IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CAYUGA NATION, *Plaintiff,* v. THE UNITED STATES OF AMERICA, et al., *Defendants.*	)	Civil Action No. 1:20-cv-03179-RCL

MEMORANDUM IN SUPPORT OF PLAINTIFF'S CROSS-MOTION FOR SUMMARY JUDGMENT AND OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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Plaintiff the Cayuga Nation (the "Nation") moves for summary judgment on its claims challenging the decision of the Federal Bureau of Investigation ("FBI") to deny the Cayuga Nation an Originating Agency Identification Number ("ORI") and access to the FBI's criminal information databases.

INTRODUCTION

In the Tribal Law and Order Act of 2010 ("TLOA"), Congress imposed on the FBI a mandatory duty to allow Indian nations' police forces to access FBI-administered criminal databases. Congress did so because it recognized that tribal police need such access to operate safely and effectively. All too often, however, tribal police struggled to gain such access. Congress thus directed that the "Attorney General *shall permit* tribal … law enforcement agencies … to access … Federal criminal information databases." 28 U.S.C. § 534(d) (emphasis added). And it specified 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).

Under TLOA, the Cayuga Nation Police Department ("CNPD") is entitled to access the FBI's databases: It is a "tribal … law enforcement agenc[y]" whose officers "serv[e] an Indian tribe" with "criminal jurisdiction over Indian country." Indeed, the U.S. Department of the Interior—which Congress mandated "shall … have the management of all Indian affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2—has expressly recognized that the CNPD is a legitimate law enforcement body with jurisdiction over the Nation's Indian country. TLOA thus required the FBI to permit the CNPD access to the FBI's criminal information databases.

This case is about the FBI's attempt to evade that mandatory duty. Since 2018, it has denied the Nation's applications based on a shifting series of rationales that, at bottom, seek to

transform TLOA's mandatory duty into discretionary authority for the FBI to grant access or not, as it sees fit. In 2018, the FBI denied the Nation's applications with no explanation at all, in decisions not even transmitted to the Nation. In July 2020, it denied the Nation's application again. When the Nation asked for a reason, the FBI said the CNPD did not qualify because the "Nation has no federal trust lands" and because "the [Bureau of Indian Affairs ('BIA')] provides no funding to the CNPD" and has not "commissioned the CNPD with federal … authority." AR883. The Nation promptly requested reconsideration. AR885-88. It explained that none of the factors the FBI invoked are relevant under TLOA—and that indeed, the Department of the Interior and the Solicitor General have both acknowledged that Indian nations have criminal jurisdiction outside of trust lands and need no federal commissioning to exercise it. AR886. The FBI promised to respond by October 31, 2020. AR933. But it did not, and the Nation filed suit. Only on the eve of the FBI's answering deadline, on February 4, 2021, did the FBI issue a letter in response. This letter declined to "chang[e the FBI's] original decision." AR968. But it abandoned nearly all of that decision's rationales. Instead, the FBI asserted for the first time that certain events in February 2020—in which the CNPD executed a search warrant against certain Nation-owned properties that had been unlawfully seized—"indicate … that a leadership dispute … exists within the Nation that prevents the FBI from recognizing criminal justice officials for the Cayuga Nation." AR967.

The FBI cannot defend its decision based on this new rationale—because the FBI asserted it only after this case was already in litigation. But regardless, the FBI's new litigating position is as unlawful as it is pretextual. The Nation resolved its leadership dispute in 2016, when more than 60% of adult Cayuga citizens completed a traditional "Statement of Support" campaign and recognized a Cayuga Nation Council led by Clint Halftown as the Nation's governing body. AR18-22. The Department of the Interior reviewed that process in detail, determined that it

"complied with Nation law," and recognized "the Halftown Council to be the Nation's government for all purposes" "as a matter of [f]ederal law." AR497-500. Interior emphasized that due respect for the Nation's sovereignty and self-government compelled this conclusion. AR500. A federal district court also reviewed Interior's decisions and affirmed them on judicial review.

In its summary-judgment papers, the FBI stakes its case on the claim that it "was not bound to follow" the determinations of the Cayuga people and the Department of the Interior. Mem. 2. This claim is both wrong and irrelevant. First, it is wrong because decades of federal Indian law require federal agencies to respect "principles of tribal self-determination" by giving effect to Indian nations' resolutions of their "internal disputes" in "tribal forum[s]" via "referendum"-type measures. *Ransom v. Babbitt*, 69 F. Supp. 2d 141, 150 (D.D.C. 1999). When agencies "simply ignore the[se]" results, they act unlawfully. *Id.* at 155. Moreover, where—as here—Interior has recognized an Indian nation's governing body, its decision triggers 25 U.S.C. § 2, which mandates that Interior "*shall* … have the management of *all Indian affairs* and of *all matters* arising out of Indian relations." 25 U.S.C. § 2 (emphasis added). Assessments of which government to recognize assuredly qualify. Just as the State Department determines which foreign governments to recognize, Congress in 25 U.S.C. § 2 ensured that the United States would "speak with one voice" on matters of Indian relations. *Cayuga Nation v. Tanner*, 824 F.3d 321, 328 (2d Cir. 2016) (quoting *Zivotofsky ex rel. Zivotofsky v. Kerry*, 576 U.S. 1, 14 (2015)). By disregarding Interior's recognition decisions, the FBI violated 25 U.S.C. § 2.

Second, even if the FBI had the power to depart from Interior's recognition decisions, its decision to chart its own path here would be arbitrary and capricious. The FBI did not actually *analyze* the status of the Nation's leadership. It did not evaluate Cayuga law (as Interior did) or the Nation's Statement of Support campaign (as Interior also did). Nor did the FBI claim that,

since Interior's recognition decisions, the Cayuga people have changed course and withdrawn their recognition of the Halftown Council. Instead, the FBI rested its decision entirely on the fact that a small faction still refuses to *accept* the determinations of the Cayuga people, the Department of the Interior, and the federal district court. That is not a rational basis for refusing to follow Interior's conclusions. On January 6, 2021, hundreds of people stormed the U.S. Capitol claiming the 2020 election was stolen. Many people still believe so. Yet Joe Biden remains no less the lawful President. Even if the FBI could claim for itself Interior's authority to conduct Indian affairs (and it cannot), it would need at a minimum to weigh the relevant questions under tribal and federal law and not simply give a heckler's veto to those who refuse to accept lawful resolutions.

The reality is that the FBI does not *want* to grant the CNPD access to its databases and would like to exercise discretion to deny the Nation's application. That is why the FBI's decision and letter rely on so many factors irrelevant to TLOA. On July 31, 2020, for example, Interior denied the Nation's discretionary application to take land into trust under Section 5 of the Indian Reorganization Act ("IRA") based in part on (for example) "opposition [from] surrounding jurisdictions." AR907. The FBI's most recent letter "include[s] in [its] consideration" all the "facts and considerations underlying that [trust] decision"—even though many of the discretionary factors Interior considered under Section 5 have nothing to do with the FBI's mandatory TLOA duty. AR968. Doubling down on this approach, the FBI's moving papers find fault with the manner in which the CNPD executed search warrants in February 2020. For example, the FBI's lawyers claim for the first time that the CNPD acted improperly because its officers did not conduct the February 2020 operation wearing the "police uniforms" "depicted in pictures submitted" to the FBI. Mem. 12, 17. These new claims are procedurally improper (because *Chenery* bars lawyers

from relying on new arguments the agency did not invoke) and meritless to boot (because it is not unusual for police to conduct specialized operations wearing specialized attire).

More to the point, however, the FBI's prudential concerns are irrelevant to the question at hand. An agency acts arbitrarily and capriciously if it "relie[s] on factors which Congress has not intended it to consider." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). And here, Congress mandated that the FBI "shall permit tribal … law enforcement agencies" to access its databases—recognizing that, all too often, federal and local agencies would find some paternalistic reason to deny access. 28 U.S.C. § 534(d). *Even if* the FBI had some legitimate concern about how the CNPD had conducted one law enforcement action, that does not change the fact that CNPD officers are "tribal justice official[s] serving an Indian tribe with criminal jurisdiction over Indian country." 34 U.S.C. § 41107(3). State and local police departments at times have behaved unwisely or even illegally. But there is no evidence the FBI has *ever* invoked those actions to deny access to the databases it administers. To be sure, if a law enforcement agency uses these databases for an improper purpose, the FBI's regulations permit it to impose sanctions, including withdrawing access. But absent such evidence of misuse, Congress did not permit the FBI to deny access to tribal law enforcement based on the FBI's "exercise[of] its own discretion" that it is not "appropriate" for a tribal police department to "access … law enforcement databases." Mem. 2.

Because the FBI's decision is "not in accordance with law" and is "arbitrary and capricious," the Court should deny the FBI's motion for summary judgment, grant the Nation's cross-motion, and require the FBI to grant the Nation's application. Mem. 14.

BACKGROUND

A. The Cayuga Nation And Its Reservation.

The Cayuga Nation is a federally recognized Indian nation. *See Indian Entities Recognized By and Eligible to Receive Services from the U.S. Bureau of Indian Affairs*, 85 Fed. Reg. 5462, 5463 (Jan. 30, 2020). In the 1794 Treaty of Canandaigua, the federal government recognized a 64,015-acre reservation for the Nation—located within what today are Cayuga and Seneca Counties, 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. Yet in 1795 and 1807, New York unlawfully purchased the Nation's lands, in violation of the Non-Intercourse Act. *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 268 (2d Cir. 2005). That left the Nation landless and its people scattered.

