To be Argued by:
DAVID W. DEBRUIN
(Time Requested: 20 Minutes)

APL-2018-00179
Seneca County Clerk's Index No. 51342
Appellate Division–Fourth Department 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 FOR PLAINTIFF-RESPONDENT

JENNER & BLOCK
1099 New York Avenue, N.W.
Washington, D.C. 20001
Tel.: (315) 413-7279
Fax: (202) 639-6066

BARCLAY DAMON, LLP
125 East Jefferson Street
Syracuse, New York 13202
Tel.: (315) 425-2700
Fax: (315) 425-2701

Attorneys for Plaintiff-Respondent

Date Completed: January 10, 2019

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QUESTION PRESENTED

The premise of Defendants' challenge to Supreme Court's jurisdiction is that "no state court has subject matter jurisdiction to hear an internal governance dispute involving a sovereign Indian nation." [Br. 5]. But Defendants frame the wrong question, and most of their brief addresses issues not before this Court. This case does not require New York courts "to hear" or "resolve" any internal governance dispute. [Br. 5, 29]. The Cayuga Nation itself has *resolved* its leadership dispute, and the federal government—empowered by the Constitution and statute to manage Indian affairs—has *recognized* Plaintiff here as the Nation's governing body chosen by the Nation's citizens in a fair and open process. The U.S. Supreme Court has long held that courts "follow the action of the executive and other political departments" in such questions, *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865), and the Second Circuit recently applied that rule to allow Plaintiff to protect the Nation's rights, *Cayuga Nation v. Tanner*, 824 F.3d 321 (2d Cir. 2016).

The issue in this case is whether New York courts follow that same rule, so that the recognized governing body of an Indian Nation may protect the Nation's legal rights like any other citizen in accordance with the rule of law. Both courts below answered that question in the affirmative, holding that state courts can exercise jurisdiction and need not look beyond Plaintiff's recognition by the United States as the governing body of the Cayuga Nation.

The Appellate Division granted leave to appeal on the certified question of whether the Appellate Division's "order … entered July 25, 2018" was "properly made." Plaintiff contends that the answer is yes.

PRELIMINARY STATEMENT

In 2014, Defendants seized real properties in New York owned by the Cayuga Nation ("Nation"). [RA-31 ¶ 4, RA-32 ¶ 6, RA-64 ¶ 9, RA-68 ¶ 35].[1] In 2017, the Nation's governing body recognized by the U.S. Department of the Interior brought suit on the Nation's behalf seeking to recover those properties. [RA-2-3, RA-12-13 ¶¶ 9-11, RA-14 ¶ 17]. Defendants, however, claimed to be the Nation's *true* leadership. [RA-3; A-6]. And they argued that, with this claim, they could divest Supreme Court of jurisdiction—even though the Department's Bureau of Indian Affairs ("BIA"), having determined that the Cayuga people had rejected Defendants' claims, refused to recognize Defendants. [RA-3; A-6-7].

Below, Supreme Court (Bender, J.) rejected Defendants' arguments and granted a preliminary injunction. [RA-4-5]. Agreeing with the Second Circuit in *Cayuga Nation v. Tanner*, 824 F.3d 321 (2d Cir. 2016), it held that the proper approach was for the "Court to accept and act upon the determination made by the BIA." [RA-3]. The Appellate Division affirmed, agreeing with *Tanner* by "accord[ing] deference to the BIA's determination that plaintiff is the proper body to enforce the Nation's rights." [A-7].

[1] "RA-__" refers to Respondent's Appendix filed with this brief; "A-__" refers to Appellants' Appendix."

The question in this case is thus whether the Cayuga Nation's governing body, selected by the Cayuga people and recognized as such by the federal government, can sue in New York courts to enforce the Nation's New York law rights. The answer is yes, as more than a century of law establishes.

The U.S. Supreme Court explained long ago that "[i]n reference to all matters of this kind"—meaning, questions of which foreign or tribal governments to recognize—courts' "rule [is] to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs." *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865). The Executive Branch often must determine which foreign or tribal governments to recognize. And here, the federal government has recognized Plaintiff. That means a court hearing a suit like this one has no need to—and cannot—resolve any tribal leadership dispute. It must follow the federal government's recognition decision.

Recently, the Second Circuit applied this rule in *Tanner*, holding that the Nation's leadership dispute was no obstacle to the Court's jurisdiction over a claim brought on the Nation's behalf. As in *Holliday*, the Second Circuit explained that courts may "defer to the BIA's determination … without resolving questions of tribal" leadership. 824 F.3d at 330.

Contra Defendants, New York courts thus have no need to "resolv[e]" the Nation's leadership dispute. [Br. 29]. That means there is no obstacle to Supreme

Court exercising the jurisdiction that Congress and the State Legislature have conferred. Under 25 U.S.C. § 233, New York courts have long exercised jurisdiction over Indians and their properties, even within reservations. Congress conferred that jurisdiction *specifically* to address perceived gaps in law and order—in particular, gaps that resulted from *leadership* disputes. *Infra* at 23-24, 40. The State Legislature then implemented that authority in Indian Law § 5 and § 11-a. Those sections require New York courts to hear "action[s] between Indians … to the same extent as … other actions," and authorize "the council, chiefs, trustees or headmen constituting the governing body of any nation, tribe or band of Indians" to maintain "on behalf of such nation" any "action … to recover the possession of lands of such nation … and for damages resulting from such occupation." N.Y. Indian Law §§ 5, 11-a. Indian Law § 11-a thus contemplates that courts may need to determine whether the action is, in fact, brought by the Nation's "governing body." And certainly, courts can do so where, as here, they do not need to make an independent judgment about tribal leadership, but instead can (and indeed must) follow the federal government's decision to recognize the governing body identified by the Cayuga people.

While this Court has not yet had occasion to apply the rule of *Holliday* and *Tanner* to Indian governments, this Court has long applied the analogous rule for *foreign* governments. If the Russian government sued to expel trespassers from its

embassy, for example, the trespassers could not force dismissal by claiming to be Russia's true government. The court would ask whom the *federal government* recognized, and treat that federal recognition as controlling. *Infra* at 45. This case is no different. As with foreign governments, the federal government has exclusive authority to manage affairs with Indian Nations, and Congress has specifically invested the Department of the Interior with authority over "matters arising out of Indian relations." 25 U.S.C. § 2. The Supremacy Clause requires state courts to give effect to the Department's decisions. That rule both respects the federal government's paramount role in Indian affairs and prevents the void in law and order that would result from Defendants' position. The Court should therefore affirm the order of the Appellate Division.

STATEMENT OF THE CASE

A. The Government-To-Government Relationship Between Indian Nations And The Federal Government.

The Cayuga Nation is a federally recognized Indian nation. [RA-64 ¶ 3]. Indian Nations are separate sovereigns, *Ransom v. St. Regis Mohawk Education & Community Fund, Inc.*, 86 N.Y.2d 553, 560 (1995), but they are subject to "federal guardianship under the Constitution," *United States v. Antelope*, 430 U.S. 641, 648 n.8 (1977). The federal government has "plenary power … to deal with the special problems of Indians," which derives "both explicitly and implicitly from the Constitution itself"—in particular, the power in "Article I, S[ection] 8 to 'regulate

Commerce … with the Indian Tribes.'" *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).

As part of the federal executive's "responsibility for carrying on government relations with Tribe[s]," it "is obligated to recognize and deal with some tribal governing body," *Goodface v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983), much as it must do with foreign governments. In particular, Congress has vested that authority in the Department of the Interior and the BIA, which "shall … have the management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2. Hence, when the federal government must interact with an Indian Nation, the Department and the BIA have "the authority and responsibility" to "identify the duly chosen or elected tribal governing body." *Richards v. Acting Pac. Reg'l Dir.*, 45 IBIA 187, 191-92 (2007).

There are many reasons why the federal government may need to recognize an Indian Nation's governing body. Federal court jurisdiction specifically exists over "all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1362; *see, e.g.*, *Price v. Hawaii*, 764 F.2d 623, 626 (9th Cir. 1985) (relying on recognition decision by the federal executive). Many other statutes also require the federal government to identify an Indian Nation's governing body. Especially

relevant here, an application for a contract under the Indian Self-Determination Act ("ISDA") requires the BIA to determine whether the Indian Nation has submitted a resolution from its "recognized governing body." 25 U.S.C. § 5304(*l*); *see also, e.g.*, 23 U.S.C. § 207(b)(1) (similar for transportation grants); 25 U.S.C. § 2710(b)(1)(B) (tribal gaming); 25 U.S.C. § 5383(c)(1)(B) (tribal self-governance grants); 34 U.S.C. § 12291(36)(a) (Violence Against Women Act).

B. The Cayuga Nation's Seneca County Properties.

The Nation owns a number of properties in Seneca and Cayuga Counties. In 2002, the Nation's governing body—the Cayuga Nation Council—extended authority to Council member Clint Halftown to pursue economic development activities, in an effort to regain some of the Nation's ancestral reservation lands that, long ago, had been unlawfully sold to New York. [RA-14-15 ¶¶ 22-27; RA-64 ¶¶ 4-6; RA-65 ¶¶ 10-11]. The Nation thus acquired several properties in Seneca County, and began operating businesses there. [RA-14-16 ¶¶ 22-40]. Although these properties are within the boundaries of the Nation's historic reservation [RA-15 ¶ 27], the Nation purchased them on the open market in fee simple [RA-64-66 ¶¶ 13, 15, 18, 20, 22; RA-83 ¶ 3; RA-88 ¶ 6]. Federal courts have held that the Nation owns these properties subject to certain local laws, including "zoning and land use laws." *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005); *see City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S.

