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.	)	

REPLY IN SUPPORT OF DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON PLAINTIFF'S FIRST AMENDED COMPLAINT AND OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

This is a case about the FBI's determination that the Cayuga Nation Police Department ("CNPD") did not qualify for access to twenty-one of the most highly confidential criminal databases of information maintained by the United States Government. Specifically, the FBI determined that the CNPD did not meet the statutory criteria for the issuance of an originating agency identifier ("ORI") for two independent reasons. 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." Administrative Record ("AR") 945. The FBI acted in accordance with the Tribal Law and Order Act of 2010 § 233(b), 34 U.S.C. § 41107 ("TLOA"), which requires the FBI to consider three specific criteria before granting an ORI to a tribal law enforcement agency, two of which the FBI determined that CNPD had not met. The FBI's decision was neither arbitrary nor capricious. It provided an extensive record of the reasons for its decision, including an analysis of facts, statutes, case law, and the determinations of the Bureau of Indian Affairs ("BIA"). And when the Nation was dissatisfied with the FBI's original July 2020 determination, the FBI agreed to reconsider its decision in light of new documents and arguments submitted by the Nation, and it did just that in its February 2021 decision. Because the FBI's action was "reasonable and reasonably explained" and "[j]udicial review under [the APA] standard is deferential," *FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1158 (2021), the Court should grant the Government's motion for summary judgment and deny Plaintiff's motion.

Plaintiff's opposition seeks to overcomplicate the straightforward issue in this case concerning the FBI's adjudication of an application for database access, and obscures the roles that different agencies play in this matter. According to Plaintiff, the FBI had two choices: It could either accept the BIA's 2016 leadership determination as to Cayuga Nation for all purposes, including law enforcement, or it was otherwise required to undertake the same extensive analysis

that the BIA took as to the proper tribal leadership, including a weighing of whether a historic tribal statement of support process was valid or not. *See* Defs.' Mem. P. & A. Supp. Defs.' Mot. Summ. J., ECF No. 16-1 ("Defs.' Mot.") at 10–11 (describing the statement of support process, including concerns about its validity that the BIA ultimately determined did not undermine the result). The FBI was not required to choose either of these options, but could follow its own statutory authority to make a law enforcement judgment and to explain the law enforcement reasons for that judgment. That is what it did.

At its essence, Plaintiff's argument confuses the way that respective authority is allocated among Government agencies. The Department of the Interior ("Interior" or "DOI") is responsible for the "management of all Indian Affairs and of all matters arising out of Indian relations," 25 U.S.C. § 2, and the FBI is responsible for "detect[ing] and prosecut[ing] crimes against the United States" and "conduct[ing] such other investigations regarding official matters under the control of the Department of Justice and the Department of State as may be directed by the Attorney General." 28 U.S.C. § 533 (1), (4). This case, relating to a police department's access to criminal databases, falls squarely within the FBI's purview. Cayuga Nation (the "Nation") ultimately asks this Court "to weigh[] whether the FBI *should* depart from Interior's recognition decisions." Pl.'s Mem. Supp. Pl.'s Cross-Mot. Summ. J. & Opp'n Defs.' Mot. Summ. J., ECF No. 19-1 ("Pl.'s Br.") at 39. But reweighing the evidence is the precise thing this Court cannot do. *Consolo v. Fed. Mar. Comm'n*, 383 U.S. 607, 620 (1966).

The Court should uphold the FBI's denial of Cayuga Nation's ORI application, grant the Government's motion for summary judgment, and deny Plaintiff's motion.

ARGUMENT

I. The FBI Acted in Accordance with Law in Denying CNPD's Application.

In denying CNPD's ORI application, the FBI acted in accordance with law when it determined that CNPD's application did not meet the TLOA's requirements. The FBI was required to make an independent judgment under its own statutory authority. And in determining that CNPD lacked criminal jurisdiction as a law enforcement agency, the FBI did not interfere with the sovereignty of Cayuga Nation.

A. The FBI Properly Applied the Law to Determine that CNPD's Application Did Not Meet the TLOA's Requirements.

Plaintiff first relies on the language in the TLOA stating that 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." 28 U.S.C. § 534(d). But the Attorney General's obligation to permit access to the databases is only triggered when specific statutory criteria are met. When Congress was considering amendments to 28 U.S.C. § 534 in 2008 and 2009, it faced a situation in which "tribal police often d[id] not have access to national criminal databases" because there was no right specifically given to tribal police enshrined in statute at that time. *Examining S. 797, The Tribal Law & Order Act of 2009: Hearing Before the S. Comm. on Indian Affairs*, 111th Cong. 65 (2009) (statement of Sen. Udall). Congress wanted to relax "federal laws [that] make it difficult for officers to access federal criminal history databases." *Law and Order in Indian Country: A Field Hearing Before the Sen. Comm. on Indian Affairs*, 110th Cong. 4 (2008) (statement of Sen. Dorgan). Congress therefore enacted a statute that provided, in part, that that the Attorney General "shall permit trial . . . law enforcement agencies to access" its databases, 28 U.S.C. § 534(d).

The statute does not state, however, that the Attorney General shall permit access to every applicant that asserts it is a tribal law enforcement agency. *Cf. Rotkiske v. Klemm*, 140 S. Ct. 355, 360–61 (2019) ("It is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by courts.'") (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 94 (2012)). Rather, the Attorney General must determine if specific statutory criteria are met. The TLOA provides that "[t]he Attorney General shall ensure that tribal law enforcement officials *that meet applicable Federal or State requirements* be permitted access to national crime information databases." 34 U.S.C. § 41107(1) (emphasis added).

