IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAYUGA NATION	)	
Plaintiff,	)	
v.	)	Civil Action No. 1:20-cv-03179-RCL
UNITED STATES OF AMERCA, et al.,	)	Hon. Royce C. Lamberth
Defendants.	)	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FIRST AMENDED COMPLAINT

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INTRODUCTION

This Administrative Procedure Act case challenges the FBI's ability to make critical law enforcement determinations as to who is able to access highly confidential criminal database information. Plaintiff, the Cayuga Nation Indian tribe, applied to the FBI on behalf of its newly formed police department, the Cayuga Nation Police Department ("CNPD"), for access to a collection of twenty-one criminal databases containing some of the most sensitive law enforcement information. After a thorough review of the material now included in the administrative record, the FBI determined that CNPD had not met the statutory criteria for access because it had failed to show (1) that it is a tribal justice agency serving an Indian tribe and that (2) it has criminal jurisdiction over tribal land.

The FBI based its decision in part on a decades-long dispute between two rival factions of Cayuga Nation (the "Nation") that continues today. The FBI found that one of those factions—a group led by Mr. Clint Halftown (the "Halftown Council")—controls the CNPD and has used the CNPD to effect its political ends, including at least twice through violent means. The FBI therefore determined that CNPD had not established that it is a tribal justice agency serving Cayuga Nation or that it has criminal jurisdiction over Cayuga Nation's land. The FBI explained that it sought to be cautious not to intervene in an internal tribal dispute, but acted to safeguard access to non-public information that could be used to a party's advantage or to perpetuate criminal interests.

Plaintiff now asks this Court to second-guess the FBI and wade into the realm of law enforcement determinations. The Court should decline to so, particularly in an Administrative Procedure Act ("APA") challenge, where the only question before this Court is whether the FBI acted rationally and explained its reasoning. Plaintiff's primary argument appears to be that FBI was required to grant CNPD access to the FBI's databases because the Bureau of Indian Affairs

("BIA") of the Department of the Interior ("DOI") previously recognized the Halftown Council as the tribe's legitimate leadership in 2016 and affirmed that conclusion in 2017 and 2019. But the FBI was not bound to follow the BIA's determination. The FBI acknowledged the BIA's determination, but exercised its own discretion to explain why its statutory responsibilities and considerations made it appropriate for FBI to render its own determination on access to sensitive law enforcement databases. The FBI's decision more than meets the standard of rationality required under the APA.

This claim can be resolved now based on the administrative record, the index of which is served contemporaneously herewith, *see* ECF No. 15-2, and the Court should uphold FBI's denial of Cayuga Nation's application and grant the Government summary judgment.[1]

BACKGROUND

I. Statutory and Regulatory Framework

FBI's Criminal Justice Information Services Division ("CJIS") serves as the central repository for criminal justice information within the FBI and is responsible for the operation of existing systems and the development of new technologies for identity history information. The National Crime Information Center ("NCIC") is a "computerized information system, which includes telecommunications lines and any message switching facilities that are authorized by law, regulation, or policy approved by the Attorney General of the United States to link local, state, tribal, federal, foreign, and international criminal justice agencies for the purpose of exchanging NCIC related information. The NCIC includes, but is not limited to, information in the [Interstate

[1] Defendants reserve the right to contest the allegations contained in Plaintiff's First Amended Complaint, ECF No. 12. *See Jurdi v. United States*, 485 F. Supp. 3d 83, 99 (D.D.C. 2020) ("[A] defendant may file a pre-answer motion for summary judgment without automatically admitting as true all the allegations in the complaint.").

Identification Index] III System." 28 C.F.R. § 20.3(n). CJIS has maintained the NCIC database since NCIC was launched in 1967. "National Crime Information Center (NCIC)," FBI, *available at* https://www.fbi.gov/services/cjis/ncic (last accessed Apr. 8, 2021). The automated database now consists of twenty-one different sub-databases or "files." Fourteen of these files relate to people such as the Known or Suspected Terrorist File, Wanted Person File, Violent Person File, and Protection Order File. The other seven relate to property such as records of stolen articles, guns, and vehicles. *Id.* Authorized criminal justice agencies enter records into NCIC that are then made accessible to law enforcement and criminal justice agencies nationwide. When an agency queries NCIC, the system returns an immediate response. *Id.* NCIC policy requires the inquiring agency to contact the entering agency thereafter (known as "hit confirmation") to verify the information is accurate and up-to-date and to determine the proper course of action. *Id.* The NCIC now contains more than seventeen million active records and processes millions of transactions each day. *Id.*

In order for an authorized agency to gain access to the highly confidential information in NCIC, the agency must have an Originating Agency Identifier ("ORI"). AR 939. An ORI is a nine-character identifier assigned by the FBI CJIS Division to an agency that has met the established qualifying criteria, as required by the regulations, to identify the agency in transactions on the NCIC System and to ensure proper access to the CJIS Division systems. *See* 28 C.F.R. § 25.2. The ORI identifies the agency accessing that information in all transactions. It also serves to restrict access to criminal justice information based upon the duties and responsibilities of the agency. AR 946.

To obtain a full access law enforcement ORI, the law enforcement agency "must provide through its CJIS Systems Agency all statutory authorities, budgetary information, and

documentation officially creating the agency [and] confirming the officers have been state or federally trained and certified as law enforcement officers" and it must also "specify the law enforcement duties and functions of the agency." AR 946; *see also* AR 939. Indian law enforcement agencies must submit their ORI applications through either (1) their respective state CJIS System Agencies or (2) the U.S. Department of Justice Office of Tribal Justice Tribal Access Program. AR 939. In either case, FBI CJIS ultimately decides whether to grant the application.