197 (2005). On these Seneca County properties, the Nation operates—among other businesses—a gas station and store, which in 2013 earned $5.6 million in profit. [RA-84 ¶ 6]. It is undisputed that these properties belong to the Nation, not any individuals. [RA-14-16, Compl. ¶¶ 24, 32, 35-37; RA-97, Answer ¶ 3 (admitting these allegations in Complaint)].

C. Defendants' Property Seizures.

From the time of acquisition, pursuant to the Council's 2002 directive, the Nation's business activities were led by Council Member Halftown. In April 2014, however, Defendants and their associates seized several of the Nation's Seneca County properties, including the gas station and store, in a sudden, forcible takeover. [RA-67-68 ¶¶ 26, 35]. Defendants claimed to be the Nation's true leaders, seeking to justify their takeover based on a leadership dispute that had festered within the Nation since 2005, when some within the Nation claimed that Mr. Halftown and others had been removed from the Council. [A-34]. Defendants did not act pursuant to any court order or federal recognition of their claimed status as the governing body of the Nation. [RA-64 ¶ 6]. They simply stormed the properties and refused to leave. [RA-67 ¶ 26].

There is no factual dispute that Defendants continue to possess these Nation business properties, and no dispute concerning the basis on which they claim a right to possession. Defendants admit that they "have been in possession of the real

property in question" and exercise "dominion and control over [this] real . . . property owned by the Cayuga Nation." [RA-100, Answer ¶¶ 15-16]. Defendants contest only that "such possession has been without the consent or permission of the lawful governing body of the Cayuga Nation"—because Defendants claim *to be* the Nation's governing body. [*Id*.; *see* RA-101, Answer ¶ 23 (asserting that Defendants "act[ed] at the direction of the governing body of the Cayuga Nation")].

Mr. Halftown and the other Nation leaders who had purchased, developed, managed, and possessed the properties turned to New York's courts for a remedy—but Supreme Court found it could not intervene because it could not discern which side the federal government recognized. In a decision issued May 19, 2014, Supreme Court Justice Dennis F. Bender observed that there "is no question but that the businesses and property involved are Cayuga Nation property, and it is not denied that the actions of the defendants disrupted businesses activity." [RA-27-28]. And he emphasized that "some of the defendants have no respect for this Court's … order[s]," lamenting that it "would seem to fly in the face of reason to argue that there is nothing this Court can do." [RA-27-28]. Just a few days earlier, however, the BIA had submitted a letter to the Court in which it stressed that it was "not express[ing] view recognizing either side." [R-29 (quoting BIA letter)]. And because the federal government had declined to recognize either side, Justice Bender found that adjudicating the suit would require him to answer the "question of who

has the right to lead the Nation." [RA-30]. He found he had no "subject matter jurisdiction" to answer that "preliminary question." [*Id.*]. He thus dismissed.

D. The Nation's Resolution Of The Leadership Dispute.

The Nation's leadership dispute endured for two more years. In 2015, the BIA recognized, "on an interim basis," the "last undisputed leadership of the Nation"—namely, the Nation Council as it had existed in 2006, "with Clint Halftown as the Nation's [federal] representative." [RA-71]. This "*interim* recognition" was "intended to provide the Nation with additional time to resolve this dispute." [*Id.* (emphasis in original)].

The situation proved unsustainable. The 2006 Council had not met in full for almost a decade, and it was deadlocked by the leadership dispute within the Nation. [RA-54]. Three members of the 2006 Council aligned with the Halftown group, and the other three members (Defendants here) aligned with an opposition "Jacobs" group. [RA-33 & n.1, RA-38]. Moreover, the Jacobs group claimed there was a new Council, with only their members. [*Id.*]. Meanwhile, the Nation was due in 2016 to submit a proposal for a new ISDA contract with the federal government. [RA-33]. These contracts are essential for the Nation's government and the services it provides to Nation citizens—but before the BIA will award a contract, the Nation must submit a formal tribal resolution from its "recognized governing body." [RA-

44 n.89 (citing 25 U.S.C. §§ 5304(*l*), 5321(a)(1))]. The leadership dispute made that impossible. [RA-54].

The group led by Mr. Halftown therefore embarked on a path that would bring a permanent resolution to the dispute. Under Cayuga law, when a "specially important matter or a great emergency arises," the solution is to "submit the matter to the decision of the[] people." [RA-45]. The Halftown group thus proposed to take the governance dispute directly to all enrolled Cayuga citizens, through a "[s]tatement of [s]upport" process. [RA-33, RA-35-39]. Specifically, the process solicited the views of each enrolled adult Cayuga citizen—many of whom have moved from New York and live throughout the country—on (1) "[a] governance document that describes the operation of the government of the Cayuga Nation of New York and the selection and removal process for its leaders," and (2) "[w]hether five named individuals … who were selected through a traditional clan process are the recognized members of the Cayuga Nation Council." [RA-35 (quoting Halftown Initiative Request)].

The Jacobs group (Defendants here) was invited to participate in the process, and they did. [RA-36]. On July 25, 2016, the Jacobs group sent a letter to all Cayuga Nation citizens, urging them to reject the two proposals. [RA-37].

Over the course of two months, Cayuga citizens responded. "BIA employees scrutinized the statements of support and the membership roll maintained by the

Nation's Secretary and concluded that, of 392 adult Cayuga citizens identified on the membership roll, 237 submitted statements of support for both of the two propositions." [RA-37]. Thus, over 60% of enrolled Cayuga citizens agreed that the Nation's lawful Council was the five-person Council associated with Mr. Halftown. [RA-35-37, RA-39, RA-48]. That is the Council that authorized this suit on the Nation's behalf. [RA-12-13 ¶¶ 9-10, RA-14 ¶ 17.]

E. The Federal Government's Recognition Of The Halftown Council And Rejection Of Defendants' Claims.

Both sides submitted separate ISDA applications claiming to be the Nation's government. [RA-33; A-5, A-25-26]. The BIA thus had to identify the Nation's "recognized governing body." 25 U.S.C. §§ 5304(*l*), 5321(a)(1); [*see* A-26]. The BIA's Regional Director solicited briefing from both sides. [A-26-27]. And on December 15, 2016, the BIA recognized the Halftown Council as the Nation's government. [A-39].

At the outset, the BIA emphasized that, while the ISDA application was the trigger for the recognition decision, the decision's effects would be broader—in at least five ways. First, the Nation had a "fee to trust application … now pending" before the Department of the Interior. [A-28]. Second, the Nation was "eligible for other federal government programs," which had "been in limbo pending a governmental recognition decision." [*Id.*]. Third, the Nation had submitted a "Liquor Control Ordinance" requiring federal approval. [*Id.*]. Fourth, the leadership

dispute had created uncertainty over whether Mr. Halftown could "represent the Nation in court," with a federal district court dismissing a suit authorized by Mr. Halftown for lack of standing and the Second Circuit then reversing that decision. [*Id.*; (citing *Tanner*, 824 F.3d 321)]. Fifth, "instances of unrest and even violence" concerning the Nation's properties in Seneca County "demonstrated a need for a functioning Cayuga Nation government." [A-28]. The BIA foresaw that its decision would affect all of these areas. [*Id.*].

The BIA also decided it could not issue an "interim" decision, as it had done in 2015. It explained that it had "been one year and ten months since that 2015 interim decision," and that "[i]ssuing repeated interim recognition decisions that ignore efforts by the Cayuga people to resolve this dispute risks paralyzing the Nation in a state of uncertainty and is inconsistent with BIA's responsibility for carrying on government relations with the Tribe." [A-27 (internal quotation marks omitted)].

On the merits, the BIA considered each side's arguments and determined it would recognize the verified expressions of the Cayuga citizens' statements of support. The BIA did not understand its decision as *itself* resolving the Nation's leadership dispute; instead, it accepted the Cayuga citizens' statement of support process as "a valid resolution of an intratribal dispute by a tribal mechanism." [A-26]. That approach accorded with the "well-settled tenet of Indian law that the

Federal government should encourage and defer to tribal resolutions of tribal disputes." [A-31]. That often means "defer[ing] to decisions of tribal courts," but the "Cayuga Nation has no tribal judiciary." [*Id.*]. The U.S. Supreme Court has recognized, however, that "[n]onjudicial tribal institutions" are "also … competent law-applying bodies." [*Id.* (quotations marked omitted)]. The BIA regarded the statement of support process as just such a nonjudicial resolution, emphasizing that the "citizens of the Cayuga Nation remain the ultimate 'nonjudicial tribal institution' competent both to identify and to apply Cayuga law." [*Id.*].

Hence, the BIA determined that respecting the Cayuga citizens' statements of support accorded with federal Indian law, as well as the Cayuga law reserving "specially important" matters for decisions by the Cayuga people. [A-29-30]. It considered and rejected all of Defendants' arguments that the statement of support process either was inconsistent with Cayuga law or was not properly implemented. [A-32-38]. Instead, the BIA concluded that it would respect the views of "a significant majority of the Cayuga citizens," which it could not "consider … as anything other than resolution of a tribal dispute by a tribal mechanism" that the BIA was "obligated to recognize." [A-5-6]. Indeed, the BIA explained, "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 [the BIA] to deny to the Nation's citizens their fundamental human right to have a say in their own government." [A-31]. The BIA therefore "recognize[d] the Halftown Council as the governing body of the Cayuga Nation." [*Id.*].