Indeed, Congress specifically heard testimony acknowledging that "[a]ccess to National Criminal Information Databases, must take into consideration that . . . tribal law enforcement programs must meet a series of stringent measures intended to safe guard such information." *Discussion of Draft Legislation to Address Law and Order in Indian Country: A Hearing Before the Sen. Comm. on Indian Affairs*, 110th Cong. 41 (2008) (prepared statement of Walter E. Lamar, President/CEO, Lamar Associates); *see also Tribal Law and Order Act of 2009: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the House Comm. on the Judiciary*, 111th Cong. 73 (2009) ("[The TLOA] allows tribal authorities to obtain data from, as well as enter data into these information systems, so long as they meet the applicable Federal or State requirements.") (testimony of Marcus Levings); *Tribal Courts and the Administration of Justice in Indian Country: A Hearing Before the Sen. Comm. on Indian Affairs*, 110th Cong. 17 (2008) ("This provision would also direct the Attorney General to ensure that tribal officers meeting either state or federal standards would gain access to the databases.") (Attachment A to prepared statement of Hon. Roman J. Duran, First Vice President, National American Indian Court Judges Association).

In order to safeguard sensitive information systems, Congress ensured that an agency must meet those criteria before the Attorney General shall permit it access in 34 U.S.C. § 41107(3). And 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). The determinations of whether a law enforcement agency is a "tribal justice official serving an Indian tribe" and whether that law enforcement agency has "criminal jurisdiction over Indian country" are discretionary judgments reserved to the FBI. *Id.* The mandatory requirement for the Attorney General to grant access to the databases is triggered only if those criteria are met. Here, the FBI exercised its sound judgment in determining that those criteria were not met. Therefore, the Attorney General's obligation to permit access to the databases under the TLOA was not triggered.

B. The FBI Properly Exercised Its Own Statutory Authority.

The first of two independent reasons that the FBI provided for denying the Nation's ORI application is that CNPD does not qualify as "tribal justice official[s] serving an Indian tribe." AR 964–65. Plaintiff contends that this determination was unlawful because it purportedly departs from the Nation's and the BIA's[1] determination that the Nation's leadership dispute has been resolved. This contention is meritless. The FBI's decision was a lawful exercise of its own statutory obligations, which require it to address whether the CNPD may access certain databases

[1] Plaintiff alleges that the Government chooses to refer to this agency in this litigation as the Bureau of Indian Affairs rather than the Department of the Interior because "'the BIA' sounds less weighty than 'the Department of the Interior.'" Pl.'s Br. at 30 n.5. Actually, the Government does so because it is the more accurate title. The Department of the Interior encompasses not only the BIA, but also the National Parks Service, the Bureau of Trust Funds Administration, the U.S. Fish and Wildlife Service, and numerous other agencies that do important work that is entirely unrelated to the FBI's denial of Cayuga Nation's ORI application.

as a law enforcement agency. In fulfilling its own statutory obligations, the FBI did not violate either statutory authority cited by Plaintiff: 25 U.S.C. § 2 or 28 U.S.C. § 1362.

i. The FBI May Exercise Its Statutory Authority Independently of the BIA.

Plaintiff apparently seeks to convince the Court that the FBI has stepped outside its proper authority and that an inter-agency dispute exists with the BIA. That is not the case, however. The BIA has the authority for deciding what tribal leadership to recognize for government relations purposes, and the FBI has the authority to determine whether a law enforcement agency, tribal or otherwise, qualifies for access to the Criminal Justice Information Services ("CJIS") databases. Here, the FBI did what it was statutorily required to do—determine whether a law enforcement agency met the criteria for access to the CJIS databases. It did not make any determination as to the rightful leadership of Cayuga Nation nor does Plaintiff point to any part of the FBI's opinion that could be reasonably interpreted as, for example, determining that the Nation had no leadership, that the Unity Council was the rightful leadership, or that the BIA's determination was in any way incorrect for its separate purposes. Rather, the FBI merely observed that two factions of the Nation continue to dispute the rightful leadership, and under those circumstances, FBI was unable to issue an ORI to one of the two factions.

Plaintiff cites authority that relates to tribal rights of self-determination and argues that it compels the FBI to undertake an extensive analysis of the Halftown Council statement of support process. But the Nation's right to determine its own leadership is not at issue here. For example, Plaintiff faults the FBI for "improperly disregard[ing] the decision of the Cayuga people, in the statement of support campaign, resolving the Nation's leadership dispute," Pl.'s Br. at 28–29, and cites case law recognizing Indian tribes' right to self-government and purportedly supporting the validity of the 2016 Halftown Council statement of support process. But the FBI's opinion denying access to criminal databases does not concern the Nation's recognized right to self-

government, nor question the validity of the statement of support process or ignore the results of that process.

Plaintiff's invocation of *Ransom v. Babbitt*, 69 F. Supp. 2d 141 (D.D.C. 1999), is particularly inapt. The court in that case held that "*[i]n situations of federal-tribal government interaction* where 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.* at 150 (emphasis added). The italicized portions, which Plaintiff omitted from the quotations in its brief, indicate that Judge Kollar-Kotelly's decision in *Ransom* applied to interactions with the federal government regarding the recognition of a tribal government. The BIA and the Interior Board of Indian Affairs ("IBIA") were the defendants in that case, and the court intended its decision to apply to the BIA's purposes—not the FBI's separate determination under distinct statutory law. The FBI's decision to deny access to criminal databases does not address the Nation's recognized right of self-government. Plaintiff attempts to impose upon the FBI a set of duties that belong to the BIA and that are irrelevant for determining whether a police force should have access to criminal databases.

The Nation's reliance on *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983) for the notion that the FBI is illegally creating a hiatus in tribal government is similarly misplaced. The central holding of *Goodface* is that "[t]he BIA, in its responsibility for carrying on government relations with the Tribe, is obligated to recognize and deal with some tribal governing body in the interim before resolution of the election dispute" so as not to "jeopardize[] the continuation of necessary day-to-day services on the reservation." *Id.* at 339. In other words, the BIA cannot tell a tribe that because of an ongoing tribal leadership dispute, the tribe is on its own, and the BIA refuses to interact with anyone. But *Goodface* does not concern the denial of access to a specific

federal program to which the Nation claims any entitlement and imposes no specific duty on the FBI in the context of making a decision about access to criminal databases over which the FBI exercises statutorily mandated discretion. Moreover, there is no concern about "the continuation of necessary day-to-day services on the reservation," *id.*, where the FBI's decision has no bearing on the Nation's contracts with the federal government and CNPD continues to patrol the reservation every day, Pl.'s Br. at 8.

