IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

DUSTIN PARKER,

Petitioner,

v.

CLINT HALFTOWN, TIMOTHY TWOGUNS, DONALD JIMERSON, GARY WHEELER, MICHAEL BARRINGER, and JONATHAN DEKANSKI, in their official capacities as members of the Cayuga Nation Council, and JOSEPH E. FAHEY, in his official capacity as Cayuga Nation Tribal Court Judge,

Respondents.

Case No. 5:24-cv-886 (BKS/TWD)

RESPONDENTS' MEMORANDUM OF LAW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

PRELIMINARY STATEMENT 1

BACKGROUND 2

A. The Cayuga Nation and Its Reservation 2

B. The Nation's Laws and Court System 3

C. The Events Giving Rise to the Banishment Proceeding 4

D. The Banishment Proceeding and Subsequent Judicial Review 5

E. Procedural History of This Suit 8

LEGAL STANDARD 9

ARGUMENT 10

I. THIS COURT LACKS JURISDICTION OVER PETITIONER'S ICRA CLAIM. 10

II. PETITIONER'S CLAIMS CHALLENGING THE BANISHMENT ORDER SHOULD BE DISMISSED (COUNTS ONE AND SIX). 14

A. Petitioner's Due Process Claim Fails. 14

1. Petitioner received due process at the banishment hearing. 15

i. Bias. 15

ii. Notice. 17

iii. Discovery and cross-examination. 17

iv. Separation of powers. 18

v. Substantive due process. 19

2. Petitioner received due process because he had the opportunity for judicial review in the Nation's courts. 20

B. Petitioner's Ex Post Facto Claim Fails. 22

C. At a Minimum, Petitioner's Banishment Claims Should Be Dismissed with Respect to Respondent Timothy Twoguns. 24

CONCLUSION.....24

TABLE OF AUTHORITIES

CASES

Aetna Life Insurance Co. v. Lavoie, 475 U.S. 813 (1986) 15, 16

Alvarez v. Lopez, 835 F.3d 1024 (9th Cir. 2016) 14, 21

Basil Cook Enterprises, Inc. v. St. Regis Mohawk Tribe, 117 F.3d 61 (2d Cir. 1997) 13

Brown v. Davenport, 596 U.S. 118 (2022) 18

Campo v. New York City Employees' Retirement System, 843 F.2d 96 (2d Cir. 1988) 20

Cayuga Indian Nation of New York v. Gould, 14 N.Y.3d 614 (2010) 2

Cayuga Indian Nation of New York v. Seneca Cnty., 260 F. Supp. 3d 290 (W.D.N.Y. 2017) 2

Cayuga Nation ex rel. Cayuga Nation Council v. Parker, No. 22-cv-00128, 2022 WL 3347327 (N.D.N.Y. Aug. 12, 2022) 3

Cayuga Nation v. Bernhardt, 374 F. Supp. 3d 1 (D.D.C. 2019) 3

Cayuga Nation v. Parker, Index No. CV-21-016, Order (Cayuga Nation Civ. Ct. Dec. 2, 2021), ECF No. 33-4 4

Cayuga Nation v. Parker, Index No. CV-21-016, Order (Cayuga Nation Civ. Ct. Mar. 11, 2022), ECF No. 33-6 5

Cayuga Nation v. Parker, Index No. CV-21-016, Decision and Order (Cayuga Nation Civ. Ct. June 28, 2022), ECF No. 33-7 5

Cayuga Nation v. Parker, Index No. CV-21-016, Order (Cayuga Nation Civ. Ct. July 15, 2022), ECF No. 33-8 5

Cayuga Nation v. Parker, No. 22-cv-00128 (N.D.N.Y. filed Feb. 10, 2022) 4

Cayuga Nation v. Tanner, 448 F. Supp. 3d 217 (N.D.N.Y. 2020), *aff'd*, 6 F.4th 361 (2d Cir. 2021) 2

Cayuga Nation v. United States Department of Interior, No. 20-cv-2642, 2022 WL 888178 (D.D.C. Mar. 25, 2022) 2

Chegup v. Ute Indian Tribe of Uintah & Ouray Reservation, 28 F.4th 1051 (10th Cir. 2022) 19