Defendants appealed the BIA's decision within the Department of the Interior to the Assistant Secretary – Indian Affairs. [RA-34, RA-40-41]; *see* 25 C.F.R. § 2.20(c); 43 C.F.R. § 4.332(b). In a detailed 28-page decision, the Assistant Secretary again rejected each objection raised by Defendants and affirmed the BIA's decision. [RA-33-60]. In particular, the Assistant Secretary reaffirmed the BIA's core conclusion: Federal officials "must … defer to [a] tribe's … ability to internally resolve disputes." [RA-47]. And when a "significant majority of the Cayuga citizens" had resolved this dispute by "stat[ing] their support for the Halftown Council," the Assistant Secretary "equally considered[ed himself] obligated to recognize the result." [RA-47-48].

This recognition of the Halftown Council remains in force. Although Defendants have challenged the Department of the Interior's decision under the federal Administrative Procedure Act [Br. 27], the filing of an APA action does not stay the decision, 5 U.S.C. § 705. In February 2018, Defendants moved for a preliminary injunction, but the federal district court rebuffed that request, explaining that Defendants "have not demonstrated that they are likely to succeed on their

claims, most of which are based on speculation or can be distilled to mere disagreements with the decisions reached by the agency." *Cayuga Nation v. Zinke*, 302 F. Supp. 3d 362, 365 (D.D.C. 2018).

F. Supreme Court's Decision Below.

Because the federal government's recognition decision removed the impediment that Justice Bender had previously found to his jurisdiction, the Nation returned to Supreme Court to seek the recovery—though peaceful legal processes—of the properties seized in 2014. Its Complaint pleads six claims (trespass, conversion of money and of property, tortious interference, replevin, and ejectment). [RA-17-22]. But the only issues Supreme Court has addressed are a pair of threshold cross motions: The Nation's motion for a preliminary injunction seeking to regain possession and control of the Nation's own businesses, and Defendants' motion to dismiss the suit entirely for lack of subject matter jurisdiction. [RA-2-3, A-11-13].

These motions both turned on whether Supreme Court had jurisdiction to enter an order awarding possession to the Nation. As noted, Defendants do not dispute that these properties belong to the Nation, and Defendants do not claim they are entitled to remain in possession for any reason *besides* their claim to be the Nation's true leadership. *Supra* at 10. Instead, Defendants claim only that Supreme Court lacked jurisdiction to order relief because doing so would require the "[c]ourt to wade into internal leadership disputes within the Cayuga Nation." [RA-3].

Justice Bender, however, "agree[d] with the [Nation] that the issue of leadership need not be determined by this Court." [*Id.*]. The "plaintiff rather, is simply asking the Court to accept and act upon the determination made by the BIA." [*Id.*]. Justice Bender observed that the Second Circuit had recently accepted the BIA's determination as controlling by allowing Mr. Halftown to sue in federal court on the Nation's behalf. [*Id.*]. Justice Bender found the "reasoning in *Tanner* … sound and [its] rationale equally applicable to the state court." [*Id.*]. He therefore "recognize[d] plaintiff as having authority to bring the action on behalf of Cayuga Nation, and determine[d he] ha[d] jurisdiction to hear this matter." [*Id.*].

Justice Bender also determined that the Nation was entitled to a preliminary injunction. [RA-4]. To begin, the Nation had "made a showing of a likelihood of success on the merits." [*Id.*]. Defendants claimed that "sovereign immunity" barred certain claims against them "because of their positions within the Nation." [*Id.*]. But Justice Bender explained that even if sovereign immunity was a defense to certain specific claims in the Complaint, it was irrelevant to the Nation's request for a preliminary injunction seeking to reacquire going-forward possession of the Nation's own business properties: "While some [Defendants] may arguably have been acting in their official capacities" before the BIA's decision, they "clearly are not continuing their occupancy of the subject premises in such capacity following the decision of the BIA." [*Id.*]. Supreme Court ruled it was "too early to determine

which defendants, if any, are immune from suit regarding their actions prior to the August 2, 2017 BIA decision." [*Id.*].

Justice Bender also found that "irreparable injury will result if an injunction is not granted, and a balancing of the equities supports … a preliminary injunction." [*Id.*]. He explained that Defendants were "[c]learly" taking actions "in violation of the plaintiff's rights" by "impermissibly exercising dominion and control over Nation properties" and by "divert[ing]" the "monies derived from … commercial operations [that] rightfully belong to the plaintiff." [*Id.*]. The Nation thus had "made the requisite showing that … a subsequent judgment would be ineffectual if the monies and occupancy continue to be diverted by the defendants." [*Id.*].

Justice Bender thus granted a preliminary injunction. [RA-5]. Although the Court originally did not set an undertaking in connection with the injunction, it later required Plaintiff to post an undertaking of $2.1 million in order to obtain possession. [A-18]. Defendants filed a notice of appeal [RA-6], and invoked CPLR § 5519(a)(6)'s automatic stay of enforcement pending appeal [A-18]. Supreme Court set Defendants' undertaking at $2 million. [*Id.*].

G. The Appellate Division's Affirmance.

In the Appellate Division, Defendants first engaged in preliminary motion practice—moving the Court to vacate or stay the preliminary injunction pending appeal or, in the alternative, to reduce the undertaking to $129,000. The Appellate

Division did not grant the request to stay or vacate the injunction but did reduce the undertaking to $129,000. [RA-104]. Defendants posted the $129,000 bond and therefore remain in possession of the properties.

On the merits, the Appellate Division affirmed. Again, Defendants staked their case on the claim that "the courts of New York have no power to determine who controls the Nation." [A-6]. And again, the Appellate Division deemed that assertion irrelevant because "we are not required to do so in this appeal"; instead, the court "accord[s] due deference to the BIA's conclusion that the Nation … has resolved the [leadership] dispute in favor of plaintiff." [*Id.*]. The Appellate Division explained that even if courts "lack authority to resolve internal disputes about tribal … governance," the federal Executive Branch assuredly has authority "'to make recognition decisions regarding tribal leadership'" [*Id.* (quoting *Tanner*, 824 F.3d at 327-28)]. That authority is vested in the Department of the Interior as part of its "power to manage 'all Indian affairs and … all matters arising out of Indian relations.'" [*Id.* (quoting *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008))]. Hence, "[p]ursuant to federal law, 'we owe deference to the judgment of the Executive Branch as to who represents a tribe.'" [A-7 (quoting *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935, 938 (D.C. Cir. 2012))].

The Appellate Division "caution[ed] that we do not determine which party is the proper governing body of the Nation, nor does our determination prevent the

Nation from resolving that dispute differently according to its law in the future." [*Id.*]. Instead, the "Nation, as a sovereign body, retains full authority to reconcile its own internal governance disputes according to its laws." [*Id.*]. But "[u]ntil such action occurs … we accord deference to the BIA's determination that plaintiff is the proper body to enforce the Nation's rights, including its rights to control the property at issue in this action." [*Id.*].

Two Justices dissented, and the Appellate Division subsequently granted a motion for leave to appeal to this Court, certifying the limited question of whether the Appellate Division's "order … entered July 25, 2018, [was] properly made." [A-1].

On December 20, 2018, the Nation filed a motion seeking to reinstate Supreme Court's original $2 million bond, to which Defendants responded on December 28, 2018. That motion remains pending.

ARGUMENT

The decisions of Supreme Court and the Appellate Division are correct. The State Legislature has conferred jurisdiction on New York courts to hear actions like this one. And New York courts must exercise that jurisdiction unless they are *unable* to do so. Defendants argue that their leadership claims create that type of jurisdiction-destroying impediment, despite the rejection of those claims by the Nation's citizens, the BIA, the Department of the Interior, and federal courts. But

the decisions below correctly did not accept Defendants' argument. To grant the Nation an injunction, New York courts need not themselves reweigh the merits of the Nation's leadership dispute. They can—indeed, must—defer to the federal government's determination that the Nation has resolved that dispute in favor of the Halftown Council. When the federal executive chooses to recognize foreign governments, that determination binds New York courts. The same rule applies when the federal executive exercises its plenary authority to recognize an Indian Nation government. A contrary rule would allow any Indian defendant to destroy the jurisdiction of New York courts with any assertion of a right founded in tribal law. With the courts closed to New York's Indians, might would make right. That is not, and cannot be, the law.

I. Under 25 U.S.C. § 233 And Indian Law §§ 5 And 11-a, Supreme Court Has Jurisdiction Over This Case.

New York's Constitution confers on Supreme Court "general original jurisdiction." N.Y. Const. art. VI, § 7(a). Hence, Supreme Court "is competent to entertain all causes of action[ ] unless its jurisdiction has been specifically proscribed." *People v. Correa*, 15 N.Y.3d 213, 227 (2010). Here, no statute "proscribe[s]" Supreme Court's jurisdiction. Quite the opposite: Statutes repeatedly confirm Supreme Court's jurisdiction to hear cases like this one—brought by Indians and Indian governments, and seeking the recovery of real property.

To begin, Congress specifically authorized New York courts to exercise such jurisdiction in 25 U.S.C. § 233. There, Congress granted New York courts "jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings." Then, in Indian Law § 5, the State Legislature exercised the power Congress conferred by providing that "[a]ny action … between Indians or between one or more Indians and any other person or persons may be prosecuted and enforced in any court of the state to the same extent as provided by law for other actions." The State Legislature put Congress's authorization into action again in Indian Law § 11-a, specifying that the "governing body of any nation … of Indians may in the name and on behalf of such nation … maintain any action or proceeding to recover the possession of lands of such nation … unlawfully occupied by others and for damages resulting from such occupation." In short, as this Court has explained, an Indian Nation's governing body has the right to "deal with the lands of the tribe including the maintenance of actions or proceedings to recover the possession of such lands of the tribe unlawfully occupied." *Brenner v. Great Cove Realty Co.*, 6 N.Y.2d 435, 448 (1959).