Plaintiff also contends that the FBI's decision was contrary to law because it "improperly disregarded Interior's multiple decisions *recognizing* the results of the statement of support." Pl.'s Br. at 29. To the contrary, the FBI included all of those decisions in the administrative record and specifically discussed them in its decision. The FBI specifically distinguished the 2016 BIA Maytubby Decision, the 2019 Sweeney affirmation, and the *Cayuga Nation v. Bernhardt*, 374 F. Supp. 3d 1 (D.D.C. 2019) decision on which Plaintiff relied in its request for reconsideration to the FBI. *See* AR 947–49; Defs.' Mot. at 26. The FBI considered the BIA's decisions at length and analyzed the different context in which the BIA made them. The FBI noted that BIA Regional Director Maytubby stated in his 2016 decision, which Plaintiff claims the FBI was bound to follow, 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. The FBI then came to the reasoned conclusion that it "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; *see also* Defs.' Mot. at 26.

The FBI's decision comported with well-established law 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); *see Nat'l Lab. Rel. Bd. v. Pac. 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."); *see also* Defs.' Mot. at 21–22 (collecting cases). Plaintiff does not address any of the federal and administrative cases the Government cites for this basic recognition of how federal agencies operate under their own authority, *see id.* at 21–23, except for one: *Alturas Indian Rancheria v. Pac. Reg'l Dir.*, 54 IBIA 138 (2011).

Plaintiff argues that "*Alturas Rancheria* does not remotely suggest that when Interior *has made* a determination, other agencies may disregard it." Pl.'s Br. at 32. Actually, *Alturas Rancheria* does reserve for other agencies the choice about whether to follow such an Interior determination. In *Alturas Rancheria*, the IBIA explained in dicta that "[w]here the Tribe has a need to interact with agencies and organizations other than BIA," they may choose with whom to interact or "wait until such time as BIA, *another entity*, or the Tribe itself, makes a determination upon which those third parties *choose to* rely." 54 IBIA at 144 (emphasis added). In so doing, the IBIA explicitly reserved to other federal agencies the choice about whether to follow a BIA recognition decision or not, after the BIA had made such a decision, and the IBIA based this conclusion on what it described as "well-established precedent." *Id.* at 145. Moreover, the IBIA recognized that "another entity" such as the FBI, in exercising its statutory responsibility to determine eligibility to access criminal databases, might have cause to conduct an independent review of tribal leadership to the extent necessary to discharge those statutory responsibilities. The

IBIA did not contemplate that the BIA's choice of "with whom to engage for government-to-government purposes," *id.* at 147, would bind all government agencies for all purposes.

The Supreme Court's recent holding in *McGirt v. Oklahoma*, 140 S. Ct. 2454, 2460 (2020) does not change that result, notwithstanding that Plaintiff takes a quote from that opinion out of context. *See* Pl.'s Br. at 7 ("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.'" (quoting *McGirt*, 140 S. Ct. at 2460)). When fully excerpted, the Supreme Court stated, "*If Mr. McGirt and the Tribe are right*, the State has no right to prosecute Indians for crimes committed in a portion of Northeastern Oklahoma that includes most of the city of Tulsa. Responsibility to try these matters would fall instead to the federal government and Tribe." *McGirt*, 140 S. Ct. at 2460 (emphasis added). In any event, the Court explained that "[t]he only question before us, however, concerns the statutory definition of 'Indian country' as it applies in federal criminal law under the [Major Crimes Act], and often nothing requires other civil statutes or regulations to rely on definitions found in the criminal law." *Id.* at 2480. The Nation's possession of Indian country is not in dispute here.

In sum, none of the authority Plaintiff cites forecloses the FBI from exercising its authority on database access based on the notion that the FBI disregarded tribal sovereignty. The FBI in fact explicitly "acknowledge[d] that Cayuga Nation is a federally recognized, sovereign Indian nation." AR 946–47. All that is at issue here is whether CNPD's application to access the CJIS databases met the statutory criteria. This is a determination delegated to the FBI, and the FBI reasonably determined that it did not.

This approach makes good sense. The argument that the BIA's separate tribal leadership determination required the FBI to grant the Nation's ORI application implies that the BIA

considers the law enforcement and national security implications of its determinations related to Indian tribes. Nowhere in the 2016 Maytubby Decision, the 2017 Black affirmation, or the 2019 Sweeney affirmation did the Office of the Assistant Secretary – Indian Affairs purport to consider whether the CNPD, as controlled by the Halftown Council, should be able to access highly secure law enforcement information or whether it might abuse any such access. The BIA did not, for example, determine whether it would be appropriate for the CNPD to have access to the Known or Suspected Terrorist Database. The BIA did not consider any of this as part of its decision to recognize the Halftown Council because it was the FBI's statutory responsibility. Indeed, the only time the BIA mentioned CNPD in documents contained in the administrative record called attention to that police department's failings and how those failings undermined Cayuga Nation's application to take land into trust. *See* AR 903–05; Defs.' Mot. at 13.

ii. The FBI's Action Does Not Violate Other Statutory Law.

Plaintiff also contends that the FBI's decision was contrary to 25 U.S.C. § 2 and 28 U.S.C. § 1362, but neither statute constrains the FBI's authority under the TLOA. Section 2 of Title 25 states: "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations." 25 U.S.C. § 2. But the TLOA specifically provides separate statutory authority for the FBI to make the decision at issue here. "[I]t is a commonplace of statutory construction that the specific governs the general." *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992). "That is particularly true where, as [here], 'Congress has enacted a comprehensive scheme and has deliberately targeted specific problems with specific solutions.'" *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012).

