) (quoting from the Black Decision, "Federal officials must still be cautious to defer to the tribe's interpretation of its own laws and its ability to internally resolve its disputes."). Any BIA decision is "fatally flawed" when it extends recognition for purposes beyond "conduct of any specified BIA function or program." *Cayuga Indian Nation,* 58 IBIA at 179. Consequently, "principles of tribal sovereignty and self-determination must prevail, and must act as constraints on BIA intervention, when there is no separate matter that requires or separately triggers a need for the BIA action that implicated the government-to-government relationship, and which in turn necessitates a BIA decision on the tribal dispute." *Id.* at 180.

In the Fourth Department, the majority mistakenly opined "deference" must be given by state courts "to judgment of the Executive Branch as to who represents

[3] The majority was under the misperception that these competing applications sought funding for the Nation office located on the subject property. (A. 5). Although the BIA indicated that the two applications both sought funding "to maintain office space, equipment and supplies to support the office, and communication infrastructure" (A 25, fn. 3), the Halftown and Jacobs Councils have continued to maintain separate offices since 2014. Consequently, the majority erred when it stated the BIA "determination concerns the very property that is the subject of this action" and never determined the Halftown Group had "right to control the property at issue in this action." (A. 7)

a tribe." (A. 7) *quoting Timbisha Shoshone Tribe v. Salazar,* 678 F.3d 935, 938 (D.C. Cir. 2013). This quotation has been taken out-of-context and contradicts the bedrock principles that sovereign Indian nations have exclusive jurisdiction to resolve disputes over internal affairs. *See, e.g., Tanner*, 824 F.3d. at 327; *Bowen,* 880 F. Supp. at 115.

In reviewing relevant case law, there is only one category of cases in which deference is given to a recognition decision made by the BIA. The issues presented in those cases relate to whether a party has standing to bring a lawsuit on behalf of an Indian nation, not on whether the court has subject matter jurisdiction to hear the underlying dispute. *See, e.g., Tanner*, 824 F.3d 321 (2d Cir. 2016); *Salazar,* 678 F.3d 935 (D.C. Cir. 2013).

In *Salazar*, a faction of an Indian nation, purporting to be its tribal council, brought an action against the United States Department of Interior and the United States Treasury, seeking declaratory and injunctive relief to prevent funds being distributed directly to tribal members on the grounds distribution of these funds would constitute an unconstitutional taking of Nation property. *Salazar,* 678 F.3d at 936. However, before addressing plaintiffs' constitutional claims, the United States Court of Appeals for the District of Columbia Circuit first reviewed whether this political faction had standing to sue. *Id.* The Circuit Court dismissed the complaint without reaching the merits because a newly-elected Council had been

recognized by the BIA. *Id.* at 937-39. Consequently, the Circuit Court found the plaintiff lacked standing to bring an action on behalf of the tribe. *Id.* at 939.

In *Tanner,* the United States Court of Appeals for the Second Circuit ruled an interim recognition decision from the BIA was sufficient proof to show Clint Halftown had the authority to initiate litigation in the Nation's name against an outside, third party – the Village of Union Springs. *Tanner*, 824 F.3d. at 330. In a footnote, the Second Circuit specifically noted Halftown and his supporters claimed to be acting on behalf of the Nation's governing body, a fact disputed by other Council members. *Id.* at 332 fn. 4. Nonetheless, its decision was intended "neither to endorse nor disparage" the Halftown Council's "claim to authority under tribal law" on which the Second Circuit "take no position." *Id.* Because the *Tanner* complaint otherwise presented a federal question as to whether a village anti-gambling ordinance was preempted by federal law, the Second Circuit found the district court had jurisdiction and erred by dismissing the complaint on the grounds Haltfown lacked standing to commence the action. *Id.* at 333.

Neither of these cases address whether federal treaties and statutes have preempted New York courts from hearing disputes involving two feuding, political faction within the Nation, each claiming to be the Nation's lawful governing body, and each claiming to have the right to exercise dominion and control over Nation property and businesses. Consequently, those federal appellate decisions are

neither relevant nor controlling on the merits of this appeal.

Although the Congress has given the BIA authority to manage "all matters arising out of Indian relations," this provision does not allow the BIA to manage the internal affairs and governance of an Indian nation. 25 U.S.C. § 2. The BIA is given the authority to manage the ***relationship*** between the federal government and an Indian nation or tribe. The Interior Board of Indian Appeals (IBIA) has made this point quite clear in each and every one of its decisions. *See, e.g., Cayuga Indian Nation,* 58 IBIA at 180 ("principles of tribal sovereignty and self-determination must prevail, and must act as constraints on BIA intervention, when there is no separate matter that requires or separately triggers a need for the BIA action that implicated the government-to-government relationship, and which in turn necessitates a BIA decision on the tribal dispute.")