These provisions aimed both to ensure equality and to secure law and order. Congress and the State Legislature spoke with one voice in affirming that "the civil relationship and responsibility of all the citizens within a State should be equal …

under … jurisdiction that … protect[s] all alike," S. Rep. No. 81-1836, at 4 (1950), and that Indians should be able to "come before [New York] courts on terms of equality with all other[s]," Public Papers of Thomas E. Dewey (1952) at 26, *in* Bill Jacket, 1953, ch. 671. So if non-Indians could come before New York courts to protect their property, Indians and Indian governments must have the same right.

Meanwhile, Congress and the State Legislature recognized that if New York's courts were *closed* to its Indian citizens and governments, the results would be chaos. Then, as now, many New York Indian Nations lacked "civil courts to which tribal members may resort." S. Rep. 81-1836, at 5. And with so many Indian Nations having "no tribal courts of any kind," there was "no[] semblance of … law and order," yielding "lawlessness and lack of individual protection." *Id.* This lack of "adequate opportunities for resort to the courts for a redress of wrongs," *id.* at 6, was the evil the State Legislature sought to remedy when it invoked 25 U.S.C. § 233's "Federal sanction" for state-court jurisdiction over Indian cases, *see* Report of Joint Legislative Committee on Indian Affairs at 3, Bill Jacket, 1953, ch. 671 ("1953 Report of Joint Legis. Comm.").

For decades, this Court and others have exercised the jurisdiction Congress and the State Legislature conferred, recognizing that the above-cited provisions "make available to … Tribe[s] and [their] members … full access to our State courts." *Brenner*, 6 N.Y.2d at 448; *see Oneida Indian Nation of N.Y. v. Burr*, 132

A.D.2d 402, 405-08 (3d Dep't 1987). They have done so even in disputes regarding property on a reservation, and even where ownership is a question of tribal law. *Bennett v. Fink Constr. Co.*, 47 Misc. 2d 283, 285 (N.Y. Sup. Ct., Erie Cty. 1965); *Mt. Pleasant v. Gansworth*, 150 Misc. 584, 585 (N.Y. Sup. Ct., Niagara Cty. 1934), *aff'd*, 242 A.D. 675 (4th Dep't 1934) (unpublished table decision); *Lyons v. Lyons*, 149 Misc. 723, 727 (N.Y. Sup. Ct., Onondaga Cty. 1933), *aff'd*, 244 A.D. 759 (4th Dep't 1935) (unpublished table decision); *George v. Pierce*, 85 Misc. 105, 123-24 (N.Y. Sup. Ct., Onondaga Cty. 1914); *Shongo v. Shongo*, 158 N.Y.S. 99, 102-03 (Erie Cty. Ct. 1915).

Indeed, 25 U.S.C § 233 specifically confirmed that New York courts may "recogniz[e] and giv[e] effect to any tribal law or custom which may be proven to the satisfaction of such courts." And in exercising this jurisdiction, New York courts have been mindful that, otherwise, they would frustrate the intent of Congress and the State Legislature in extending such jurisdiction in the first place—that if an "Indian may [not] resort to the courts of this State for the enforcement of his rights," then "he would be without remedy." *Mt. Pleasant*, 150 Misc. at 586; *see Lyons*, 149 Misc. at 727; *Peters v. Tallchief*, 121 A.D. 309, 312-13 (4th Dep't 1907); *George*, 85 Misc. at 123-24; *Shongo*, 158 N.Y.S. at 102-03.[2]

[2] In *Ransom v. St. Regis Mohawk Education & Community Fund, Inc.*, 86 N.Y.2d 553 (1995), this Court held that an arm of the St. Regis Mohawk Tribe was entitled to sovereign immunity from suit, *id.* at 560. In so doing, it rejected the argument that 25 U.S.C. § 233 and Indian Law § 5

It is thus clear that Supreme Court had jurisdiction over the Nation's suit seeking to recover possession and control over Nation businesses and real property.

II. Defendants' Leadership Claims Cannot Destroy Supreme Court's Jurisdiction, Particularly When The Federal Government Has Recognized Plaintiff As The Governing Body Of The Nation Chosen By The Cayuga People.

Because the State Legislature has conferred jurisdiction, Supreme Court was obligated to exercise jurisdiction unless some other statute or rule of law has "proscribed" Supreme Court from doing so. *Correa*, 15 N.Y.3d at 227. Defendants' argument, at bottom, is that jurisdiction is "proscribed" here simply because they *claim* to be the Nation's true leadership. New York courts have no jurisdiction to "resolv[e an] internal leadership dispute[]," Defendants say, and adjudicating this suit would require New York courts to do so. [Br. 29].

This argument is false at its most basic premise. To grant relief, New York courts need not "resolv[e]" any leadership dispute. The federal government has rejected Defendants' leadership claim and recognized Plaintiff as the Nation's governing body, based on the BIA's verification of a determination made by the

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abrogated that immunity, stating that "those provisions govern private disputes between individual Indians, not disputes between an Indian and a sovereign tribe." *Id.* at 560 n.3. That statement, made in addressing sovereign immunity, should not be understood to mean that Indian Nations cannot sue *as plaintiffs* when no issue of sovereign immunity arises. The Appellate Division has held, after detailed analysis, that 25 U.S.C. § 233 and Indian Law § 5 authorize suits by Indian Nations in their governmental capacities. *See Oneida Indian Nation*, 132 A.D.2d at 405-08. *St. Regis Mohawk* did not undertake, *sub silentio*, to abrogate that holding.

Cayuga people themselves. Under more than a century of New York and federal law, courts must defer to such recognition decisions by the federal executive.

A. The Federal Executive, Charged With Making Recognition Decisions, Has Recognized Plaintiff.

The Department of the Interior and the BIA can and must decide who to recognize as an Indian Nation's governing body, even when that question is disputed. That duty, as noted above, stems from Congress's directive that the Department of the Interior and the BIA "shall … have the management of all Indian affairs," 25 U.S.C. § 2; from the federal government's "obligat[ion] to recognize and deal with some tribal governing body" as part of its "responsibility for carrying on government relations with the Tribe[s]," *Goodface*, 708 F.2d at 339; and from the myriad statutes that require the federal government to identify an Indian Nation's governing body, *supra* at 7-8. Here, the federal executive has carried out those responsibilities to recognize the Cayuga Nation's governing body. In the decisions by the BIA and the Department of the Interior, the federal government "recognize[d] the Halftown Council as the legitimate Cayuga Nation government and … reject[ed]" Defendants' contrary claims. [RA-34].

Defendants observe that the BIA does not have "authority or obligation to resolve the internal disputes of a sovereign Indian nation." [Br. 19; *see* Br. 19-27]. But here, the BIA did not undertake "to resolve" the Nation's leadership dispute. It found that, through the statements of support, *the Cayuga people* had "resolv[ed] …

a tribal dispute by a tribal mechanism." [RA-47-48 (quoting A-38)]. The BIA then "recognize[d] the result of that tribal process." [RA-48 (citing A-69)]. Far from "infringing upon the Nation's right of self-determination and self-governance" [Br. 29], that approach *respects* the Nation's sovereign ability to resolve its own disputes.

B. Courts Defer To Recognition Decisions By The Federal Executive.

Where, as here, the federal executive has made a recognition decision, courts do not themselves reweigh that decision. They properly defer. And in so doing, they avoid any need to conduct the inquiry that Defendant claims is beyond their jurisdiction: "resolv[ing] [an] internal leadership dispute." [Br. 29].

1. More Than A Century Of Caselaw Establishes The Rule That Courts Defer To The Federal Executive's Recognition Decisions.

Shortly after the Civil War ended, the U.S. Supreme Court set forth the governing rule in *Holliday*, 70 U.S. at 419. In addressing whether to recognize an Indian Nation for purposes of regulations governing liquor traffic, the Supreme Court explained that "[i]n reference to all matters of this kind," the Court's "rule [is] to follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs." *Id.* And "[i]f by them those Indians are recognized as a tribe, this court must do the same." *Id.*

That rule still governs today, including recognition decisions arising out of leadership disputes. The D.C. Circuit applied that rule in *Timbisha Shoshone Tribe*

v. Salazar, 678 F.3d 935 (D.C. Cir. 2012). There, the plaintiffs raised a claim on an Indian Nation's behalf. *Id.* at 937. A question arose, however, about whether those plaintiffs were the Nation's rightful leaders, entitled to sue on its behalf. *Id.* The D.C. Circuit did not, as Defendants here would have it, throw up its hands and dismiss simply because a question of leadership had been *raised*. The BIA had issued a letter concluding that the leadership dispute had been "resolv[ed] … in a valid tribal forum"—there, an election. *Id.* (quoting letter). And that determination, the D.C. Circuit held, answered the question. The court "owe[d] deference to the judgment of the Executive Branch as to who represents a tribe." *Id.* at 938. For that proposition, the D.C. Circuit cited the U.S. Supreme Court's decision in *Holliday* and the power vested in the Department of the Interior under 25 U.S.C. § 2 "to manage '*all* Indian affairs and ... *all* matters *arising out of Indian relations*.'" *Id.* (emphasis and omissions in original) (quoting *Cal. Valley Miwok*, 515 F.3d at 1267 (in turn quoting 25 U.S.C. § 2)). The D.C. Circuit recognized that one side in the leadership dispute was "unhappy with how the election was run, who voted, and the results." *Id.* But it stressed that "ours is not the forum for that debate." *Id.* What mattered—and all that mattered—was that the Court "ha[d] a letter from the Executive Branch recognizing [one] faction, and we must not turn a blind eye to facts in assessing jurisdiction." *Id.* at 939.

