

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

CAYUGA NATION,)
256 Cayuga Street)
Union Springs, New York 13160,)
)
Plaintiff,)

v.)

THE UNITED STATES OF AMERICA,)
)
U.S. DEPARTMENT OF JUSTICE,)
U.S. Department of Justice)
950 Pennsylvania Avenue, NW)
Washington, DC 20530-0001)

FEDERAL BUREAU OF)
INVESTIGATION,)
935 Pennsylvania Avenue NW,)
Washington, DC 20535)

Civil Action No. 1:20-cv-03179-RCL

FIRST AMENDED COMPLAINT

ROBERT M. WILKINSON, in his)
official capacity as ACTING)
ATTORNEY GENERAL,)
950 Pennsylvania Avenue, NW)
Washington, DC 20530-0001)

CHRISTOPHER A. WRAY, in his)
official capacity as DIRECTOR of the)
FEDERAL BUREAU OF)
INVESTIGATION)
935 Pennsylvania Avenue NW,)
Washington, DC 20535)

Defendants.

INTRODUCTION

1. The Cayuga Nation (“Nation”), a federally recognized Indian nation, brings this action against the United States of America, the U.S. Department of Justice, the Federal Bureau of Investigation (“FBI”), Acting Attorney General Robert M. Wilkinson, and FBI Director

Christopher A. Wray to redress the FBI's unlawful denial of the Nation's application to obtain an Originating Agency Identifier ("ORI") for the Cayuga Nation's Police Force and to access the federal criminal databases maintained by the FBI.

2. ORIs are critical to law enforcement agencies, including those of Indian nations. ORIs allow these law enforcement agencies to access the FBI's databases, to coordinate with other law enforcement agencies, to identify and locate suspect vehicles and individuals, and to reduce risk and improve public safety. Because access to these databases is so important to Indian nations, Congress has mandated that the "Attorney General shall permit tribal and Bureau of Indian Affairs law enforcement agencies" to "access and enter information" from these databases and "to obtain information from the[se] databases." 28 U.S.C. § 534(d). Congress has further mandated that tribal law enforcement officials "shall be considered to be an authorized law enforcement official for purposes of access to" these databases so long as (1) the person seeking access is a "tribal justice official serving an Indian tribe"; (2) the Indian nation has "Indian country"; and (3) the Indian nation has "criminal jurisdiction" over its Indian country. 34 U.S.C. § 41107(3).

3. Here, determinations by the Bureau of Indian Affairs ("BIA") and the U.S. Department of the Interior ("Interior")—which Congress provided "shall ... have the management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2, and which have decades of expertise in Indian affairs—correctly recognize that the Cayuga Nation and its Police Force meet each of these three requirements. Yet the FBI denied the Nation's application for an ORI. That denial violated the Administrative Procedure Act ("APA") and multiple substantive statutes—including 28 U.S.C. § 534(d), 34 U.S.C. § 41107(3), 25 U.S.C. § 2, 28 U.S.C. § 1362, and 25 U.S.C. § 5123. To redress this unlawful denial, the Nation brings this suit.

JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action under 28 U.S.C. § 1331 (because the Nation’s claims arise under federal law), and 28 U.S.C. § 1362 (because this case is brought by an Indian nation and arises under federal law). The United States has waived its sovereign immunity for claims for non-monetary relief brought under the APA and 5 U.S.C. § 706(1) and (2). *See* 5 U.S.C. § 702.

5. Venue is proper in this district both because the defendants reside in the district, and because a substantial part of the events and omissions giving rise to the claim occurred in this district. 28 U.S.C. § 1391(b), (e).

PARTIES

6. The Cayuga Nation is a federally recognized sovereign Indian nation. *See* Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 85 Fed. Reg. 5462, 5463 (Jan. 30, 2020).

7. In the 1794 Treaty of Canandaigua, the United States recognized a federal reservation for the Nation comprising 64,015 acres—located within what today are Seneca and Cayuga Counties in upstate New York—and pledged that the “reservation[] shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.” Treaty of Canandaigua of 1794, art. II, 7 Stat. 44, 45.

8. The Nation’s reservation has continuously existed for over 200 years, up through today.

9. The Nation is governed by the Cayuga Nation Council. The Nation’s federal representative is Clint Halftown.

10. The United States of America is a sovereign nation.

11. The U.S. Department of Justice is part of the executive branch of the United States government and is responsible for the enforcement of the law and administration of justice in the United States.

12. The FBI is part of the executive branch of the United States government and is within the U.S. Department of Justice. The FBI serves as one of the intelligence and security services of the United States and as one of its principal federal law enforcement agencies.

13. Robert M. Wilkinson is the Acting Attorney General of the United States and is sued in his official capacity.

14. Christopher A. Wray is the Director of the FBI and is sued in his official capacity.

FACTUAL ALLEGATIONS

A. The Statutes Requiring The FBI To Grant Originating Agency Identifiers To The Police Forces Of Indian Nations.

15. An Originating Agency Identifier, or ORI, is a unique code that allows law enforcement agencies to access certain databases maintained by the FBI, including the National Crime Information Center (“NCIC”) and other databases maintained by the FBI’s Criminal Justice Information Services (“CJIS”) Division.

16. Under 28 U.S.C. § 534(d), the “Attorney General shall permit tribal and Bureau of Indian Affairs law enforcement agencies - (1) to access and enter information into Federal criminal information databases; and (2) to obtain information from [Federal criminal information] databases.”