Ellingburg v. United States, No. 24-482, 2026 WL 135982 (U.S. Jan. 20, 2026) 22

Gryger v. Burke, 334 U.S. 728 (1948) 23

Napoles v. Rogers, No. 16-cv-01933, 2017 WL 2930852 (E.D. Cal. July 10, 2017), *aff'd*, 743 F. App'x 136 (9th Cir. 2018) 11

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324 (1983) 20

Nichols v. United States, 511 U.S. 738 (1994) 23

Parker v. Halftown, Index No. CV-23-001, Decision and Order (Cayuga Nation Civ. Ct. Sept. 25, 2023), ECF No. 1-14 .....5, 6, 7, 10, 13, 16, 17, 18, 22

Poodry v. Tonawanda Band of Seneca Indians, 85 F.3d 874 (2d Cir. 1996) 11, 12

Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978) 14, 19

Storey v. Morris, No. 7:16-CV-206, 2017 WL 933212 (N.D.N.Y. Feb. 1, 2017), *report and recommendation adopted by* 2017 WL 916418 (N.D.N.Y. Mar. 8, 2017) 21

Talton v. Mayes, 163 U.S. 376 (1896) 18

Tavares v. Whitehouse, 851 F.3d 863 (9th Cir. 2017) 19

United States v. Josephberg, 562 F.3d 478 (2d Cir. 2009) 23

United States v. Kalish, 626 F.3d 165 (2d Cir. 2010) 23

Withrow v. Larkin, 421 U.S. 35 (1975) 15, 19

STATUTES

18 U.S.C. § 1151(a) 2

25 U.S.C. § 1301 8

25 U.S.C. § 1302 8

25 U.S.C. § 1302(a)(8) 14

25 U.S.C. § 1302(a)(9) 22

25 U.S.C. § 1303 8

Treaty of Canandaigua of 1794, art. II, 7 Stat. 44, 45 2

OTHER AUTHORITIES

Banishment Ordinance (2022), ECF No. 1-5 ..... 3, 12, 17

Business Ordinance (2021), ECF No. 1-2 3

Cayuga Nation Judiciary Law (2022), https://cayuganationpolice.com/wp-content/uploads/2022/11/Cayuga-Nation-Judiciary-Law-as-adopted-October-pdf.1-2022 4

Cohen's Handbook of Federal Indian Law (Nell Jessup Newton & Kevin K. Washburn eds. 2024) 14, 18, 20

Indian Entities Recognized By and Eligible to Receive Services from the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112 (Jan. 12, 2023) 2

Local Rule 56.1(a) 10

Pursuant to this Court's January 5, 2026 order (ECF No. 64), Respondents Clint Halftown, Timothy Twoguns, Donald Jimerson, Gary Wheeler, Michael Barringer, and Jonathan Dekanski, in their official capacities as members of the Cayuga Nation Council, and Joseph E. Fahey, in his official capacity as Cayuga Nation Tribal Court Judge (collectively, "Respondents"), submit this memorandum of law in support of denial of Petitioner's habeas petition.

PRELIMINARY STATEMENT

For years, Petitioner—a Cayuga citizen—has operated a business on the Cayuga Reservation in violation of the law of the Cayuga Nation (the "Nation"), as well as in violation of state and federal laws. The Nation has gone to great lengths to bring an end to this unlawful activity, pursuing actions in tribal court, state court, and this Court. But Petitioner avoided the consequences of his unlawful activity at every turn. In light of Petitioner's refusal to adhere to Cayuga law, the Nation had no choice but to exercise its sovereign right to banish Petitioner from the Cayuga Nation Reservation.

Petitioner now claims that the Nation's banishment order violated the due process and Ex Post Facto Clauses of the Indian Civil Rights Act ("ICRA"). Petitioner's claims lack merit. First, there was no due process violation. Petitioner had a full and fair opportunity to present his defense case at the banishment hearing. Petitioner then exercised his right to challenge the banishment order in the Nation's judicial system, wherein he received a full and fair hearing including the opportunity for appellate review. Petitioner's conclusory assertions of unfairness and bias are no basis for overturning a tribal-court decision and interfering with the Nation's sovereignty. Second, Petitioner's ex post facto challenge fails because the banishment order rested on conduct that occurred after the banishment ordinance was enacted.