The Second Circuit's decision in *Tanner*, on which Supreme Court and the Appellate Division relied, applied that same principle. That case also concerned the Cayuga Nation, and it presented complications not present here. There too, the court was called upon to address a legal right of the Cayuga Nation (in that case, involving gaming), and to identify the governing body of the Nation that could assert that right. *Tanner*, 824 F.3d at 327. At that time, however, the statement of support process described above had not yet occurred, and the operative BIA decision was the 2015 decision recognizing Mr. Halftown "on an interim basis … for purposes of administering existing ISDA contracts." *Id.* at 329; *see supra* at 11. But the Second Circuit found that even this interim decision was sufficient to entitle Mr. Halftown to sue on the Nation's behalf. Citing *Timbisha Shoshone*, the Second Circuit explained that "the BIA's decision to recognize a tribal government can determine a plaintiff's claims." *Tanner*, 824 F.3d at 328. And in light of the BIA's "expertise," and federal courts' "lack[] [of] authority … to question the decision of the Executive," the Second Court determined that the "only practical and legal option is for the courts to consider the available evidence of the present position of the Executive and then defer to that position." *Id.* at 330.

The BIA's 2015 decision, even though "interim" and "couched in limiting language," was sufficient to warrant deference: There was "nothing in the BIA's *reasoning* … that confines itself to the ISDA contracts at issue, or that suggests that

the BIA would recognize different tribal leadership in connection with other functions relevant to the Nation's dealings with the federal government, including its courts." *Id.* at 329. The Second Circuit therefore concluded that it was "entitled to defer to the BIA's recognition of an individual as authorized to act on behalf of the Nation, notwithstanding the limited issue that occasioned that recognition." *Id.* at 330.

The instant case follows *a fortiori* from *Tanner* and *Timbisha Shoshone*, as the courts below held. Both Plaintiff and Defendants agree: the properties belong to the Cayuga Nation. *Supra* at 9. The question is who may *assert* those rights of the Nation, and take possession as the Nation. As in *Tanner*, New York courts must respect the decision of the BIA, which has special expertise in and responsibility for dealing with Indian affairs, and which recognized here a leadership determination by the Cayuga people. As in *Timbisha Shoshone*, Defendants may be "unhappy with" the statement of support process (as the *Timbisha Shoshone* litigants were unhappy with the electoral process there) and the BIA's acceptance of it. 678 F.3d at 938-39. But Defendants' ongoing disagreement does not diminish courts' obligation to follow these decisions. By contrast, to *refuse* to decide this case would itself deny the authority of the Cayuga Nation Council, formally recognized by the United States as the Nation's governing body, to govern the Nation and protect its

rights. *Tanner*, 824 F.3d at 330. That would be the ultimate affront to the Cayuga Nation's sovereignty.

2. Defendants' Contrary Arguments Fail.

Defendants raise three principal arguments for why the rule of *Holliday*, *Timbisha Shoshone*, and *Tanner* should not apply here. All fail.

First, Defendants argue that the Appellate Division was "mistaken[]" in relying on the rule that courts must respect the "'judgment of the Executive Branch as to who represents a tribe,'" claiming that this deference applies to "only one category of cases"—"standing to bring a lawsuit on behalf of an Indian nation"—and not questions concerning "the right to exercise … control over Nation businesses." [Br. 22-24 (quoting A-7 (in turn quoting *Timbisha Shoshone*, 678 F.3d at 938))]. But as already explained, *Timbisha Shoshone* and *Salazar* are merely specific applications of *Holliday*'s general rule of deference to the federal executive. State and federal courts have not hesitated to apply that rule wherever recognition questions arise. *See, e.g.*, *Holliday*, 70 U.S. at 419-20 (liquor control regulations); *Wyandot Nation of Kan. v. United States*, 858 F.3d 1392, 1394 (Fed. Cir. 2017) (breach of trust claims); *Samish Indian Nation v. United States*, 419 F.3d 1355, 1358 (Fed. Cir. 2005) (ISDA benefits); *Atkinson v. Haldane*, 569 P.2d 151, 162-63 (Alaska 1977) (sovereign immunity); *State v. Cooney*, 80 N.W. 696, 697 (Minn. 1899) (hunting rights); *Huron Potawatomi, Inc. v. Stinger*, 574 N.W.2d 706, 708

(Mich. Ct. App. 1997) (sovereign immunity). Especially close to home is *State v. Gowdy*, 462 P.2d 461 (Or. Ct. App. 1969), which applied this rule in the context of a tribal dispute over "authority to enact fishing regulations." *Id.* at 464. The court explained that, because "the Yakima Tribal Council, and not the 'Fish Commission', is recognized by the Bureau of Indian Affairs as having … authority …, this court must also recognize that authority." *Id.* Indeed, the Nation has found no case in which a state or federal court has refused to defer to the federal executive's recognition decision. Defendants—having cited none—apparently have not done so either. That is no surprise, given how long *Holliday*'s rule has been settled.

Second, Defendants claim that deference is not due to the BIA's decision because it supposedly was only an "interim" decision made "for purposes of entering into contracts with the Nation." [Br. 27-28]. Even if that accurately characterized the decisions here (and it does not), it would not diminish the deference due. The Second Circuit in *Tanner* explained why. The BIA's view is that it may not "issu[e] a recognition decision" unless some BIA "purpose requires recognition," such as the need to identify the tribal governing body that is competent to contract with the BIA. 824 F.3d at 329. As a result, "such decisions will typically carry some kind of limiting language." *Id.* A rule "requir[ing] tribes to cite a BIA decision recognizing a tribal government for all purposes, or for the specific purpose of initiating litigation" would be, in most cases, a rule of no deference *at all*—and one that "could

in many situations prevent tribes from vindicating their rights." *Id.* at 329-30. *Tanner* thus followed the BIA's then-governing recognition decision even though it was "interim" and made for the limited "purpose[] of administering existing ISDA contracts." *Id.* at 329. Indeed, Defendants' argument makes nonsense of 28 U.S.C. § 1362, which—as noted—provides federal court jurisdiction over suits "by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior." The Department does not make recognition decisions simply for the purpose of deciding who may sue in court. Under Defendants' rule, then, no Indian Nation could *ever* rely on § 1362.

Defendants are also wrong on the facts. When the BIA determines that an Indian Nation has not resolved a dispute internally, it will sometimes issue an "interim" recognition decision—like the 2015 "interim" decision at issue in *Tanner*. [A-27]. But here, the BIA expressly stated that its decision was *not* interim. The BIA spent an entire paragraph explaining: The BIA had "considered whether [it] could issue a follow-up interim recognition decision," but found that doing so was inappropriate because "[i]ssuing repeated interim recognition decisions that ignore efforts by the Cayuga people to resolve this dispute risks paralyzing the Nation in a state of uncertainty." [A-27]. Instead, the BIA found—definitively—that the statement of support process "was a valid resolution of an intratribal dispute by a tribal mechanism." [A-26]. The BIA explained that when a "dispute is resolved

through internal tribal mechanisms, the BIA must recognize the tribal leadership embraced by the tribe itself," and it contrasted such decisions with the "interim" decisions the BIA might issue absent such an internal resolution. [RA-43]. Indeed, while an ISDA contract occasioned the recognition decision at issue here, the BIA specifically foresaw that its decision would apply more broadly, and specifically approved that result: It "identif[ied] five other reasons," besides the ISDA contract, that made a recognition decision necessary—including the very "instances of unrest and even violence" in Seneca County associated with Defendants' forcible takeover of the businesses and property at issue in this case. [A-27-28].

To be sure, as Defendants note, the question of the "proper organization" of the Nation's government "remains a matter for the Nation to decide." [Br. 20 (quoting *George v. E. Reg'l Dir.*, 49 IBIA 164, 188 (2009))]. That means that the Nation's citizens, having resolved the leadership dispute through the statement of support process, are not forever bound to their present form of government. They retain their sovereign right, in the future, to chart a different path. And in that sense, a Department of Interior recognition decision is never set in stone. If the Nation itself reconsiders, so too must the Department. But that fact has nothing to do with this case. Defendants do not claim that anything has changed within the Nation. They merely re-raise here the same arguments already rejected by the Nation's

citizens and the Department of the Interior. Those arguments have, indeed, been finally rejected by the relevant decisionmakers.

Third, echoing the dissent below, Defendants note that Plaintiff has also sought damages "for defendants' actions prior to July 14, 2017," and they contend that these claims may raise more complicated questions concerning issues like "whether the defense of sovereign immunity is available" for certain Defendants prior to the BIA's recognition of the Halftown Council as the Nation's governing body. [Br. 3-4 (quoting A-8)]. The answer to that argument, however, is the one that Justice Bender gave: In whatever capacity some Defendants may have claimed to occupy Nation properties before the BIA's decision recognizing the Halftown Council, "they clearly are not continuing their occupancy of the subject premises in such capacity following the decision of the BIA." [RA-4]. As to the question of whether adjudicating some of the Nation's damages claims may raise additional issues, "it is too early to determine" that question. [*Id.*]. Defendants did not press in their interlocutory appeal to the Appellate Division the limited argument that *some* claims should have been dismissed on grounds of sovereign immunity or otherwise; instead, they have argued only that Supreme Court "lacked subject matter jurisdiction" over the *entire* case. [Br. 2].