Recently, however, the Nation has reacquired in fee simple a number of properties within its reservation and built thriving businesses that anchor a restored homeland. These businesses have included Lakeside Entertainment—a Class II gaming facility that operates under the regulation of the National Indian Gaming Commission pursuant to the Indian Gaming Regulatory Act ("IGRA"), *see Tanner*, 824 F.3d at 324—as well as two convenience stores, a 154-acre farm, a cannery, and an ice cream store. *Cayuga Nation v. Campbell*, 83 N.Y.S.3d 760, 761 (App. Div. 2018), *rev'd*, 140 N.E.3d 479 (N.Y. 2019); *Cayuga Nation v. Jacobs*, 986 N.Y.S.2d 791, 792 (Sup. Ct., Seneca Cnty. 2014).

"[E]very federal court" to consider the question, as well as the New York Court of Appeals, agrees that the Nation's federal reservation continues to exist. *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). Because the Nation's reservation remains intact, it constitutes "Indian country" under federal law, which includes "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).

B. The Nation's Police Force.

Because the Nation's reservation remains intact, the Nation has criminal jurisdiction over those lands. *See McGirt v. Oklahoma*, 140 S. Ct. 2452, 2460 (2020) (explaining that because the Creek Nation's reservation has not been disestablished, "[r]esponsibility" to exercise criminal jurisdiction "fall[s] … to the federal government and [the] Tribe"). As the Ninth Circuit explained long ago, "intrinsic in" Indian nations' retained "sovereignty is the power … to create and administer a criminal justice system," and "tribal police forces have long been an integral part of … tribal criminal justice systems." *Ortiz-Barraza v. United States*, 512 F.2d 1176, 1179 (9th Cir. 1975). Likewise, 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). 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.

In, 2018, the Nation exercised its sovereign authority to create a police force and exercise its criminal jurisdiction. AR68. The Nation established the Office of the Commissioner of Public Safety and granted the Commissioner the power to establish the CNPD. *Id.* The Nation appointed Arthur F. Pierce, a former Captain of the New York State Police, as its Public Safety Commissioner. *Id.* The Nation also appointed Colonel Mark Lincoln, also a former member of the New York State Police as its first Superintendent of Police. AR98.

The CNPD began operating in 2018, and has operated continuously since. Like police departments throughout the United States, the CNPD's primary function is the criminal detention, apprehension, and investigation of suspected violations of the Nation's criminal laws. AR68. The

Nation has adopted and implemented the Cayuga Nation Rules of Criminal Procedure, AR618-67, and the Cayuga Nation Penal Code, AR668-845. The CNPD has also promulgated a Policy Manual governing the conduct of its officers. AR537-38. The CNPD now numbers about 20 officers, all of them experienced law enforcement professionals who have been certified by the New York State Division of Criminal Justice Services. AR539-92. The CNPD patrols the Nation's reservation daily and regularly confronts potential criminal suspects. AR847.

After the CNPD's establishment, local governments asked the Secretary of the Interior whether the Nation could indeed establish a police force and exercise criminal jurisdiction. On June 17, 2019, the Director of the Bureau of Indians Affairs, Darryl LaCounte, "respond[ed] … on [the Secretary's] behalf." AR846 ("LaCounte Letter"). Interior explained that "[b]oth Federal and State Courts have ruled that the Cayuga Indian Nation Reservation has not been diminished or disestablished." *Id.* And as a result, Interior concluded that the "Nation may enforce its own criminal laws against Indians within the boundaries of the Reservation." *Id.* Interior acknowledged that it did not have a relationship with the CNPD, that the CNPD does not receive funding from Interior, and that the CNPD's officers are not federally commissioned. *Id.* Interior emphasized, however, 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 … Reservation boundaries through a law enforcement program." *Id.* Interior also acknowledged that the Nation "does not have lands in trust." *Id.* But it explained that this fact was irrelevant because "all lands within the exterior boundaries of the Reservation are considered Indian Country under Federal law." *Id.* Hence, Interior memorialized "the Department's position" that the "Nation may enforce its own criminal laws against Indians within … the Reservation" and that its jurisdiction was "concurrent" with the jurisdiction of New York and the federal government. *Id.*

C. The Nation's Applications For An ORI And The FBI's Denials.

2018 Application. On March 28, 2018, the Cayuga Nation submitted an application for an ORI to Thomas J. Cascone, an Information Technology Specialist at New York's CJIS Audit & Compliance Unit. AR68. State officials like Mr. Cascone receive ORI applications in the first instance and forward them to the FBI for processing. Mem. 5. Before submitting its application, counsel for Nation spoke with Mr. Cascone about application requirements and noted that the Nation had "addressed in this letter all of the items you indicated were necessary for assignment of the ORI." AR68. Mr. Cascone forwarded the application to the FBI. AR65.

When the FBI filed the administrative record in this case, the Nation learned for the first time that the FBI's CJIS division denied that application on April 19, 2018. AR65; *see* Compl. ¶ 65; Mem. 6. The FBI's denial stated that the Nation "has not officially established a law enforcement agency." AR65.

Although the Nation did not know at the time that the FBI had denied its application, it understood that the FBI had "requested additional information." AR982. Hence, on June 29, 2018, the Nation supplemented its application. AR82. It provided: (1) a map of the Nation's reservation; (2) a list of Nation-owned properties; (3) a May 18, 2018 letter detailing the Nation's authority to form a police force and its criminal jurisdiction; (4) the press release announcing the appointment of Colonel Mark Lincoln as the first Superintendent of Police; (5) Colonel Lincoln's resume; (6) an agreement with Cambria County, Pennsylvania to house individuals detained by the CNPD; (7) the Police Department policy manual; (8) resumes for CNPD officers; (9) photographs of the CNPD vehicles; (10) the CNPD oath; (11) an image of a CNPD officer's badge; (12) the Nation's Rules of Criminal Procedure; and (13) the Nation's Penal Code. AR86.

Again, on July 17, 2018, the CJIS Division told Mr. Cascone that the Nation "was not an authorized criminal justice agency performing the administration of criminal justice as defined in" 28 C.F.R. Part 20. AR82. Again, Mr. Cascone did not convey this decision to the Nation.

2020 Application. In April 2020, the Nation renewed its request to Mr. Cascone. Mr. Cascone emailed an FBI official asking "if anything changed with [the Nation's] chance of getting an ORI." AR484. The official responded that "the past denial responses were based in part, because the Cayuga Nation did not have territory to access jurisdiction over"—*i.e.*, it did not have land in trust. AR483. The official recalled that the Nation's "documentation supported the creation of a [police department], and identified a criminal code but lacked the territory to exercise jurisdiction." *Id.* "[U]nless that has changed," the official said, "most likely our response will remain the same." *Id.* Even so, the FBI requested a complete application package, including: (1) statutory authorization for the CNPD; (2) the statutory authority authorizing law enforcement powers, duties, functions, etc.; (3) officers' training certifications; (4) budget information; (5) information showing how law enforcement cases have been handled; (6) the statutory authority giving the CNPD jurisdiction; and (7) information regarding jurisdiction and territory. AR482.

On June 3, 2020, the Nation again submitted its ORI application through Mr. Cascone. AR852-57. In addition to the documents previously submitted, this application included: (1) a November 14, 2019 letter from Assistant Secretary – Indian Affairs Tara Sweeney; (2) an analysis of CNPD's calls for service since its inception; (3) the 2020 budget; (4) photographs of the police uniforms; and (5) photographs of a CNPD officer's identification card. AR492.

On June 8, 2020, the FBI's CJIS Division again found that the CNPD "was not an authorized criminal justice agency performing the administration of criminal justice as defined in" 28 C.F.R. Part 20. AR487. The Nation requested a "formal denial." AR484.

On July 2, 2020, the FBI issued a two-page denial letter (the "July 2020 Decision"). AR882-83. The FBI memorialized its justification as follows: "Given that the Cayuga Nation has no federal trust lands …, the BIA provides no funding to the CNPD, the BIA denies having any relationship with the CNPD, and the BIA has not commissioned the CNPD with federal law enforcement authority, it is our conclusion that officials of the CNPD are not 'tribal justice officials serving an Indian tribe with criminal jurisdiction over Indian country.'" AR883. "For these reasons" the FBI concluded, it was "denying the … request." *Id.* The July 2020 Decision also averred that the New York Court of Appeals had issued a decision, *Cayuga Nation v. Campbell*, 140 N.E.3d 479 (N.Y. 2019), that the FBI believed showed "a serious dispute about who represents the [Nation's] lawful government"—though the FBI's decision did not tie that observation to the reasons it gave for its "conclusion" that the CNPD did not satisfy TLOA. AR882-83.

Request for Reconsideration. On July 22, 2020, counsel for the Nation requested reconsideration. AR885. The Nation explained that the relevant statutes, 28 U.S.C. § 534 and 34 U.S.C. § 41107, required the FBI to grant its application if three requirements were met: (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. *Id.* Then, the Nation detailed how it met each requirement. AR885-86.

The Nation also addressed and refuted each of the "reasons given in the [FBI's] July 2 decision." AR886. First, the Nation addressed the FBI's reliance on the Nation's lack of "lands in trust." *Id.* This fact, the Nation explained, was irrelevant to whether it has "criminal jurisdiction" over "Indian country." *Id.* It pointed the FBI to the LaCounte Letter's conclusion that the Nation "'may enforce its … criminal laws against Indians within [its] Reservation' *even though* the Nation 'does not have lands in trust.'" *Id.* (quoting AR846).