17. Under 34 U.S.C. § 41107(3), “[e]ach tribal justice official serving an Indian tribe with criminal jurisdiction over Indian country shall be considered to be an authorized law enforcement official for purposes of access to the National Crime Information Center.”

18. Hence, as applied to Indian nations, the FBI is required to grant access to the NCIC provided that (1) the person seeking access is a “tribal justice official serving an Indian tribe”; (2) the Indian nation has “Indian country”; and (3) the Indian nation has “criminal jurisdiction” over its Indian country.

19. The U.S. Criminal Justice Information System National Data Exchange Policy and Operating Manual underscores that “[f]ull system participants are federal, state, local, and *tribal* [criminal justice agencies] throughout the U.S., District of Columbia, and U.S. territories.” FBI, Criminal Justice Information Services (CJIS) National Data Exchange (N-DEx) System: Policy and Operating Manual § 1.5 (May 1, 2020), <https://www.fbi.gov/file-repository/policy-and-operating-manual.pdf> (emphasis added).

20. The Department of Justice states that over 330 tribal governmental agencies have access to the CJIS system. *Tribal Access Program*, Dep’t of Justice, <https://www.justice.gov/tribal/tribal-access-program-tap> (last visited Mar. 2, 2021).

B. The Cayuga Nation And Its Qualifications For An Originating Agency Identifier.

21. The Cayuga Nation meets each of the three requirements that the statutes set forth.

1. Indian Nation.

22. The Cayuga Nation is a federally recognized, sovereign Indian nation. *Supra* ¶ 6.

23. Moreover, the “tribal justice officials”—defined by statute to include any “tribal law enforcement officer” or “any ... person responsible for investigating or prosecuting an alleged criminal offense in tribal court,” 25 U.S.C. § 2801(10)—who have sought an ORI and access to the federal criminal information databases serve the Cayuga Nation.

24. Until 2016, a dispute existed regarding the proper leadership of the Cayuga Nation, and until 2016, that dispute had not been resolved by the Cayuga people in a process

recognized by Interior. A group known sometimes as the “Jacobs Faction” or the “Unity Council” claimed to constitute the Nation’s true leadership. The Nation’s federal representative, Clint Halftown, and others within the Nation rejected those claims and maintained that the Nation’s lawful governing body was a Cayuga Nation Council including Mr. Halftown, Tim Twoguns, and Gary Wheeler and not consisting of the Council identified by the Jacobs Faction or the Unity Council.

25. In 2016, the Nation resolved this leadership dispute by undertaking a “statement of support” campaign in which more than 60% of the Nation’s adult citizens recognized the Cayuga Nation Council led by Mr. Halftown and consisting of Mr. Halftown, Tim Twoguns, Gary Wheeler, Donald Jimerson, and Michael Barringer as the Nation’s lawful governing body for all purposes.

26. On December 15, 2016, BIA Eastern Regional Director Bruce W. Maytubby Sr. determined that the statement of support was “a valid resolution of an intratribal dispute by a tribal mechanism” and so “recognize[d] the Halftown Council as the governing body of the Cayuga Nation.” Dec. 15, 2016 Letter from Bruce W. Maytubby Sr. at 2, 14 (attached as Ex. A).

27. On July 13, 2017, Acting Assistant Secretary – Indian Affairs Michael S. Black “affirm[ed] the Regional Director's Decision to recognize the Halftown Council as the legitimate Cayuga Nation government.” Decision at 2, *Cayuga Nation v. E. Reg’l Dir.* (Dep’t of Interior, Assistant Sec’y – Indian Affairs July 13, 2017) (attached as Ex. B).

28. The U.S. District Court for the District of Columbia rejected challenges to the Maytubby and Black decisions. *Cayuga Nation v. Bernhardt*, 374 F. Supp. 3d 1 (D.D.C. 2019).

29. Subsequently, some claimed that Interior had recognized the Halftown Council only for a limited purpose—namely, for the purpose of determining which governing body could

enter contracts under the Indian Self-Determination and Education Assistance Act (“ISDEAA”). A New York state court adopted that reading in a decision issued on October 29, 2019. *See Cayuga Nation v. Campbell*, 34 N.Y.3d 282 (2019).

30. On November 14, 2019, Assistant Secretary – Indian Affairs Tara Sweeney issued a letter that addressed “argu[ments] that in the Maytubby and Black Decisions, the Department did not recognize the Halftown Council for any purpose other than entering into contracts under the [ISDEAA].” Nov. 14, 2019 Letter from Tara Sweeney at 1 (“Sweeney Letter”) (attached as Ex. C).

31. The Sweeney Letter explained that Interior’s 2016 decision “determined that [the] 2016 ‘statement of support’ process, through which the citizens of the Nation acknowledged the Halftown Council to be the Nation’s government for all purposes, complied with Nation law and was binding on ... Interior.” *Id.* The Sweeney Letter “reaffirmed” that the Interior had “acknowledge[d] ... the Halftown Council as the Nation’s governing body without qualification. At no point since the issuance of the Black Decision has the Department considered the Halftown Council’s governmental authority to be limited in any way. The Halftown Council is the Nation’s government for all purposes.” *Id.* The Sweeney Letter explained that the Department had “*not* merely recognize[d] the Halftown Council for the purposes of signing Federal contracts.” *Id.* at 3. The Sweeney Letter concluded that the “Department continues to recognize and follow [a] non-qualified acknowledgment of the Halftown Council as the Nation’s governing body,” and that the “Halftown Council remains the tribal leadership *as a matter of Federal law.*” *Id.* at 2, 4 (emphasis added).