The dissent also was wrong that New York courts must make "impermissibl[e]" determinations to resolve whether Defendants, today, "continue

to have a legitimate claim under traditional law" to possess the properties at issue. [A-9]. It is undisputed that these businesses and properties belong to the Nation, *supra* at 9, and Defendants do not assert any right "under traditional law" to operate (and maintain the profits from) these businesses and to possess these properties *aside from* their claim to be the Nation's governing body—a claim the Cayuga people have rejected, in a process recognized by the federal government. Indeed, for this reason, the key issue in this case is not materially different from those in *Timbisha Shoshone* and *Tanner*. Those cases followed the Department of the Interior's recognition decisions in deciding whether or not the plaintiffs could properly bring an action on the Indian Nation's behalf. And here, once it is decided that Plaintiff may properly bring *this* action on the Nation's behalf, there is no controversy left concerning the issues that Supreme Court has decided—denying Defendants' motion to dismiss and awarding possession to Plaintiff. [A.13]. As noted above, Defendants admit that they "have been in possession of the real property in question" and exercise "dominion and control over [this] real … property owned by the Cayuga Nation." [RA-100, Answer ¶¶ 15-16]. And they assert a right to do so *only* on the ground they are "acting at the direction of the governing body of the Cayuga Nation." [RA-101, Answer ¶ 23].

Nor is it even correct that any claim "under traditional law," if raised, would divest Supreme Court of jurisdiction, as the dissent implied. [A-9]. Under 25 U.S.C.

§ 233, New York courts have jurisdiction to "recogniz[e] and giv[e] effect to any tribal law or custom which may be proven to the satisfaction of such courts." 25 U.S.C. § 233; *see Bennett*, 47 Misc. 2d at 285 (applying Seneca law); *Lyons*, 149 Misc. at 727 (applying Onondaga law); *see also Alexander v. Hart*, 64 A.D.3d 940, 941 (3d Dep't 2009). But here, as already explained, there was no such issue to consider with regard to the going-forward possession of the Nation's properties and operation of the Nation's businesses—given the determination by the Cayuga people, recognized by the federal government, that Plaintiff is the Nation's governing body.

C. Under New York And Federal Law, Deference To The Federal Executive's Recognition Decisions Is Mandatory.

New York courts not only *can* defer to the federal executive's recognition decisions, and thereby avoid any need "to resolve" a tribal leadership dispute [Br. 29], they *must* do so. Both New York and federal law require courts to defer to the federal executive's determination, rather than dismissing a lawsuit by declining to give effect to that determination.

Indian Law 11-a. As explained above, Indian Law § 11-a expressly authorizes suits by "the council, chiefs, trustees or headmen constituting the governing body of any nation" to recover Nation property. That *presumes* courts may need to make a threshold decision concerning whether the entity that has brought the suit *in fact* "constitut[es] the [the Nation's] governing body." And read

in context, that provision indicates that, when New York courts do so, they should look to whom the federal government recognizes as the "governing body." Federal authorization for Indian Law § 11-a comes from 25 U.S.C. § 233, which similarly empowers an Indian Nation's "governing body" to act on the Nation's behalf. When it does so, it clearly means the "governing body" recognized by the Department of the Interior: It authorizes "the governing body of any *recognized* tribe of Indians" to identify which "tribal laws" the Nation wishes to codify, and it provides that "on certification *to the Secretary of the Interior* by the governing body of such tribe," these laws "shall be published in the Federal Register," 25 U.S.C. § 233 (emphasis added). So when Indian Law § 11-a—enacted after 25 U.S.C. § 233, and pursuant to its authorization—accords a Nation's "governing body" the right to sue "to recover the possession of lands of such nation," it follows that the statute *also* refers to the governing body recognized by the Department of the Interior. It would make no sense if that governing body had the power to codify tribal laws in the Federal Register, but not sue to enforce the Nation's rights pursuant to state-court jurisdiction conferred by the same federal statute.

Indeed, § 233's legislative history is impossible to square with the position that mere invocation of a leadership dispute, even when the federal government has made a recognition decision, destroys Supreme Court's jurisdiction. That section, as explained above, *supra* at 24, stemmed from Congress's concern that, without

state-court jurisdiction, there would be "lawlessness and lack of individual protection." S. Rep. No. 81-1836, at 5. And Congress had these concerns in part because it perceived that leadership disputes rendered tribal forums effectively unavailable: It explained that, in one Indian Nation, "[t]he situation is worsened by the existence of a 'rump' organization … asserting that it is the true tribal governing body." *Id.* This leadership dispute, Congress believed, "prevent[ed] the establishment of a modern efficient tribal government," including "tribal courts." *Id.* It would be perverse indeed if invocation of a leadership dispute destroyed state-court jurisdiction when Congress conferred that jurisdiction precisely to avoid the absence of "law and order" resulting from leadership disputes. *Id.*

Federal Law. If New York adopted a rule that did not give effect to federal recognition decisions, federal law would preempt that rule. As noted above, the federal government has "plenary power" over Indian affairs, *Morton*, 417 U.S. at 551, and Congress has conferred on the Department of the Interior "management of all Indian affairs and of all matters arising out of Indian relations," including power to make recognition decisions like the one at issue here. 25 U.S.C. § 2. That preempts States from making different recognition decisions, or from failing to give effect to decisions the federal government has made. Indeed, the U.S. Supreme Court's seminal *Holliday* decision was a preemption case, explaining that "[n]either the constitution of [a] State nor any act of its legislature … can withdraw [Indians]

from the influence of an act of Congress which that body has the constitutional right to pass concerning them." 70 U.S. at 419-20.

Even absent express preemption, state law is preempted "if it interferes or is incompatible with federal and tribal interests reflected in federal law, unless the State interests at stake are sufficient to justify the assertion of State authority." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983). Here, declining to give effect to the federal government's recognition decision would indeed "interfere[] … with federal law," *id.*, and New York has no legitimate interest in ignoring the federal government's recognition decision.

Conflicts could arise in numerous ways. For example, the BIA recognized the Halftown Council and awarded it funds to operate and maintain the Nation's offices. [A-25 n.3]; *see* 25 U.S.C. § 5304(a) (authorizing ISDA funds for such purpose). If another group stole those funds, and New York courts instead recognized *that group* as the Nation's governing body, or declined to follow the federal government's recognition decision in disputes concerning "dominion and control over the Nation's property" [Br. 5], there would be intolerable conflict. The Nation's governing body recognized by the federal government would be unable to

access the funds the federal government had awarded or the property the funds were intended to support.[3]

The same conflict exists with regard to property the Cayuga Nation has applied to be taken into trust by the United States. The Nation's pending trust application includes some of the properties at issue here. [RA-14 ¶ 24, RA-16 ¶ 36, RA-97 ¶ 3; *see* AKRF, *Cayuga Indian Nation of New York, Environmental Impact Statement, Scoping Report, Conveyance of Lands into Trust* at 8-9 (Nov. 2006), http://cayuganationtrust.net/110606_ScopingReport/1%20Cayuga%20Indian%20Nation%20of%20NYS%20Land%20Into%20Trust%20-%20EIS%20Scoping%20Report%20110606.pdf]. There would be a grave conflict if an Indian Nation's governing body recognized by the federal government could not secure possession and control of property owned by the Nation, so as to be able to tender that property to the United States to be taken into trust for the benefit of the Nation's people.

[3] Defendants are wrong in contending that the Appellate Division based its decision on a "misperception" concerning the Nation's offices. [Br. 22 n.3]. In their submissions to the BIA, both sides "state[d] in their scope of work the intention to maintain office space." [A-25]. In 2014, however, Defendants seized the property used as the "Nation's Offices," and this property is one of the properties at issue here. [RA-14 ¶ 34, RA-15 ¶ 32, RA-80, RA-97 ¶ 3]. When the BIA issued its decision recognizing the Halftown Council as the Nation's governing body, and awarded an ISDA contract to the Nation based on the Halftown Council's application, that determination indeed "concern[ed] the very property that is the subject of this action," as the Appellate Division correctly noted. [A-7]. It was a determination that the Halftown Group was entitled to operate offices on behalf of the Nation, and Defendants were not. It is neither here nor there that, as Defendants allege, the Halftown Council was forced to use a different physical space as the Nation's offices since Defendants' 2014 seizures. [Br. 22 n.3].

There also is nothing to Defendants' argument that the Department of the Interior's recognition decision cannot be preemptive because it supposedly is not a "Law[] of the United States" within the meaning of the Supremacy Clause. [Br. 25-26 (quoting U.S. Const. art. VI, cl. 2)]. "Pre-emption may result not only from action taken by Congress itself; a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 369 (1986). Agencies may do so by promulgating regulations, or—equally—by issuing orders following adjudications. It is "well established that when developing law on a subject, an agency usually has a choice between the method of rulemaking and that of adjudication"; either way, these agency actions "have the binding force of 'federal law.'" *Gen. Motors Corp. v. Abrams*, 897 F.2d 34, 39 (2d Cir. 1990) (citation omitted). Indeed, the U.S. Supreme Court has accorded preemptive force to agency orders entered following adjudications. *Chicago N. W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 314-15, 321-28 (1981). Thus, contrary to Defendants' argument, "[i]t is clear … that federal agency orders resulting from quasi-judicial agency proceedings may constitute 'federal law' under the Supremacy Clause." *Fellner v. Tri-Union Seafoods, L.L.C.*, 539 F.3d 237, 244 (3d Cir. 2008).[4]

[4] These points illustrate why the dissent below erred by relying on the claim that the Department of the Interior's decision did not have "a preclusive effect on" Defendants under principles of *res judicata* and collateral estoppel. It is not *preclusion* principles that compel courts to follow the

D. Deferring To The Federal Government's Recognition Decisions Accords With Courts' Approach In Analogous Areas.

Deferring to the federal government's recognition decisions also accords with how courts approach two analogous problems: foreign government recognition, and disputes over church property.