Plaintiff also contends that 28 U.S.C. § 1362 "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." Pl.'s Br. at 33. But as explained in the Government's moving brief, by its own terms, 28 U.S.C. § 1362 is simply a jurisdictional statute, governing whether a district court shall have original jurisdiction over certain civil actions. *Cayuga Nation v. Tanner*, 824 F.3d 321, 330 (2d Cir. 2016); *see* Defs.' Mot. at 24–25. It says nothing about the substantive law governing access to criminal databases. Plaintiff now argues that this is beside the point "because, under 25 U.S.C. § 2, it *always* falls to Interior to authoritatively decide which body to recognize." Pl.'s Br. at 33. But, for the reasons explained above, the statutory authorities vested in the Secretary of the Interior do not bar the FBI's decision, as neither 25 U.S.C. § 2 nor 28 U.S.C. § 1362 supplants the independent statutory authority exercised by the FBI.

C. The FBI Lawfully Determined that CNPD Lacks Criminal Jurisdiction as a Law Enforcement Agency, Irrespective of the Sovereignty that the Nation Possesses.

As a second and independent basis for denying Plaintiff's ORI, the FBI also found that "the CNPD does not have 'criminal jurisdiction over Indian country.'" AR 949. Plaintiff argues that this basis of denial was contrary to law because the Nation "possesses a federal reservation and Indian nations have criminal jurisdiction over their reservations (including lands owned in fee)." Pl.'s Br. at 34. Again, there is no dispute that the Nation has jurisdiction over land within its reservation, but it does not follow that the FBI is thereby foreclosed from exercising its statutory authority to determine whether a particular law enforcement agency controlled by one of two factions within the Nation is eligible for an ORI.

Taken as a whole, Plaintiff's argument amounts to the proposition that there is only one factor the FBI may consider and that is whether the BIA has determined that the law enforcement

agency applying for the ORI is controlled by a tribal government recognized by the BIA. But under that view, there would be no authority or role for the FBI to play at all with respect to access to criminal databases—a proposition that disregards its separate statutory authority. Here, the FBI considered numerous factors, including (1) "that the Nation's unilateral demolition of property, detention of Tribe members, and subsequent violence were serious matters that 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," (2) "the absence of Tribal laws protecting its members from arbitrary exercise of government authority," (3) "the apparent unwillingness [of the CNPD] to use restraint," and (4) "the general poor relations and lack of intergovernmental agreements between the Nation and its neighbors." AR 950. The FBI explained that, taken as a whole, these show that there were "serious 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." *Id.*

Ample information in the record, discussed further below, *infra* at 17–24, supports the FBI's conclusion. A March 17, 2020 letter from James P. Kennedy, Jr. (United States Attorney for the Western District of New York) and Grant C. Jaquith (United States Attorney for the Northern District of New York) to W. Timothy Luce (Sheriff, Seneca County) following CNPD's violent acts of February 2020 notes that during a March 2018 meeting, "the consensus of all present—both DOJ and DOI—was that although the Halftown group, as the recognized leadership of Cayuga Nation, was entitled to stand up their own police force, it would be premature for them to do so until the land-in-trust process was complete." AR 480. Four months after that letter, the BIA denied the Nation's land-into-trust application. The FBI plainly acted according to law.

II. The FBI's Decision was Not Arbitrary or Capricious.

Plaintiff has also failed to meet its burden of showing that there was not "a rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins., Co.*, 463 U.S. 29, 43 (1983) (citation and internal quotation marks omitted). Its contention that the FBI's decision was arbitrary and capricious is wrong on several counts, including because (1) the FBI's decision does not conflict with determinations made by the BIA or the Cayuga people, (2) the FBI did not rely on factors Congress did not intend it to consider, and (3) the APA does not require the FBI to rely on punishment for misuse of a database in place of preventing access in the first place. Ultimately, "[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*, 141 S. Ct. at 1158. The FBI plainly did that here, and deference to its decision is warranted in light of the particular deference owed by courts to law enforcement and national security determinations such as those involved in this case. *See* Defs.' Mot. at 19–20; *Olivares v. TSA*, 819 F.3d 454, 462 (D.C. Cir. 2016); *Lapp v. FBI*, No. 1:14CV160, 2016 WL 737933, at *5 (N.D. W. Va. Feb. 23, 2016); *cf. Dep't 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"). Notably, Plaintiff does not here argue that such deference is inappropriate, nor can it. This case is quintessentially one that challenges the FBI's law enforcement and national security determinations, particularly given that the ORI CNPD seeks would permit access to a database of Known or Suspected Terrorists.

A. The FBI's Decision Does Not Conflict with the BIA's Authority or the Cayuga Peoples' Right of Self-Determination.

Plaintiff's first argument that the FBI's decision was arbitrary and capricious begins with a misquotation of the Government's brief that Plaintiff repeats throughout its argument. Plaintiff contends: "The FBI also acted arbitrarily and capriciously in exercising its claimed power to 'render its own determination' concerning the Nation's leadership." Pl.'s Br. at 38 (quoting Defs.' Mot. at 2); *see also* Pl.'s Br. at 39 (same). When properly quoted, the Government argued that "[t]he 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*." Defs.' Mot. at 2 (emphasis added). The FBI never made a determination on the Nation's leadership, and its decision does not conflict with the BIA's tribal government recognition decision.

i. The FBI Did Not Make a Tribal Government Recognition Decision.

For the reasons already set forth above, the FBI determined that CNPD officers do not function as criminal justice officials or have criminal jurisdiction for the limited purpose of issuance of an ORI. *See supra* at 5–13. Plaintiff's arguments that the FBI (1) violated principles of tribal self-determination, (2) violated the rule that a referendum is the appropriate way to make tribal decisions, and (3) created a hiatus in tribal government by declining to recognize any tribal governing body all miss the mark.