BACKGROUND

A. The Cayuga Nation and Its Reservation

The Cayuga Nation is a federally recognized, sovereign Indian nation. *See* Indian Entities Recognized By and Eligible to Receive Services from the United States Bureau of Indian Affairs, 88 Fed. Reg. 2112, 2112 (Jan. 12, 2023). The United States recognized the Nation's reservation in the 1794 Treaty of Canandaigua and pledged that the "reservation[] shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." Treaty of Canandaigua of 1794, art. II, 7 Stat. 44, 45. The Nation's reservation comprises 64,015 acres, located in what today are Seneca and Cayuga Counties in New York. *See Cayuga Nation v. U.S. Dep't of Interior*, No. 20-cv-2642, 2022 WL 888178, at *1 (D.D.C. Mar. 25, 2022); *Cayuga Nation v. Tanner*, 448 F. Supp. 3d 217, 222-23 (N.D.N.Y. 2020), *aff'd*, 6 F.4th 361 (2d Cir. 2021).

The Nation's reservation still exists today. Indeed, "every federal court" to consider the question, as well as the New York Court of Appeals, has agreed that the Nation's federal reservation continues to exist and has not been disestablished. *Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 639 (2010); *see Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 260 F. Supp. 3d 290, 307-15 (W.D.N.Y. 2017) (collecting cases). The federal government likewise recognizes that the Nation's reservation "has not been diminished or disestablished." ECF No. 33-3 (June 17, 2019 Letter from Darryl LaCounte, Director, Bureau of Indian Affairs ("BIA"), to Stuart Peenstra, Seneca Falls Chief of Police).

Because the Nation's reservation remains intact, it constitutes "Indian country" under federal law, which is defined by statute to include "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and, including rights-of-way running through the reservation." 18 U.S.C. § 1151(a).

B. The Nation's Laws and Court System

The Nation is led by the Cayuga Nation Council. *Cayuga Nation ex rel. Cayuga Nation Council v. Parker*, No. 22-cv-00128, 2022 WL 3347327, at *2 (N.D.N.Y. Aug. 12, 2022). Clint Halftown is the Nation's federal representative. Although Petitioner derisively refers to Respondents as the "Halftown Faction Respondents," Respondents have been recognized as the Nation's leaders by the Nation's citizens. After a period of division in the Nation, the BIA recognized that an overwhelming majority of Cayuga citizens had affirmed Clint Halftown as the Nation's federal representative and specific Cayuga Nation Council members identified in a "statement of support" campaign as the proper leaders of the Nation. *See* Pet. for Writ of Habeas Corpus ("Pet.") ¶¶ 17, 19, ECF No. 1-16; *Cayuga Nation v. Bernhardt*, 374 F. Supp. 3d 1, 6-9 (D.D.C. 2019). The BIA's decision was upheld against a challenge under the Administrative Procedure Act. *See* 374 F. Supp. 3d at 9-28.

Exercising its sovereignty, the Nation has promulgated laws that govern its territory and those within it. They include the Cayuga Nation Amended and Restated Business License and Regulation Ordinance ("Business Ordinance") and the Cayuga Nation Banishment Ordinance ("Banishment Ordinance"). *See* Business Ordinance (2021), ECF No. 1-2; Banishment Ordinance (2022), ECF No. 1-5. Among other things, the Business Ordinance states that "No person shall engage in any type of business on Nation land without a business license issued by the Nation pursuant to this Ordinance." Business Ordinance art. II, ECF No. 1-2. The Cayuga Nation Council is authorized to issue banishment orders under the Banishment Ordinance. Banishment Ordinance § 2.1, ECF No. 1-5. Among the grounds for banishment are "failure to obtain a license pursuant to the Nation's Business License and Regulation Ordinance." *Id.* § 2.3.5.

The Nation has also established the Cayuga Nation Civil Court, which includes both a trial and an appellate court, to adjudicate tribal law disputes. *See* Cayuga Nation Judiciary Law §§ 5, 7-8 (2022), https://cayuganationpolice.com/wp-content/uploads/2022/11/Cayuga-Nation-Judiciary-Law-as-adopted-October-2022-1.pdf. Under tribal law, that Court is authorized to issue orders for violations of the Nation's Business Ordinance. *Id.* §§ 3.1(n), 5.2. Respondent Fahey—a former Acting Judge for the New York State Supreme Court, Onondaga County—is one of the Nation's trial court judges.