In making its decision, FBI is guided by statutory law, which provides that the sharing of criminal history records shall be done "with, and for the official use of, authorized officials of the Federal Government, including the United States Sentencing Commission, the States, including State sentencing commissions, Indian tribes, cities, and penal and other institutions." 28 U.S.C. § 534(a)(4). The "Attorney General shall permit tribal and Bureau of Indian Affairs law enforcement agencies" to "access and enter information into Federal criminal information databases" and to "obtain information from the databases." *Id.* § 534(d).

Congress has provided specific criteria that an Indian tribe seeking access must demonstrate that it meets in order to be classified as a "tribal [or] Bureau of Indian Affairs law enforcement agency" to obtain information from NCIC. *Id.* Specifically, only those "tribal justice official[s] 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 of the Federal Bureau of Investigation." 34 U.S.C. § 41107(3). In other words, an Indian tribe seeking access must meet three separate criteria: (1) the entity seeking access must be a "tribal justice official serving an Indian tribe"; (2) the Indian nation must have "Indian country"; and (3) the Indian nation must have "criminal jurisdiction" over its Indian country. *Id.*

The regulations implementing this statutory provision provide that "[c]riminal history record information contained in the [Interstate Identification Index] System and the FIRS may be made available . . . [t]o criminal justice agencies for criminal justice purposes," 28 C.F.R. § 20.33(a)(1), and to other entities for specified purposes. A "criminal justice agency" is "[a] governmental agency or any subunit thereof that performs the administration of criminal justice pursuant to statute or executive order, and that allocates a substantial part of its annual budget to the administration of criminal justice." *Id.* § 20.3(g)(2). The "[a]dministration of criminal justice," in turns, refers to the "performance of any of the following activities: Detection, apprehension, detention, pretrial release, post-trial release, prosecution, adjudication, correctional supervision, or rehabilitation of accused persons or criminal offenders. The administration of criminal justice shall include criminal identification activities and the collection, storage, and dissemination of criminal history record information." *Id.* § 20.3(b). Additionally, an agency must allocate a substantial part of its budget (as interpreted by the DOJ to mean more than 50%) to the administration of criminal justice functions in order to be a criminal justice agency. *See id.* § 20.3(g) and AR 6–7 (U.S. Department of Justice, *Privacy and Security Planning Instructions, Criminal Justice Information Systems* (April 1976)). Only if an agency meets all of these criteria will the FBI grant its application for an ORI.

II. The FBI's Denial of Cayuga Nation's Application for an ORI

The CNPD began operating on June 31, 2018. Pl.'s First Am. Compl., ECF No. 12 ("FAC") ¶ 58. The force is reportedly composed entirely of non-Native retired and semi-retired Sheriffs and local police officers. AR 474.004. CNPD submitted its first ORI application to Thomas J. Cascone, an Information Technology Specialist for the New York State Police, a CJIS Systems Agency, on or about March 28, 2018. AR 68–69. Mr. Cascone sent that application to

the FBI on April 12, 2018. AR 65. Soon thereafter, the FBI determined that CNPD was not an authorized criminal justice agency and therefore did not qualify for an ORI. The FBI sent its decision to Mr. Cascone on April 19, 2018, AR 65, and then again on July 17, 2018, AR 82. Plaintiff alleges Mr. Cascone never forwarded those denials on to Cayuga Nation. FAC ¶ 66.

CNPD then filed a renewed ORI application (the "Application") by way of Lieutenant Colonel Scott Wilcox, formerly the CJIS Systems Officer for the State of New York, on June 3, 2020. FAC ¶ 69. Mr. Cascone informed CNPD by email on June 8, 2020 that the FBI had denied CNPD's Application. At the request of Plaintiff's counsel, the FBI followed up with a written denial letter on July 2, 2020 from Trudy Lou Ford, Section Chief, Global Law Enforcement Support Section, FBI CJIS. Then, on July 22, 2020, Mr. David W. DeBruin, Plaintiff's counsel in this action, sent an email directly to the FBI requesting reconsideration of the July 2, 2020 denial. *See* AR 885–900. Mr. DeBruin reiterated his request for reconsideration in another letter dated September 18, 2020. *See* AR 916–919. Although Cayuga Nation did not submit these requests through its respective CJIS Systems Agency, as it was required to do, the FBI nevertheless informed Mr. DeBruin on September 25, 2020 that it would re-review Plaintiff's Application. AR 933.

While the FBI was undertaking that review, Plaintiff filed this lawsuit on November 3, 2020. ECF No. 1. The FBI completed its review and issued a reconsideration letter on February 4, 2021, which upheld its July 2, 2020 denial. *See* AR 945–951. The FBI explained that it had re-reviewed all of the information in CNPD's Application as well as all of the supporting materials Mr. DeBruin had submitted for reconsideration on July 22, 2020 and September 18, 2020 and also additional information and materials related to actions that the BIA took after the FBI's original July 2, 2020 ORI denial. Based on its review of all of this information, CNPD concluded that

CNPD had "failed to show (1) that it is a tribal justice agency serving an Indian tribe and also that (2) it has criminal jurisdiction over tribal land" and therefore concluded that "CNPD's application must therefore be denied." AR 945.

Among the numerous factors the FBI explained it considered in making its decision were:

1. "[T]he news reported in February and March 2020 that the longstanding leadership disagreement within Cayuga Nation continued and resulted in one faction, with support from CNPD, razing buildings controlled by another faction claiming leadership," AR 947;

2. CNPD "perpetrating acts of violence against the opposing faction a week later at a press conference concerning the destruction of buildings," AR 947;

3. The BIA's July 2020 denial of Cayuga Nation's fee-to-trust application recognizing a "change in circumstances" since its Cayuga Nation leadership determination and citing the BIA's specific concerns with CNPD's law enforcement capabilities, AR 949–950;

4. "[T]he general poor relations and lack of intergovernmental agreements between the Nation and its neighbors," including the lack of any agreements with local or state law enforcement, AR 950; and

5. "[S]erious examples of federal and state jurisdictional problems and conflicts of lands use which impacted public safety and undermined the hope that such conflicts as may arise with local or State government in the future could be successfully managed," AR 950.