First, the notion that the FBI gave the opposition Unity Council "the equivalent of a heckler's veto over the Nation's government," Pl.'s Br. at 38, is particularly problematic. The *Ransom v. Babbitt* case that Plaintiff cites for that proposition merely held that, "[i]n situations of federal-tribal government interaction where 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." 69 F. Supp. 2d at 150. The FBI has not recognized any tribal entity as the government, but simply denied a tribal police department criminal database access. The Nation asserts that "[t]he 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." Pl.'s Br. at 38. That analogy is clearly misguided. Here, the FBI simply exercised its statutory authority to deny the CNPD access to the CJIS criminal databases based in part on concerns as to its role in acts of violence, and that decision on access falls well within its statutory discretion. *See also infra* at 21–22.

In support of its argument that the FBI created a hiatus in tribal government, Plaintiff again misapplies *Goodface*, which stands for the uncontroversial proposition that "[t]he BIA, in its responsibility for carrying on government relations with the Tribe, is obligated to recognize and deal with some tribal governing body in the interim before resolution of the election dispute." 708 F.2d at 339. That case says nothing about how the FBI must exercise its authority in deciding whether an Indian nation qualifies for CJIS database access. *See supra* at 7–8. Moreover, the notion that "the FBI's decision denies the Nation authority to protect those properties," Pl.'s Br. at 40, is wrong. Plaintiff admits that "[t]he CNPD patrols the Nation's reservation daily and regularly confronts potential criminal suspects," irrespective of the FBI's decision. Pl.'s Br. at 8 (citing AR 847).

ii. The FBI's Decision Does Not Conflict with the BIA's Decision.

Plaintiff also replays a version of its erroneous statutory authority argument—that "the FBI acted arbitrary and capriciously by failing to acknowledge 25 U.S.C. § 2 and 28 U.S.C. § 1362." Pl.'s Br. at 39. As explained, neither of those statutes does nor can preclude the FBI from fulfilling its own statutory duties. *See supra* at 11–12. Plaintiff's recycled argument is this: "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 recognition decisions." Pl.'s Br. at 39. But in the context of an APA review, a court may not reweigh the evidence considered by the agency. That is the precise teaching of *Consolo v. Federal Maritime Commission*, which held that the APA's standard of review "frees the reviewing courts of the timeconsuming and difficult task of weighing the evidence, it gives proper respect to the expertise of the administrative tribunal and it helps promote the uniform application of the statute." 383 U.S. 607 at 620 (1966).

In any event, for all of the reasons already described at length, *see supra* at 5–12, Defs.' Mot. at 26, it was rational for the FBI to conclude that the BIA's tribal recognition decision did not deprive the FBI of its independent duty under a different statute to ensure that a law enforcement agency met the law enforcement criteria laid out by Congress for the issuance of an ORI. Indeed, 28 U.S.C. § 534, the tribal ORI provision, falls under Title 28, Chapter 33 ("Federal Bureau of Investigation"). Congress placed that decision with the FBI for a reason—because it is a responsibility properly carried out by the nation's lead law enforcement agency.

B. Plaintiff's Extra-Record Evidence is Improper and Does Not Undercut the FBI's Independent Statutory Authority.

In support of its argument that the FBI was obligated to follow the BIA's determination of tribal leadership for all purposes (while ignoring the BIA's negative assessment of the CNPD), the Nation asks this Court to consider evidence outside the record that FBI did not possess at the time of its decision. Specifically, in a footnote, the Nation requests that the Court either take judicial notice of or supplement the administrative record by adding the Nation's amended complaint from a different case in which the Nation challenges the BIA's 2020 denial of its land into trust application. Pl.'s Br. at 19 n.3. That amended complaint sets out the Nation's version of CNPD's involvement in the violent events of February 2020.

As an initial matter, this material is outside the record, and the FBI never possessed it, much less considered it, in making its determination. *See Hill Dermaceuticals, Inc. v. FDA*, 709 F.3d 44, 47 (D.C. Cir. 2013) ("[I]t is black-letter administrative law that in an APA case, a reviewing court should have before it neither more nor less information than did the agency when it made its decision.") (internal quotation marks and citation omitted); *see also Dist. Hosp. Partners, L.P. v. Sebelius*, 971 F. Supp. 2d 15, 32 n.14 (D.D.C. 2013), *aff'd in part and rev'd in part on other grounds sub nom. Dist. Hosp. Partners, L.P. v. Burwell*, 786 F.3d 46 (D.C. Cir. 2015) ("[T]aking judicial notice is typically an inadequate mechanism for a court to consider extra-record evidence when reviewing an agency action.").

Plaintiff's request appears to be premised on the notion that relying on the existing record would "preclude effective review," Pl.'s Br. at 19 n.3, but Plaintiff has not so much as attempted to explain how it meets the high burden of overcoming the presumption that the administrative record is complete. The D.C. Circuit has explained that it has

> recognized a small class of cases where district courts may consult extra-record evidence when "the procedural validity of the [agency]'s action . . . remains in serious question," *Esch v. Yeutter*, 876 F.2d 976, 991 (D.C. Cir. 1989) . . . . [However,] *Esch* has been given a limited interpretation since it was decided, and at most it may be invoked to challenge gross procedural deficiencies—such as where the administrative record is so deficient so as to preclude effective review.