C. The Events Giving Rise to the Banishment Proceeding[1]

Petitioner is a citizen of the Cayuga Nation. Pet. ¶ 7. He owns and operates Pipekeepers, an entity currently located in Montezuma, New York. *Id.* ¶ 8.

Petitioner first operated Pipekeepers on a piece of property located in Seneca Falls, New York (the "Seneca Falls Property"). *Id.* ¶ 8. The Nation brought suit against Petitioner for violating the Business Ordinance, and on December 2, 2021, the Nation's trial court permanently enjoined Petitioner's operations. *See id.* ¶ 51; Order, *Cayuga Nation v. Parker*, Index No. CV-21-016 (Cayuga Nation Civ. Ct. Dec. 2, 2021), ECF No. 33-4.

Petitioner ignored the order and continued to operate Pipekeepers. The Nation, however, was able to purchase the Seneca Falls Property from its owner (Petitioner was a renter) to allow it to eject Petitioner. Pet. ¶ 54. The Nation's trial court found that, when the Nation sought to lawfully seize the Seneca Falls Property on January 1, 2022, Petitioner's wife "stabbed [an officer] with" a

[1] There has been abundant litigation between the Nation and Parker, in federal, state, and tribal court. That litigation includes the RICO suit in which the Court recently conducted a jury trial. *See Cayuga Nation v. Parker*, No. 22-cv-00128 (N.D.N.Y. filed Feb. 10, 2022). For simplicity's sake, this background section focuses on the facts relevant to Petitioner's sole remaining claims in this suit: his due process and ex post facto challenges to his banishment.

"sharpened piece of metal" while Petitioner "f[ought] with [other] officers in an attempt to resist" the seizure. *See* Decision and Order at 6-7, *Cayuga Nation*, Index No. CV-21-016 (Cayuga Nation Civ. Ct. June 28, 2022), ECF No. 33-7.

At this point, rather than comply with the order, Petitioner moved his operations to a property that he owns in Montezuma, New York (the "Montezuma Property"), and he resumed unlicensed and unlawful operations within the Nation's Reservation. Pet. ¶¶ 8, 59. Petitioner had the option of moving his business to countless out-of-reservation locations in New York or elsewhere, but instead chose to locate his business within reservation boundaries.

Upon the Nation's motion, the Nation's court again enjoined Petitioner's operations. *See* Order, *Cayuga Nation*, Index No. CV-21-016 (Cayuga Nation Civ. Ct. Mar. 11, 2022), ECF No. 33-6. Petitioner refused to comply with the injunction and was held in contempt. *See* Order, *Cayuga Nation*, Index No. CV-21-016 (Cayuga Nation Civ. Ct. July 15, 2022), ECF No. 33-8. During this period, the Nation's trial court observed that Petitioner "made a conscious decision to simply … disregard the proceedings being conducted in this Court," and made "threats of physical violence … during … encounters" with officers of the Cayuga Nation Police Department attempting to serve him with process. ECF No. 33-7 at 6-7.

D. The Banishment Proceeding and Subsequent Judicial Review

As Petitioner flouted the Tribal Court's authority, the Nation commenced banishment proceedings against Petitioner, which the Nation's court would later describe as "understandable" given "an unremitting record of defiance spanning several years." Decision and Order at 10, *Parker v. Halftown*, Index No. CV-23-001 (Cayuga Nation Civ. Ct. Sept. 25, 2023), ECF No. 1-14.

On February 28, 2023, the Nation's Council served Petitioner with a Notice of Potential Banishment. ECF No. 1-18. The Notice advised him of four grounds for potential banishment:

(1) operating an unlicensed smoke shop and marijuana dispensary in Montezuma; (2) previously operating an unlicensed smoke shop, marijuana dispensary and gas station in Seneca Falls; (3) failing to respond to criminal charges and ignoring an arrest warrant; and (4) operating a Nation-owned house without paying rent. *Id.* at 2. The Notice informed Petitioner that he would have the opportunity to be heard by the Council if he requested a hearing, that he could be represented by counsel at the hearing, and that he would be afforded the opportunity to present evidence on his behalf. *Id.* The Notice further advised him that a banishment would result in total exclusion from the Reservation, and that violation of any banishment order would be a misdemeanor. *Id.* at 3.