Thus, the FBI ultimately concluded that CNPD did not meet the statutory criteria of a tribal justice agency serving Cayuga Nation, nor did it have criminal jurisdiction over Cayuga Nation's tribal land, primarily because "a leadership dispute still exists within the Cayuga Nation that prevents the FBI from recognizing criminal justice officials for the Nation." AR 949. In so doing, the FBI acknowledged that the BIA had determined in 2016 and reaffirmed in 2017 and 2019 that the Halftown Council was the recognized leadership of Cayuga Nation for all DOI purposes. Nevertheless, the FBI determined that the BIA's decision only extended to the DOI, recent events called into question CNPD's qualifications for an ORI, and the FBI had an independent statutory duty to evaluate the criteria necessary for granting access to secure criminal databases. AR 949; *see also infra* at 25–26.

The FBI also noted that "the CNPD did not have a relationship with the BIA; the CNPD did not receive funding from the BIA; and the CNPD officers were not commissioned by the BIA or under federal law such as 25 U.S.C. § 2804." AR 950. Although the FBI acknowledged that none of these considerations was necessary to the FBI's ultimate decision, the FBI found that "these facts were relevant . . . because they demonstrate that BIA had not recognized CNPD as authorized law enforcement officials, as opposed to recognizing a certain faction of the Nation for contracting purposes." AR 950.

Plaintiff amended its complaint to respond to the FBI's final decision letter on March 3, 2021. *See* FAC.

III. Cayuga Nation's Long-Standing Leadership Dispute

As set forth above, the FBI's decision refers to a leadership dispute within Cayuga Nation. In its decision, the FBI cited and considered another judicial opinion in this district that describes the historic leadership dispute within Cayuga Nation – a decision on which Plaintiff relied in part in its request that the FBI reconsider its initial denial. *See Cayuga Nation v. Bernhardt*, 374 F. Supp. 3d 1 (D.D.C. 2019).

A. History of the Leadership Struggle

The decades-long dispute between two rival factions for control of Cayuga Nation is well established. *See, e.g.*, *Bernhardt*, 374 F. Supp. 3d at 5–8; *Cayuga Nation v. Zinke*, 324 F.R.D. 277, 278–79 (D.D.C. 2018); *Cayuga Nation v. Campbell*, 140 N.E.3d 479, 481–85 (N.Y. 2019). "The Cayuga Nation is one of the six nations of the Haudenosaunee Confederacy. It adheres to a traditional government that has historically relied on an oral, unwritten law referred to as the 'Great Law of Peace.'" *Bernhardt*, 374 F. Supp. 3d at 5. The Cayuga National Council ("CNC"), composed of six tribal members, has historically governed Cayuga Nation. *Id.* Starting in the

early 2000s, a division began to develop between two factions within the CNC. At the time, Mr. Clint Halftown served as the Nation's "federal representative" for purposes of relations with the Federal Government. *Id.* On one side of the divide, Mr. Halftown and two of his supporters composing the Halftown Council favored rule by a single leader—Mr. Halftown. On the other side, three other CNC members led by William Jacobs (the "Jacobs Council," later known as the "Unity Council") favored a leadership structure of clan mothers and chiefs. Tensions ran high between the two factions in the early 2000s, and some Cayuga citizens allegedly reported that Mr. Halftown and his associates had mistreated tribal members at this time. *Bernhardt*, 374 F. Supp. 3d at 6.

This division culminated in the early 2000s with the Cayuga Nation clan mothers removing Mr. Halftown and two other members from the CNC, claiming to act in accordance with tribal law, which they alleged gave the clan mothers absolute authority to appoint and remove members of the CNC. *Id.* The Halftown Council argued that these changes were invalid, and the BIA continued to recognize Mr. Halftown as the federal representative of the Nation. *Id.*

B. BIA Involvement in the Cayuga Nation Leadership Dispute

In 2011, the Nation's clan mothers again tried to remove Mr. Halftown and his two supporters from the CNC and to install new representatives in their places, this time notifying the BIA of the changes to the CNC. *Id.* In August 2011, after considering briefing from both factions, the BIA recognized the new CNC established by the Unity Council and rejected the Halftown Council's claim to leadership. *Id.* Thereafter, however, the Interior Board of Indian Appeals ("IBIA") stayed and vacated the BIA's decision without reaching the merits, reasoning that "the BIA should never have issued a decision on the leadership dispute." *Id.* In its opinion, the IBIA took no side in the leadership dispute going forward but decided that the BIA may make such a

recognition decision only when necessary to achieve a federal purpose. *Cayuga Indian Nation of N.Y.*, 58 IBIA 171, 179–81 (2014).

The Nation's leadership dispute climaxed in 2015 when both of the factions submitted requests to the BIA to modify contracts between the Nation and the Federal Government under the Indian Self-Determination Act ("ISDEAA"). *Bernhardt*, 374 F. Supp. 3d at 6. The BIA initially declined to recognize either of the two factions and, instead, recognized the prior 2006 CNC led by Mr. Halftown "as the last undisputed leadership of the Nation" on an interim basis for purposes of administering the 2015 ISDEAA contracts "to provide additional time to the members of the Nation to resolve this dispute using tribal mechanisms." AR 16 n.10, AR 35. CNC was unable to reach a consensus, however, and the BIA again faced the decision of with whom it would contract for a new ISDEAA on behalf of the Nation. This time, on December 15, 2016, Regional Director Bruce Maytubby recognized the Halftown Council as the Nation's governing body based on a statement of support ("SOS") process conducted by the Halftown Council. *See* AR 14–42 (the "Maytubby Decision").