Hill Dermaceuticals, 709 F.3d at 47. Here, Plaintiff does not so much as allege that there were any deficiencies in the FBI's review, and to the extent Plaintiff bases its argument on the inclusion of the initial complaint in the trust case in the administrative record, that simply does not warrant

adding new materials never seen by the FBI or cited in either its July 2020 or its February 2021 decisions.[2]

To the extent the Court is inclined to consider the amended complaint as if it were part of the administrative record, it does not undercut the FBI's decision that CNPD were not "tribal justice official[s] serving an Indian tribe with criminal jurisdiction over Indian country." 34 U.S.C. § 41107. Indeed, Plaintiff's own extra-record evidence confirms that CNPD's actions were violent and likely unlawful. Federal prosecutors declined repeated requests by the Halftown Council to pursue charges against the Unity Council for trespass into what the Halftown Council claimed were its buildings. Trust Compl. ¶ 112. Then, after the New York Court of Appeals also denied the Nation's attempt to turn over control of community buildings from the Unity Council to itself, *Cayuga Nation v. Campbell*, 140 N.E.3d 479, 481 (N.Y. 2019), CNPD bulldozed those buildings at 2 a.m. on February 22, 2020. The buildings included a school and day care center, among others, occupied by the Unity Council. *See* Defs.' Mot. at 11–12. The Nation attempts to explain away these actions, asserting that "[d]ue to concerns that the buildings would become objects of contention, the Nation decided to demolish some of the buildings." Pl.'s Br. at 21. But the next week, when the Unity Council attempted to hold a press conference, the CNPD deployed pepper spray and nightsticks on Unity Council supporters and detained eight of them, including a non-Indian, whom the CNPD lacked jurisdiction to arrest. AR 904–05; Pls.' Br. at 21. The police for

[2] The Government previously agreed to the Nation's request to supplement the administrative record by adding a letter from Plaintiff's counsel to the New York CJIS Systems Representative that the FBI never received or considered in making its determination. ECF No. 21. However, that document was "a cover letter from Plaintiff's counsel accompanying Plaintiff's earlier June 29, 2018 application for an originating agency identifier, the rest of which [wa]s already included in the administrative record," ECF No. 21-1, and the letter therefore did not contain any substantively different information from that already contained in the administrative record that the FBI had before it when it issued its decision. Supplementing the record here with the amended trust complaint would add such substantive extraneous information never considered by the FBI and is therefore inappropriate.

Seneca Falls refused to arrest the non-Indian, and he was eventually released. Trust Compl. ¶ 119 n.13.

The Nation's assertion that CNPD's destruction of the Unity Council properties was lawful because CNPD carried it out pursuant to a "Cayuga Nation permit" allowing the demolition is also misleading. *See* Pl.'s Br. at 21; Trust Compl. ¶ 118. Much as the purported search warrant was signed by the tribal court evidently under the CNPD's control, *see* Defs.' Mot. at 16–17, the demolition permit was signed by Clint Halftown, leader of the Halftown Council that runs the CNPD, himself. *See* Trust Compl. Ex. O (*Cayuga Nation v. United States*, Case No. 20-cv-1581-ABJ (D.D.C.), ECF No. 15-15).

Plaintiff relies heavily on a June 17, 2019 letter from BIA Director Darryl LaCounte in which the director noted that "the Department's position is that the Cayuga Indian Nation may enforce its own criminal laws against Indians within the boundaries of the [Cayuga] Reservation." AR 890. But even if Plaintiff's own extra-record evidence is considered, following the CNPD's violent acts, in March 2020, when the Nation's counsel asked the BIA to "issu[e] a public statement to federal, state and local officials with responsibility for Cayuga and Seneca Counties rejecting JP Kennedy's December 18 letter and reaffirming Mr. LaCounte's July 17 letter," Trust Compl. Ex. S (*Cayuga Nation v. United States*, Case No. 20-cv-1581-ABJ (D.D.C.)) at 4, the BIA did no such thing. Indeed, Plaintiff acknowledges that "state authorities and federal prosecutors have continued to deny the lawfulness of the Nation's Police Force." Trust Compl. (*Cayuga Nation v. United States*, Case No. 20-cv-1581-ABJ (D.D.C.), ECF No. 15) ¶ 144(f). All of these factors provide far more than a rational basis for the FBI's decision, particularly in this law enforcement context where deference to the FBI's judgment is most appropriate. In any event, the FBI's decision does not prevent the CNPD from continuing to enforce its own criminal laws against tribe

members within its reservation, which was the promise in Director LaCounte's letter and which CNPD has done continuously since it was founded in 2018.

In short, the trust complaint that Plaintiff wishes to add to the record helps to confirm that the FBI reasonably found that ongoing violence at Cayuga caused grave doubt as to whether CNPD should be granted access to highly sensitive databases. The fact that one side to the dispute believes it was justified in taking certain action, such as the destruction of property, does not indicate that the FBI's conclusion was unreasonable or vest this Court with authority to review the FBI decision de novo based on extra-record evidence and second guess the FBI's determination. Plaintiff does not dispute that the violent events occurred, and its own interpretation of those events does not undercut the FBI's reasonable conclusion that these events "revealed serious 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 governments in the future could be successfully managed." AR 950.

Again, the Nation's comparison between the leadership dispute within the Nation and the January 6, 2021 Capitol insurrection is particularly inapt. *See* Pl.'s First Am. Compl., ECF No. 12 ("FAC") ¶ 99, Pl.'s Br. at 4, 23–24, 38. As the record shows, the leadership dispute within Cayuga Nation goes back decades, and at least forty percent of Cayuga citizens on the Halftown Council's own membership roll did not support the Halftown Council or the leadership of Clint Halftown, who has never run for re-election or expressed an intent to do so, according to the administrative record. AR 24. Some of those Cayuga citizens had been utilizing community buildings for six years or more, when the CNPD violently dispossessed them of those buildings in the middle of the night while wearing ski masks and carrying AR-15 semi-automatic rifles. *See* AR 474.003. And a week later, CNPD used pepper spray and nightsticks on Cayuga citizens as well as citizens of

other Indian nations, drawing criticism from local, state, and federal law enforcement, as well as the U.S. Attorney's Office and the BIA. *See* AR 904–05.