Foreign governments. The rule of *Holliday*, *Timbisha Shoshone*, and *Tanner* derives from an "analogy to recognition of foreign governments." *Miami Nation of Indians of Ind., Inc. v. U.S. Dep't of Interior*, 255 F.3d 342, 345 (7th Cir. 2001). That area raises similar problems, which this Court has resolved by applying the same approach adopted by Supreme Court and the Appellate Division below—namely, deference to the federal executive.

As with identifying a tribe's governing body, "[w]hat government is to be regarded here as representative of a foreign sovereign state is" not "a judicial

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recognition decisions of the federal Executive Branch. If the executive recognizes the government of Russia, for example, that is binding on courts, regardless of whether the requirements for preclusion are met. *Infra* at 45. Instead, the source of courts' duty of deference is the supremacy of federal law, and respect for the Department of the Interior's authority over "management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2.

In any event, the dissent was wrong that the Department of the Interior's decision is not binding on Defendants under preclusion principles. It is "clear that the doctrines of *res judicata* and collateral estoppel are applicable to give conclusive effect to the quasi-judicial determinations of administrative agencies," provided that the agency employs "adjudicatory … procedures substantially similar to those used by a court of law." *Ryan v. N.Y. Tel. Co.*, 62 N.Y.2d 494, 499 (1984). Here, the decisions of the BIA Regional Director and the Assistant Secretary – Indian Affairs were adjudicatory, and Defendants have not claimed they did not receive "a full and fair opportunity to litigate" their claims. *Id.* at 501. Those decisions are therefore binding on Defendants insofar as they establish, *inter alia*, that the federal government recognizes Plaintiff, not Defendants, as the Nation's governing body.

question"; rather, it is "political" one "to be determined by the political department of the government." *Guar. Tr. Co. of N.Y. v. United States*, 304 U.S. 126, 137 (1938). Courts lack the power, for themselves, to determine such questions. So, they treat the federal government's determination as controlling. For example, this Court has held that a foreign government is entitled to sue in New York courts if, but only if, it is "recognized as such by the United States." *Republic of Honduras v. Soto*, 112 N.Y. 310, 311-12 (1889). That recognition decision, this Court explained, is "purely a matter for the determination of the legislative or executive departments of the government," and "courts are bound by the decision reached by those departments." *Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 262 (1923). That is because "[i]t is not for the courts to say whether the present governments of Russia or Mexico or Great Britain should or should not be recognized. They are or they are not. That is as far as we may inquire." *Id.* at 263.

State courts are not free to depart from this rule. As the Second Circuit explained, "recognition … 'is a topic on which [the United States] must speak with one voice,' and that voice must emanate from the [federal] Executive." *Tanner*, 824 F.3d at 328 (quoting *Zivotofsky ex rel. Zivotofsky v. Kerry*, 135 S. Ct. 2076, 2086 (2015)). That determination "by the political departments conclusively binds the courts," and "no state policy can prevail" against it. *United States v. Belmont*, 301 U.S. 324, 327-28 (1937); *see also N.Y. Times Co. v. City of N.Y. Comm'n on Human*

Rights, 41 N.Y.2d 345, 350 (1977) (deferring to the federal government's recognition of South Africa, despite the Court's disapproval of South Africa's policies). So if the recognized Russian government sued to recover New York property seized by a Russian splinter group, New York courts would not—and could not—simply *dismiss* the suit on the theory that adjudicating it would require them to impermissibly "resolve [a Russian] leadership dispute[]." [Br. 29]. They must treat the federal government's determination as "conclusive[]," *Belmont*, 301 U.S. at 328, and adjudicate the case. Likewise as to Indian Nations, the "one voice" in government-to-government relations is that of the federal government, which New York courts must treat as "conclusive[]."

Church property. Disputes over church property also present a similar set of problems, with the disputes sometimes implicating questions of ecclesiastic doctrine that courts are loath to address. In that context, courts have roundly rejected Defendants' position—that mere *invocation* of such a dispute divests courts of jurisdiction, and as a result, possession alone is king. Instead, courts have sought, and found, approaches that allow them to adjudicate these cases without impermissibly wading into church doctrine.

The Supreme Court's seminal decision is *Presbyterian Church in the United States v. Mary Elizabeth Blue Hull Memorial Presbyterian Church*, 393 U.S. 440 (1969). There, two local churches withdrew from a hierarchical general church

organization, and the local churches asserted a right to continue to retain possession of the local church properties on the ground that the general church had departed from the tenets of controlling church doctrine. In resolving the dispute, the Supreme Court made clear that, as Defendants assert is true in the Indian context, longstanding precedent "leaves the civil courts no role in determining ecclesiastical questions in the process of resolving property disputes." *Id.* at 447; *see Watson v. Jones*, 80 U.S. (13 Wall.) 679, 728-29 (1871); *Jones v. Wolf*, 443 U.S. 595, 602 (1979).

The Court, however, rejected the argument that this complication rendered state courts powerless. The Court's starting point was that "the State has a legitimate interest in resolving property disputes, and that a civil court is a proper forum for that resolution." *Presbyterian Church*, 393 U.S. at 445. States can effectuate this interest, the Supreme Court found, by adopting either of two approaches to adjudicate such disputes without improperly deciding matters of church doctrine. States may adopt a "neutral principles" approach, resolving disputes by reference to rules "developed for use in all property disputes" that "can be applied without 'establishing' churches to which property is awarded" and "without resolving underlying controversies over religious doctrine." *Id.* at 449; *see First Presbyterian Church of Schenectady v. United Presbyterian Church in the United States*, 62 N.Y.2d 110, 121-22 (1984). Or they may "defer[] to a hierarchical organization's

internal authority," accepting the resolution of the highest governing authority. *First Presbyterian*, 62 N.Y.2d at 120-21.[5]

The point is not that church-property disputes are precisely analogous to this case, or that the Court should adopt a "neutral principles" or "hierarchical" approach for cases like this one; the cases concerning foreign-government recognition, discussed above, are stronger analogues. Instead, the critical point is that state courts did not lose their jurisdiction simply because the dispute concerned competing factions within a church. *Id.* at 118. To the contrary, the U.S. Supreme Court affirmatively authorized state courts to develop methods to resolve such disputes—rather than, as Defendants would have it, throwing up their hands and declaring that possession alone trumps.

Indeed, if translated into the Indian context, either the "neutral principles" or the "hierarchical" approach would dictate the same result as the decisions below. Deference to the Department of the Interior's recognition decision is a "neutral principle" that can be applied without deciding any issue of tribal leadership. That is just another label for the Second Circuit's reasoning in *Tanner*. 824 F.3d at 328. The result is the same from deferring to the highest "hierarchical … authority." *First*

[5] While the U.S. Supreme Court in *Presbyterian Church* did not specifically address the "hierarchical" approach, this Court has held that "[j]udicial deference to a hierarchical organization's internal authority remains an acceptable alternative mode of decision." *First Presbyterian*, 62 N.Y.2d at 121. For purposes of church-property disputes, this Court adopted the "neutral principles" approach. *Id.*

Presbyterian, 62 N.Y.2d at 120-21. The Department of the Interior (the highest authority in our federal constitutional system with regard to Indian affairs) has identified "[t]he adult citizens of the Cayuga Nation [as] the ultimate 'nonjudicial tribal institution'" within the Cayuga Nation [A-31], and these Cayuga citizens—in turn—have identified the Halftown Council as the Nation's governing body [A-37]. This Court can, and must, give effect to that choice without itself deciding any issue of tribal leadership.

E. Defendants' Sweeping Contrary Position Invites Chaos And Would Undermine The Principles Of Tribal Self-Government That Defendants Purport To Champion.

Defendants' position, if accepted, would threaten law and order in the areas of New York that are home to Indian Nations. On their view, mere invocation of a tribal leadership dispute disables New York courts from intervening, regardless of how resoundingly the Nation's people have rejected their claims, or how definitive the federal government's recognition. That is true for the properties that Defendants have seized thus far. And it would be true if, tomorrow, Defendants decided to seize more. The sole recourse of the Nation's federally-recognized government would be to *take them back*—and consistency would demand that Defendants acknowledge that New York courts would be powerless to redress such forcible self-help. The State of New York would thus be helpless to avoid an escalating cycle of tit-for-tat, as one side then the other took matters into its own hands. Courts have resoundingly

rejected that result in other contexts, *supra* at 44-49, and the Court should do so again here.

While Defendants pay lip service to Indian Nations' "right of self-determination and self-governance" [Br. 29], their position profoundly undermines this right. Self-determination means, in part, being able to "resol[ve] … a tribal dispute by a tribal mechanism" *and have that resolution recognized* by outsiders, as the federal government did here. [A-38]. Thus, this Court in *New York Times Co.* explained that the way it "respect[ed] the independence of … other sovereign State[s]" was to give effect to other States' choices concerning their governments and to deal with the foreign governments "recognized as such by our [federal] government." 41 N.Y.2d at 352. Likewise in the Indian realm, that same approach is the only way the Nation can protect the rights that belong to *the Nation*—whether under federal gaming law (as in *Tanner*), or New York property law (as here). To depart from that approach would be "effectively to deny [the Nation's] authority by the very act of refusing to decide" whether a suit is authorized by the Nation. *Tanner*, 824 F.3d at 330. Such a "result would be convenient for litigants engaged in disputes with the tribe, but disastrous for the tribe's rights." *Id.* at 328.