2. Indian Country.

32. The lands within the Nation’s federally recognized reservation qualify as “Indian country.”

33. Congress has defined “Indian country” to include “*all* land within the limits of *any* Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent.” 18 U.S.C. § 1151(a) (emphasis added).

34. The Cayuga Nation has a federal reservation recognized by the 1794 Treaty of Canandaigua.

35. “[E]very federal court” to consider the question, as well as the New York Court of Appeals, has agreed that the Nation’s federal reservation continues to exist and has not been disestablished. *Cayuga Indian Nation of N.Y. v. Gould*, 930 N.E.2d 233, 247 (N.Y. 2010); *see Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 260 F. Supp. 3d 290, 307-15 (W.D.N.Y. 2017) (collecting cases).

36. In a June 17, 2019 letter (attached as Ex. D), the Director of the BIA, writing on behalf of the Secretary of the Interior, reaffirmed that the Cayuga Nation’s reservation “has not been diminished or disestablished.”

37. Because the Nation has a federal reservation that has not been diminished or disestablished, the lands within that reservation are “Indian country.”

3. Criminal Jurisdiction And The Nation’s Police Force.

38. The Cayuga Nation also has criminal jurisdiction over the “Indian country” within its reservation. The Nation has exercised that criminal jurisdiction by, among other things, creating the Cayuga Nation Police Force.

39. The BIA's June 17, 2019 letter again expressly recognizes that "the Cayuga Indian Nation may enforce its own criminal laws against Indians within the boundaries of the Reservation." Ex. D at 1.

40. The BIA's June 17, 2019 letter is consistent with settled principles of Indian law recognizing the inherent authority of Indian nations within Indian country to enact criminal laws, to apply those laws to members and other Indians, and to create police forces, court systems, and incarceration facilities to enforce those laws.

41. The Supreme Court first acknowledged these principles almost 200 years ago in *Worcester v. Georgia*, 31 U.S. 515, 560-61 (1832).

42. These principles recognize that, although the Nation and its reservation exist within the boundaries of the United States and New York State, the "sovereignty retained by tribes includes 'the power of regulating their internal and social relations.'" *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332 (1983) (quoting *United States v. Kagama*, 118 U.S. 375, 381-82 (1886)).

43. A core part of Indian nations' retained sovereignty is the authority to enforce tribal law. Thus, the Supreme Court has explained that Indian nations' "right of internal self-government includes the right to prescribe laws applicable to tribe members and to enforce those laws by criminal sanctions," and that "[i]t is undisputed that Indian tribes have power to enforce their criminal laws against tribe members." *United States v. Wheeler*, 435 U.S. 313, 322 (1978); see *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975).

44. Courts have repeatedly and expressly recognized Indian nations' inherent authority and right to form police forces. The Ninth Circuit, for example, has explained that "Indian tribal police forces have long been an integral part of ... tribal criminal justice systems

and have often performed their law enforcement duties to the limits of available jurisdiction,” and that the “propriety of operation of tribal police forces has been recognized, presently and in the past, by the federal government.” *Ortiz-Barraza*, 512 F.2d at 1179. So too, the Supreme Court has “not ... question[ed] the authority of tribal police to patrol ... within a reservation.” *Strate v. A-1 Contractors*, 520 U.S. 438, 456 n.11 (1997).

45. Indian nations sometimes choose to avail themselves of federal funding to support their law enforcement functions under the Indian Self-Determination and Education Assistance Act of 1975, Pub. L. 93-638; *see* 25 U.S.C. § 5301 *et seq.* Likewise, Indian nations sometimes choose to enter cross-deputization agreements with federal and/or state authorities under the ISDEAA, the Tribal Law and Order Act of 2010, or state law. *See* 25 U.S.C. § 2801 *et seq.*; 25 C.F.R. Part 12.

46. Such arrangements, however, are not necessary for Indian nations to exercise their criminal jurisdiction or to create law enforcement agencies, which instead are powers inherent in Indian nations’ retained sovereignty.

47. Consistent with these principles, many of New York’s Indian tribes maintain police forces, including the Oneida Indian Nation, the Seneca Nation of Indians, and the Saint Regis Mohawk Tribe. Although the police force of the Saint Regis Mohawk is expressly authorized by New York statute and enforces New York state laws, *see* New York Indian Law § 114, the other nations did not—and did not need to—obtain any authorization to create a tribal police force to enforce tribal laws.

48. The BIA’s June 17, 2019 letter again recognizes as much. It explains that the “Department of the Interior ... does not have any relationship with [the Cayuga Nation’s] Law Enforcement Department,” and that the Nation’s “officers are not federally commissioned under

25 U.S.C. § 2804,” but the letter reiterates that “Federal funding or commissioning is not necessary for the Cayuga Indian Nation to exercise its inherent sovereign authority to enforce its own laws inside the Cayuga Indian Nation Reservation boundaries through a law enforcement program.” Ex. D at 1.

49. In 2018, the Cayuga Nation exercised its inherent authority to create a police force and a criminal justice system.

50. The Nation, by Ordinance No. CN-2018-1, established an office of the Commissioner of Public Safety. This ordinance further granted the Commissioner of Public Safety the power to establish a police force, whose primary function is criminal detention, apprehension, and investigation of suspected violations of the Nation’s criminal laws.