In September 2020, the BIA ultimately denied the Halftown Council's land into trust application, largely based on these "significant acts of public violence," as already described. AR 904–05; *see* Defs.' Mot. at 13–14. For all these reasons, it was reasonable for the FBI to conclude that the BIA's recognition did not constrain the FBI's statutory authority regarding access to a collection of twenty-one sensitive criminal databases.

C. The FBI Did Not Rely on Factors That Congress Did Not Intend it to Consider.

Plaintiff next contends that the FBI considered a variety of factors that it was not permitted to consider. These include:

- "The 'opposition of the surrounding jurisdictions to taking the land in trust.'" Pls.' Br. at 41 (quoting AR 950).
- "The 'lack of intergovernmental agreements between the Nation and its neighbors.'" *Id.* (quoting AR 950).
- "Supposed 'tension between the Nation and its neighbors.'" *Id.* (quoting AR 950).
- "Claims that the February 2020 events had 'weakened the trust that the Nation's government can operate . . . harmonious[ly] with the other governments . . . that share the same geography.'" *Id.* (quoting AR 950).

In sum, Plaintiff contends that it was arbitrary and capricious for the FBI to consider a law enforcement agency's acts of violence and the effect that violence had on the Nation's neighboring jurisdictions in determining whether that agency should have access to highly sensitive criminal databases.[3] But the FBI's judgment on these issues falls well within the bound of reasonable. And Plaintiff's quip that "[t]he FBI, presumably, could find fault with how many state and local police

[3] To the extent Plaintiff argues that the FBI's final decision was not perfectly clear on how each and every factor weighed into its analysis, that is not a reason to overturn the decision. As the Supreme Court has held, "We will 'uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned.'" *State Farm*, 463 U.S. at 43 (quoting *Bowman Transp. Inc. v. Arkansas-Best Freight Sys.*, 419 U.S. 281, 286 (1974)).

departments carried out particular operations" but the FBI "does not claim that it has ever refused to issue a state or local police department an ORI on that basis," Pl.'s Br. at 42, is beside the point. On its face, the TLOA pertains to tribal law enforcement officials' access to national crime information databases. 34 U.S.C. § 41107(1). Moreover, it is undisputed that the FBI retains discretion on sharing and restricting access to the CJIS databases with state and local law enforcement agencies. *See* 28 C.F.R. §§ 20.1 *et seq.*

In any event, the issue in *this* case is whether FBI had a reasoned basis to carry out the applicable statutory authority under the TLOA. The record evidence shows that the CNPD violence was anything but a "prudential concern[]." Pl.'s Br. at 5. Actually, it drew resounding criticism not only from the FBI in its ORI decision, but also from the BIA; local, state, and federal law enforcement; County Supervisors who requested deployment of U.S. Marshals to keep the peace; and a U.S. Senator and U.S. Congressman, who called for an investigation. *See* AR 947. Plaintiff does not point to any statutory language or case law that limits what Congress permitted the FBI to consider in making the determination of whether the CNPD officers are "tribal justice official[s] serving an Indian tribe with criminal jurisdiction over Indian country." 34 U.S.C. § 41107(3). And the APA only requires that the agency offer a rational basis for its decision. The FBI did that here as to these particular factors. *See, e.g.*, AR 950 ("Without regard to Mr. DeBruin's assertion that none of these are required, we believe that all of these facts were relevant to our decision 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.").

None of Plaintiff's arguments alters the conclusion that the FBI, in making its law enforcement determination that the CNPD did not qualify for access to CJIS databases, "examined

the relevant data and provided a reasoned explanation supported by a stated connection between the facts found and the choice made" on a matter concerning national security. *North Carolina v. FERC*, 112 F.3d 1175, 1189 (D.C. Cir. 1997). The Court should therefore "defer to the agency's expertise." *Id.*

D. The APA Does Not Require the FBI to Punish Database Misuse Rather than Prevent it in the First Place.

Plaintiff's final argument, that the FBI "entirely failed to consider" an "important aspect of the problem" because it could have chosen to punish misuse of its CJIS databases by the Nation rather than prevent it in the first place, Pl.'s Br. at 42–43 (citation and internal quotation marks omitted), is also meritless. This is not a failure to consider an important aspect of the problem, but simply a wish that the FBI had made a different decision and adopted Plaintiff's preferred alternative remedy. The FBI acted reasonably in deciding not to wait until the harm to law enforcement or national security interests occurred before protecting the sensitive databases at issue. The FBI's judgment on how best to protect those interests is well within its specific area of expertise and is properly left to it to decide. *Olivares*, 819 F.3d at 462. For the Court to accept the Nation's preferred resolution on this point—relying on punishment rather than vetting and deterrence—would be to "substitute its own policy judgment for that of the agency," which it must not do. *Prometheus Radio Project*, 141 S. Ct. at 1158.

The case on which Plaintiff relies for its preferred remedy—*State Farm*—is not to the contrary. At issue there was the National Traffic and Motor Vehicle Safety Act of 1966, which required the Secretary of Transportation to implement motor vehicle safety standards. *State Farm*, 463 U.S. at 33. The Secretary delegated this authority to the National Highway Traffic Safety Administration ("NHTSA"), which in 1977, promulgated Modified Standard 208, requiring that new motor vehicles be equipped with either automatic seatbelts or airbags. *Id.* at 37. In 1981,

however, the NHTSA determined that manufactures would overwhelming choose the automatic seatbelts option and that those seatbelts would not produce significant safety benefits because manufacturers planned to install automatic seatbelts that could be easily and permanently detached. *Id.* at 38–39. The NHTSA therefore rescinded the entire Modified Standard 208, and "[n]ot one sentence of its rulemaking statement discusse[d] the airbags-only option." *Id.* at 48. The Supreme Court overturned the decision because the agency had entirely failed to consider either requiring nondetachable automatic seatbelts instead of detachable seatbelts or just requiring airbags. *Id.* at 48, 55. No comparable situation exists here. The statute in this case directs the FBI to adjudge qualifications according to a statutory criteria and then either grant or deny access. At issue here is not a mandated safety standard rule, but a factual adjudication of whether CNPD should receive access to sensitive databases. Nothing compelled the FBI to consider the alternative of post hoc enforcement.