Second, the Nation addressed the FBI's reliance on the CNPD's lack of "relationship with the Department of the Interior" or "federal law enforcement commissions." AR887. The Nation explained that Indian nations do not need federal commissioning to exercise their inherent authority to create police forces and that Congress in TLOA did not give the FBI "discretion" to deny an application "simply because [an Indian nation's police force] lack[s] funding or commissions from the federal government." AR887 & n.1.

The Nation also addressed the comment that the New York Court of Appeals' *Campbell* decision showed there was a "dispute about who represents the [Nation's] lawful government." *Id.* The Nation explained that the Department of the Interior and Bureau of Indian Affairs had definitively recognized the Halftown Council as the Nation's lawful governing body and that a federal district court upheld that decision. *Id.* While *Campbell* "declined to accord controlling weight to that determination for purposes of … state-law property claims," the Nation explained that the FBI was bound to "follow the BIA and … Interior—not New York state courts." *Id.* It pointed the FBI to 25 U.S.C. § 2, which vests in Interior "management of all Indian affairs and all matters arising out of Indian relations." *Id.* Indeed, the Nation stressed that, if there had been any doubt about the scope of Interior's recognition, a November 2019 letter from Assistant Secretary Tara Sweeney—which the Nation had provided with its application, AR497-500—had "reiterated that [Interior] had recognized the [Halftown] Council 'as the Nation's governing body without qualification,' 'for all purposes,' and not 'limited in any way.'" AR887.

D. The FBI's Delays And This Suit.

On July 30, 2020, the Nation asked the FBI "when we can expect [the FBI's] response" and asked for the "opportunity … to address … any … questions [the FBI] may have." AR897. The FBI, however, did not respond. On September 18, 2020, the Nation wrote again "to make one

final request that the FBI reconsider," explaining that the Nation intended to file suit by September 28 unless the FBI indicated that it intended to weigh the Nation's reconsideration request. AR917-19. The FBI responded on September 25, 2020, stating that it "intended to seek clarification from the … BIA … about its position" and "requesting until October 31, 2020 to" act. AR933.

The FBI, however, did not respond by October 31. The Nation thus filed this suit on November 3, 2020 alleging that the FBI's denials were not in accordance with law and were arbitrary and capricious in violation of the Administrative Procedure Act ("APA"). ECF No. 1.

E. The FBI's Reconsideration Letter.

On February 4, 2021—six days before the FBI's answering deadline—the FBI finally responded to the Nation's request for reconsideration (the "February Letter"). The February Letter did not purport to constitute a new decision on the Nation's application. Rather, the FBI characterized it as an "addendum" to the FBI's "original decision" memorializing that the FBI's "position remains unchanged." AR963.

The February Letter, however, abandoned virtually all of the FBI's prior reasoning. Since 2018, the Nation's lack of trust lands had been the FBI's primary (and sometimes exclusive) justification for denying the Nation's application. *Supra* 9, 11. Yet the February Letter dropped any argument that an Indian nation must have trust lands to exercise criminal jurisdiction. AR963-69. The July 2020 Decision had also relied heavily on the CNPD's lack of BIA funding or commissioning. *Supra* 11. The February Letter, however, no longer claimed that these facts could justify a denial and included them only as "other facts relevant to our decision." AR950.

The February Letter instead relied on the claim that the FBI could not "conclude that any leadership officials presently serve as 'tribal justice officials' representing the Nation because a leadership dispute still exists within the Nation." AR965. The FBI acknowledged Interior's

multiple decisions recognizing that the Nation had *resolved* the leadership dispute that once existed within the Nation. But the FBI averred that Interior's recognition decisions applied only "for government to government contracting purposes" and that the "FBI does not believe that the … decision identified the appropriate leadership for … criminal justice" purposes. AR966. The FBI did not, however, acknowledge Interior's clarification in the Sweeney Letter that it had recognized "the Halftown Council to be the Nation's government for all purposes" "as a matter of Federal law." AR497, AR500. The February letter also asserted that Interior's decision did not "bind[] … the FBI," AR967, but it did not address 25 U.S.C. § 2 and its exclusive grant of authority.

The February Letter also did not attempt to undertake the FBI's *own* analysis of the status of the Nation's leadership. Instead, it relied on a series of events in that occurred in February 2020. AR967-68. Pursuant to a warrant issued by the Nation's court, the CNPD retook certain properties unlawfully occupied by a few individuals who refused to acknowledge the Nation's resolution of its leadership dispute or Interior's recognition of that resolution. *Infra* 21. The FBI's July 2020 Decision had not mentioned those events. AR967-68. Yet in the February Letter, these events became the basis for the FBI's conclusion that a "leadership dispute still exists within the Cayuga Nation." AR967. The February Letter did not claim that anything *new* had happened within the Nation to change the Nation's lawful governing body since Interior's recognition decisions. Nor, even, did the FBI purport to *disagree* with Interior's reasons for recognizing the Halftown Council. Instead, the February Letter relied entirely on the fact that an "opposing faction" had refused to accept this resolution and that the CNPD's actions in February 2020 had generated significant local controversy, as reflected in "news report[s]." AR965.

The February Letter also stated that, "relatedly, the FBI has determined that the CNPD does not have 'criminal jurisdiction over Indian country.'" AR949. On July 31, 2020, Interior

placed some weight on the February 2020 events in a decision denying the Nation's application to take land into trust under IRA Section 5.[1] Under Section 5, Interior "is authorized, in [its] discretion, to acquire … lands … for the purpose of providing land for Indians." 25 U.S.C. § 5108. The February Letter did not reassert the FBI's claim that trust lands were *necessary* for the CNPD to exercise criminal jurisdiction. Nor did it claim that Interior's trust decision had altered Interior's recognition of the Halftown Council. Instead, the February Letter vaguely averred that the trust decision indicated that Interior had "recognized a change in circumstances, even if not an explicit change in … leadership." AR967. The February Letter then recited some of the considerations Interior had deemed relevant in exercising its discretionary Section 5 authority (such as the "opposition of the surrounding jurisdictions to taking the land into trust"). AR967-68. And after this recitation, the FBI stated that it "has taken all these considerations into account in determining that the CNPD does not qualify for … an ORI." AR950; *see id.* ("we have included in our consideration … the facts and considerations underlying [Interior's trust] decision").

F. The Nation's Leadership Dispute And Property Seizures.

Because the FBI's decision has come to rely entirely on assertions that the Nation is enmeshed in a leadership dispute, some background on that issue is required. The Administrative Record tells only part of that story—because the FBI never asked the Nation about leadership issues or made more than passing mention of such issues until after the Nation had filed suit. *Infra* 36-38 (discussing the Supreme Court's *Regents* decision holding that such conduct undermines orderly judicial review). But other parts of the story appear in sources subject to judicial notice.

[1] The Nation has challenged this decision under the APA. *See* Am. Compl., *Cayuga Nation v. U.S. Dep't of Interior*, No. 1:20-cv-01581 (D.D.C. Sept. 9, 2020), ECF No. 15 ("Trust Compl.").

The leadership dispute and property seizures. In 2004, a small faction of Nation citizens claimed that Clint Halftown and several others had been removed from the Cayuga Nation's governing body, the Cayuga Nation Council. *Campbell*, 140 N.E.3d at 482. This faction, however, failed to persuade Interior to withdraw recognition from Mr. Halftown. *Cayuga Nation v. Bernhardt*, 374 F. Supp. 3d 1, 6 (D.D.C. 2019) (recounting history). So the faction decided to forsake legal processes. In 2014, members of this faction "took possession of the Nation's security office and seized several sets of keys to the Nation's offices, businesses, vehicles, and certain personal property." *Campbell*, 140 N.E.3d at 482. This violent takeover left members of this faction in control of several of the Nation's businesses and properties. The Halftown Council, meanwhile, continued to operate the rest of the Nation's business and properties, including the Nation's Class II gaming facility. *See Tanner*, 824 F.3d at 324.

The Halftown Council declined to respond to the seizures in kind. Instead, it sought assistance from law enforcement and state courts. Law enforcement, however, declined to intervene—and New York courts held they lacked jurisdiction because the faction that seized the properties claimed to be the Nation's government. *Jacobs*, 986 N.Y.S.2d at 795.

The statement of support and Interior's recognition of it. By 2016, the Nation's people determined that the situation had become untenable and resolved the leadership dispute through a traditional "statement of support" process. In that process, more than 60% of adult Cayuga citizens recognized as the Nation's lawful government a Nation Council led by Mr. Halftown and affirmed a set of principles delineating how the Nation is governed. AR5, 18-19, 22. Because Interior had to determine whether to enter into a new contract with the Halftown Council under the Indian Self-Determination and Education Assistance Act ("ISDEA"), Interior analyzed the statement of support process in detail. It reviewed the statements of support that the Nation's citizens returned,

checked them against the Nation's membership roll, and tabulated the results. AR5, 18-19, 22. Interior also solicited briefing from both sides on whether the statement of support process was lawful under Cayuga law and had been carried out fairly and reliably. AR15-16.