51. The Nation appointed Arthur F. Pierce, a former Captain of the New York State Police, as its Public Safety Commissioner.

52. On May 18, 2018, the Nation appointed Colonel Mark Lincoln, also a former member of the New York State Police, as its first Superintendent of Police.

53. On May 31, 2018, the Nation entered into an agreement with Cambria County, Pennsylvania to house persons in the custody of the Nation’s Police Force.

54. The Nation obtained and outfitted police vehicles, and supplied uniforms and badges for the Nation Police.

55. The Nation’s Police Force promulgated a Policy Manual that governs the conduct of its officers.

56. The Nation has adopted and implemented the Cayuga Nation Rules of Criminal Procedure and the Cayuga Nation Penal Code.

57. The Nation has established a court system with jurisdiction under Nation law over offenses defined in the Nation's Penal Code, including a trial court, appellate court, prosecutor, and public defender.

58. The Nation's Police Force began operating on July 31, 2018, and has been operating continuously since that date.

59. The Nation's Police Force now numbers approximately 20 officers, all of whom are experienced law enforcement professionals and have been previously certified by the New York State Division of Criminal Justice Services. The Nation's Police Force patrols the Nation's reservation daily and regularly confronts potential criminal suspects.

60. In February 2020, Nation Police responded to a violent protest at a Nation property in Seneca Falls, New York and made multiple arrests for violations of Nation laws.

61. The Nation continues to receive threats of violence directed at the Nation's leadership and businesses.

62. The Nation's Police Force regularly coordinates with state, local, and federal law enforcement officers and works in harmony with these law enforcement agencies.

63. Absent an ORI, however, the ability of the Nation's Police to coordinate with other law enforcement agencies is hampered. An ORI is necessary for the Nation's Police Force to better coordinate with other law enforcement agencies, to identify and locate suspect vehicles and individuals, and generally to reduce risk and improve public safety. An ORI, as explained above, would give the Nation's Police Force access to the NCIC and other databases maintained by the FBI's CJIS Division.

C. The Cayuga Nation's Applications For An Originating Agency Identifier.

64. The Nation initially submitted its request for an ORI on or about March 28, 2018.

This submission was made to Thomas J. Cascone, Information Technology Specialist for the New York State Police.

65. Mr. Cascone, in turn, transmitted the Nation's request to the FBI.

66. The Nation received no written response from the FBI.

67. As a result, the Nation contacted Mr. Cascone on or about April 23, 2020 to inform him that it intended to renew its request for an ORI.

68. In response to the Nation's outreach, Mr. Cascone invited a renewed application from the Nation and requested the following information and documentation:

- a. Statutory authority creating the Nation's Police Force;
- b. Statutory authority authorizing the law enforcement powers, duties, and functions of the Nation's Police Force;
- c. Training certifications to document that the Nation's Police Force officers are trained and certified as law enforcement officers and have arrest powers;
- d. Budget information for the Nation's Police Force;
- e. Information concerning whether the Nation's Police Force has been performing any type of law enforcement function and documentation showing cases handled; and
- f. Statutory authority giving the Nation's Police Force "jurisdictional/territorial authority" and information concerning "what that jurisdiction/territory includes."

69. The Nation promptly and fully complied with Mr. Cascone's request by providing each piece of information that he had asked for. In particular, by letter dated June 3, 2020, the Nation, through its counsel, supplied the following information and documentation:

- a. A history of the Nation and its treaty relationship with the United States, as well as a map of its 64,015-acre reservation, which has continuously existed for over 200 years and exists to this day.
- b. A statement describing the lawful governing body of the Cayuga Nation, the Nation's Council, and its federal representative, Clint Halftown, as recognized by the United

States Department of Interior, Acting Assistant Secretary – Indian Affairs in a letter dated July 14, 2017.

- c. The Sweeney Letter affirming that the Nation’s “Council is the Nation’s government for all purposes.” *See supra* ¶ 31 & Ex. C.
- d. A copy of Cayuga Nation Ordinance No. CN-2018-1, whereby the Nation established an office of the Commissioner of Public Safety, with the power to establish a Nation Police Force, whose primary function is criminal detention, apprehension, and criminal investigation of suspected violations of Nation criminal laws.
- e. A copy of a press release announcing the appointment of a Superintendent of Nation Police, Colonel Mark Lincoln, together with Colonel Lincoln’s resume, training transcript, professional references, and noteworthy awards.
- f. A description of activities undertaken by the Nation’s Police Force and an analysis of the calls for service handled by the Nation’s Police Force.
- g. Contact information for the Nation Police Force and Colonel Lincoln.
- h. A statement setting forth the Nation’s need for an ORI.
- i. A copy of the implementing budget for the Nation’s Police Force.
- j. A copy of an agreement with Cambria County, Pennsylvania to house persons in the custody of the Nation’s Police Department.
- k. A copy of the Table of Contents for the Nation Police Department Policy Manual.
- l. Resumes for all of the Nation’s Police officers, all of whom are experienced law enforcement professionals and have been previously certified by the New York State Division of Criminal Justice Services.
- m. Photographs depicting the vehicles and uniforms utilized by the Nation’s Police Force.
- n. A copy of the oath taken by Police Force officers.
- o. An exemplar of the badge used by Police Force officers.
- p. Copies of the Nation’s Rules of Criminal Procedure and the Nation’s Penal Code.
- q. A detailed legal analysis setting forth the Nation’s inherent right to establish its own police department as a matter of federal law.