On March 3, Petitioner requested a hearing. ECF No. 1-14 at 12. After the Nation's counsel proposed a hearing within 30 days, Petitioner's counsel requested a hearing after April 15. *Id.* The Nation agreed to accommodate that request, and a hearing was set for April 19. *Id.* at 13.

The Nation's counsel also reached out regarding a mutual exchange of documents in advance of the hearing. *Id.* at 11. On April 17, two days before the hearing, the Nation's counsel granted Petitioner access to the documents that the Nation intended to reference during its banishment case (while reserving itself the right to present additional documents in rebuttal). *Id.* at 13. On April 18, the Nation's counsel informed Petitioner's counsel that Petitioner was "welcome to make a presentation" at the hearing either himself or through counsel. *Id.* at 14. The Nation's counsel further stated that although "the process is not designed to have additional witnesses and cross-examination of them," the Council would "keep the record open for two weeks" following the proceeding, during which "the Council will accept additional submissions from you on behalf of [Petitioner] including affidavits or legal briefing." *Id.*

The following day, Petitioner's counsel notified the Nation's counsel that in view of the Nation's explanation of the process, Petitioner would "simply provide a statement from counsel,"

but Petitioner "will not make any statements or put on any proof" and would "not … participate." *Id.* However, counsel stated that Petitioner intended to submit written materials. *Id.*

At the hearing, Petitioner submitted eleven exhibits, while the Nation submitted twenty-nine. *Id.* at 15. Although counsel for both parties made presentations to the Council, Petitioner did not appear at or participate in the hearing. *Id.* Consistent with the Nation's assurance, the hearing was kept open for two weeks following its conclusion to afford Petitioner the opportunity to submit additional evidence. *Id.* The hearing was transcribed, and Petitioner's counsel was granted a two-week extension to review the transcript. *Id.*

On July 11, 2023, the Nation's Council unanimously determined that Petitioner had engaged in conduct constituting five grounds for banishment: the four identified in the Notice of Potential Banishment, as well as the finding that Petitioner engaged in "behavior that poses a threat to the safety, welfare and order of the Nation." *Id.*; ECF No. 1-19. On August 9, Petitioner was served with a Notice of Total Banishment that required him to vacate the Reservation and prohibited him from reentering. *See* Pet. ¶ 75; ECF No. 1-19.

Petitioner filed a habeas petition in the Nation's Tribal Court claiming that the banishment violated his ICRA rights. Pet. at 22 n.6. Following a thorough analysis, the Nation's trial court rejected Petitioner's claims. It concluded that Petitioner did not allege physical custody that would give rise to habeas jurisdiction. ECF No. 1-14 at 5. It also analyzed and rejected Petitioner's claims on the merits—including, relevant here, his due process and ex post facto claims. ECF No. 1-14 at 10-17. The Nation's appellate court affirmed the trial court's dismissal of the petition, agreeing that Petitioner was not in custody for purposes of habeas jurisdiction. ECF No. 37-4.

E. Procedural History of This Suit

Petitioner brought this petition for a writ of habeas corpus under the Indian Civil Rights Act of 1968 ("ICRA"), 25 U.S.C. §§ 1301-1303. Petitioner challenged both his banishment order as well as the alleged interference with his property rights. The Nation moved to dismiss.

The Court granted the Nation's motion in part and denied it in part. ECF No. 45. The Court concluded it lacked jurisdiction over claims challenging the Nation's seizure of Petitioner's property. *Id.* at 24. It concluded, however, that it had jurisdiction over Petitioner's challenge to the banishment order, finding that "Petitioner has plausibly alleged that the total banishment is a criminal punishment and a severe restraint on his liberty for purposes of invoking this Court's habeas jurisdiction." *Id.* at 26. The Court further concluded that Petitioner had exhausted his due process and ex post facto challenges to the banishment order. *Id.* at 31.