Based on Interior's extensive analysis, the BIA's Regional Director, Bruce Maytubby, recognized the Halftown Council as the Nation's governing body on December 15, 2016. The Regional Director noted that Interior had previously issued "interim decisions" that recognized the Nation's last undisputed Council for contracting purposes. AR16. But he determined that the time had come "to look at the processes the Cayuga Nation has undertaken to resolve this dispute." *Id.* Beyond the need to enter a new ISDEA contract, he identified "five other reasons that a recognition decision is necessary," including (1) the Nation's trust application under IRA Section 5; (2) the need of "[o]ther federal agencies" for guidance; (3) a liquor-license application; (4) litigation surrounding the Nation's Class II gaming facility, which had raised questions about "the standing of different groups … to represent the Nation"; and (5) "instances of unrest and even violence." AR16-17. On the last point, the Regional Director emphasized that "[p]ast efforts to address public order have demonstrated a need for a functioning Cayuga Nation government." AR17.

The Regional Director then reviewed whether the statement of support process complied with Cayuga law, and concluded it did. Cayuga law, the Regional Director explained, "is founded on consensus principles and thus rejects the kinds of elections" that are familiar to the "governing system of the United States." AR19. But the "Haudenosaunee Great Law of Peace"[2] provides that "[w]henever a specially important matter or a great emergency" affects the Nation "threatening their utter ruin," the Nation's leaders may "submit the matter to the decision of their people and the decision of the people shall affect the decision" of the Nation, which "shall be a confirmation

[2] The Cayuga Nation is one of the six nations of the Haudenosaunee Confederacy. AR19.

of the voice of the people." *Id.* This principle, the Regional Director found, indicates that "governance within the Haudenosaunee tribes comports with the principle [that] governments 'deriv[e] their just powers from the consent of the governed.'" *Id.* And the Regional Director concluded that "to reject the principle that a statement of support campaign could be valid would be to hold that the Cayuga Nation's citizens lack the right to choose a government that reflects their choices—that the power of the Cayuga Nation Council to govern its citizens does not derive from the consent of the governed." AR20. "Nothing in federal or tribal law," the Regional Director found, "authorizes [Interior] to deny to the Nation's citizens [this] fundamental human right." *Id.*

The Regional Director also determined that recognizing the statement of support process comported with longstanding federal law holding that the "Federal government should encourage and defer to tribal resolutions of tribal disputes." *Id.* Although the Nation at that point had "no tribal judiciary," the Supreme Court has emphasized that "'[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies.'" *Id.* (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 66 (1978)). The Regional Director found that the "adult citizens of the Cayuga Nation remain the ultimate 'nonjudicial tribal institution' competent both to identify and to apply Cayuga law." *Id.* He concluded that "[w]here a question is put to the entire tribal membership for resolution by plebiscite, federal rejection of the outcome would be an impermissible intrusion into a tribe's exercise of sovereignty." AR20-21 (footnote omitted). He also considered, and rejected, the challenges to the "validity of the process" by which the statement of support had been implemented. AR21-27. Based on all of that, the Regional Director determined that he could not "consider [the statement of support process] as anything other than resolution of a tribal dispute by a tribal mechanism" and he thus "recognized the Halftown Council as the governing body of the Cayuga Nation." AR27.

The opposing faction twice challenged that decision. First, it pursued an administrative appeal within Interior. But in 2017, the acting Assistant Secretary – Indian Affairs Michael Black "rejected [the] objections and affirmed the decision of [the] Regional Director." *Cayuga Nation*, 374 F. Supp. 3d at 8. The opposing faction also sought judicial review. The district court, however, affirmed Interior's decision, and the opposing faction declined to appeal. *Id.* at 28.

The Nation's renewed efforts to invoke state and federal processes. Meanwhile, the opposing faction—which had previously called itself the "Unity Council"—splintered, and several of the Nation's properties and businesses fell into the hands of individuals who did not even claim leadership of the Nation and instead simply operated these properties and businesses for their own personal benefit, without any accounting to the Nation. Trust Compl. ¶ 101.[3] So the Nation, with federal recognition of its resolution of the leadership dispute in hand, again sought assistance from law enforcement and state courts. *Id.* ¶¶ 108-112. New York's trial court issued, and its intermediate appellate court affirmed, an injunction requiring the turn-over of the Nation's properties to the Halftown Council. *Cayuga Nation v. Campbell*, No. 51342, 2017 WL 4079004, at *3 (N.Y. Sup. Ct., Seneca Cnty. Sept. 8, 2017), *aff'd*, 83 N.Y.S.3d 760 (App. Div. 2018), *rev'd*, 140 N.E.3d 479 (N.Y. 2019); *Campbell*, 83 N.Y.S.3d at 764.

[3] This document is the Nation's Amended Complaint in its lawsuit challenging Interior's denial of its trust application. The Administrative Record in this case includes the Nation's *original* complaint in the same lawsuit, AR859-72, and the February Letter and the FBI's summary-judgment brief both discuss Interior's land-into-trust decision at length, AR967-68; Mem. at 13, 27. The Court may take judicial notice of the Amended Complaint for the limited purpose of showing the Nation's position concerning the February 2020 events. *Veg-Mix, Inc. v. U.S. Dep't of Agric.*, 832 F.2d 601, 607 (D.C. Cir. 1987). Indeed, if the FBI had so much as *mentioned* those events before the February Letter, the Nation's account of those events would be part of the Administrative Record. To the extent the Court deems it necessary, the Nation hereby moves to add the Amended Complaint (and the exhibits thereto) to the Administrative Record. *See Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) (supplementation appropriate when the existing record would "preclude effective review").

The New York Court of Appeals, however, reversed. It reasoned that some individuals occupying the properties continued to maintain claims to be the Nation's lawful leadership—despite the rejection of those claims by the Cayuga people and Interior—and that courts lacked jurisdiction to resolve "disputed issues of tribal law." *Campbell*, 140 N.E.3d at 481. The Court acknowledged that Interior had resolved those disputed issues. But it interpreted Interior's decisions as "limited" to "federal contracting." *Id.* at 485. The Court thus shut the courthouse doors to the Nation and told the Nation that it would need to rely on "mechanisms other than [state] courts … in a manner consistent with tribal … law." *Id.* at 489.

In November 2019, in specific response to the New York Court of Appeals' decision, Interior issued the Sweeney Letter. The Sweeney Letter recounted that some "have argued that … the Department did not recognize the Halftown Council for any purpose other than entering into [ISDEA] contracts." AR892. The Sweeney Letter decisively rejected those arguments:

> I respond to reaffirm that the Maytubby Decision, as upheld by the Black Decision, recognized the Nation's acknowledgment of 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. That conclusion, the Sweeney Letter explained, accorded with the Regional Director's 2016 decision, which "repeatedly emphasized that … he was not merely recognizing the Halftown Council for the purposes of signing Federal contracts"—pointing to "several reasons," besides ISDEA contracting, that the Regional Director had believed necessitated a definitive decision. AR894. The Sweeney Letter also emphasized that nothing had *changed* since Interior issued its recognition decisions and that the "Department continues to recognize and follow that non-qualified acknowledgment of the Halftown Council as the Nation's governing body." AR893. In sum, the Sweeney Letter reiterated, the "Department has always operated pursuant to Regional

Director Maytubby's conclusion that the statement of support process represented the Nation's recognition of the Halftown Council for all purposes. The Halftown Council remains the tribal leadership as a matter of Federal law." AR895.

Despite this unambiguous acknowledgment, however, the Nation could not prevail upon law enforcement—either the local police or the U.S. Attorney—to intercede and return to the Nation the properties that had been unlawfully seized in 2014. Trust Compl. ¶ 112; *cf.* 18 U.S.C. § 1163 (criminalizing embezzlement or theft from Indian nations). The Nation thus had no choice but to follow the approach the New York Court of Appeals had identified and rely on "mechanisms other than [state] courts … in a manner consistent with tribal … law." *Campbell*,140 N.E.3d at 489. In February 2020, the CNPD—pursuant to a warrant from the Nation's court—reclaimed possession of those properties. Trust Compl. ¶ 116. While executing the warrant, the CNPD briefly detained eight individuals, issued them criminal trespass complaints, and immediately released seven. *Id.* ¶ 117. The Nation retained custody of one individual—a non-Cayuga Indian—for a brief additional period based on narcotics found during the search. *Id.* Due to concerns that the buildings would become objects of contention, the Nation decided to demolish some of the buildings. *Id.* ¶ 118. The demolition was authorized pursuant to a Cayuga Nation permit dated February 20, 2020. *Id.* & Ex. O thereto.

Certain individuals who opposed the Nation's actions planned a protest at the properties on February 29, 2020. *Id.* ¶ 119. The Nation was aware of the plan and coordinated a response with the Department of Justice's Community Relations Service, as well as state and local police. *Id.* During the protest, a group of agitators decided to cross the boundary line of one of the Nation's properties and proceeded to attack the CNPD officers, one of whom was hospitalized. *Id.* The CNPD removed those who had crossed the property line, and state and local law enforcement

assisted in separating the individuals who were attacking the CNPD's officers. *Id.* Recently, a Seneca County grand jury charged one of the agitators with criminal trespass and assault.[4]

Even though the Nation acted to retake its properties only as a last resort, and only after the New York Court of Appeals had told the Nation it had no other choice, the Nation's actions on February 22 generated significant local controversy. The individuals who had unlawfully occupied the Nation's properties fed that controversy by promoting false accounts of what had occurred, which some reporters republished. AR 408-14, 416.001-.004, 418-72, 474.001-.022, 476.001-.003. The Nation worked to correct those mischaracterizations—for example, sending the U.S. Attorney for the Western District of New York and the Department of the Interior a full explanation of its actions and outlining why its actions were lawful. Trust Compl. ¶ 121 & Ex. Q thereto. Interior nonetheless denied the Nation's land-into-trust application in part based on concerns about the February 2020 events. AR905-06. But despite this decision—which the Nation has challenged under the APA—Interior never wavered in recognizing the Halftown Council as the Nation's lawful government. To the contrary, Interior directed its trust decision to "The Honorable Clint Halftown," "Federal Representative, Cayuga … Nation." AR902.