D. The FBI's Initial Denial Of The Nation's Application To Obtain An Originating Agency Identifier And To Access Federal Criminal Information Databases.

70. In an email dated June 8, 2020 (and sent to Cayuga Nation representatives Clint Halftown, Mark Lincoln, Daniel J. French, and Gabriel M. Nugent), Thomas J. Cascone stated that the FBI had denied the Nation's renewed request for an ORI and for access to the FBI's federal criminal information databases.

71. In his email, Mr. Cascone stated that the FBI had previously denied the Nation's original request (made on March 28, 2020) by determinations made on April 19 and July 17, 2018 that the Nation was not an authorized criminal justice agency.

72. The Nation has no record of receiving any such determinations.

73. In response to Mr. Cascone's email, the Nation contacted the FBI by email dated June 8, 2020 requesting a written explanation for the denial of its application.

74. The FBI responded by reply email dated June 9, 2020, stating that an "official denial letter" was being drafted.

75. The FBI provided its official denial letter via a July 2, 2020 letter (the "July 2 Decision," attached as Ex. E) from Trudy Lou Ford, Section Chief, Global Law Enforcement Support Section, Criminal Justice Information Services Division of the FBI, which reiterated that the FBI was denying the Nation's request for an ORI for its Police Force.

76. The July 2 Decision acknowledged that tribal justice officials "qualify for access to NCIC" if they "exercise criminal jurisdiction over Indian country." Ex. E at 1.

77. As explained above, the Nation's Police Force does exercise criminal jurisdiction over Indian country. Moreover, the BIA's June 17, 2019 letter recognizes that the Nation's Police Force exercises criminal jurisdiction over Indian country. Ex. D at 1.

78. The July 2 Decision gave four reasons for the FBI's denial. Each of those reasons is invalid.

79. **First**, the July 2 Decision observed that the Nation "does not have lands in trust." Ex. E at 1. But neither 28 U.S.C. § 534(d) nor 34 U.S.C. § 41107 requires an Indian nation to have trust lands. And while § 41107 *does* require that an Indian nation have "criminal jurisdiction" over its "Indian country," trust lands are not necessary to satisfy either requirement. *Supra* ¶¶ 32-63. As the BIA's June 17, 2019 letter explains, the Nation "may enforce its ... criminal laws against Indians within [its] Reservation" even though the Nation "does not have lands in trust." Ex. D at 1; *accord McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460 (2020) (on a reservation that has not been disestablished, "[r]esponsibility to try [criminal cases] ... fall[s] ... to the federal government and Tribe").

80. **Second**, the July 2 Decision asserted that "the Department of Interior ... does not have any relationship with the [Nation Police] and the [Nation] does not receive any funding from the Department for law enforcement purposes." Ex. E at 2. This, too, is irrelevant. Again, 28 U.S.C. § 534(d) and 34 U.S.C. § 41107 impose specific requirements. But nowhere does either section require that an Indian nation's tribal justice officials receive federal funds or otherwise have a relationship with Interior. Instead, Congress mandated that the FBI "shall permit tribal ... law enforcement agencies" access to the federal criminal information databases, 28 U.S.C. § 534(d), and that "[e]ach tribal justice official serving an Indian tribe with criminal jurisdiction

over Indian country *shall be* considered to be an authorized law enforcement official for purposes of access to the National Crime Information Center,” 34 U.S.C. § 41107(3) (emphasis added).¹

81. Moreover, the U.S. Solicitor General recently reaffirmed to the Supreme Court that Indian nations cannot be required to enter cross-deputization agreements or other such arrangements as a condition of exercising their inherent sovereignty to carry out their criminal jurisdiction—because such arrangements often carry conditions “that tribes may view as an affront to their sovereignty.” Pet. for Writ of Certiorari at 28, *United States v. Cooley*, No. 19-1414 (U.S. June 19, 2020), 2020 WL 3474095. Hence, “[r]equiring tribes to give up even *more* of their limited sovereignty merely to preserve law and order within reservation boundaries is not an adequate solution.” *Id.*; accord Br. for United States at 47, *United States v. Cooley*, No. 19-1414 (U.S. Jan. 8, 2021), 2021 WL 103640 (reaffirming same position).

82. **Third**, the July 2 Decision implied that because the Nation does not have trust land or a sufficient relationship with federal law enforcement officials, the Nation’s reservation is not a “reservation under the *jurisdiction of the United States Government*”—and thus not “Indian country” under 18 U.S.C. § 1151. Ex. E at 2 (emphasis added). But again, this argument is clearly wrong, as the Solicitor General again has recognized. A leading Indian law treatise explains that the phrase “under the jurisdiction of the United States Government”

¹ *Accord Information Sharing*, Office of Tribal Justice, Dep’t of Justice, <https://www.justice.gov/otj/information-sharing> (last visited Feb. 27, 2021) (“Tribal governments protect the public and are critical partners with federal, state, and local governments. In order to be [able to] do their jobs effectively, tribal criminal justice agencies receive information from other tribal, federal, state, and local criminal justice agencies. The Tribal Law and Order Act of 2010 confirmed pre-existing federal practices that allowed tribal criminal justice agencies to access and share information through FBI Criminal Justice Information Services (CJIS) systems (28 USC 534(d)). In addition, the Tribal Law and Order Act empowered the Attorney General to ‘ensure that tribal law enforcement officials that meet applicable Federal or State requirements be permitted access to national crime information databases’ (34 USC 41107).”).

