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 Hon. Royce C. Lamberth

REPLY IN SUPPORT OF PLAINTIFF'S
CROSS-MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The opposition/reply brief of the Federal Bureau of Investigation ("FBI") confirms that its decision to deny the application of the Cayuga Nation Police Department ("CNPD") was both contrary to law and arbitrary and capricious. That is true for several reasons, but two sets of errors cut across the FBI's brief—and both independently compel judgment for the Cayuga Nation.

One, the FBI tries to rewrite a mandatory statute to become a discretionary one. In the Tribal Law and Order Act of 2010 ("TLOA"), Congress mandated 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 accessing the FBI's databases. 34 U.S.C. § 41107(3). While the FBI admits that TLOA imposes an "obligation to permit access … when specific criteria are met," FBI Reply Br. 3, its brief makes clear that the FBI did not limit itself to considering whether those criteria were met. Rather, the FBI claims "discretion" to determine whether the CNPD "*should* have access to criminal databases" based on its own ad hoc balancing of "law enforcement and national security" considerations. FBI Reply Br. 7, 14-15 (emphasis added). In TLOA, however, Congress left no room for the FBI to conduct this sort of discretionary balancing. The FBI's disregard of TLOA renders its decision unlawful.

Two, the FBI acted unlawfully in determining that CNPD officers are not "tribal justice official[s] serving an Indian tribe with criminal jurisdiction over Indian country." In doing so, the FBI violated two bedrock duties. First, when "the federal government must decide what tribal entity to recognize," it must respect "principles of tribal self-determination" by deferring to "tribal forum[s']" resolution of "internal disputes." *Ransom v. Babbitt*, 69 F. Supp. 2d 141, 150, 155 (D.D.C. 1999). The Cayuga people have identified the Halftown Council as their governing body, and the FBI was not free to disregard that resolution. The FBI's absurd response—that only Interior, and not the FBI, must respect tribal self-determination—disrespects Indian nations and

contradicts decades of law affirming that these principles bind the entire federal government.

Second, because Interior has recognized the Halftown Council "for all purposes," AR497, the FBI was required to follow that determination by 25 U.S.C. § 2, which ensures that the federal government speaks with one voice by vesting in Interior "the management of all Indian affairs." The FBI avers that it *must* be allowed to disregard Interior's decisions because any other reading would "disregard[] its separate statutory authority" under TLOA. TLOA, however, does not grant *authority* to the FBI. It imposes on the FBI a *duty* to grant access to the criminal database systems the FBI administers. When the FBI carries out that duty, 25 U.S.C. § 2 requires the FBI to treat as controlling the determinations of the expert agency with centuries of experience in Indian affairs.

Indeed, the FBI's brief underscores why Congress crafted TLOA as a mandatory duty, not a discretionary grant of authority. Since 2018, the FBI has refused to grant the CNPD's application based on a shifting series of justifications that share only the FBI's refusal to treat the CNPD as a legitimate law enforcement agency. Its most recent justification—which came after this case was already in litigation (and so is not properly before the Court)—focuses on disagreements with operations the CNPD conducted in February 2020. The FBI admits (at 22-23) that it has *never* "refused to issue a state or local police department an ORI" based on similar concerns. Yet it urges this Court to defer to its determination that the CNPD, uniquely, should not receive access. This type of reasoning has a long and sordid history: For centuries, Indians have faced claims that their governments cannot be trusted to carry out the bedrock tasks all *other* governments perform—such as educating their own children, managing their lands, or maintaining law and order.[1] TLOA,

[1] *See, e.g.*, *Mississippi Band of Choctaw Indians v. Holyfield*, 490 U.S. 30, 34-36 (1989) (removal of Indian children from their families); Memorandum from the Secretary of the Interior, Federal Indian Boarding School Initiative (June 22, 2021), https://on.doi.gov/2Tx38JB (boarding schools); *Cobell v. Babbitt*, 91 F. Supp. 2d 1, 6 (D.D.C. 1999) (trust management).

however, saves this Court from any need to pass upon why the FBI concededly treats Indian nations worse than similarly situated state and local governments. In TLOA, Congress deprived the FBI of the discretion it claims to have exercised here—precisely because Congress recognized that, absent a mandatory duty, the risk was too great that the FBI would deny Indian police access to the information they need to keep themselves and their communities safe.

The Cayuga Nation has pressed this litigation to vindicate exactly that interest. To protect its people and its reservation, the Nation has created a highly professional police force composed of former state and local police officers. Federal law recognizes the Nation's authority to do so, as Interior has expressly affirmed. But for the CNPD to operate safely, access to the criminal database systems at issue here is essential. Those systems allow the CNPD to coordinate its activities with other federal, state, and local law enforcement—which is critical to working safely with these other law enforcement entities, all of which operate in overlapping locales. That public-safety imperative is why the CNPD has requested access to these criminal database systems; why Congress in TLOA compelled that such requests be granted; and why the Nation is entitled to summary judgment. The Nation's reply first discusses the reasons why the FBI's decision is contrary to law; next, it addresses the flaws rendering the decision arbitrary and capricious.

ARGUMENT

I. The FBI's Brief Confirms That The FBI's Decision Was Contrary To Law.

A. The Court Should Reject The FBI's Attempt To Rewrite TLOA's Mandatory Duty Into A Discretionary Grant Of Authority.

The FBI opens by admitting that TLOA imposes an "obligation to permit access to [the FBI's] databases … when specific criteria are met." FBI Reply Br. 3. That concession accords with the FBI's recognition that "TLOA enhances tribal law enforcement by giving tribal police *mandated statutory access* to" FBI databases. Michael J. Bulzomi, *Indian Country and the Tribal*

Law and Order Act of 2010, FBI Law Enforcement Bulletin (May 1, 2012), https://bit.ly/2SNUkia (emphasis added).