STANDARD OF REVIEW

The APA requires courts to "hold unlawful and set aside" agency action that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory … authority," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (C), (D). In APA cases, "[s]ummary judgment … serves as the mechanism for deciding, as a matter of law, whether an agency action is supported by the administrative record and is otherwise consistent

[4] Gabriel Pietrorazio, *Grand Jury Concluded: Charles Bowman Charged with Criminal Trespass, Assault by SFPD*, Finger Lakes 1 (May 4, 2021), https://bit.ly/3eN1RWM.

with the APA." *Conservation Law Found. v. Pritzker*, 37 F. Supp. 3d 254, 261 (D.D.C. 2014). By prohibiting "arbitrary" and "capricious" agency action, 5 U.S.C. § 706(2)(A), the APA provides a foundational protection: agencies must engage in "reasoned decisionmaking." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, 140 S. Ct. 1891, 1905 (2020) (quotation marks omitted). An agency may not "rel[y] on factors which Congress has not intended it to consider," "entirely fail[] to consider an important aspect of the problem," or "offer[] an explanation for its decision that runs counter to the evidence before the agency." *State Farm*, 463 U.S. at 43.

ARGUMENT

This Court must set aside the FBI's decision because it is both "not in accordance with law" and "arbitrary [and] capricious." 5 U.S.C. § 706(2)(A). The decision is contrary to law because it violates to TLOA, which imposes on the FBI a mandatory duty to grant an ORI to any "tribal justice official serving an Indian tribe with criminal jurisdiction over Indian country." 34 U.S.C. § 41107(3); *see* 28 U.S.C. § 534. The CNPD qualifies. The FBI's only real counterargument is that "a leadership dispute still exists within the Nation" and that the CNPD serves just one side in that dispute. AR965. The Nation, however, has resolved that dispute, and the Department of the Interior has recognized that resolution without qualification. Congress in 25 U.S.C. § 2 provided that Interior "shall … have the management of all Indian Affairs"—and by refusing to adhere to Interior's determination, the FBI violated Section 2.

Even had Congress left room for the FBI to second-guess Interior, the FBI's decision would be arbitrary and capricious. That is so for several reasons, but most of all this: The FBI did not actually *analyze* whether the CNPD serves the Cayuga Nation's lawful governing body. It relied solely on the fact that a few individuals refuse to *accept* the decisions of the Cayuga people and the Department of the Interior. That intransigence does not bear on whether the CNPD "serv[es]

an Indian tribe," any more than the Capitol insurrectionists' claims about the 2020 election casts doubt on the legitimacy of the Capitol Police who turned them back.

I. The FBI Acted Contrary To Law In Denying The Cayuga Nation Police Department Access To Its Criminal Information Databases.

Congress in TLOA imposed on the FBI a mandatory duty to grant tribal justice officials access to the FBI's criminal information databases. Because the CNPD meets each of the requirements triggering that mandatory duty, the FBI violated TLOA by denying the Nation's application. The FBI's contrary arguments lack merits.

A. TLOA Imposes A Mandatory Duty On The FBI.

The starting point for this case should be undisputed: TLOA imposes on the FBI a mandatory duty. Congress could, of course, have given the FBI discretion to decide whether tribal justice officials *should* receive access to the FBI's criminal information databases (much as Congress in IRA Section 5 gave Interior "discretion" to determine whether to acquire land in trust for Indian tribes, 5 U.S.C. § 5108). But in TLOA, Congress wrote a different statute. It had heard testimony that access to the FBI's criminal information databases was "critical for public safety" but that "tribal police often do not have access." *Examining S. 797, The Tribal Law & Order Act of 2009: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 12-13 (2009) ("*Examining S. 797*") (prepared statement of Hon. Thomas J. Perrelli, Associate Attorney General); *id.* at 61 (statement of Sen. Udall). So Congress mandated that the "Attorney General *shall permit* tribal … law enforcement agencies … to access … Federal criminal information databases." 28 U.S.C. § 534(d) (emphasis added). And it specified 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). Hence, if an Indian nation satisfies TLOA's requirements, the FBI must grant it access—full stop.

Although the FBI does not expressly dispute that point, its brief drips with the language of discretion. The FBI avers that it "exercised its … discretion" to determine whether it was "appropriate" to permit the CNPD "access to … law enforcement databases"; claims that "[d]enying CNPD's Application was a rationale [sic] exercise of the FBI's discretion"; and asks for deference to "the FBI's judgment about how to exercise [that] discretion." Mem. 2, 14, 16.

TLOA's plain text, however, refutes any claim that Congress permitted the FBI to weigh for itself whether it is "appropriate" to allow access by tribal justice officials. Statutory interpretation "begins with the text." *Merit Mgmt. Grp., LP v. FTI Consulting, Inc.*, 138 S. Ct. 883, 893 (2018). And here, the word "'shall' typically 'creates an obligation impervious to … discretion." *Maine Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020) (quoting *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (ellipsis in original)). In TLOA, Congress used that mandatory word twice, dictating that the FBI "shall permit tribal … law enforcement agencies to access" its databases, 28 U.S.C. § 534(d), and specifying that qualifying tribal justice officials "shall be considered … authorized law enforcement official[s]," 34 U.S.C. § 41107(3). Indeed, in 28 U.S.C. § 534, Congress expressly made other provisions *optional*—identifying steps that the Attorney General "may" (or may not) take. 28 U.S.C. § 534(a)(3), (c), (f)(1). When the same statute uses both "may" and "shall," "the normal inference is that each is used in its usual sense—the one act being permissive, the other mandatory." *Anderson v. Yungkau*, 329 U.S. 482, 485 (1947).

The Department of Justice, of which the FBI is a part, recognized as much during TLOA's passage. The Department "support[ed] efforts to increase tribal access to NCIC," recognizing that

such access was important to "public safety." *Examining S. 797* at 12-13 (prepared statement of Hon. Thomas J. Perrelli, Associate Attorney General). So when it analyzed the provision that ultimately became 28 U.S.C. § 534(d), it did not ask Congress to relieve it of the mandatory duty that provision imposed. Instead, it sought only a more limited amendment. As originally introduced, this provision required the Attorney General to ensure that tribal justice officials would "have access to" the FBI's criminal information databases. *Id.* at 61 (statement of Sen. Udall). The Department worried that the "have access" language could be interpreted to require the FBI to provide tribes "the technical resources" needed. *Examining S. 797* at 12-13 (prepared statement of Hon. Thomas J. Perrelli, Associate Attorney General); *id.* at 61 (statement of Sen. Udall). The Department thus asked Congress to amend TLOA to state that the "Attorney General shall ensure that tribal law enforcement officials … *be permitted* access." *Id.* at 13 (prepared statement of Hon. Thomas J. Perrelli, Associate Attorney General). That proposal did not seek to diminish the FBI's mandatory duty to permit access to tribes having the necessary technical resources.

B. The Nation's Application Met TLOA's Requirements.

The Nation showed that it met all of the requirements triggering the FBI's mandatory duty. In its brief, the FBI now concedes that TLOA sets forth three (and only three) 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." ECF No. 16-1, at 4 (quoting U.S.C. § 41107(3)); *see* First Am. Compl. ¶ 18, ECF No. 12; AR885. The Nation satisfies each.

First, the Cayuga Nation is a federally recognized Indian tribe. *Supra* 26. And the "tribal justice official[s]"—which Congress defined to include any "tribal law enforcement officer," 25 U.S.C. § 2801(1)—seeking access to the databases serve the Cayuga Nation. AR539; AR616. These officials were appointed by the governing body identified by the Cayuga people as the

Nation's lawful government, which the Department of the Interior has recognized "as the Nation's governing body without qualification," "for all purposes," and not "limited in any way." AR497. The FBI's attempts to evade this dispositive fact, *infra* Part I.C.1, lack merit.

Second, the Cayuga Nation has "Indian country" by virtue of its federal reservation. As Interior reaffirmed in June 2019, that reservation "has not been diminished or disestablished." AR846. Indeed, "every federal court" to consider the question, as well as the New York Court of Appeals, agrees. *Supra* 6. Meanwhile, Congress has defined "Indian country" to include "*all* land within the limits of *any* Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151(a) (emphasis added). Hence, the Nation's reservation is "Indian country" under federal law. *See McGirt*, 140 S. Ct. at 2464.

Third, the Cayuga Nation has "criminal jurisdiction" over its Indian country. Again, Interior has expressly recognized that "the Cayuga Indian Nation may enforce its own criminal laws against Indians within the boundaries of [its r]eservation." AR846. That conclusion accords with decades of settled law recognizing that Indian nations have criminal jurisdiction over their reservation lands, including lands owned in fee simple. *Supra* 7; *accord McGirt*, 140 S. Ct. at 2460 ("[i]f Mr. McGirt and the Tribe are right [that the reservation has not been disestablished]," then the "[r]esponsibility to try" "Indians for crimes committed" in a "portion of Northeastern Oklahoma that includes most of the city of Tulsa" "would fall … to the federal government and Tribe"). Indeed, although the FBI's July 2020 Decision denied the Nation's application in large part because the "Nation has no federal trust lands," AR883, the FBI now concedes that "Indian nations' criminal jurisdiction over their reservations is [not] limited to trust lands." Mem. 27.