“exclude[s] from the scope of the statute Indian reservations governed by certain states and thus not under federal protection”; it does not require that the federal government take any particular actions, or hold land in trust, before the land will be a “reservation” and “Indian country” under 18 U.S.C. § 1151. *Felix S. Cohen’s Handbook of Federal Indian Law* § 3.04(2)(c)(ii) at 191 (Nell Jessup Newton eds. 2012).

83. The Solicitor General has endorsed this interpretation and explained that he was “unaware of circumstances in which an Indian reservation—set aside, maintained, and denominated as such for a federally recognized tribe—has not been recognized as Indian country under the statutory definition” on the theory that the land was not “under the jurisdiction of the United States Government.” *See* Supp. Br. for the United States at 19, *Sharp v. Murphy*, 140 S. Ct. 2412 (U.S. Dec. 28, 2018) (No. 17-1107), 2018 WL 6918971.

84. **Fourth**, the July 2 Decision asserted that “there is a serious dispute about who represents the lawful government of the Cayuga Nation,” citing the state-court decision in *Cayuga Nation v. Campbell*, 34 N.Y.3d 282 (2019). Ex. E at 1-2. This assertion is again clearly wrong.

85. The state-court decision in *Campbell* declined to rely on Interior’s recognition decision in adjudicating a state-law property dispute because it interpreted that decision as having been made for a limited purpose.

86. After *Campbell*, however, Interior reiterated that “the citizens of the Nation [had] acknowledged the Halftown Council to be the Nation’s government for all purposes” via the “‘statement of support’ process”; that this decision “was binding on the Department” as a matter of federal law; and that Interior accordingly had recognized the Halftown Council “as the Nation’s governing body without qualification,” “for all purposes,” and not “limited in any way,”

and that the “Halftown Council remains the tribal leadership as a matter of Federal law.” Ex. C at 1-2, 4.

87. The BIA and Interior have “the management of all Indian affairs and of all matters arising out of Indian relations,” 25 U.S.C. § 2, and have special expertise in Indian affairs, including with respect to determining which “governing body” to “recogniz[e].” *See* 28 U.S.C. § 1362 (“The district courts shall have original jurisdiction of 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.” (emphasis added)). The FBI is not free to depart from the determination of the officials that Congress charged with managing Indian affairs, and with determining which governing body of an Indian nation to recognize, that the Halftown Council is the governing body of the Cayuga Nation as a matter of Federal law.

E. The FBI’s Reconsideration Decision.

88. In a July 22, 2020 letter, the Nation identified and addressed the errors in the July 2 Decision and asked the FBI to reconsider its decision. July 22, 2020 Letter from David W. DeBruin to Todd C. Commodore (attached as Ex. F).

89. On July 29, 2020, Betsy C. Taylor of the FBI’s Office of General Counsel stated that the Office was “in receipt of [the Nation’s July 22] letter” seeking reconsideration of the FBI’s decision “and [would] provide a coordinated response.”

90. On September 18, 2020—having received no response from FBI—the Nation sent another letter to the FBI. The letter reiterated the Nation’s disagreement with the FBI’s decision and stated that the Nation intended to file suit unless the FBI responded by September 28, 2020. *See* Sept. 18, 2020 Letter from David W. DeBruin to Jason A. Jones at 2-3 (attached as Ex. G).

91. By email dated September 25, 2020, the FBI “request[ed] until October 31, 2020 to provide” any further “updates” that the FBI might choose to make. *See* Sept. 25, 2020 email from Richard McNally to David W. DeBruin at 1 (attached as Ex. H).

92. The FBI did not provide any updates or other communications to the Nation by October 31, 2020.

93. On November 3, 2020, the Nation filed this suit.

94. On February 5, 2021—five days before the government’s deadline to file a responsive pleading—the FBI provided to the Nation a letter dated February 4, 2021 stating that the FBI had “review[ed] our original decision ... but our position remains unchanged.” Feb. 4 Letter from Trudy Lou Ford at 1 (“Reconsideration Decision”) (attached as Ex. I).

95. The Reconsideration Decision rested on two grounds. Neither, however, diminishes the Nation’s entitlement to an ORI under 28 U.S.C. § 534(d) and 34 U.S.C. § 41107.

96. ***First***, the Reconsideration Decision asserted that the Nation’s Police Force “is not a ‘tribal justice official serving an Indian tribe’” under § 41107(3) because “a leadership dispute still exists within the Nation.” Ex. I at 2-3. The FBI, however, still offered no adequate answer to Interior’s determination recognizing a definitive resolution to that leadership dispute by the Cayuga people.