The balance of the FBI's brief, however, tries to rescind that concession and rewrite TLOA to become a discretionary statute. The FBI claims, for example, that 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." FBI Reply Br. 5. The FBI avers that, in making these supposedly discretionary judgments, it may decide whether "a police force should have access to criminal databases," *id.* at 7, based on its own weighing of "law enforcement and national security implications," *id.* at 10-11; *see id.* at 14 (invoking the "deference owed … to law enforcement and national security determinations"); *id.* at 16 (invoking the FBI's "statutory discretion"); *cf.* Nation Br. 25 (similar examples from FBI's opening brief). And for support, the FBI cites cases like *Department of the Navy v. Egan*, 484 U.S. 518 (1988), which concerned the deference due to the executive branch on whether to "grant [a] security clearance," to which "no one has a 'right'" and which "requires an affirmative act of discretion on the part of the granting official." *Id.* at 527-28.

In TLOA, however, Congress did not provide the FBI "statutorily mandated discretion." FBI Reply Br. 8. Quite the opposite: It directed that the FBI "shall" provide access to "[e]ach tribal justice official serving an Indian tribe with criminal jurisdiction over Indian country." 34 U.S.C. § 41107(3). And the word "'shall'" "typically 'creates an obligation impervious to … discretion.'" *Me. Cmty. Health Options v. United States*, 140 S. Ct. 1308, 1320 (2020). The predicates triggering the FBI's duty turn on straightforward legal questions (namely, whether a tribal justice official "serv[es] an Indian tribe," and whether the tribe has "criminal jurisdiction over Indian country"). 34 U.S.C. § 41107(3). Congress did not authorize the FBI to determine,

for example, whether an Indian nation *should* have jurisdiction over Indian country. Indeed, the FBI admits that Congress enacted TLOA because "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." FBI Reply Br. 3 (quoting *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 sought to prohibit exactly the obstruction—justified via "discretion" and "law enforcement considerations"—the FBI engaged in here.

The FBI's invocation of the requirement that tribal justice officials "meet applicable Federal or State requirements," FBI Reply Br. 4, is a red herring. The FBI does not claim that the CNPD failed to meet any such requirement: The FBI requires that applications provide specific information—which the CNPD did, as the FBI does not dispute. AR491-847, 852-57.[2] Instead, the FBI rests its case on the claim that the statutory requirement that tribal justice officials "serv[e] an Indian tribe with criminal jurisdiction over Indian country," 34 U.S.C. § 41107(3), granted it discretion to determine whether "a police force should have access to criminal databases," FBI Reply Br. 7.[3] The mandatory statute Congress passed, however, gives the FBI no such discretion.

[2] *Cf.* Dep't of Justice, *Applying for an Originating Agency Identifier*, Tribal Access Program at 10-24, https://bit.ly/3hyPbmb (PowerPoint outlining the same information the Nation provided).

[3] The FBI also cites legislative history concerning the directive that tribal justice officials "meet applicable Federal or State requirements." FBI Reply Br. 4. This testimony, however, discusses physical and security requirements of terminal access to the FBI's databases, not ORI applications. *Discussion of Draft Legislation to Address Law and Order in Indian Country: Hearing Before the S. Comm. on Indian Affairs*, 110th Cong. 41 (2008) (prepared statement of Walter E. Lamar, President/CEO, Lamar Associates) ("[T]o have a terminal for access to [these databases], tribal law enforcement programs must meet a series of stringent measures intended to safe guard such information. Physical security, trained operators, operator security clearances, and dedicated secure connections all require funding, training and technical assistance.").

B. The FBI Acted Contrary To Law By Determining That The CNPD Are Not "Tribal Justice Officials Serving An Indian Tribe."

The Nation's opening brief showed that the CNPD's "tribal justice official[s]" seeking access to the FBI's databases meet TLOA's requirement that they "serv[e] an Indian tribe." 34 U.S.C. § 41107(3). The CNPD was established by the governing body identified by the Cayuga people as the Nation's lawful government, which Interior has recognized "as the Nation's governing body without qualification," "for all purposes," and not "limited in any way." AR497; *see* Nation Br. 16-19 (describing the Nation's statement of support process and Interior's recognition). When the FBI decided that it "cannot conclude that any leadership officials presently serve as 'tribal justice officials' representing the Nation because a leadership dispute still exists within the Nation," AR947, it unlawfully rejected the determinations of the Cayuga people and Interior. The FBI fails with its attempts to justify its departure from those determinations.

The FBI begins by trying to wish away the conflict. The FBI asserts that it "never made a determination on the Nation's leadership," and that "its decision does not conflict" with the statement of support campaign or Interior's "tribal government recognition decision." FBI Reply Br. 15. This claim, however, is transparently false. When the FBI found that no "leadership officials … represent[] the Nation because a leadership dispute still exists," AR947, it "made a determination on the Nation's leadership," FBI Reply Br. 15. And that determination directly conflicts with the determinations of the Cayuga people and Interior, both of whom concluded that the Nation's leadership dispute has been resolved and that the Halftown Council constitutes "the Nation's governing body without qualification," "for all purposes," and not "limited in any way." AR497; *see* Nation Br. 16-22. Indeed, if it were *true* that the FBI had not "made a determination on the Nation's leadership," that would be a confession of error. No one disputes that the Halftown Council authorized the CNPD's creation and that the CNPD serves the Nation's government led

by the Halftown Council. So if the Halftown Council is indeed the Nation's lawful government (which it is), then the CNPD necessarily "serv[es] an Indian tribe."

The FBI's real position is that Congress *permitted* it to reject the conclusions of the Cayuga people and Interior. Its arguments, however, lack merit.

First, the FBI has no answer as to how its decision conflicts with principles of tribal self-determination. As the Nation explained, when "the federal government must decide what tribal entity to recognize …, it must do so in harmony with the principles of tribal self-determination" by deferring to "tribal forum[s']" resolution of "internal disputes." Nation Br. 28-29 (quoting *Ransom*, 69 F. Supp. 2d at 150, 155). Here, those principles dictate deferring to the Nation's resolution of its leadership dispute via the statement of support process.