The opposing Unity Council expressed its concerns that (1) the SOS was contrary to Cayuga traditional law, (2) the Halftown Council only sent voting materials to those citizens it had on its own membership roles that the Unity Council was not permitted to inspect, and (3) the Halftown Council had distributed quarterly per capita checks as a way of influencing the survey results. AR 21–25. The Regional Director considered and rejected these concerns but explained that "[g]oing forward, the meaning of the statement of support campaign [would be] a question of Cayuga Nation law." AR 27. On July 13, 2017, Acting Assistant Secretary – Indian Affairs ("AS-IA") Michael S. Black affirmed the Regional Director's 2016 decision. FAC ¶ 27. The Unity Council appealed the BIA's decision in federal court under the APA, and in May 2019, the United

States District Court for the District of Columbia denied the Unity Council's motion for summary judgment and held that the Unity Council had not established that the BIA had violated the APA or Due Process. *Bernhardt*, 374 F. Supp. 3d at 1.

On November 14, 2019, AS-IA Tara Sweeney issued a letter in response to Plaintiff's counsel's request that she clarify the July 13, 2017 decision of AS-IA Black affirming the December 15, 2016 Maytubby Decision. *See* AR 892–895 (the "Sweeney Letter"). In her November 2019 letter, Assistant Secretary Sweeney reaffirmed that "[t]he Department continues to recognize and follow that non-qualified acknowledgment of the Halftown Council as the Nation's governing body." AR 893. The letter explained that the Department intended its recognition of the Halftown Council to not be "limited to ISDEAA contracting" but also to other matters that the Department of Interior handles "such as . . . the Nation's ability to take land into trust," another matter the DOI was considering at the time. AR 893–894. The letter said that it "was binding on the Department of the Interior," AR 892, but it did not purport to bind any other federal agency.

C. Reported Violence by the CNPD in February 2020

Rivalry for control of the Nation persisted. Just three months after Assistant Secretary Sweeney issued her letter, tensions came to a head on February 22, 2020. As described by Assistant Secretary Sweeney, "at 2:00 a.m. on February 22, 2020 in Seneca Falls, New York, the Cayuga Nation reportedly used 'bulldozers to demolish a working daycare center, store, schoolhouse and other buildings controlled by trib[al] members who oppose' the Tribal government. This extreme action was also reportedly supported by the Tribal police force." AR 903 (citations omitted). When they entered the buildings, CNPD were not dressed in the same "uniforms utilized by the Nation's Police Force" described in Plaintiff's Complaint, FAC ¶ 69(m),

and pictured in CNPD's ORI Application, AR 615, but were rather reportedly wearing ski masks and carrying pointed AR-15 semi-automatic rifles, *see* AR 474.003. Plaintiff claims that the buildings that the CNPD destroyed belonged to the Nation and that CNPD was executing lawful search warrants issued by the Nation's court. FAC ¶ 98. But the Unity Council had "continued to occupy and control the properties at issue" since approximately 2014 and claimed "they were entitled to do so because they view themselves—and not the Halftown Council—as the lawful Nation Council pursuant to Cayuga law." *Campbell*, 140 N.E.3d at 488. The New York Court of Appeals had previously ruled that it lacked jurisdiction to get involved in a sovereign nation's leadership dispute to determine who owned the property. *Id.* at 491.

Then, as described by the BIA, just days later "[t]ribal members who had planned a press conference for the morning of February 29 were met at the site by [CNPD] who had taped off the area. When these Tribal members sought to cross the tape, . . . 'the situation turned violent' when they were 'confronted by the [CNPD] with pepper spray and nightsticks in-hand.' . . . It further appears that [CNPD] detained or arrested multiple persons, including a non-Indian, with at least one individual sent to the hospital after suffering a possible concussion." AR 904–905 (citations omitted). Once again, CNPD did not appear to be wearing the uniforms depicted in pictures submitted with their ORI application. Rather, they wore black jackets that said "Cayuga Nation Police" on the back, along with mismatched hats, pants, and shoes. *See* AR 427–462. The Town of Seneca Falls Police Department, New York State Police, Seneca County Sheriff's Office, Seneca Falls Fire Department, and Seneca County Office of Emergency Management all reported to the scene, and at least one person was hospitalized. AR 905. In the wake of the violence, thirty-two children from Cayuga Nation families were reportedly sent to live away from the Nation out of fear that the CNPD would return to destroy their homes. *See* AR 411.

D. The 2020 DOI Denial of the Halftown Council's Fee-to-Trust Application

On July 31, 2020, the DOI again weighed in, this time in the context of its denial of the Halftown Council's application for fee-to-trust acquisition of property that had been pending since 2005. AS-IA Sweeney again issued the decision and explained that "the February 2020 events both underscore my . . . determinations and provide a separate, dispositive rationale for my decision to disapprove [the application]. The destruction of property—including a daycare and schoolhouse—and significant acts of public violence are serious matters, and they weaken trust that the Nation's government can operate at this time in a harmonious manner with the other governments and law enforcement officers . . . ." AR 905. Her decision related specifically to the CNPD, explaining that "[t]his extreme action was . . . reportedly supported by the Tribal police force." AR 904. She further elaborated, "Seneca County . . . expressed concern about policing and jurisdiction in the area" and noted that "'the Nation properties often require police intervention.'" AR 903 (citation omitted). She explained that Seneca County was concerned that a police department "'operated by the Nation raises serious questions regarding jurisdictional issues, [including] how such a "police force" would coordinate its operations with the New York State Police, the County Sheriff's Department and Town police forces'" given that "[n]o cross-deputization or other jurisdictional agreements . . . exist currently." AR 903. Assistant Secretary Sweeney also relied on "the united opposition of all the surrounding jurisdictions to the Property, and the generally poor relations between the Nation and its neighbors," AR 907, as well as the Halftown Council's failure to pay millions of dollars in property taxes owed to Seneca County, AR 903.

STANDARD OF REVIEW

Summary judgment is appropriate when the pleadings and other record evidence "show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322–23 (1986).