The Nation also sought to dismiss Petitioner's banishment challenge as to Respondent Twoguns, on the ground that he was no longer a member of the Cayuga Nation Council at the time of Petitioner's banishment. Because the Petition alleged otherwise, the Court declined to dismiss respondent Twoguns and directed the parties to confer on that issue. *Id.* at 34.

Following the Court's dismissal order, the Court concluded that the Rules Governing Section 2254 Cases would apply and directed the parties' discovery disputes to Magistrate Judge Dancks. ECF No. 47. Magistrate Judge Dancks granted in part and denied in part Petitioner's request for discovery. ECF No. 58. In light of the factual dispute regarding Respondent Twoguns' status, Magistrate Judge Dancks authorized Petitioner to serve the following interrogatory: "State the dates Timothy Twoguns was a member of the Cayuga Nation Council, including any and all beginning and end dates." *Id.* at 2, 12. Magistrate Judge Dancks otherwise denied Petitioner's motion for discovery, finding that Petitioner did not establish good cause. *Id.* at 8-11. Respondents

responded to the interrogatory as follows: "Timothy Twoguns was a member of the Cayuga Nation Council beginning in the year of 1994 and ending on the day of June 30, 2023." Nicholson Decl., Ex. A, at 2.

Petitioner filed a follow-up request to expand the record, which Magistrate Judge Dancks denied. She explained that Petitioner's request rested on "unfounded speculation" and "vague and conclusory arguments," and that Petitioner "fails to specifically identify how any of the documents he seeks to include would actually demonstrate that the banishment ordinance is inconsistent with the Nation's traditions or how they are relevant to his claims." ECF No. 63 at 3-4.

On January 5, 2026, the Court concluded that the record was complete and directed Respondents to file a memorandum of law. ECF No. 64.

LEGAL STANDARD

As explained below, the Court lacks jurisdiction over Petitioner's habeas petition because Petitioner is not in custody. But if the Court exercises jurisdiction, it should adjudicate this habeas corpus application based solely on materials that were before the Nation's Council in the banishment proceeding and the Tribal Court in the post-banishment habeas proceeding, together with the additional evidence served in discovery regarding Mr. Twoguns.

In the Court's order regarding the motion to dismiss and motion for preliminary injunction, the Court observed the facts were "taken from the petition and the affidavits and exhibits the parties submitted in connection with these motions," and the "findings are provisional in the sense that they are not binding on a motion for summary judgment or at trial and are subject to change as the litigation progresses." ECF No. 45 at 3 n.1 (internal quotation marks omitted). This Court concluded that the Rules Governing Section 2254 Cases ("Federal Habeas Rules") apply to this case. ECF No. 47.

As Magistrate Judge Dancks subsequently explained, in Section 2254 cases, "[r]eview of factual determinations … is expressly limited to the evidence presented in the State court proceeding," and "review of legal claims … is also limited to the record that was before the state court." ECF No. 63 at 2 (quoting *Shoop v. Twyford*, 596 U.S. 811, 819 (2022) (internal quotation marks omitted)). Magistrate Judge Dancks concluded that the same standard should apply to habeas claims under ICRA. *Id.* at 2-4. With respect to due process, Magistrate Judge Dancks concluded that the Court should not consider evidence that was "not before the Cayuga Nation Civil Court at the time of the banishment proceeding," and should not consider new scholarly materials, letters, or affidavits. *Id.* at 5. Magistrate Judge Dancks recognized, however, that discovery in habeas cases is appropriate upon a showing of good cause, *id.* at 2, and found good cause to expand the record to include evidence regarding Mr. Twoguns. *See* ECF No. 58 at 1-2, 11-12. Thus, in deciding this habeas petition, the Court should conduct a legal analysis of Petitioner's claims based solely on the record from the Nation's proceedings as well as the additional evidence regarding Mr. Twoguns.[2] Below, the Nation relies on the Notice of Potential Banishment, Notice of Total Banishment, and Tribal Court order, all of which were appended to the habeas petition. ECF Nos. 1-14, 1-18, 1-19.