97. The Reconsideration Decision characterized Interior’s recognition decisions as limited to “government to government *contracting* purposes” and as not concerning “law enforcement authority” of the Nation’s police force. *Id.* at 4-5 (emphasis added). But as Interior has recognized, the “citizens of the Nation [have] acknowledged the Halftown Council to be the Nation’s government for all purposes.” Ex. C at 1. And the Sweeney Letter in turn reaffirmed that the “Halftown Council is the Nation’s government for all purposes” and that Interior had “*not*

merely recognize[d] the Halftown Council for the purposes of signing Federal contracts.” *Id.* at 1, 3.²

98. The Reconsideration Decision also stated that events in “February and March 2020” suggested that the “leadership disagreement ... continued.” Ex. I at 3. In February 2020, the Nation’s Police Force—executing lawful warrants issued by the Nation’s court—removed trespassers who were occupying certain Nation-owned properties in Seneca County, New York. Those trespassers had originally seized those properties in 2014, before the Nation’s statement-of-support campaign and Interior’s recognition decisions. The Reconsideration Decision characterized the Police Force’s execution of these warrants and protection of the Nation’s properties as supporting one “faction” against “another faction claiming leadership.” *Id.*

99. The Reconsideration Decision, however, did not explain how those events showed that a leadership disputed “continued” after the Nation’s statement of support campaign and Interior’s recognition decisions. Some people continue to believe that former President Donald Trump prevailed in the 2020 presidential election. On that basis, some of those people occupied the U.S. Capital on January 6, 2021. Those claims do not make Joe Biden any less President

² The Reconsideration Decision also cited, as “other facts relevant to [its] decision,” that the Nation’s Policy Force does “not have a relationship with the BIA; ... [does] not receive funding from the BIA; [and does not have] officers ... commissioned by the BIA.” Ex. I at 6. The Reconsideration Decision did not claim that any “of these are required” to trigger the FBI’s duty to issue an ORI under 28 U.S.C. § 534(d) or 34 U.S.C. § 41107. But it nonetheless asserted that “these facts ... demonstrate that” Interior has only “recogniz[ed] a certain faction of the Nation for contracting purposes” and that this recognition does not extend to “law enforcement” purposes. *Id.* But again, the Reconsideration Decision did not address the Sweeney Letter’s affirmation that the “Halftown Council is the Nation’s government for all purposes.” Ex. C at 1. As explained above, Indian nations often choose not to enter cross-deputization agreements with Interior or with other governments. *Supra* ¶¶ 45-48. The Reconsideration Decision adduced no evidence that the Nation’s lack of a cross-deputization agreement reflects any limitation on the scope of Interior’s recognition of the Halftown Council.

today. The same is true of the claims by a few individuals within the Nation who continue to deny the conclusions that the Cayuga people reached in 2016, that Interior recognized in its decisions in 2016 and 2017, and that Interior reaffirmed in 2019. The Reconsideration Decision did not assert that either the Cayuga people or Interior have recognized any change in the Nation's leadership since the Sweeney Letter.³

100. Indeed, another event referenced in the Reconsideration Decision makes clear that Interior continues to recognize the same Halftown Council that it has consistently recognized since 2016. In July 2020, Interior denied an application by the Nation to take certain lands into trust under the authority of Section 5 of the Indian Reorganization Act. The trust decision was directed to the "Honorable Clint Halftown, Federal Representative, Cayuga Indian Nation of New York," and the decision did not deny the trust application on the ground that a dispute existed concerning the Nation's lawful governing body.

101. The Reconsideration Decision also suggested that Interior's position is "not binding upon the FBI." Ex. I at 5. The Reconsideration Decision, however, again did not acknowledge 25 U.S.C. § 2 or 28 U.S.C. § 1362, both of which confer on Interior alone the responsibility for managing Indian affairs and determining which "governing body" to "recognize[]." Nor did the Reconsideration Decision suggest that the FBI, unlike Interior, has any process for making its own tribal leadership recognition decisions.

³ This same point renders irrelevant the Reconsideration Decision's statement that Interior's "decision to recognize one faction of the Cayuga Nation for their purposes did not strip the Tribe of its inherent right to self-determination in choosing its leadership going forward." Ex. I at 5. The Cayuga Nation exercised their right to self-determination via the 2016 statement-of-support process. And the Reconsideration Decision, again, does not claim that the Cayuga people have exercised their sovereign right to select *different* leadership since 2016. To the contrary, by refusing to give effect to how the Cayuga people have exercised their right to self-determination, the Reconsideration Decision frustrates the Nation's right to self-determination and self-government.

102. **Second**, the Reconsideration Decision stated that the Nation’s Police Force “does not have ‘criminal jurisdiction over Indian country’” under 34 U.S.C. § 41107(3). Ex. I at 5. For that proposition, the Reconsideration Decision cited Interior’s July 2020 denial of the Nation’s application to take lands into trust (which was based in part on concerns Interior expressed regarding the February 2020 events). *Id.* at 5-6. The Reconsideration Decision, however, ignored that Indian nations’ criminal jurisdiction over their reservations is not limited to trust lands—as Interior reaffirmed in its June 17, 2019 letter explaining that the Nation “may enforce its ... criminal laws against Indians within [its] Reservation” even though the Nation “does not have lands in trust.” Ex. D at 1.

103. The Reconsideration Decision also stated that the FBI has “taken ... into account” various “considerations” that Interior had deemed relevant in denying the Nation’s trust application under Section 5 of the IRA. Ex. I at 6. But these considerations are irrelevant under 28 U.S.C. § 534(d) and 34 U.S.C. § 41107. The FBI must issue an ORI when the requirements of 28 U.S.C. § 534(d) or 34 U.S.C. § 41107 are met.

CLAIM FOR RELIEF

Count One: Arbitrary, Capricious, And Unlawful Action In Violation Of 28 U.S.C. § 534(d), 34 U.S.C. § 41107(3), 25 U.S.C. § 2, 28 U.S.C. § 1362, 25 U.S.C. § 5123(f)-(g), And The Administrative Procedure Act, 5 U.S.C. § 706(1)-(2)

104. Paragraphs 1 through 103 of this complaint are incorporated by reference as if fully set forth herein.

105. Under 28 U.S.C. § 534(d), the “Attorney General shall permit tribal and Bureau of Indian Affairs law enforcement agencies - (1) to access and enter information into Federal criminal information databases; and (2) to obtain information from [Federal criminal information] databases.”