During oral argument and in its Post-Argument Submission to the Fourth Department, the Halftown Group contended Justice Bender "was obligated to respect the BIA determination under the Supremacy Clause, as the United States has supreme authority to make such determination with regard to Indian nations." The Supremacy Clause establishes that the Constitution of the United States, "and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the Unites States shall be the supreme Law of the Land . . . .". U.S. Const. art. VI, cl. 2. The phrase

"the Laws of the United States *which shall be made in Pursuance thereof*" refers to acts of Congress, not to administrative decisions issued by federal agencies. *See Alden v. Maine*, 527 U.S. 706, 732 (1999)(finding the Supremacy Clause delegates to Congress the power to establish the supreme law of the land when acting within its enumerated powers). While the Supremacy Clause does prohibit New York courts from exercising jurisdiction over internal governance dispute due to the enactment of 25 U.S.C. § 233, it is inapplicable to an interim decision made by a federal agency for the limited purpose of ensuring federal funds, appropriated by Congress, are made available to the Cayuga people.

More importantly, as the dissent correctly stated, "[T]he BIA made no finding that defendants lacked any colorable claim to the management of the Nation's affairs or that any individual defendant had been unlawfully acting on behalf of the Nation." (A. 8).

> The BIA determination therefore does not preclude defendants from contending that they had and continue to have a legitimate claim under traditional law to exercise authority over the property at issue as Nation representatives, and as such the "Cayuga Nation Council" cannot establish that defendants are collaterally estopped from raising that contention in defense of the claims against them (*see Kaufman v Eli Lilly & Co.*, 65 NY2d 449, 456 [1985]). Inasmuch as the issue of defendants' legitimate authority or justification is material to each of the causes of action in the complaint, the court cannot rule on those claims without impermissibly resolving questions of tribal law (*see Seneca*, 293 AD2d at 58; *cf. Cayuga Nation*, 824 F.3d at 330) Thus, [the dissent] would reverse the order insofar as appealed from, grant defendants' motion to dismiss the complaint, and vacate the first through fourth ordering paragraphs. (A. 9)

This Court should adopt the dissent's position and reverse majority's opinion.

II

NO FEDERAL DISTRICT OR CIRCUIT COURT HAS RULED ON THE MERITS OF THE ADMINISTRATIVE CHALLENGE TO THE BIA DETERMINATION

Some of the Appellants in this appeal have brought a federal administrative procedure action challenging the Black Decision. (R. 331-358; A. 6). Although the majority stated the United States District Court for the District of Columbia "declined to overturn" the Black Decision (A. 6), no decision on the merits have been issued by that court. Instead, the district court only denied an application for a preliminary injunction. *Cayuga Nation v. Zinke,* 302 F. Supp.3d 362(D.C. 2018).

In *Zinke*, the United States District Court for the District of Columbia found the BIA decision "was a narrow one," which did not "'impose' a form of governance, or particular leaders, on the Cayuga Nation." *Id.* at 368. The BIA has the limited authority to make a recognition decision, on an interim basis, only when an internal governance dispute has deteriorated to the point that recognition is "essential for *Federal* purposes." *Tanner,* 824 F.3d at 328; *accord Zinke*, 302 F. Supp.3d at 368. Two "inconsistent proposals" submitted by the Halftown Group and the Jacobs Group "forced [the BIA] to determine which of two rival factions represented the Cayuga Nation's rightful government ***for purposes of conducting government-to-government relations with the United States.***" *Id.* (emphasis

added). "Making this necessary determination was not the equivalent of 'imposing' anything on the Cayuga Nation." *Id.* "[T]he Cayuga Nation remains free to govern itself however it chooses." *Id.* at 369. The *Zinke* court found the BIA was forced to make a "determination about the Nation's government for purposes of entering into contracts with the Nation and providing it with services and funding." *Id.*

The federal district court also found that any injury, caused by "the Halftown Group taking advantage of the administrative decisions" in other forums, is "speculative and dependent on actions of third parties or ***even other courts.***" *Id.* at 373. The Jacobs Group had argued they could be "injured by relief that may or may not be granted by a New York State court . . . ." *Id.* The *Zinke* court recognized it "does not have control" over actions taken by other courts. *Id.* Consequently, even *Zinke* does not support the argument, the BIA administrative decision or the *Zinke* decision have finally resolved the internal governance dispute between the Halftown Group and the Jacobs Group.

CONCLUSION

If either the Halftown Council or the Jacobs Council is "wrongfully" or "impermissibly exercising dominion and control over Nation property," then that is a subject matter within the Nation's exclusive jurisdiction to be resolved in accordance with the Nation's customs, laws and traditions. Federal and state

courts, as well as state and federal agencies, do not have jurisdiction to resolve such internal leadership disputes without violating federal treaties or infringing upon the Nation's right of self-determination and self-governance. *Bowen*, 880 F. Supp. at 112.

For the reasons stated above, Defendants-Appellants respectfully request this Court issue an Order, responding in the negative to the certified questions submitted by the Fourth Department, and directing the Fourth Department to enter an order reversing the Order of Acting Supreme Court Justice Dennis F. Bender, entered on September 18, 2017, granting Defendants-Appellants' motion to dismiss, and vacating the first through fourth ordering paragraphs.

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