Unable to answer *Ransom*, the FBI plays games and accuses the Nation of misleadingly "omit[ting] from … its brief" relevant passages. The FBI avers (italicizing the passages it says were misleadingly omitted) that *Ransom* "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.'" FBI Reply Br. 7 (quoting 69 F. Supp. 2d at 150) (emphasis by FBI). It is a mystery why the FBI believes that the omission of the italicized passages was misleading, or how the FBI believes these passages help its cause. The FBI's argument seems to be that CJIS access is not a "federal-tribal government interaction" entailing a decision about "what tribal entity to recognize," and that the FBI is not bound by the "principles of tribal self-determination" that apply to Interior.

If that is the FBI's argument, it is wrong in every respect. This case clearly concerns a "federal-tribal government interaction." The Cayuga Nation, as a coordinate sovereign, is seeking access to information held by the United States. And whether the Nation is entitled to access turns

on "what tribal entity to recognize as the government." That is just like *Ransom*. Indeed, the Department of Justice (of which the FBI is part) has acknowledged it is engaged in carrying out the United States' government-to-government relationship with Indian tribes.[4] In fact, it has done so as to criminal-database information *specifically*—explaining that the Tribal Access Program "is a reflection of the Justice Department's commitment to the government-to-government relationship, to overcoming barriers, and building strong partnerships with … Indian … people."[5]

Nor is it true that *only* Interior must respect "principles of tribal self-determination" in carrying out this government-to-government relationship. "[T]raditional notions of Indian self-government are so deeply engrained in our jurisprudence that they have provided an important 'backdrop,' against which vague or ambiguous *federal* enactments must *always* be measured." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980) (emphasis added). That across-the-board rule of construction applies equally to TLOA and to the FBI. Indeed, the "commitment to tribal self-sufficiency and self-determination" is a "federal" policy, *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 334 (1983), that the Supreme Court has "often recognized that *Congress* is committed to … supporting," *Nat'l Farmers Union Ins. Cos. v. Crow Tribe of Indians*, 471 U.S. 845, 856 (1985) (emphasis added). Congress has never limited this commitment to only *Interior*. *Accord Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 21 (1987) (invoking "Congress' policy of supporting tribal self-determination"); *Santa Clara Pueblo v.*

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[4] *E.g.*, *Tribal Law and Order Act – Five Years Later: How Have the Justice Systems in Indian Country Improved?: Hearing Before the S. Comm. on Indian Affairs*, 114th Cong. (2015) (statement of Tracy Toulou, Director Office of Tribal Justice, U.S. Dep't of Justice), https://bit.ly/2UdV0h3 (Department recognizing its role in carrying out the "government-to-government relationship with tribes and in honoring our treaty and trust obligations").

[5] Press Release, Dep't of Justice, *Department of Justice Announces 10 Tribes to Participate in Initial Phase of Tribal Access Program to Improve Exchange of National Crime Information* (Nov. 5, 2015), https://bit.ly/3qGf08h.

Martinez, 436 U.S. 49, 62 (1978) ("well-established federal 'policy of furthering Indian self-government'" (quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974)).

That is why Judge Kollar-Kotelly in *Ransom* affirmed that principles of tribal self-determination apply "where *the federal government* must decide what tribal entity to recognize." 69 F. Supp. 2d at 150 (emphasis added). That is why, too, courts have repeatedly applied these principles in cases involving other agencies.[6] And that is why, again, the Department of Justice itself has reaffirmed its own "commit[ment] to tribal self-determination, tribal autonomy, tribal nation-building, and the long-term goal of maximizing tribal control over governmental institutions in tribal communities."[7] Nothing supports the FBI's litigating position that it is uniquely exempt from this federal commitment.

Second, the FBI fails to justify its decision to reject Interior's view that the Halftown Council is the Nation's government "for all purposes." AR892. The FBI avers that, in general, one federal agency is not obligated to follow another. FBI Reply Br. 8-9. But as the Nation explained (and the FBI does not dispute), Congress sometimes *does* vest authority in a single agency. Nation Br. 30. That is just what Congress did in 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." Decisions regarding which government to recognize are at the heart of "the

[6] *Fort Peck Hous. Auth. v. U.S. HUD*, 367 F. App'x 884, 885 (10th Cir. 2010) (HUD); *Crow Tribal Hous. Auth. v. U.S. HUD*, 781 F.3d 1095, 1097 (9th Cir. 2015) (same); *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1079-80 (9th Cir. 2001) (EEOC); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1195 (10th Cir. 2002) (NLRB); *Reich v. Great Lakes Indian Fish & Wildlife Comm'n*, 4 F.3d 490, 494 (7th Cir. 1993) (Department of Labor); *Washington, Dep't of Ecology v. U.S. EPA*, 752 F.2d 1465, 1471-72 (9th Cir. 1985) (EPA).

[7] Attorney General Guidelines Stating Principles for Working With Federally Recognized Indian Tribes, 79 Fed. Reg. 73,905, 73,905 (Dec. 12, 2014); *see U.S. Department of Justice Consultation on the Strengthening Nation-to-Nation Relationships with Tribes and Consultation-related Policy, Framing Paper* (Mar. 2021), https://bit.ly/3xfFAaP ("DOJ remains committed to partnering with Tribes on a government-to-government basis … and to promoting Tribal sovereignty.").

management of … Indian affairs," which is why Congress vested responsibility for making those decisions in the expert agency with hundreds of years of experience in Indian affairs.

The FBI's only argument on 25 U.S.C. § 2 is to invoke the canon that "the specific governs the general." FBI Reply Br. 11. That canon, however, provides only that a more specific provision governs "when there is a conflict" with a general provision, *Nat'l Cable & Telecomm. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 335-36 (2002); *see Ballard v. District of Columbia*, 813 F. Supp. 2d 34, 43 n. 8 (D.D.C. 2011); *Spirit of Sage Council v. Kempthorne*, 511 F. Supp. 2d 31, 43 (D.D.C. 2007), or when necessary to avoid rendering the specific provision "superflu[ous]," *RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645-46 (2012).