ARGUMENT

I. THIS COURT LACKS JURISDICTION OVER PETITIONER'S ICRA CLAIM.

Petitioner brings a habeas corpus claim under 25 U.S.C. § 1303. "As with other statutory provisions governing habeas relief, one seeking to invoke jurisdiction of a federal court under

[2] This Court's January 5, 2026 Order directs respondents to file a "memorandum of law, not to exceed 25 pages." ECF No. 64. Respondents construe that order to request a memorandum of law only, and not a separate Statement of Material Facts as contemplated by Local Rule 56.1(a). In any event, aside from the interrogatory response regarding Twoguns, there are no "Material Facts" beyond what was before the Court at the motion to dismiss stage.

§ 1303 must demonstrate … a severe actual or potential restraint on liberty." *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 880 (2d Cir. 1996). Because Petitioner has not adequately alleged a "severe actual or potential restraint on liberty," *id.*, this Court lacks jurisdiction.

Although the Court concluded at the motion to dismiss stage that "Petitioner has plausibly alleged that the total banishment is a criminal punishment and a severe restraint on his liberty for purposes of invoking this Court's habeas jurisdiction," ECF No. 45 at 26, Respondents respectfully submit that Petitioner's jurisdictional allegations—even if plausible—should not prevail. Further, to the extent the Nation's arguments are inconsistent with the Court's prior order, the Nation advances them here in order to preserve them for any potential appeal.

Poodry concluded that permanent banishment amounts to "detention" for purposes of ICRA in some circumstances. 85 F.3d at 895-98. But this case differs from *Poodry*. In *Poodry*, the Indian nation imposed permanent banishment "without notice" and only for the "most severe of crimes"; it labeled the petitioners literal traitors by determining they had committed "treason"; and it made "deprivation of [the petitioners'] citizenship" part of the banishment, thereby "work[ing] a destruction of [their] social, cultural, and political existence." *Id.* at 895, 897; *see Napoles v. Rogers*, No. 16-cv-01933, 2017 WL 2930852, at *6 (E.D. Cal. July 10, 2017) (explaining that *Poodry* "found permanent banishment *and* disenrollment sufficient to constitute detention because it analogized such actions to the stripping of citizenship in denaturalization and denationalization proceedings" (emphasis added)), *aff'd*, 743 F. App'x 136 (9th Cir. 2018).

In this case, by contrast, Petitioner's banishment was neither permanent nor premised on any determination that Petitioner had committed crimes; nor was Petitioner stripped of his citizenship. First, the Banishment Ordinance provides that "[a]fter a period of one year has expired, a person who has been banished … may request that the Cayuga Nation Council lift the

banishment[and] [t]he banishment may be lifted at the discretion of the Cayuga Nation Council upon a showing that the person has rehabilitated his or herself and no longer poses a threat to the safety and welfare of the Nation and its citizens." Banishment Ordinance § 2.7, ECF No. 1-5. In its motion to dismiss order, the Court emphasized that the Banishment Order recited that Parker "is entirely prohibited from entering onto the Nation reservation at any future time and for any reason." ECF No. 1-19 at 3 (capitalization omitted). But the Banishment Ordinance contemplates that even when banishments are "perpetual," affected individuals may petition for the right to lift the banishments. Banishment Ordinance §§ 2.4, 2.7, ECF No. 1-5. Here, Petitioner has never attempted to lift the banishment, even though well over one year has passed, and therefore cannot establish that the banishment is permanent.

Second, Petitioner's banishment is not criminal. As *Poodry* recognized, there is strong evidence that "[ICRA] § 1303 applies only in the context of a criminal charge or prosecution." 85 F.3d at 887. In *Poodry*, the banishment was criminal: The banished members were "convicted of Treason." *Id.* at 889. Here, by contrast, the Banishment Ordinance states that a person can be banished if he commits a crime, Banishment Ordinance §§ 2.3.1, 2.3.2, ECF No. 1-5, *or* if he engages in certain non-criminal actions such as violating the Business License and Regulation Ordinance, *id.* § 2.3.5. Here, neither the Notice of Potential Banishment nor the Notice of Total Banishment identifies any criminal bases for banishment: They do not suggest that Petitioner was convicted of, or even committed, any crimes. ECF Nos. 1-18 & 1-19.