E. The FBI's February 2021 Letter is Properly Before the Court.

Finally, in an attempt to foreclose judicial review on a full record, Plaintiff asks the Court to simply ignore all of the reasoning contained in the FBI's final February 2021 determination on Plaintiff's application. Plaintiff relies on the case of *Department of Homeland Security v. Regents of the University of California*, which primarily affirmed the longstanding rule that "judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" 140 S. Ct. 1891, 1907 (2020). That rule was in no way violated here. Plaintiff's counsel specifically requested that exact FBI reconsideration, and Plaintiff responded to the FBI's reasoning upon reconsideration in Plaintiff's amended complaint and in its cross-motion for summary judgment. There is no impediment to the Court considering the full and complete record of the outcome of the agency action now under judicial review. Indeed, the Nation admits in its

amended complaint that "[t]he July 2 Decision and the Reconsideration Decision are 'final agency action' within the meaning of the APA." FAC ¶ 115. It is incongruent for Plaintiff to admit that the February 2021 reconsideration decision is a final agency action but also argue that it is not reviewable by this Court.

Plaintiff's primary claim is that the Court should overlook the FBI's determination that "a leadership dispute 'still exists' within the Nation (based significantly on the February 2020 events)" because "[t]hose justifications . . . appear nowhere in the July 2020 Decision." Pl.'s Br. at 35. Even a cursory review of the two decisions shows that the FBI has steadfastly maintained that a leadership dispute exists within the Nation. *Compare* AR 882 (July 2020 Decision) ("there is a serious dispute about who represents the [Nation's] lawful government" (citing *Campbell*, 140 N.E.3d at 479)), *with* AR 949 (February 2021 Reconsideration Decision) ("[R]ecent events indicate to the FBI that a leadership dispute still exists within the Cayuga Nation that prevents the FBI from recognizing criminal justice officials for the Nation."). Nor has the FBI "abandoned" reasoning initially included in its July 2020 decision, as Plaintiff alleges. *See* Pl.'s Br. at 35. The FBI in fact explained in its February 2021 decision that it was incorporating in its decision a number of factors included in its July 2020 decision. AR 950. The FBI's February 2021 decision did not contain new reasons for denying the FBI's ORI application and complies with *Regents*.

In any event, even if Court determines that the February 2021 decision contained new reasoning, Plaintiff's assertion that the FBI's February 2021 decision is a post hoc explanation under *Regents* because it was issued after Plaintiff filed its Complaint is obviously wrong. The longstanding rule against post hoc rationalizations in APA cases, applied in *Regents*, concerns post hoc rationales *given to courts*, in the course of litigation—not further explanation given to a regulated party by an agency in the course of an administrative process. The February 2021

decision was the culmination of an administrative process in response to Cayuga Nation's own request for reconsideration by the agency, and the letter's reasoning is properly before the Court.

The rule as applied in *Regents* is that an agency cannot give one explanation in a decision to a regulated party when it makes that decision, and then another to a court when the decision is challenged in litigation. This does not prohibit an agency from articulating additional reasoning for its decision while an issue is still before the agency and particularly where, as here, the Plaintiff specifically requested that the agency reconsider its decision. *See Recreation Vehicle Indus. Ass'n v. EPA*, 653 F.2d 562, 566 (D.C. Cir. 1981) (holding that the rule against post hoc explanations did not prohibit the court from evaluating the EPA's decision, even though its reconsideration occurred after its rulemaking proceedings and after the litigation commenced). Plaintiff's argument would incentivize litigants to sue before final agency actions and explanations are made in order to foreclose an agency from fully explaining its reasoning before judicial review. That approach would result in material omissions from the record, including the July 31, 2020 BIA decision to deny the Nation's land into trust application, which noted that "the Nation's unilateral demolition and the public violence involving Tribal members and Tribal police . . . . provide a . . . dispositive rationale for my decision to disapprove." AR 905.

Finally, the Nation was in no way denied the opportunity to provide "a fulsome submission" because the FBI did not say "in its July 2020 Decision that it reserved the right to reweigh Interior's leadership decisions, based on the February 2020 events." Pl.'s Br. at 38; *see also id.* at 42 (claiming that "the FBI never gave the Nation the chance to address" "many of the characterizations of the February 2020 events in the February Letter itself"). As an initial matter, Plaintiff chose to file this lawsuit before the administrative process was complete, when it could have continued to engage with the FBI if it wished to address further points. And as the FBI

explained in its decision, even today, CNPD remains free "to pursue access at some point in the future based on a new application" should circumstances change. AR 951. The FBI did not cut off further administrative engagement from the Nation. Plaintiff's effort to delete the FBI's reasoning from the administrative record should be rejected.

III. If the Court Grants Plaintiff's Motion for Summary Judgment, the Proper Remedy is to Remand the Matter to the FBI.

Even if the Court were to find that the FBI's decision did not meet the minimum standards of rationality required by the APA, the relief Plaintiff seeks is inappropriate. The Nation asks this Court to "[d]eclare that the Cayuga Nation is entitled to an ORI and to access to the federal criminal databases maintained by the FBI" and to "[e]nter an injunction requiring the FBI to grant the Nation's application to obtain an ORI." FAC ¶¶ 119–20. Although injunctive or declaratory relief may occasionally be appropriate under the APA, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *See Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985); *see also Banner Health v. Price*, 867 F.3d 1323, 1356–57 (D.C. Cir. 2017) (per curiam) (same). Accordingly, even if the Court finds that the FBI's denial of the Application somehow violated the APA, the proper remedy is to remand to the FBI for further consideration.

CONCLUSION

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

Dated: June 23, 2021

Respectfully submitted,

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