This action seeks judicial review of a determination made by the FBI under the Administrative Procedure Act, 5 U.S.C. § 551 *et seq*. Under the APA, a reviewing court must uphold an agency decision unless it is (1) arbitrary and capricious, (2) an abuse of discretion, or (3) otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). As set forth below, "[t]he APA's arbitrary-and-capricious standard requires that agency action be reasonable and reasonably explained. Judicial review under that standard is deferential, and a court may not substitute its own policy judgment for that of the agency." *FCC v. Prometheus Radio Project*, ---U.S.---, 2021 WL 1215716, at *5 (Apr. 1, 2021). Courts generally evaluate an agency's decision based on the administrative record that was before the agency at the time of its decision. *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 743 (1985); *see also James Madison Ltd. v. Ludwig*, 82 F.3d 1085, 1095 (D.C. Cir. 1996).

ARGUMENT

Plaintiff alleges that the FBI's denial of CNPD's Application violates the APA because it was arbitrary and capricious and not in accordance with law. This claim is meritless. In seeking to overturn the FBI's denial of the Application, Plaintiff asks the Court to overrule the FBI's judgment about how to exercise its discretion in controlling access to highly confidential and sensitive information. The FBI made a reasonable decision after a careful consideration of the full record before it, based on recent events, and it was not obligated to follow the determination of a

different agency made for a different purpose. Defendants are therefore entitled to judgment as a matter of law.

I. FBI's Denial of Cayuga Nation's Application Was Not Arbitrary and Capricious.

"The scope of review under the 'arbitrary and capricious' standard is narrow and a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Holy Land Found. for Relief & Dev. v. Ashcroft*, 333 F.3d 156, 162 (D.C. Cir. 2003) ("*Holy Land II*"). Under this "narrow standard of review, we insist that an agency 'examine the relevant data and articulate a satisfactory explanation for its action."' *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (quoting *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43). To determine whether agency action is arbitrary or capricious, a court must consider "whether the decision was based on a consideration of the relevant factors and whether there has been a clear error of judgment." *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 378 (1989) (citation omitted). The party challenging the agency's action has the burden of showing that there was not "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation and internal quotation marks omitted). "A court simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." *Prometheus Radio Project*, 2021 WL 1215716, at *5. If the agency has "considered the relevant factors and articulated a rational connection between the facts found and the choice made," the court must uphold its decision. *Baltimore Gas & Elec. Co. v. Natural Res. Def. Council*, 462 U.S. 87, 105 (1983); *see also North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997) ("So long as the [agency] has examined the relevant data and provided a reasoned explanation supported by a stated connection between the facts found and the choice made, we will defer to the agency's

expertise.") (citations omitted). Ultimately, as long as the agency's challenged action—here the denial of CNPD's Application—has a rational basis, it must be affirmed. *See Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984).

A. FBI's Denial of Cayuga Nation's Application Was Reasonable.

FBI's decision to deny CNPD's Application more than satisfies the "minimal standards of rationality" required by the APA. *Troy Corp. v. Browner*, 120 F.3d 277, 283 (D.C. Cir. 1997) (citation omitted). The FBI is responsible for safeguarding sensitive law enforcement information and making that information available for law enforcement agencies to use appropriately. Denying CNPD's Application was a rationale exercise of the FBI's discretion. The FBI explained that it denied the application because CNPD "failed to show (1) that it is a tribal justice agency serving an Indian tribe and also that (2) it has criminal jurisdiction over tribal land." *See supra* at 5–8. Moreover, after Plaintiff's counsel sent the FBI a direct letter objecting to the FBI's original July 2, 2020 decision, the FBI agreed to reconsider its decision. As part of that reconsideration, the FBI considered every document Plaintiff's counsel submitted as well as specific case law Plaintiff cited, all of which are part of the administrative record. *See* Administrative Record Index, ECF No. 15-2. The FBI ultimately determined that none of Plaintiff's arguments, repeated in its Amended Complaint, should alter its original decision. *See supra* at 5–8; *infra* at 25–26.

As described above, the FBI based its decision, in part, on acts of violence perpetrated by the CNPD in February 2020. Plaintiff now specifically argues that the buildings CNPD demolished at that time belonged to the Halftown Council prior to 2014 and that its destruction of those buildings was somehow justified by "lawful [search] warrants issued by the Nation's court," which is also controlled by the Halftown Council and whose website is a sub-page on CNPD's website. FAC ¶ 98; *see* "Cayuga Nation Tribal Court," Cayuga Nation Police, *available at*

http://cayuganationpolice.com/cayuga-nation-tribal-court.html (last visited Apr. 7, 2021). Assuming for purposes of this motion that assertion were true, and setting aside that a search warrant would not ordinarily permit the destruction of the searched premises, it does not undermine FBI's conclusion that CNPD were not "tribal justice officials." AR 947. Ample information in the administrative record supports this determination, indicating that CNPD razed several community buildings occupied by the Unity Council using bulldozers in the middle of the night, dressed not in police uniforms but in ski masks, such that the FBI would not consider them "tribal justice officials." AR 427–462. The FBI further determined that the CNPD did not have "criminal jurisdiction over Indian country" because the violence, whether authorized by warrant or not, "weakened the trust that the Nation's government can operate at this time in a harmonious nature with the other governments and law enforcement officers that share the same geography" and "impacted public safety," among other reasons. AR 949–950.