Neither situation exists here. First, TLOA and 25 U.S.C. § 2 do not conflict. TLOA imposes on the FBI the duty to grant access to "tribal justice official[s] serving an Indian tribe with criminal jurisdiction over Indian country." 34 U.S.C. § 41107(3). That command is perfectly consistent with requiring the FBI, pursuant to 25 U.S.C. § 2, to adhere to Interior's tribal leadership decisions when carrying out that command.

Second, applying 25 U.S.C. § 2 does not render TLOA superfluous. Arguing otherwise, the FBI avers that unless it can make an independent decision—and do so based on discretionary multifactor assessment examining, for example, the state of "relations … between the Nation and its neighbors," FBI Reply Br. 13 (quoting AR 950)—then there would be "no … role for the FBI to play," which would "disregard[] its separate statutory authority." *Id.* That argument, however, misunderstands what TLOA does. It does not provide "separate … authority" to the FBI. *Id.* It imposes a *duty* to provide access. And it imposes that duty on the FBI, rather than Interior, simply because the FBI administers the relevant databases. The on-point canon is instead the harmonious-reading canon, which provides that courts' "task is to fit, if possible, all parts into a harmonious

whole." *Roberts v. Sea-Land Servs., Inc.*, 566 U.S. 93, 100 (2012) (quotation marks omitted). The way to read TLOA and 25 U.S.C. § 2 together is to recognize that Congress in TLOA imposed on the FBI a specific duty to provide access (because the FBI controls the databases) but left in place 25 U.S.C. § 2's general mandate that Interior has "the management of all Indian affairs."

The FBI also has no adequate answer to how 28 U.S.C. § 1362 reinforces the same conclusion. Nation Br. 33-34. The FBI says that § 1362 is a "jurisdictional statute" that does not directly control here. FBI Reply Br. 12. But the FBI simply ignores the broader principle that § 1362 reflects: Congress understood that it falls to *Interior* to authoritatively resolve for the federal government questions about which "governing body" to "recognize[]"—reflecting the need for the federal government to "'speak with one voice.'" *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)). Tellingly, the FBI does not cite one case—not one, not ever—where another federal agency has declined to treat as controlling Interior's tribal leadership decisions.

The IBIA's decision in *Alturas Indian Rancheria v. Pacific Regional Director* certainly does not hold that federal agencies may do so. The FBI invokes a passage—which the FBI concedes was "dicta"—musing that "[w]here the Tribe has a need to interact with agencies and organizations other than BIA," those third parties may "wait until such time as BIA, another entity, or the Tribe itself, makes a determination upon which those third parties *choose* to rely." FBI Reply Br. 9 (quoting *Alturas Indian Rancheria v. Pac. Reg'l Dir.*, 54 IBIA 138, 144 (2011)) (emphasis added). The word "choose," the FBI suggests, indicates that federal agencies have discretion to follow Interior's determinations or not. That reading, however, wrenches the IBIA's dicta from context. In the relevant passage, the IBIA broadly discussed the need of "other agencies"—including "Federal and State agencies"—"organizations, or businesses" to deal with

Indian tribes. *Alturas*, 54 IBIA at 143-44. Even if *some* of those diverse entities may depart from Interior's decisions, the IBIA did not say that *federal* agencies may do so. Indeed, the IBIA could not have reasonably resolved that question without so much as *mentioning* 25 U.S.C. § 2.

The FBI fares no better with its reliance on the Regional Director's statement, in his 2016 decision, 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." AR27. For one thing, the FBI ignores the Regional Director's statement that he believed a decision was "necessary" for "five other reasons," including that "efforts to address public order have demonstrated a need for a functioning Cayuga Nation government." AR16-17. More important, Interior definitively rejected the FBI's reading of its position in 2019: It explained that it had recognized the Halftown Council as the Nation's leadership "for all purposes" and not "limited in any way." AR887. That clarification is not just more recent but came from the Assistant Secretary – Indian Affairs.[8] The FBI has never grappled with that express statement—not in the decision under review, not in its opening brief, and not in its response. That is no surprise given how squarely the Assistant Secretary's 2019 statement forecloses the FBI's position.

C. The FBI Acted Contrary To Law By Determining That The Cayuga Nation Lacks "Criminal Jurisdiction Over Indian Country."

The FBI's brief descends into incoherence trying to defend its conclusion that the Nation has not satisfied the requirement that it have "criminal jurisdiction over Indian country." The FBI concedes that "there is no dispute that the Nation has jurisdiction over land within its reservation." FBI Reply Br. 12. Nonetheless, the FBI avers that "it does not follow that the FBI is thereby foreclosed from exercising its statutory authority to determine" whether to grant an ORI based on

[8] Dep't of Interior, *Organizational Chart*, https://on.doi.gov/3hbq0al (last visited July 14, 2021).

"numerous factors" including (for example) the FBI's assessment of "'relations … between the Nation and its neighbors.'" FBI Reply Br. 12-13 (quoting AR950). But the proposition that the FBI says "does not follow" is exactly what TLOA *says*. Under TLOA's plain text, if the "Indian tribe" served by a tribal justice official has "criminal jurisdiction over Indian country," then the official "shall be considered to be an authorized law enforcement official." 34 U.S.C. § 41107(3). So the FBI's concession that the Nation "has jurisdiction over land within its reservation," FBI Reply Br. 12—including, presumably, criminal jurisdiction—should end the matter.