Because the Nation meets each of TLOA's three requirements, the FBI "shall permit" the CNPD to access its criminal information databases. 28 U.S.C. § 534(d).

C. The FBI's Contrary Arguments Fail.

The February Letter defends the FBI's denial on two grounds. First, it avers that because "a leadership dispute still exists within the Nation," the CNPD does not qualify as "tribal justice official[s] serving an Indian tribe." AR964-65. Second, the February Letter asserts that "the CNPD does not have 'criminal jurisdiction over Indian country" (despite the FBI's belated concession that Indian nations do not need trust lands to exercise criminal jurisdiction). AR949. But even if these arguments were properly before the Court, *cf. infra* Part II.A, they contradict controlling federal law and the express terms of the governing statutes.

1. The FBI Was Not Free To Depart From The Conclusions Of The Cayuga People And Interior That The Nation's Leadership Dispute Has Been Resolved.

In two respects, the FBI acted unlawfully in claiming the authority to weigh for itself whether a "leadership dispute still exists" within the Nation. AR965.

First, the FBI improperly disregarded the decision of the Cayuga people, in the statement of support campaign, resolving the Nation's leadership dispute. "Indian tribes have a right to self-government," which "the Federal Government encourages tribes to exercise." *Wheeler v. U.S. Dep't of Interior, Bureau of Indian Affs.*, 811 F.2d 549, 553 (10th Cir. 1987). As a result, the federal government must "act … to avoid any unnecessary interference with a tribe's right to self-government." *Id.* And in particular, "question[s] of the rightful leadership of a [t]ribe" are governed by tribal law. *Att'y's Process & Investigative Servs., Inc. v. Sac & Fox Tribe of Mississippi in Iowa*, 609 F.3d 927, 943 (8th Cir. 2010). And while the principle of "defer[ring] to" "tribal forum[s]" on questions of tribal law applies most often to tribal courts, *Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2d Cir. 1997), "[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 65-66 (1978); *see id.* (affirming that tribal council was a tribal law-applying

body). Here, Interior explained that under Cayuga law, the Cayuga people "remain the ultimate 'nonjudicial tribal institution' competent both to identify and to apply Cayuga law." AR20. So now that the Cayuga people have resolved the Nation's leadership dispute, agencies must defer to that resolution.

Ransom v. Babbitt, 69 F. Supp. 2d 141 (D.D.C. 1999), underscores that conclusion. There, Judge Kollar-Kotelly explained that when "the federal government must decide what tribal entity to recognize …, it must do so in harmony with the principles of tribal self-determination." *Id.* at 150. That means, in turn, that a "tribe has the right initially to interpret its own governing documents in resolving internal disputes, and [federal agencies] must give deference to a tribe's reasonable interpretation." *Id.* (quotation marks omitted). Judge Kollar-Kotelly applied that principle to hold that when a "Tribe turned to the ultimate tribal forum—a referendum," Interior violated "principles of self government and tribal sovereignty" by "simply ignor[ing] the results." *Id.* at 155. Here, the FBI did not purport to question whether the statement of support process was valid under tribal or federal law. It "simply ignored the results." *Id.* This it may not do.

Second, the FBI improperly disregarded Interior's multiple decisions *recognizing* the results of the statement of support. In its moving papers, the FBI briefly suggests that Interior's decisions did not concern "law enforcement" issues but only "DOI's contractual" purposes. Mem. 8, 20-21; *see id.* at 20 ("The BIA's Leadership Decision Does Not Concern the FBI's Determination."). But the FBI does not dwell on that argument, and for good reason: Based on the statement of support, the Sweeney Letter unambiguously recognized the Halftown Council "as the Nation's governing body without qualification," "for all purposes," and not "limited in any way." AR497, AR500. Indeed, when the Regional Director first recognized the statement of support's results in 2016, he did so in part because "[p]ast efforts to address public order have

demonstrated a need for a functioning Cayuga Nation government." AR17. And when Interior in June 2019 affirmed that the "Nation may enforce its own criminal laws against Indians within the boundaries of the Reservation," AR846, Interior was well aware that it was the *Halftown Council* that had created the CNPD and authorized the CNPD to exercise the Nation's criminal jurisdiction. Nor can there be any claim that Interior *withdrew* this plenary recognition due to the February 2020 events: While it is fair to say that Interior's trust decision expressed concerns about those events, not a word in that decision suggests that Interior had altered its recognition decisions. To the contrary, it continued to address the Halftown Council as the Nation's governing body. AR902.

The FBI's real argument is that it is "not required to adopt [Interior's] determinations." Mem. 25.[5] The FBI avers that "one agency's interpretation is not binding on another." *Id.* at 22. And this principle, the FBI says, authorized it to disregard Interior's decisions. *Id.*

That argument, however, runs headlong into 25 U.S.C. § 2. Congress sometimes *does* delegate to one agency plenary authority to resolve certain issues. *E.g.*, *Regents*, 140 S. Ct. at 1910 (noting one such example). And in 25 U.S.C. § 2, Congress did just that by providing that Interior "shall… have the management of *all* Indian affairs and of *all* matters arising out of Indian relations." (emphasis added). That delegation of exclusive authority certainly covers decisions about which government to recognize, which is core to "the management of … Indian affairs."

Congress conferred this exclusive authority both because Interior has hundreds of years of experience in managing Indian affairs and because, "as the Supreme Court has acknowledged in

[5] The FBI repeatedly characterizes "the BIA" as having made the relevant determinations. Mem. 1-2, 7, 20-22, 25, 26, 27; AR967. Presumably, the FBI does so because "the BIA" sounds less weighty than "the Department of the Interior." This characterization is incorrect: In 2017, the Assistant Secretary – Indian Affairs decided *for the Department* that the Halftown Council is the Nation's lawful governing body. AR500. And in 2019, the Assistant Secretary again affirmed *for the Department* that it had recognized the Halftown Council "for all purposes." AR497, 500.

the analogous context of foreign relations, recognition … 'is a topic on which [the United States] must speak with one voice.'" *Tanner*, 824 F.3d at 328 (quoting *Zivotofsky*, 576 U.S. at 14 (alteration in original)). The D.C. Circuit has thus recognized that 25 U.S.C. § 2 confers on Interior "plenary administrative authority in discharging the federal government's trust obligations to Indians." *Cal. Valley Miwok Tribe v. United States*, 515 F.3d 1262, 1267 (D.C. Cir. 2008) (quoting *United States v. Eberhardt*, 789 F.2d 1354, 1359 (9th Cir. 1986)). And that authority, in particular, includes both ensuring that a tribe's "representatives, with whom [the Secretary] must conduct government-to-government relations, are valid representatives of the [tribe] as a whole," *Seminole Nation v. Norton*, 223 F. Supp. 2d 122, 140 (D.D.C. 2002), and interpreting tribal law when necessary to carry out that government-to-government relationship, *Reese v. Minneapolis Area Director*, 17 IBIA 169, 173 (1989); *see infra* 33 (discussing similar authority under 28 U.S.C. § 1362). Just as the FBI may not disagree with the State Department over which government of (say) Ukraine to recognize, Congress did not authorize the FBI to second-guess Interior's decisions on matters of tribal leadership.

The FBI has no adequate answer. Neither the July 2020 Decision, nor the February Letter, addressed § 2 *at all* (even though the Nation's request for reconsideration invoked § 2). *See* AR887. And even in its brief, the FBI's only response is to assert, without citation, that Interior's "responsibility does not supersede the responsibility of other federal agencies concerning the duties they perform." Mem. 23. But that just begs the question, which is whether Congress authorized the FBI carry out its responsibilities by contradicting Interior's recognition decisions.

Section 2's plain text answers that question: Because recognition is core to "the management of … Indian affairs," it falls within § 2's broad grant of authority to Interior.[6]

The FBI also suggests that Interior itself has *disclaimed* the authority to bind other agencies. That assertion, if true, would be irrelevant: Congress in § 2 did not give Interior an *optional* power; it mandated that Interior "shall … have the management of all Indian affairs." *See Union Pac. R.R. Co. v. Brotherhood of Locomotive Eng'rs & Trainmen Gen. Comm. of Adjustment, Cent. Region*, 558 U.S. 67, 71 (2009) ("[T]here is surely a starting presumption that when jurisdiction is conferred, a court may not decline to exercise it. The general rule applicable to courts also holds for administrative agencies directed by Congress to adjudicate particular controversies."). But in any event, the FBI's claim is false. The decision it cites, *Alturas Indian Rancheria v. Pacific Regional Director*, 54 IBIA 138 (2011), concerns a prudential rule under which the BIA (and the Interior Board of Indian Appeals, or "IBIA") will not "issue a tribal recognition decision in the absence of BIA's own need to engage in government-to-government business with a tribe." *Id.* at 143. *Alturas Rancheria* then says where the BIA has not issued a recognition decision, "agencies and organizations other than the BIA" must either "determine for themselves with whom they will interact in dealings with the Tribe or, alternatively, … wait until such time as BIA, another entity, or the Tribe itself, makes a determination upon which those third parties choose to rely." *Id.* at 144. *Alturas Rancheria* does not remotely suggest that when Interior *has made* a determination, other agencies may disregard it.

[6] Notably, the FBI does not claim that it is entitled to deference under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), on the threshold question of whether it must follow Interior's decision. That is because *Chevron* does not apply when a question implicates the statutory responsibilities of multiple agencies. *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 149 (1991).