The views of Cayuga Nation's neighboring governments bolster the FBI's determination and its specific law enforcement concerns. "[T]he Village [of Union Springs] continues to deny that the Nation validly exercises any 'government power' over its lands or its citizens. And local municipalities like Seneca and Cayuga County continue to deny the legitimacy of the Nation's law enforcement activities." *Cayuga Nation v. Tanner*, 448 F. Supp. 3d 217, 232 (N.D.N.Y. 2020) (citations omitted). The Village of Union Springs wrote a letter to the Honorable United States District Judge David Hurd, who is overseeing litigation between the Village and the Nation regarding its gambling operation, citing "the recent string of violence in Seneca Falls between warring factions of the Cayuga Nation and fear that violence will spread to the Village of Union Springs." AR 907 (quoting Letter to the Court from David Tenant, Counsel for Defendant Village of Union Springs at 1, *Tanner*, 448 F. Supp. 3d 217 (internal quotation marks omitted)). And

while the FBI explained that cross-deputization agreements and other intergovernmental agreements with federal or state authorities are not necessary for Indian nations to exercise criminal jurisdiction or to create law enforcement agencies and that it was therefore not relying on that notion, the FBI found it instructive that the DOI noted that "the lack of any intergovernmental agreements addressing jurisdiction and land use issues between the nation and its neighbors increases the likelihood of future disputes . . . . in the fraught circumstances here." AR 908.

That the denial of CNPD's application would result in the CNPD not being able to access the NCIC and other databases maintained by the FBI, FAC ¶ 63, is entirely appropriate. These databases contain secure information that is not intended for public dissemination, and the FBI's concern is more than reasonable that, should one of two factions competing for control of Cayuga Nation gain access to that information, the consequences could be harmful to the Government's interests. As the FBI explained, such access could create the perception that the FBI is recognizing a police department that does not represent the interests of all people of Cayuga Nation, and that the Halftown Council could use the access as a tool to further a dispute with political opponents. Nothing about the FBI's decision prevents Cayuga Nation from "creat[ing] a tribal police force to enforce tribal laws." *See* FAC ¶ 47. As Plaintiff acknowledges, "[t]he Nation's Police Force patrols the Nation's reservation daily and regularly confronts potential criminal suspects." *Id.* ¶ 59. Nor does it prevent CNPD, in particular, from "coordinat[ing] with state, local, and federal law enforcement officers," as Plaintiff claims it is also currently doing. *See id.* ¶ 62. Moreover, CNPD remains free "to pursue access at some point in the future based on a new application" should circumstances change. AR 951.

For these reasons, there is "a rational connection between the facts found and the choice made" by the FBI to deny the Application. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43 (citation and internal quotation marks omitted). That is all that is required.

B. FBI Law Enforcement Determinations Are Entitled to Additional Deference.

The FBI's decision to deny the Application was reasonable and justified under the APA standard of review, for all of the aforementioned reasons. But the assessment of what entities should be permitted to access the twenty-one FBI databases, consistent with law enforcement interests, is quintessentially one to which additional deference is due.[2] Access to FBI databases is critical because "lawbreakers could utilize . . . CJIS systems and obtain non-public information, and 'potentially add/manipulate data to their advantage and criminal interests.' [Additionally,] 'unauthorized access to these CJIS systems presents privacy concerns, since information in these systems pertains to individuals nationwide.'" *Lapp v. FBI*, No. 1:14CV160, 2016 WL 737933, at *5 (N.D. W. Va. Feb. 23, 2016) (quoting approvingly from an FBI declaration, and "giv[ing] deference to the declarations of FBI professionals in that arena"); *cf. In re New York City*, 607 F.3d 923, 945 n.22 (2d Cir. 2010) (A court "intrudes into the province of the executive branch" when it "[d]etermin[es] that law enforcement materials are subject to disclosure."). These principles also weigh against any claim of entitlement to an ORI permitting access to such highly sensitive information, and are particularly salient here where a leadership disputes exists and the FBI has

[2] Indeed, because the ORI CNPD seeks would permit access to a database of Known or Suspected Terrorists, the FBI's determination also implicates access to information with national security implications, a determination to which deference is also owed. *See Olivares v. TSA*, 819 F.3d 454, 462 (D.C. Cir. 2016) ("[C]ourts do not second-guess expert agency judgments on potential risks to national security. Rather, we defer to the informed judgment of agency officials whose obligation it is to assess risks to national security."); *cf. Department of Navy v. Egan*, 484 U.S. 518, 527 (1988) (describing as a "sensitive and inherently discretionary judgment call" who may have "access to information bearing on national security").

recognized that the faction requesting access to the sensitive national security information has already demonstrated a willingness to use force to achieve political ends.

II. The FBI May Independently Determine Whether CNPD Qualifies for an ORI.

Faced with the FBI's reasoned decision, well supported by the administrative record, Plaintiff argues that the FBI was required to follow a 2016 BIA decision made in a different context and for a different purpose, notwithstanding the impact of recent violent events. This argument misunderstands how federal agencies operate and fulfill their own unique Congressional mandates. In fact, while agency decisions may provide guidance to other agencies, they do not generally have the legal ability to bind them. This is especially true because developments that took place after the BIA's decision counsel strongly against the request CNPD makes of the FBI and, in any event, underscore how the BIA never meant its decision to bind the hands of a law enforcement agency in making a law enforcement determination, in particular.

A. The BIA's Leadership Decision Does Not Concern the FBI's Determination.

The BIA's December 15, 2016 Maytubby Decision recognizing the Halftown Council as the leadership of Cayuga Nation made clear that "[u]ltimately, all BIA can do is decide whether either of the entities that has submitted a proposal for a 638 Community Services contract has provided adequate evidence that they represent the Cayuga Nation." AR 27. The BIA did just that and awarded the 638 Community Services contract to the Halftown Council. The BIA expounded that "adopting these results should not freeze the Nation with its current configuration of leaders but will, it is hoped, allow the Nation to proceed and adapt, as necessary, to the needs of the future." AR 23–24.

The BIA's November 14, 2019 letter to Plaintiff's counsel in this case reaffirmed the Maytubby Decision—it did not purport to change the meaning of it. It explained, "Nothing in this

explanation changes the Department's recognition of the Halftown Council since the Black Decision. . . . The Department continues to recognize and follow that non-qualified acknowledgment of the Halftown Council as the Nation's governing body." AR 893. Thus, the letter continued to recognize that, as of 2019, the Halftown Council would remain the recognized leadership of Cayuga Nation for purposes of the DOI's contractual dealings and other DOI purposes. Although the BIA said that it hoped that its letter would "provid[e] clarification to other Federal agencies," it only purported to bind the DOI. AR 895.