The FBI also asks the wrong question. Despite the FBI's concession that "*the Nation* has jurisdiction over land within its reservation," it avers that the "*CNPD* [l]acks [c]riminal [j]urisdiction." FBI Reply Br. 12 (emphasis added). Under TLOA, however, the question is whether *the Nation* has "criminal jurisdiction." The statute, again, provides: "Each tribal justice official serving an Indian tribe *with criminal jurisdiction over Indian country* shall be considered to be an authorized law enforcement official." 34 U.S.C. § 41107(3) (emphasis added). Under the rule of the "last antecedent," the phrase "with criminal jurisdiction over Indian country" modifies the nearest phrase ("Indian tribe"), not the more distant phrase ("[e]ach tribal justice official"). *See Lockhart v. United States*, 577 U.S. 347, 351 (2016) ("A limiting clause or phrase … should ordinarily be read as modifying only the noun or phrase that it immediately follows."); *accord Black's Law Dictionary* 1532-33 (10th ed. 2014). While the rule of the last antecedent is "context dependent," *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1170 (2021), the context here reinforces the same conclusion. "[J]urisdiction" means "the authority of a sovereign power to govern or legislate." Jurisdiction, *Merriam-Webster*, https://bit.ly/3jyfZFS (last visited July 14, 2021). It is Indian nations, not individual officials, that are the "sovereign power."

In any event, both the Cayuga Nation and the CNPD have "criminal jurisdiction over Indian

country." As the Nation explained, Indian nations have criminal jurisdiction over their reservation lands, and the CNPD exercises the Nation's jurisdiction. Nation Br. 27 (citing, *e.g.*, *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020)). Despite conceding in the relevant part of its brief that the Nation has criminal jurisdiction, the FBI elsewhere accuses the Nation of taking a passage from *McGirt*—on which the Nation relied (in part) for this proposition—"out of context." FBI Reply Br. 10. This accusation, however, is just more games-playing. The FBI says the Nation misleadingly excerpted out the italicized part of the following passage: "*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). But first, the Nation quoted the italicized segment in full. Nation Br. 27. Second, the FBI's focus on the italicized caveat is bizarre: The Court went on to conclude that "Mr. McGirt and the Tribe" were indeed "right" and that the Creek Nation's reservation had not been disestablished. And that meant, just as the Nation has said, that criminal jurisdiction fell "to the federal government and Tribe." Nation Br. 27 (quoting *McGirt*, 140 S. Ct. at 2460).

The FBI resorts to such games-playing because a legion of authority recognizes that Indian nations possess criminal jurisdiction over their reservation lands. *United States v. Lara*, 541 U.S. 193, 197-98 (2004); *Means v. Navajo Nation*, 432 F.3d 924, 933 (9th Cir. 2005); *Las Vegas Tribe of Paiute Indians v. Phebus*, 5 F. Supp. 3d 1221, 1225-26 (D. Nev. 2014); *United States v. Loera*, 952 F. Supp. 2d 862, 866 (D. Ariz. 2013); 25 U.S.C. § 1301; *see also* 18 U.S.C. § 1151. The Department of Justice's own "Indian Country Criminal Jurisdictional Chart" confirms that the Department follows this authority. Dep't of Justice, *Indian Country Criminal Jurisdictional Chart* (Dec. 2010), https://bit.ly/365RIPI.

II. The FBI's Brief Confirms That The FBI's Decision Was Arbitrary And Capricious.

The Nation's opening brief detailed that even if the FBI had the authority to depart from the Cayuga people's leadership determination, and Interior's recognition of that determination, the FBI acted arbitrarily and capriciously in exercising that (nonexistent) authority. Nation Br. 35-43.

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

As the Nation's opening brief explained (at 35-38), the FBI's principal justifications—that the FBI is entitled to make its own leadership decisions and to conclude, contradicting Interior, that a leadership dispute "still exists" within the Nation (based significantly on the February 2020 events)—are not properly before the Court because they did not appear in the July 2020 Decision. Rather, the FBI invoked them for the first time in the Reconsideration Letter, after this suit was already in litigation. The recent decision in *Department of Homeland Security v. Regents of the University of California*, 140 S. Ct. 1891, 1908-09 (2020), forecloses the FBI from relying on these "post hoc justifications." The FBI has no adequate answer to *Regents*' dispositive rule.

First, the FBI denies that the Reconsideration Letter "contained new reasoning" or that it has "abandoned" the reasoning in its July 2020 Decision. A simple comparison, however, shows otherwise. The only rationales on which the July 2020 Decision clearly relied were that the Nation (1) has no land in trust and (2) has no cross-deputization agreements. AR883; *see* Nation Br. 35-36. The FBI no longer defends those rationales. Instead, the Reconsideration Letter asserts that the FBI has the authority to depart from Interior's leadership decisions and that the February 2020 events justify denying access. Those rationales appear nowhere in the July 2020 Decision.

Second, the FBI asserts that *Regents* "concerns post hoc rationales *given to courts* … not further explanation … in the course of an administrative process." FBI Reply Br. 26. Hence, the FBI suggests that because the agency *itself* issued the Reconsideration Letter via administrative

action, it escapes *Regents*' rule. *Id.* That attempted distinction, however, fails utterly. In *Regents*, as here, the Department of Homeland Security issued a new explanation (the Nielsen Memorandum) via administrative action. 140 S. Ct. at 1904. Yet still, *Regents* declined to consider rationales offered for the first time in that document. *Regents* explained that "[w]hile it is true that the Court has often rejected justifications belatedly advanced by advocates, we refer to this as a prohibition on *post hoc* rationalizations, not advocate rationalizations, because the problem is the timing, not the speaker." 140 S. Ct. at 1909; *accord Pomona Valley Hosp. Med. Ctr. v. Azar*, No. 18-2763, 2020 WL 5816486, at *9 (D.D.C. Sept. 30, 2020), *appeal docketed*, No. 20-5350 (D.C. Cir. Nov. 30, 2020). The same principle applies with equal force here.