Meanwhile, adopting the FBI's position would yield indefensible results that would gravely undermine tribal sovereignty and contradict settled federal law. Imagine, for example, that Interior recognized a tribe's resolution of a leadership dispute and awarded the recognized governing body funds it used to buy a car. Now imagine that, the next day, the dissenting faction stole that car, and the tribe dispatched its police to repossess the car. Under the FBI's position—that Interior's decisions do not bind "a law enforcement agency in making a law enforcement determination," Mem. 20—the FBI could arrest and seek the prosecution of those officers, just for doing their jobs. That cannot be right. In *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983), the Eighth Circuit held that the BIA cannot "effectively creat[e] a hiatus in tribal government" by declining to recognize any tribal governing body and so "jeopardiz[e] the continuation of necessary day-to-day services on the reservation. *Id.* at 338-39. Yet the FBI's decision does just that by holding, in substance, that the Nation has *no* governing body for law-enforcement purposes. Congress in 25 U.S.C. § 2 sought to avoid that sovereignty-destroying result.

Nor does the FBI have any adequate answer to 28 U.S.C. § 1362, which provides federal 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" federal law. The FBI observes that this provision "does not grant … Interior … to recognize an Indian governing body for anything other than jurisdictional purposes." Mem. 25. The point, however, is that Congress in § 1362 vested this responsibility in Interior because, under 25 U.S.C. § 2, it *always* falls to Interior to authoritatively decide which body to recognize. Tellingly, the FBI cites no case in which another agency has *ever* disregarded a leadership decision Interior has made. *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 140 S. Ct. 2183, 2201 (2020) ("Perhaps the most

telling indication of [a] severe constitutional problem with an executive entity is [a] lack of historical precedent to support it" (internal quotation marks omitted) (alterations in original)).

2. The FBI's Conclusion That "The CNPD Does Not Have 'Criminal Jurisdiction' Over Indian Country" Is Contrary To Law.

As explained above, the Cayuga Nation has "criminal jurisdiction over Indian country," 34 U.S.C. § 41107(3), because it possesses a federal reservation and Indian nations have criminal jurisdiction over their reservations (including lands owned in fee). *Supra* 6-7. The February Letter nonetheless concluded that "the CNPD does not have 'criminal jurisdiction over Indian country.'" AR949. But now that the FBI has abandoned its argument that "Indian nations' criminal jurisdiction over their reservations is limited to trust lands," Mem. 27, it is not obvious how the FBI defends this conclusion. At times, counsel for the FBI glosses this conclusion as just a different version of its "leadership dispute" argument. *See* Mem. 7 ("[T]he FBI ultimately concluded that CNPD did not … have criminal jurisdiction over Cayuga Nation's tribal land, primarily because 'a leadership dispute still exists within the Cayuga Nation.'" (quoting AR949)). To the extent that is the FBI's argument, it fails for the same reasons already explained. Elsewhere, the FBI suggests that the CNPD lacks "criminal jurisdiction" for a hodgepodge of reasons drawn from Interior's decision to deny the Nation's trust application under IRA Section 5—for example, that Interior had noted that the Nation "lack[s] intergovernmental agreements addressing jurisdiction and land use issues between the nation and its neighbors." Mem. 17-18 (quoting AR908). The FBI avers that it found these statements "instructive" in determining that the CNPD lacked jurisdiction. Mem. 18.

This second rationale is contrary to law. TLOA asks whether an Indian nation has "criminal jurisdiction" over land. 34 U.S.C. § 41107(3). And "jurisdiction" means, as relevant, "the authority of a sovereign power to govern or legislate." Jurisdiction, *Merriam Webster*

Dictionary, https://www.merriam-webster.com/dictionary/jurisdiction (last visited May 19, 2021). None of the factors the FBI invoked have anything to do with whether the Nation has "authority … to govern or legislate" via criminal laws. *Id.* Indeed, the FBI *concedes* that "cross-deputization agreements and other intergovernmental agreements … are not necessary for Indian nations to exercise criminal jurisdiction." Mem. 18. The FBI is simply trying to smuggle in discretionary considerations and to rewrite the mandatory statute that Congress enacted.

II. The FBI's Decision Was Arbitrary And Capricious.

The FBI's decision also violates the APA's reasoned decisionmaking requirements. That is so for four reasons. First, the core rationales on which the FBI now relies are not properly before the Court because they appear nowhere in the July 2020 Decision. Second, even if TLOA permitted the FBI to make its own tribal-leadership determinations (contradicting Interior's), the FBI cannot just aver that a leadership dispute "still exists" simply because a small faction refuses to *accept* the resolution the tribe has reached and Interior has recognized. Third, the FBI has relied on a slew of considerations that are, on their face, irrelevant under TLOA. Fourth, the FBI's regulations address any legitimate concerns about how the CNPD will use the FBI's databases.

A. The FBI's Principal Justifications Are Not Properly Before The Court.

After three years of denying the Nation's applications, the FBI has finally settled on a justification—that the FBI is entitled to make its own tribal-leadership decisions and to conclude, contradicting Interior, that a leadership dispute "still exists" within the Nation (based significantly on the February 2020 events). Those justifications, however, appear nowhere in the July 2020 Decision. That decision is best read to rely only on justifications the FBI has now abandoned (concerning the Nation's lack of trust land or cross-deputization agreements).[7] Its only mention

[7] AR883 ("Given that the Cayuga Nation has no federal trust lands under the jurisdiction of the United States, the BIA provides no funding to the CNPD, the BIA denies having any relationship

of leadership issues was a passing comment that "the New York Court of Appeals made judicial findings that there is a serious dispute about who represents the [Nation's] lawful government." AR882-83 (citing *Campbell*, 140 N.E.3d at 479). The July 2020 Decision did not identify that observation as one of the reasons for the FBI's "conclusion" on the Nation's application. AR883. But regardless, this observation about *Campbell* has little to do with the FBI's current justifications, which appeared for the first time in the February Letter. Confirming as much, the February Letter relegates *Campbell* to a footnote, AR966 n.1, and the FBI's brief does not discuss *Campbell* in its argument section. *Cf.* Mem. 8, 12.

Under the Supreme Court's recent decision in *Regents of the University of California*, the FBI may not rely on justifications that appear only in the February Letter, which it issued after this case was already in litigation. There, the Department of Homeland Security rescinded the Deferred Action for Childhood Arrivals Program (via the "Duke Memorandum") and then, after that rescission was challenged, purported to "elaborate on the reasons for the initial rescission" (via the "Nielsen Memorandum"). 140 S. Ct. at 1908. The Court, however, refused to allow the Department to rely on the Nielsen Memorandum because its "reasoning bears little relationship to that of" the Duke Memorandum. *Id.* The Court explained that when agencies face a challenge, they have a choice. "First, the agency can offer 'a fuller explanation of the agency's reasoning at the time of the agency action'"—but with the "important limitation[]" that it "may not provide new" reasons. *Id.* at 1907-08 (internal quotation marks and emphasis omitted). Alternatively, the "agency can … tak[e] *new* agency action," in which case the agency "is not limited to its prior reasons." *Id.* at 1908. But once an agency makes its choice, it must stick to it: When the agency

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with the CNPD, and the BIA has not commissioned the CNPD with federal law enforcement authority, it is our conclusion that officials of the CNPD are not 'tribal justice officials serving an Indian tribe with criminal jurisdiction over Indian country.'").

chooses not to "take new … action," it is "limited to the … original reasons," and its "explanation 'must be viewed critically' to ensure that" it is not an "impermissible '*post hoc* rationalization.'" *Id.* (citation omitted); *see Brotherhood of Locomotive Eng'rs & Trainmen v. Fed. R.R. Admin.*, 972 F.3d 83, 117 (D.C. Cir. 2020).

Regents is dispositive here. The FBI chose *Regents*' first path and, in the February Letter, offered additional explanation for the decision it had already made. The FBI expressly characterized the February Letter as an "addendum" to the July 2020 Decision and stated that its "position remains unchanged" and that it would not "change [its] original decision based upon the new information." AR963, AR968. Indeed, because the FBI violated its own deadline for acting on the Nation's reconsideration request, this case was already in litigation when the FBI issued the February Letter. That means that, under *Regents*, the FBI could "elaborate … on" the reasoning in the July 2020 Decision but could not "provide new [reasons]." 140 S. Ct. at 1908. The FBI cannot now defend its decision based on reasons provided for the first time in the February Letter, including the claim that the FBI can depart from Interior's recognition decisions and that the February 2020 events show that a leadership dispute still exists within the Nation.

Nor is *Regents*' rule a mere "formality"; it "serves important values of administrative law." *Regents*, 140 S. Ct. at 1909 (internal quotation marks omitted). On the one hand, "[c]onsidering only contemporaneous explanations for agency action … instills confidence that the reasons given are not simply 'convenient litigating position[s].'" *Id.* (citation omitted). On the other, "[p]ermitting agencies to invoke belated justifications, … can upset 'the orderly functioning of the process of review,' forcing both litigants and courts to chase a moving target." *Id.* (quoting *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943)). This case vividly illustrates both concerns. First, the FBI issued the February Letter on the eve of its answering deadline (and did so, one might

reasonably conclude, based on advice from its litigation counsel). The February Letter is thus simply a "convenient litigating position." *Id.* (quotation marks omitted). Second, the Administrative Record only sparsely addresses the leadership issues and the February 2020 events—and that is because the FBI did not focus on those matters until the February Letter. If the FBI had said in its July 2020 Decision that it reserved the right to reweigh Interior's leadership decisions, based on the February 2020 events, then the Nation would have provided the FBI with a fulsome submission. But instead, the Nation narrowly addressed *Campbell*. AR887. The FBI has thus forced the Nation to "chase a moving target." *Regents*, 140 S. Ct. at 1909.