B. Federal Government Agency Opinions Do Not Generally Bind Other Agencies.

It is well established that "an administrative agency is ordinarily not bound to follow a determination made upon the same question by another administrative agency." E. H. Schopler, Annotation, *Applicability of Stare Decisis Doctrine to Decisions of Administrative Agencies*, 79 A.L.R.2d 1126 (1961). An agency may certainly depart from its own precedent, when offering a reasoned basis to do so. *Hatch v. Federal Energy Regul. Comm'n,* 654 F.2d 825, 834 (D.C. Cir. 1981). It therefore naturally follows that an agency can depart from a different agency's precedent. Courts have repeatedly ruled that one agency's views are not binding on another agency. *See National Lab. Rel. Bd. v. Pacific Intermountain Express Co.*, 228 F.2d 170, 176 (8th Cir. 1955) ("Each fact-finding agency is entitled to make its own decision upon the evidence before it, and the fact that another tribunal has reached a different conclusion upon the same issue arising out of the same transaction does not invalidate any decision which has proper evidentiary support."); *United Brick & Clay Workers of Am. v. Deena Artware, Inc.*, 198 F.2d 637, 642–43 (6th Cir. 1952) (same); *see, e.g.*, *Old Colony R.R. Co. v. Comm'r*, 284 U.S. 552, 562 (1932) (holding that accounting rules enforced by the Interstate Commerce Commission are not binding upon the IRS); *City of Tacoma v. FERC*, 460 F.3d 53, 76 (D.C. Cir. 2006) ("Yet the action agency must not blindly

adopt the conclusions of the consultant agency, citing that agency's expertise. Rather, the ultimate responsibility . . . falls on the action agency." (citation omitted)); *Gee v. Celebrezze*, 355 F.2d 849, 850 (7th Cir. 1966) ("The Secretary is not bound by determinations of other agencies possibly made on standards different from those to which he is subject."). Indeed, even where two agencies apply the same statute, one agency's interpretation is not binding on another. *American Bar Ass'n v. FTC*, 671 F. Supp. 2d 64, 81 (D.D.C. 2009), v*acated and remanded on other grounds*, 636 F.3d 641 (D.C. Cir. 2011).

This is particularly true where, as here, an agency is considering a question under authority derived from a different statute. *See Tipler v. E. I. duPont deNemours & Co.*, 443 F.2d 125, 128–29 (6th Cir. 1971) ("[A] determination arising solely under one statute should not automatically be binding when a similar question arises under another statute."); *see also* 2 K.C. Davis Admin. Law Treatise § 18.04 at 577–78 (1978) ("Because the legislative history of two statutes is always different, because the purposes of two statutes are never the same, and because the context of provisions must be taken into account, the conclusion is probably sound that a determination under one statute need not necessarily be res judicata when the same question arises under identical words of another statute."). In short, the BIA's recognition of the Halftown Council for government contracting and other DOI purposes was based on considerably different factors than the FBI's determination of whether a particular entity warrants access to highly sensitive law enforcement databases.

Ultimately, Plaintiff's argument—that the FBI should have deferred to the BIA—is nothing more than a request for this Court to reweigh the evidence, which it may not do. *See Consolo v. Federal Mar. Comm'n*, 383 U.S. 607, 620 (1966).

i. BIA Tribal Leadership Determinations Serve BIA and DOI Purposes—Not FBI Purposes.

The Department of the Interior is charged with "the management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2, and has special expertise in Indian affairs, including with respect to determining which "governing body" to "recogniz[e]." In short, BIA has "responsibility for carrying on government relations with the Tribe." *Goodlace v. Grassrope*, 708 F.2d 335, 339 (8th Cir. 1983). This responsibility does not supersede the responsibility of other federal agencies concerning the duties they perform, however.

The IBIA has therefore held that "[w]here the Tribe has a need to interact with agencies and organizations other than BIA, it is the responsibility of those third parties . . . either to determine for themselves with whom they will interact in dealings with the Tribe or, alternatively, to wait until such time as BIA, another entity, or the Tribe itself, makes a determination upon which those third parties choose to rely." *Alturas Indian Rancheria*, 54 IBIA 138, 143 (2011).

Numerous other IBIA decisions affirm that the BIA will only address a tribal dispute when necessary to take a specific action within its purview. *See Cayuga Indian Nation of N.Y.*, 58 IBIA 171, 179–81 (2014) ("[W]e reaffirm the Board's case law that principles of tribal sovereignty and self-determination must prevail, and must act as constraints on BIA intervention, when there is no separate matter that requires or separately triggers a need for BIA action that implicates the government-to-government relationship, and which in turn necessitates a BIA decision on the tribal dispute."); *Cloverdale*, 55 IBIA 220 (2012) (BIA may not address a tribal dispute when there is no separate Federal action required.); *Coyote Valley Band of Pomo Indians*, 54 IBIA 320 (2012) (vacating BIA decisions addressing a tribal dispute when the BIA had not identified any required BIA action that prompted the BIA's intervention); *Pueblo de San Ildefonso*, 54 IBIA 253 (2012)

(vacating the BIA recognition decision because there was no evident need for federal action); *Phillip Del Rosa*, 51 IBIA 317 (2010) (same).

The BIA's 2016 decision recognizing the Halftown Council acknowledged this principle, explaining that "all BIA can do is decide whether either of the entities that has submitted a proposal for a 638 Community Services contract has provided adequate evidence that they represent the Cayuga Nation." AR 27; *see also* AR 14 ("In order to provide this funding for the benefit of the people of the Cayuga Nation, I must therefore determine which governing council to recognize for purposes of entering into a contract to provide these services.").