The FBI also does not (and cannot) deny that its approach here has yielded the exact ills that *Regents*' rule aims to prevent. First, there is every reason to believe that the Reconsideration Letter is just a "convenient litigating position[]," 140 S. Ct. at 1909 (quotation marks omitted): The FBI issued it just days before its answering deadline, likely based on advice from its litigation counsel. Second, the Reconsideration Letter forced the Nation "to chase a moving target," *id.*, by making new evidence—like the Nation's account of the February 2020 events—relevant after this suit was already in litigation and by depriving the Nation of the opportunity to address those events administratively. The FBI's statement that the Nation "chose to file this lawsuit before the administrative process was complete," FBI Reply Br. 27, is pure invention: The FBI's regulations do not provide for reconsideration *at all*, and the Nation sued only after the FBI failed to act by the deadline *it* provided the Nation. Nation Br. 2. *Regents* also forecloses the FBI's argument that the Nation "could have continued to engage with the [agency] if it wished to address further points." FBI Reply Br. 27. The same could have been said in *Regents*. Instead, *Regents* held that

litigants should *not* be required to "chase a moving target" because such a requirement would upset "the orderly functioning" of judicial review. *Regents*, 140 S. Ct. at 1909.[9]

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

The Nation's opening brief explained that even if FBI had authority to depart from leadership determinations, its decision to do so—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—was arbitrary and capricious, for four reasons. The FBI has no adequate answer to any of those reasons, each of which is independently dispositive.

First, the Nation explained that 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 without even acknowledging the harm it was inflicting on the Nation's self-government. Nation Br. 38-39. The FBI insists that it did not provide such a veto because its decision concerned just "criminal database access." FBI Reply Br. 16. The point, however, is that the *principle* underlying the FBI's decision—refusing to recognize the government identified by the Cayuga people just because some Nation citizens remain intransigent—is indeed a heckler's veto that, if applied in a principled fashion, would hamstring the Nation's government. Nation Br. 38-39.

The FBI also avers that it permissibly disregarded the will of the Cayuga people because "forty percent" of the Cayuga people did not endorse the statement-of-support process. But again, that principle would be untenable if applied to the United States: Even today, respected polls find

[9] Notably, the FBI does not dispute that the July 2020 Decision itself constituted "final agency action." If it believed as much, the FBI could have moved to dismiss the Nation's original complaint. Nor is it relevant that the FBI has left open the door to a new application "should circumstances change." FBI Reply Br. 28. The Nation maintains that the FBI acted arbitrarily and capriciously based on the record before it, not that circumstances have changed.

that "[o]ne-third of Americans believe [President] Biden won because of voter fraud."[10] Those opinions do not diminish the recognition to which President Biden is entitled as the chief executive of the United States. Likewise, in Maryland, Governor Hogan won the 2018 gubernatorial election with 55.4% of the vote. The FBI did not revoke the Maryland State Police's access to its criminal information databases simply because another candidate received 43.5% of the vote.[11] And what is true of the United States and Maryland is equally true of the Cayuga Nation.

Second, the Nation explained that the FBI ignored the rule 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; Nation Br. 39. In response, the FBI can only reprise its incorrect claims that it has not made a leadership determination and that principles of tribal self-determination bind only Interior and not the FBI. FBI Reply Br. 15-16. Those arguments are meritless for the reasons explained above. *Supra* 6-12. But for present purposes, the key point is that the FBI did not even *consider* the conclusion the Cayuga people had reached; it just disregarded that decision without explanation or justification.

Third, the Nation explained that the FBI violated the principle of *Goodface v. Grassrope*, 708 F.2d 335 (8th Cir. 1983), and "effectively creat[ed] a hiatus in tribal government" by declining to recognize any tribal governing body. Nation Br. 40. The FBI avers that here, supposedly unlike *Goodface*, the governing statute imposes "no specific duty" on the FBI, which instead exercises

[10] Max Greenwood, *One-third of Americans Believe Biden Won Because of Voter Fraud: Poll*, The Hill (June 21, 2021), https://bit.ly/367pkMT (summarizing a Monmouth University poll finding that 32% of Americans believe fraud was the reason President Biden was elected).

[11] Maryland State Board of Elections, *Official 2018 Gubernatorial General Election Results for Governor / Lt. Governor*, https://bit.ly/36bRExH (last updated Dec. 11, 2018).

"statutorily mandated discretion." FBI Reply Br. 7-8. But again, TLOA says the opposite: It imposes a specific duty on the FBI and forecloses the FBI from exercising discretion. *Supra* 3-5.

The FBI also avers that it has not created a hiatus in tribal government because its decision does not deny the CNPD's power to "protect th[e Nation's] properties" and because the CNPD still "patrols the Nation's reservation." FBI Reply Br. 16. Congress, however, enacted TLOA precisely because it determined that tribal police needed CJIS access in order to safely carry out their duties. Nation Br. 24-26. And the principle of *Goodface* does not authorize federal agencies to create a *partial* hiatus in tribal government any more than a *total* hiatus. 708 F.2d at 338-39.

Fourth, the Nation explained that the FBI acted arbitrarily and capriciously because neither the July 2020 Decision nor the Reconsideration Letter *acknowledged* 25 U.S.C. § 2 or 28 U.S.C. § 1362. Nation Br. 31-34. The dead giveaway that the FBI has no answer is that the FBI ignores the argument the Nation *actually made* and recharacterizes the Nation's argument as an invitation to "reweigh the evidence." FBI Reply Br. 16-17. The Nation's point, however, is that the FBI *never* weighed these critical statutes in the decision under review (nor the "one voice" principle they embody)—which is certainly "an important aspect of the problem," *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mutual Auto. Ins. Co.*, 463 U.S. 29, 43 (1983), in assessing whether the FBI *should* depart from Interior's decisions (even assuming it had power to do so).

C. The FBI Considered Factors Congress Did Not Intend For It To Consider.

The FBI concedes (indeed, trumpets) that it did not simply ask the factual and legal question of whether CNPD "serv[es]" the Cayuga Nation and whether the Nation has "criminal jurisdiction over Indian country." Instead, the FBI undertook an "adjudication" of whether the CNPD "should receive access" to its databases based on a "discretionary" assessment of "law enforcement and national security" considerations. FBI Reply Br. 14, 25

The only remaining question is: Did Congress authorize the FBI to undertake that discretionary balancing? The answer is no. TLOA, again, authorizes the FBI to consider *only* whether a "tribal justice official serv[es] an Indian tribe with criminal jurisdiction over Indian country." None of the discretionary factors the FBI invokes bear on this narrow factual and legal inquiry. The FBI thus violated *State Farm*'s bedrock rule that agencies act arbitrarily when they "rel[y] on factors which Congress has not intended [them] to consider." 463 U.S. at 43.