The Supreme Court of Connecticut recognized that same principle in another dispute over Indian lands, in *Golden Hill Paugussett Tribe of Indians v. Town of Southbury*, 651 A.2d 1246 (Conn. 1995). A plaintiff claiming to be the Paugussett

Tribe's leader filed suit to recover lands that the Tribe allegedly owned—but another tribal body and the State intervened, claiming that the Tribe had not actually authorized the suit. *Id.* at 1248-49. The plaintiff contended that "tribal sovereignty" barred the state court from looking behind its bare allegations that the Tribe had authorized the suit, and thus the suit had to proceed. *Id.* at 1252. The State agreed that the state court had "no power to decide who had authority to sue"—but concluded that this required dismissal, because the court could not "make an affirmative finding" of standing. *Id.* The Connecticut Supreme Court, however, disagreed with both conclusions. Instead, it found that the trial court had followed the correct approach by taking evidence and *deciding* whether to recognize the suit as properly brought on the Tribe's behalf (concluding it was not). *Id.*

Acknowledging that "our courts are powerless to intervene in the exercise of tribal self-government," the Connecticut Supreme Court explained that this does not "render all matters touching upon tribal decisions nonjusticiable." *Id.* at 1252-53. Instead, the Court explained that state courts could exercise jurisdiction so long as doing so is "'compatible with tribal autonomy.'" *Id.* (citation omitted). In *Golden Hill*, the Court found that the only way to "preserve[] the autonomy of the tribe to choose its own form of government" was the one the trial court had followed—"determining whether the suit had been brought by the tribe." *Id.* By contrast, the plaintiff's approach disrespected tribal autonomy because it allowed the suit to

proceed based on bare allegations of authority, which subjected the Tribe to a risk of loss on a suit that it had never authorized to be brought. Meanwhile, the state's approach—dismissing simply because a question of tribal authorization was *raised*—undermined tribal sovereignty because it could "forever foreclose[]" the Tribe "from bringing even an authorized lawsuit in its own name." *Id.* at 1254. Both approaches, the Court recognized, "lead to results far more detrimental to tribal sovereignty." *Id.*

The same principles dictate affirmance in this case. That is especially true because, in order to "determin[e] whether the suit ha[s] been brought by the tribe," *id.* at 1253, the only thing New York courts must decide is to confirm that the federal government has recognized Plaintiff as the Nation's governing body, based on the resolution of the leadership dispute by the Cayuga people.

F. *Bowen v. Doyle* Illustrates Why Defendants' Position Is Wrong.

Defendants rely heavily on the Western District of New York's decision in *Bowen v. Doyle*, 880 F. Supp. 99 (W.D.N.Y. 1995) [Br. 16, 17, 18, 19, 23, 29], but it just illustrates what is wrong with their position. They cite *Bowen* for the proposition that New York courts lack jurisdiction "over the internal governance of an Indian nation" [Br. 17]. But as both courts below correctly understood, this suit does not ask New York courts to take jurisdiction of the Nation's "internal governance." The key question of internal governance—the identity of the Nation's

governing body—has been resolved by the Cayuga people, as recognized by the federal government. Defendants disapprove of those results, but now there is nothing for New York courts to do but to give effect to that resolution and that recognition.

Bowen and this case are nearly opposites. In *Bowen*, the plaintiffs brought a state-court action alleging that the Seneca Nation's President "violated the Nation's Constitution and laws," and they obtained an injunction that "purport[ed] to decide who may serve on the Nation's Council; to direct how the Council's meetings are to be conducted; to determine the validity of Council action; to require the Nation to expend funds and direct how those funds are to be spent; and to order Nation police officers to enforce State Court orders against officials of the Nation's government." 880 F. Supp. at 107, 110. The federal-court decision in *Bowen* was plainly right to conclude that the state court lacked jurisdiction to thus take into its own hands the Seneca Nation's "internal affairs." *Id.* at 115. But the features that rendered the state-court *Bowen* action impermissible are absent here. The Nation's claims are founded on New York law property rights within New York courts' jurisdiction. And as a result of the federal government's recognition decision, based on the Cayuga people's resolution, no issues of tribal leadership need be decided.[6]

[6] The other cases cited by Defendants [Br. 18-19], do not advance their position. Aside from *Bowen* (which is irrelevant), *Tanner* (which supports Plaintiff), and *Ransom* (discussed above, *supra* at 25-26 n.2), Defendants cite two Appellate Division cases that stand for the obvious

By contrast, it is Defendants who seek to relitigate in this Court the very claims considered and rejected first by Cayuga citizens, and then by the federal government—involving assertions regarding clan mothers, seatwarmers, condoled chiefs, and other supposed tenets of Cayuga oral traditions. [Br. 2-3, 5-9, 11-15]. Defendants thus devote the bulk of their brief to the very issues they claim cannot be considered in state courts.

G. Defendants' Arguments Concerning 25 U.S.C. § 233 Lack Merit.

In their December 28, 2018 Memorandum in Opposition to the Nation's motion to increase the undertaking ("Bond Mem."), Defendants raise additional arguments concerning 25 U.S.C. § 233. In the event Defendants also raise these arguments in reply on the merits, the Nation addresses them here.

Defendants' § 233 argument begins with an unsupported assumption—that because this case arises "within an Indian reservation" and "involv[es] only Indians," New York courts have "adjudicatory jurisdiction" only if Congress has affirmatively conferred it. [Bond Mem. 3 (citing *Williams v. Lee*, 358 U.S. 217 (1959))]. But

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provision that suits involving Indians raise no jurisdictional concerns when they do not implicate Indian Nations' "internal affairs" [Br. 18-19 (citing *Alexander*, 64 A.D.3d at 942; *Seneca v. Seneca*, 293 A.D.2d 56, 58-59 (4th Dep't 2002))]. Those cases do not help Defendants show that this suit is beyond New York courts' jurisdiction. Defendants also cite a 1965 Supreme Court decision for the proposition that an Indian nation, "in its capacity of [sic] a sovereign nation, is not subservient to the orders and directions of the courts of New York State" [Br. 19 (quoting *Bennett*, 47 Misc. 2d at 285)]. But here, the Cayuga Nation has *invoked* the jurisdiction of New York's courts. And to grant the Nation the relief it seeks, New York courts need not issue any "orders and directions" against any "sovereign nation," but only against individuals who are unlawfully occupying Nation-owned properties.

federal courts have held that, under the Supreme Court's decision in *City of Sherrill*, certain local laws apply on the Nation's reservation. *Supra* at 8. While the Nation opposed those rulings, they are the law today. Defendants do not support their assumption that, on lands subject to *City of Sherrill*, affirmative congressional action is required for New York courts to have adjudicatory jurisdiction.

Next, Defendants misrepresent § 233—which, in fact, says that New York courts *can* exercise jurisdiction here. First, Defendants invoke § 233's statement that "nothing herein contained shall be construed as authorizing the alienation from any Indian nation … of any lands within any Indian reservation." [Bond Mem. 4]. But this suit does not seek to alienate lands "from" an Indian Nation. The Nation sues *to recover* lands seized by individuals. There will be no "alienation" of land, which will continue to be owned by the Cayuga Nation. Moreover, this provision merely clarifies that, where land is subject to a restriction on alienation—which occurs, for example, on lands held in trust by the United States, or restricted allotments—§ 233 does not *eliminate* these restrictions. *See Bryan v. Itasca Cty.*, 426 U.S. 373, 391 (1976). Here, however, Defendants do not identify any restrictions relevant here.

Second, Defendants badly misquote § 233, characterizing it as saying that "nothing herein contained shall be construed as conferring jurisdiction on the courts of the State of New York … in civil actions involving Indian lands." [Bond Mem.

4]. The sentence *actually* says that § 233 does not authorize jurisdiction over claims "involving Indian lands or claims with respect thereto *which relate to transactions or events transpiring prior to September 13, 1952*." 25 U.S.C. § 233 (emphasis added); *see* 1953 Report of Joint Legis. Comm. at 3. This case does not relate to pre-1952 events.

III. This Appeal Does Not Present The Question Of Whether Supreme Court Properly Exercised Its Discretion To Issue A Preliminary Injunction.

In a preliminary motion to vacate the injunction before the Appellate Division, Defendants argued that the injunction should be vacated for reasons separate from their jurisdictional challenge—for example, because the injunction was a "mandatory" injunction. But Defendants did not raise that argument in their opening brief, and cannot do so now. New arguments cannot be raised on reply. *People v. Couser*, 28 N.Y.3d 368, 380 (2016). And here, there is more: Those issues have not been brought before this Court. This appeal comes to the Court on the certified question of whether the Appellate Division's "order … entered July 25, 2018, [was] properly made." [A-1]. But the Appellate Division's July 25 order did not address non-jurisdictional challenges to the preliminary injunction, and Defendants did not *ask* the Appellate Division to do so. Only in their preliminary motion did Defendants raise this argument. Where, as here, the "jurisdictional predicate for an appeal to this court is a certified question, the appeal brings up for review 'only the question

or questions so certified.'" *Matter of Pollock*, 64 N.Y.2d 1156, 1158 (1985) (quoting N.Y. Const. art. VI, § 3(b)(4)).

CONCLUSION

The Appellate Division's order of July 25, 2018 was properly made, and it should be affirmed.

Dated: January 11, 2019

BARCLAY DAMON LLP;
JENNER & BLOCK, LLP

By: _____

Kevin G. Roe
Daniel J. French
Lee Alcott

Attorneys for Plaintiff-Respondent

Barclay Damon Tower
Syracuse, NY 13202
125 East Jefferson Street
Telephone: (315) 413-7279
Email: kroe@barclaydamon.com

David W. DeBruin
Zachary C. Schauf
1099 New York Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 639-6015
Email: DDeBruin@jenner.com
(*pro hac vice* applications pending)

NEW YORK STATE COURT OF APPEALS
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BARCLAY DAMON LLP;
JENNER & BLOCK, LLP

By: _____
Kevin G. Roe
Daniel J. French
Lee Alcott

Attorneys for Plaintiff-Respondent