106. The FBI violated 28 U.S.C. § 534(d) by unlawfully denying the Cayuga Nation’s “tribal ... law enforcement agenc[y]”—namely, the Cayuga Nation Police Force—access to the FBI’s Federal criminal information databases. *Supra* ¶¶ 21-59, 70-103.

107. Under 34 U.S.C. § 41107(3), “[e]ach tribal justice official serving an Indian tribe with criminal jurisdiction over Indian country shall be considered to be an authorized law enforcement official for purposes of access to the National Crime Information Center.”

108. The FBI violated 34 U.S.C. § 41107(3) by unlawfully denying the Cayuga Nation’s Police Force access to the National Crime Information Center even though the Nation’s Police Force consists of “tribal justice official[s] serving an Indian tribe with criminal jurisdiction over Indian country.” *Supra* ¶¶ 21-59, 70-103.

109. Moreover, the FBI’s denial was arbitrary and capricious in that the July 2 Decision and the Reconsideration Decision failed to “examine the relevant data and articulate a satisfactory explanation for its action including a ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). The FBI “relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.” *Id.*

110. In particular, and among other things, the FBI asserted that the Cayuga Nation’s Police Force “is not a ‘tribal justice official serving an Indian tribe’” under 34 U.S.C. § 41107(3) because a “leadership dispute still exists within the Nation,” Ex. I at 2-3, when, as Interior has determined, the “citizens of the Nation [have] acknowledged the Halftown Council to be the

Nation's government for all purposes," and Interior has on that basis recognized and continues to recognize the Halftown Council as "the Nation's government for all purposes" without limitation, Ex. C at 1. The FBI also asserted that the Nation's Police Force "does not have 'criminal jurisdiction over Indian country'" under 34 U.S.C. § 41107(3) because Interior did not grant the Nation's discretionary trust application, Ex. I at 5, when Indian nations do not need trust lands to exercise criminal jurisdiction over their Indian country, as longstanding precedent establishes and Interior has recognized, Ex. D at 1; *see also supra* ¶¶ 78-87, 96-103 (detailing other errors in the July 2 Decision and Reconsideration Decision).

111. The July 2 Decision and the Reconsideration Decision violated 25 U.S.C § 2 and 28 U.S.C. § 1362 by failing to adhere to the determinations of Interior that the leadership dispute within the Nation has been resolved; that the Halftown Council is "the Nation's government for all purposes"; and that the Cayuga Nation has criminal jurisdiction over Indian country.

112. The July 2 Decision and the Reconsideration Decision were arbitrary and capricious in departing without explanation from determinations of Interior, including that the Halftown Council is "the Nation's government for all purposes" and that the Cayuga Nation has criminal jurisdiction over Indian country even though it does not have lands in trust.

113. The July 2 Decision and the Reconsideration Decision are inconsistent with decisions of the FBI involving other Indian tribes, which have not limited access to the FBI's Federal criminal information databases to law enforcement activities these tribes conduct on trust lands. The FBI's unexplained departure from these other decisions renders the July 2 Decision and the Reconsideration Decision arbitrary and capricious and contrary to 25 U.S.C. § 5123(f)-(g), which forbids agencies from making decisions "with respect to a federally recognized Indian

tribe that classifies, enhances, or diminishes the privileges and immunities available to the Indian tribe relative to other federally recognized tribes by virtue of their status as Indian tribes.”

114. The July 2 Decision and the Reconsideration Decisions were arbitrary and capricious insofar as they relied on the view that the Nation was required to have cross-deputization agreements or otherwise have a relationship with Interior when the Solicitor General has correctly reaffirmed to the Supreme Court that such agreements or relationships are unnecessary for Indian nations to exercise their criminal jurisdiction and their inherent sovereignty.

115. The July 2 Decision and the Reconsideration Decision are “final agency action” within the meaning of the APA, and the Nation has no other adequate remedy.

116. The July 2 Decision and the Reconsideration Decision are arbitrary, capricious, an abuse of discretion, and contrary to law in violation of the APA.

117. Accordingly, pursuant to 5 U.S.C. § 706(1) and (2), the Nation is entitled to an order and judgment vacating and setting aside the FBI’s denial of the Nation’s application to obtain an ORI and to access the FBI’s federal criminal information databases and to an injunction requiring the FBI to grant the Nation’s application.

PRAYER FOR RELIEF

WHEREFORE, the Nation prays that the Court:

118. Enter an order vacating the FBI’s denial of the Nation’s application to obtain an ORI and to access the federal criminal databases maintained by the FBI;

119. Declare that the Cayuga Nation is entitled to an ORI and to access to the federal criminal databases maintained by the FBI under 28 U.S.C. § 534(d) and 34 U.S.C. § 41107(3);

120. Enter an injunction requiring the FBI to grant the Nation’s application to obtain an ORI and to access the federal criminal databases maintained by the FBI;

121. Award the Nation reasonable costs and attorneys' fees; and
122. Award such other relief, legal or equitable, as this Court may deem just and proper.

Dated: March 3, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, David DeBruin, hereby certify that on March 3, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and copies will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

/s/ David DeBruin _____

David DeBruin (D.C. Bar No. 337626)