The FBI fails with its attempts to defend this error. First, it observes that *State Farm* concerned "seatbelt" standards and not law enforcement databases. That is a distinction without a difference. *State Farm*'s blackletter rule applies to seatbelt standards and law enforcement databases (and on Tuesdays as well as Mondays, and to those with blue eyes or brown). That is why courts have applied that rule without hesitation across the administrative state.[12]

Next, the FBI avers that the Nation "does not point to any statutory language … that limits what Congress permitted the FBI to consider." FBI Reply Br. 23. That is an odd claim. TLOA provides that "[e]ach tribal justice official" who "serv[es] an Indian tribe with criminal jurisdiction over Indian country shall be considered to be an authorized law enforcement official." 34 U.S.C. § 41107(3). That mandatory language leaves no room for the FBI to add its own discretionary factors before it will deem the CNPD's officers authorized. *E.g.*, *Union Elec. Co. v. EPA*, 427 U.S. 246, 257 (1976) ("The mandatory 'shall' makes it quite clear that the [agency] is not to be

[12] *E.g.*, *Massachusetts v. EPA*, 549 U.S. 497, 533 (2007) (the EPA's decision was arbitrary and capricious when it "rest[ed] on reasoning divorced from statutory text"); *D.C. Fed'n of Civic Ass'ns v. Volpe*, 459 F.2d 1231, 1247 (D.C. Cir. 1971) (ordering agency to "make new determinations … without regard to any considerations not made relevant by Congress in the applicable statutes"); *L.A. Waterkeeper v. Pruitt*, 320 F. Supp. 3d 1115, 1125 (C.D. Cal. 2018) (EPA acted arbitrarily and capriciously in considering factors outside "the criterion Congress set out in the … statute"); *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 254 F. Supp. 2d 1196, 1212-15 (D. Or. 2003) (voiding NOAA's consideration of statutorily excluded factors).

concerned with factors other than those specified."); *United States v. Ayers*, 795 F.3d 168, 173 (D.C. Cir. 2015) ("[T]he omission of any language suggesting a [consideration] from a statute expressly setting forth the relevant factors for a court to consider … is a strong indicator that Congress did not intend any such presumption to apply."); *Halverson v. Slater*, 129 F.3d 180, 185 (D.C. Cir. 1997) (applying "expressio unius" to hold that, when a statute "authorize[d] delegations to Coast Guard officials," it impliedly "exclude[d] delegations to non-Coast Guard officials").[13]

Finally, the FBI avers that its judgment about whether the CNPD "should [receive] access … falls well within the bound of reasonable." FBI Reply Br. 22. That is untrue, but also irrelevant: An agency cannot consider *reasonably* factors that Congress did not intend for it to consider *at all*. *Massachusetts v. EPA*, 549 U.S. 497, 534 (2007).

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

The FBI again confirms that it relied on extra-statutory factors when it responds to the Nation's point that the FBI has ample tools to address any legitimate concerns (via its regulations limiting how its databases may be used and penalizing misuse). Nation Br. 42-43. The FBI insists that it made a permissible "policy judgment" to rely on "vetting and deterrence" instead of these tools. FBI Reply Br. 24. But again, TLOA's whole point was to deny the FBI discretion to grant or withhold access to Indian nations based on its own "policy judgment."

Nor, anyway, does the word "vetting" aptly describe what the FBI did here. If the FBI had *actually* wanted to understand the actions the CNPD undertook in February 2020, it would have *asked* the Nation and the CNPD about those actions. When the FBI vets candidates for

[13] The FBI proves the Nation's point when it invokes "the particular deference owed by courts to law enforcement and national security determinations." FBI Reply Br. 14. The Nation very much maintains that such deference is "inappropriate," *id.*—because Congress did not authorize the FBI to weigh law-enforcement or national-security factors but only to undertake a narrow inquiry into whether a tribal justice official serves an Indian tribe with criminal jurisdiction.

employment or appointment, for example, its investigators *talk to* the applicants. If the FBI had done that here, it would have learned that the CNPD retook the Nation's properties because state and federal authorities left the Nation no other choice, and that the CNPD at all times acted professionally and in accordance with law when they did so. Nation Br. 15-22.

The reality is that the FBI did not want to do genuine vetting. It wanted a pretext. It has been denying the Nation's applications since 2018 based on a shifting set of justifications. Nation Br. 1-2. And it proffered these "vetting" concerns only after the Nation *sued* (and likely after litigation counsel advised the FBI that the justifications in the July 2020 Decision would not withstand scrutiny). Tellingly, the FBI concedes that it has *never* "refused to issue a state or local police department an ORI on th[e] basis" of concerns about how those departments "carried out particular operations." FBI Reply Br. 23 (quoting Nation Br. 42). It insists that this damning fact is irrelevant because "it is undisputed that the FBI retains discretion on sharing and restricting access to the CJIS databases with state and local law enforcement." *Id.* (citing 28 C.F.R. § 20.1 *et seq.*); *cf.* AR941 ("[I]t is the [FBI's] policy that no criminal justice agency be denied access to NCIC."). But that observation cuts the other way: The FBI admits it has never invoked similar "vetting" concerns *even where* it has discretion. And to do so for the first time as to an Indian nation is especially offensive to TLOA, whose purpose is to make the FBI's duty mandatory, not discretionary. The Court may resolve this case by enforcing that clear statute, without passing on the troubling question of why the FBI concededly treats applications by Indians worse than applications from all other governments. *Cf. Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575-76 (2019) ("The reasoned explanation requirement of administrative law[] … is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public. … What was provided here was more of a distraction.").