Plaintiff's statutory argument that Congress charged the DOI with the ability to determine Indian nation governing bodies for all purposes is unavailing. Plaintiff alleges that "[t]he 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." FAC ¶ 87. However, the statute Plaintiff cites for that proposition is inapposite. *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."). By its own terms, 28 U.S.C. § 1362 gives the Secretary of the Interior the authority to recognize an Indian tribe's governing body for the purpose of determining whether a district court shall have original jurisdiction in a civil action. That was the holding of the Second Circuit Court of Appeals. *See Cayuga Nation v. Tanner*, 824 F.3d 321, 330 (2d Cir. 2016) ("Like the BIA, which must determine whom to recognize as a counterparty to administer ongoing contracts on behalf of the Nation, the courts must recognize someone to act on behalf of the Nation to institute, defend,

or conduct litigation."). 28 U.S.C. § 1362 does not grant the Secretary of the Interior the ability to recognize an Indian governing body for anything other than jurisdictional purposes. The statute is plainly inapplicable here where the Government does not challenge the Court's jurisdiction and does not contend that the Halftown Council may not bring this action on behalf of Cayuga Nation.

ii. The FBI Must Independently Evaluate All of the Relevant Factors Before Granting an ORI.

In contrast to Section 1362, 28 U.S.C. § 534 places the responsibility to insure that only the appropriate law enforcement agencies are granted access to the FBI databases squarely on the Attorney General, who has delegated that responsibility to the FBI. *See* 28 U.S.C. § 534. "[T]he FBI's function of maintaining and disseminating criminal identification records and files carries with it as a corollary the responsibility to discharge this function reliably and responsibly . . . ." *Menard v. Saxbe*, 498 F.2d 1017, 1026 (D.C. Cir. 1974). The FBI is therefore not required to adopt the BIA's determinations for its own distinct purposes. Rather, the FBI has the responsibility and authority to make an independent determination on access to CJIS systems, which it did here after a reasoned and thorough analysis. The criteria the FBI is required to use to make an ORI determination is ultimately different from that which the BIA employed for its separate purposes in 2016, 2017, and 2019. And the FBI has its own expertise in judging the risk to law enforcement or national security interests arising from granting access to criminal databases. *See Marsh*, 490 U.S. at 377 (Courts defer to the "the informed discretion of the responsible federal agencies" in their areas of expertise.). The FBI properly considered how much weight to afford the BIA's determinations, but it was ultimately bound to fulfill its own statutory obligations, and may exercise its own discretion in so doing.

C. The FBI's Decision to Reach a Different Determination from the BIA for a Different Statutory Purpose Was Reasonable.

To the extent there remains any doubt, the FBI carefully documented how it considered the arguments that Plaintiff now recites in its First Amended Complaint that BIA's 2016 decision relating to government contracting was intended to bind the FBI's determinations. The FBI ultimately rejected arguments that:

1. The 2016 decision by the BIA "was intended to resolve the leadership dispute of the Cayuga Nation for all purposes," AR 947;
2. The 2019 BIA letter intended to clarify or expand the scope of the 2016 decision or 2017 affirmation of that decision to cover issues of law enforcement and national security outside of BIA's area of expertise, AR 948–949; and
3. The *Bernhardt* case mandates FBI grant the ORI application, AR 947–948.

The notion that the FBI "depart[ed] without explanation from determinations of Interior," FAC ¶ 112, strains credulity. In fact, the FBI distinguished the BIA's actions at length and analyzed the differing context in which the BIA made them in detail. It considered the arguments of Plaintiff's counsel set forth in multiple letters counsel sent to the FBI, as well as the specific documents that counsel requested that the FBI consider. *See* AR 947. The FBI reviewed all of those materials and specifically discussed the *Cayuga Nation* v. *Bernhardt* case from this district that Plaintiff relied on in its submissions. The FBI then ultimately came to the reasonable conclusion that "based upon that litigation as well as other information, the FBI believes that the BIA decision applies only for BIA purposes and that leadership for the purposes of executing law enforcement authority for the members of the Cayuga Nation is still not resolved." AR 947. The FBI explained its reasonable decision to deny the Application, and the APA requires nothing more. *See Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974) (citation omitted) (APA satisfied where agency's explanation is clear enough that its "path may reasonably be discerned").

D. CNPD's Violent Actions in 2020 are Specifically Applicable to FBI Law Enforcement Matters.

It also bears noting that the BIA issued its decision in November 2019—before the violent events of February 2020. *See Seven Star, Inc. v. United States*, 873 F.2d 225, 227 (9th Cir. 1989) (holding that "a decision by an administrative agency in one case does not mandate the same result in every similar case in succeeding years"). In fact, while it has not withdrawn its prior recognition of the Halftown Council, the BIA has taken note of the violent actions of CNPD. In September 2020, the BIA ultimately denied the Halftown Council's fee-to-trust application, largely based on the February 2020 violence that CNPD perpetrated. The BIA's decision notes that these "significant acts of public violence are serious matters, and they weaken trust that the Nation's government can operate at this time in a harmonious manner with the other governments and law enforcement officers that share the same geography as the Nation's reservation." AR 947–948. The FBI cited the BIA's decision as support for the reasonableness of its conclusion that CNPD, having perpetrated these acts of violence that BIA condemned in July 2020, does not meet the criteria for access to criminal databases. *See* AR 949–950. The FBI did not claim or base its decision on the notion that Indian nations' criminal jurisdiction over their reservations is limited to trust lands. *See* FAC ¶¶ 102, 110.

In all events, the FBI's decision was, at a minimum, reasonable, and Plaintiff's APA challenge should be resolved in the Government's favor at this stage based on the record now before the Court.

CONCLUSION

For the foregoing reasons, the Court should grant Defendants' Motion for Summary Judgment and enter judgment for Defendants.

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Respectfully submitted,

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