B. The FBI Acted Arbitrarily And Capriciously In Declining To Follow The Decisions Of The Cayuga People And The Department Of The Interior.

The FBI also acted arbitrarily and capriciously in exercising its claimed power to "render its own determination" concerning the Nation's leadership. Mem. 2. The FBI departed from the decisions of the Cayuga people and Interior and held, in effect, that the Nation has *no* recognized leadership—based solely on the fact that a few Cayuga citizens refuse to adhere to those decisions and that the CNPD had to remove a few individuals from properties they were unlawfully occupying. AR965, AR967-68. For four reasons, that was arbitrary and capricious.

First, the FBI violated "principles of tribal self-determination" by giving a few Nation citizens the equivalent of a heckler's veto over the Nation's government. *Ransom*, 69 F. Supp. 2d at 150. The United States government could not function if it lost authority to act simply because a few individuals deny that the current government is legitimate. The ongoing prosecutions of the Capitol insurrectionists seek to vindicate that enduring principle. And what is true of the United States is just as true of Indian nations. As Judge Kollar-Kotelly explained, when "the federal government must decide what tribal entity to recognize as the government, it must do so in harmony with the principles of tribal self-determination." *Id.* The FBI badly violated those

principles by concluding that a "leadership dispute still exists within the Cayuga Nation" simply because a few individuals refuse to acknowledge that dispute's resolution. Mem. 7 (quoting AR949). If the FBI *really* wants to claim the authority to "render its own determination" concerning the Nation's leadership, Mem. 2, it must do the work Interior did and weigh whether the statement of support process was "a valid resolution of an intratribal dispute by a tribal mechanism." AR15. It cannot simply rely on the fact that a few individuals continue to reject its results.

Second, and relatedly, the FBI violated the rule—repeatedly recognized by decisions in this District—that "when tribal governmental entities are 'irremediably unavailable,' a referendum is an appropriate way for the Tribe to reach decisions that have authority and legitimacy." *Ransom*, 69 F. Supp. 2d at 154; *see Harjo v. Kleppe*, 420 F. Supp. 1110, 1146 (D.D.C. 1976), *aff'd sub nom. Harjo v. Andrus*, 581 F.2d 949 (D.C. Cir. 1978). "Once [a] dispute is resolved through internal tribal mechanisms," the federal government "must recognize the tribal leadership embraced by the tribe itself." *Att'y's Process*, 609 F.3d at 943. Via the statement of support process, more than 60% of adult Cayuga citizens affirmed their conclusion that the Halftown Council is the Nation's lawful government. AR22. The FBI did not purport to disagree with Interior's conclusion that the statement of support process was valid under Cayuga and federal law. The FBI simply ignored the Cayuga people's determination because a few individuals continue to refuse to accept it.

Third, the FBI acted arbitrarily and capriciously by failing to acknowledge 25 U.S.C. § 2 and 28 U.S.C. § 1362. Even if those statutes did not *compel* the FBI to adhere to Interior's recognition decisions, they are certainly relevant to weighing whether the FBI *should* depart from Interior's recognition decisions. Yet neither the July 2020 Decision, nor the February Letter, so

much as mentioned either statute. That is an "important aspect of the problem" the FBI failed to consider. *State Farm*, 463 U.S. at 43.

Fourth, the FBI's decision violated the principle of *Goodface v. Grassrope* and "effectively creat[es] a hiatus in tribal government" by declining to recognize any tribal governing body. 708 F.2d at 338-39. The FBI's decision, in effect, holds that the Nation has no recognized "leadership … for executing criminal justice actions." AR966. So even though the Nation (under Interior's decisions) can interact with the United States and purchase properties with the funds it obtains, the FBI's decision denies the Nation authority to *protect* those properties via the type of police force that Indian nations have the inherent sovereign authority to create. *Supra* 7.

A common thread unites these errors. The FBI lacks expertise in Indian affairs. So when the FBI undertook to step into Interior's sphere and make its own leadership determinations, the FBI—no surprise—violated a slew of principles governing the federal government's interactions with Indian nations. Those mistakes only underscore Congress's wisdom in vesting in Interior the authority to conduct Indian relations and the FBI's error in violating that command.

C. The FBI Acted Arbitrarily And Capriciously By Relying On Factors That Congress Did Not Intend It To Consider.

The FBI also acted arbitrarily and capriciously because it "relied on factors which Congress has not intended it to consider." *State Farm*, 463 U.S. at 43. The FBI's core theory, again, is that Interior's recognition decisions do not "bind[] the FBI" and that the February 2020 events show that "a leadership dispute still exists within the Nation." AR965-66. But the July 2020 Decision and the February Letter rely on myriad assertions that are irrelevant *even on that theory* and that have nothing to do with the only question TLOA asks—namely, whether CNPD officers are "tribal justice official serving an Indian tribe with criminal jurisdiction over Indian country." 34 U.S.C. § 41107(3). Especially egregiously, the February Letter stated that the FBI had taken into account

all "the facts and considerations underlying [Interior's] decision" to deny the Nation's trust application under IRA Section 5, including:

- The "opposition of the surrounding jurisdictions to taking the land in trust." AR950.
- The "lack of intergovernmental agreements between the Nation and its neighbors." *Id.*
- Supposed "tension between the Nation and its neighbors." *Id.*
- Claims that the February 2020 events had "weakened trust that the Nation's government can operate … harmonious[ly] with the other governments … that share the same geography." *Id.*

The Nation disputes whether Interior validly relied on these considerations in denying the Nation's trust application. *Supra* 15 n.1. Interior, however, at least can say that its authority under IRA Section 5 is "discretion[ary]." 25 U.S.C. § 5108; *see* 25 C.F.R. § 151.10(f) ("The Secretary *will consider* the following criteria in evaluating requests … [j]urisdictional problems and potential conflicts of land use which may arise."). In TLOA, by contrast, Congress specifically withheld similar discretion from the FBI. Disregarding Congress's choice, the FBI nonetheless stated that it "has taken all these considerations [underlying Interior's decision] into account in determining that the CNPD does not qualify for the issuance of an ORI." AR950. In so doing, the FBI "relied on factors which Congress has not intended it to consider." *State Farm*, 463 U.S. at 43.

Indeed, the FBI's brief doubles down on this error. It now invokes for the first time concerns about exactly how the CNPD executed the warrant issued by the Nation's court in February 2020—averring, for example, that the CNPD officers "were not dressed in the same uniforms … pictured in CNPD's ORI [a]pplication." Mem. 11-12. Counsel for the FBI, of course, cannot defend the agency's decision by inventing new rationales in this Court. *SEC v. Chenery Corp.*, 332 U.S. 194, 196-97 (1947). And on the merits, it is hardly unusual for police departments to wear different uniforms when conducting specialized operations. But most fundamentally, these concerns—about how the CNPD conducted a particular operation—have nothing to do with

whether the CNPD satisfies TLOA's requirements. The FBI, presumably, could find fault with how many state and local police departments carried out particular operations. The FBI, however, does not claim that it has ever refused to issue a state or local police department an ORI on that basis. And TLOA prohibits the FBI from treating tribal police departments differently and worse. The Court should reject the FBI's attempt to rewrite TLOA's mandatory duty as a discretionary grant of authority.

D. The FBI Has Authority To Address Any Concerns About How The CNPD Uses Access To Its Criminal Information Databases.

The FBI's brief expresses concerns about how the CNPD will use access to the FBI's criminal information databases. Many of those concerns, again, appear for the first time in the FBI's brief. For example, litigation counsel for the FBI tries to punch up its rhetoric by asserting that the Nation "has used the CNPD to effect … political ends" and even suggests that the CNPD "could be used to … perpetuate criminal interests." Mem. 1. To be very clear, the FBI did not make any such statement in either the July 2020 Decision or in the February Letter. The Nation does not believe that the Attorney General, the Department of Justice, and the FBI are well served when litigation documents make such inflammatory statements on such sensitive matters. The Nation also disagrees with many of the characterizations of the February 2020 events in the February Letter itself, which the FBI never gave the Nation the chance to address (because the FBI raised its concerns only after this case was in litigation).

But be that as it may, the FBI has ample tools to address any legitimate concerns. To access the FBI's databases, tribal justice officials must abide by the FBI's regulations, which contain detailed requirements for how those databases may be used. *See*, *e.g.*, 28 C.F.R. § 20.33(a) (limiting circumstances in which "[c]riminal history record information" may be used); *id.* § 20.36(a) (to access FBI's Interstate Identification Index System, users must "abide by all present

rules, policies, and procedures of the NCIC"). And under those regulations, "[a]ccess to systems managed or maintained by the FBI is subject to cancellation in regard to any agency or entity that fails to comply with the provisions of" the FBI's regulations. *Id.* § 20.38. Those regulations amply address any concerns about how the CNPD uses the information in the FBI's databases. Because the FBI "entirely fail[ed] to consider [this] important aspect of the problem," its decision is arbitrary and capricious for this reason too. *State Farm*, 463 U.S. at 43.

CONCLUSION

For the foregoing reasons, the Nation respectfully requests that the Court deny the FBI's motion for summary judgment and grant the Nation's cross-motion for summary judgment and enter the declaratory and injunctive relief requested in its Amended Complaint.

Respectfully submitted,

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