E. The FBI's Arguments About "Extra-Record Evidence" Lack Merit.

If the FBI was going to conduct a discretionary "vetting" of the CNPD's conduct, then the APA's reasoned-decisionmaking mandate at least required the FBI to *ask* the Nation about the February 2020 events. *See, e.g.*, *Sierra Club v. Salazar*, 177 F. Supp. 3d 512, 533 (D.D.C. 2016) (agency must "examine the relevant data" (quotation marks omitted)). The FBI's regulations did not direct the Nation to submit anything relevant to this issue (which is no surprise given that TLOA does not authorize the FBI to engage in a discretionary vetting). AR482 (email from CJIS regarding information requested for CNPD application); AR936-42 (general ORI handbook detailing the requirements for an ORI assignment). Hence, the Nation's opening brief laid out the explanation for the February 2020 events it would have offered had the FBI not raised this issue for the first time after this suit was already in litigation. Nation Br. 15-22.

There is no merit to the FBI's claim that the Nation has impermissibly relied on "extra-record evidence." The FBI concedes that courts may consider evidence not before the agency if the record otherwise would "preclude effective review" or if the agency engaged in "gross procedural deficiencies." FBI Reply Br. 18. As just explained, the FBI relied on concerns about the February 2020 events even though its procedures did not ask the Nation to submit any information relevant to that issue, without any warning to the Nation that it intended to do so, and without providing the Nation any opportunity to address those concerns. The explanation the Nation would have provided, if given the chance, is certainly relevant to this Court's review.

The FBI's litigation counsel offers his own take on the Nation's evidence. This Court, of course, cannot affirm based on counsel's post hoc justifications. *State Farm*, 463 U.S. at 50. And the many obvious errors and omissions in the FBI's brief only underscore that it lacked any reasoned basis for denying the Nation's application. A few examples follow:

- The FBI notes that New York Court of Appeals turned aside the Nation's attempt to rely on state-law processes to regain its properties. FBI Reply Br. 19. But it ignores the Court of Appeals' statement that the Nation should instead rely on "mechanisms other than [state] courts … in a manner consistent with tribal … law," *Cayuga Nation v. Campbell*, 140 N.E.3d 479, 489 (N.Y. 2019)—which is exactly what the Nation did.

- The FBI asserts that the tribal court that issued the warrant that the CNPD served is "under the CNPD's control." FBI Reply Br. 20. No evidence supports this claim. In fact, the Nation's courts are independent, and its judges are retired New York state court judges.

- The FBI observes that Clint Halftown, a member of the Cayuga Nation Council, signed the demolition permit. *Id.* But there is nothing unusual about a leader of the Nation's government signing an executive order.

- The FBI avers that the CNPD "lacked jurisdiction to arrest" the single non-Indian it detained during the February 2020 raid. FBI Reply Br. 19. But as the Supreme Court recently confirmed in *United States v. Cooley*, 141 S. Ct. 1638, 1643-45 (2021), tribal police have the authority to briefly detain non-Indians suspected of violating state or federal laws. That is all that the CNPD did.

- The FBI's statement that the CNPD deployed "pepper spray and nightsticks" against a "press conference," FBI Reply Br. 19, outrageously misrepresents the facts: Agitators entered Nation properties and assaulted the CNPD's officers. And the Court need not take the Nation's word for it: As the Nation showed (yet the FBI ignores), Seneca County prosecutors have indicted one of those agitators for assault against CNPD officers (even as local and federal prosecutors have declined to bring any charges against any CNPD officer). Nation Br. 22, n.4.

- The FBI quotes a letter from the US Attorney for the Western District of New York asserting that in 2018, the "consensus" of 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." AR480; *see* FBI Reply Br. 13. That letter only underscores that the Department of Justice—of which the FBI is part—conceded in 2018 that the Halftown Council was the Nation's recognized leadership and had the power to create a police force. The FBI's failure to address the inconsistency with its present position independently renders its decision arbitrary and capricious. *Regents*, 140 S. Ct. at 1913. And the opinion of the Department of Justice (and Interior) about whether the Nation *should* exercise its sovereign authority to "stand up" a police force, AR480, is irrelevant under TLOA.

At the end of the day, none of these disagreements are relevant to the question at hand. The Nation recognizes that other government entities have disagreed with the sovereign choices the Nation made in February 2020. Such disagreements are inevitable in our federalist system of shared and overlapping sovereignty. For present purposes, dispositive point is that Congress in

TLOA did not permit the FBI to enforce its own opinions by denying tribal police access to its criminal information databases. Because the CNPD's officers are "tribal justice official[s] serving an Indian tribe with criminal jurisdiction over Indian country," 34 U.S.C. § 41107(3), TLOA required the FBI to grant the Nation's application.

F. The Court Should Direct The FBI To Grant The Nation's Application.

The FBI argues that, if the Court grants the Nation's motion for summary judgment, it should "remand to the FBI for further consideration." FBI Reply 28. The FBI, however, concedes that the APA authorizes this Court to enter "injunctive or declaratory relief." *Id.*; *see* 5 U.S.C. § 706(1). And when, as here, Congress gives an agency a "specific, unequivocal command" to take a "discrete agency action," and the agency has failed to do so, a court can compel agency action. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 63-64 (2004). TLOA "fit[s] that bill" because it "'leave[s] *no* discretion to determine'" whether qualifying tribal justice officials should receive an ORI. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 954 (D.C. Cir. 2016) (internal quotation marks omitted). The FBI has never so much as hinted that it could deny the CNPD access to its databases for any reason *besides* its unlawful assertion that the CNPD's officers do not qualify as "tribal justice official[s] serving an Indian tribe with criminal jurisdiction over Indian country." 34 U.S.C. § 41107(3). And given that the FBI has spent more than three years denying the CNPD's applications based on a shifting series of unlawful and pretextual justifications, this Court should effectuate Congress's intent by compelling the FBI to grant the Nation's application.

CONCLUSION

For the foregoing reasons, the Nation respectfully requests that the Court deny the FBI's motion for summary judgment, 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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CERTIFICATE OF SERVICE

I, David W. DeBruin, hereby certify that on July 14, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, and copies will be sent electronically to the registered participants as identified in the Notice of Electronic Filing.

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