In its prior order, the Court noted that the Notice included findings that Petitioner failed "to respond to criminal charges," ignored a "warrant for his arrest," and engaged in behavior that posed "a threat to the safety, welfare, and order of the Nation." ECF No. 45 at 25-26 (quoting ECF No. 1-7 at 3); *see* ECF No. 1-19 at 3. But none of those actions is *itself* a crime under state or tribal

law. The Notice states that Petitioner was *charged* with crimes, but does not state he *committed* them—only that he failed to submit to the criminal process, which would allow a determination of his innocence or guilt. The remaining grounds for banishment—operating an illegal business, occupying a building without paying rent, and engaging in "behavior that poses a threat to the safety, welfare, and order of the Nation," ECF No. 1-19 at 3—are similarly not characterized as crimes in the Notice of Total Banishment. And although, as the Court's order notes, Petitioner could be charged with a crime if he *violated* the terms of the banishment, ECF No. 45 at 25-26, that does not transform the banishment *itself* into a criminal punishment.[3]

Third, unlike in *Poodry*, Petitioner was not disenrolled from the Nation. The Petition claims that the Nation stripped Petitioner of his Nation citizenship. *See* Pet. ¶ 7. But that is not true: The Notice of Total Banishment expels Petitioner from the Cayuga Reservation, but it does not revoke his citizenship. ECF No. 1-19. Petitioner has not presented evidence of his alleged disenrollment, and the record before the Court otherwise refutes Petitioner's allegation. *See, e.g.*, ECF No. 33-13 ¶¶ 5, 74; *see also, e.g.*, ECF No. 33-2 ¶ 3.

Finally, both the Nation's trial court and its appellate court rejected Petitioner's claim that there was habeas jurisdiction under *Poodry*. ECF No. 1-14 at 5; ECF No. 37-4 at 3. This is strong evidence that the Nation itself does not understand the banishment to be criminal punishment. *See, e.g.*, *Basil Cook Enters., Inc. v. St. Regis Mohawk Tribe*, 117 F.3d 61, 66 (2d Cir. 1997) ("The Supreme Court has long recognized the exclusive responsibility of Native American tribes to construe their own law, and with that responsibility comes the parallel responsibility of federal courts to abide by those constructions." (citations omitted) (collecting cases)).

[3] In December 2025, Petitioner was charged in the Nation Court with violating the Notice of Total Banishment and released from custody. No determination has been made with respect to his guilt, and no date has been set for any trial.

Because the banishment order is not criminal punishment, this Court lacks habeas jurisdiction under ICRA.

II. PETITIONER'S CLAIMS CHALLENGING THE BANISHMENT ORDER SHOULD BE DISMISSED (COUNTS ONE AND SIX).

Petitioner alleges that the banishment order violated ICRA's due process and ex post facto clauses. If the Court exercises jurisdiction over these claims, it should reject them.

A. Petitioner's Due Process Claim Fails.

The Court should reject Petitioner's contention that the Nation deprived him of liberty without due process of law. *See* 25 U.S.C. § 1302(a)(8).

ICRA's due process clause and the Constitution's due process clause are not coextensive. ICRA "modified the safeguards of the Bill of Rights to fit the unique political, cultural, and economic needs of tribal governments." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 62 (1978); *see Cohen's Handbook of Federal Indian Law*, § 17.04[2], at 1112 (Nell Jessup Newton & Kevin K. Washburn eds. 2024) ("[T]he meaning and application of ICRA is not determined by Anglo-American constitutional interpretations." (quotation mark omitted)). "[W]here the tribal court procedures under scrutiny differ significantly from those commonly employed, courts weigh the individual right to fair treatment against the magnitude of the tribal interest to determine whether the procedures pass muster under ICRA." *Alvarez v. Lopez*, 835 F.3d 1024, 1028-29 (9th Cir. 2016) (ellipsis and quotation marks omitted). "This balancing test reflects a compromise intended to guarantee that tribal governments respect civil rights while minimizing federal interference with tribal culture and tradition." *Id.* at 1029 (internal quotation marks omitted).

Applying those principles, the Court should reject Petitioner's due process claim. The Nation provided Petitioner with due process at the banishment hearing. Even if it did not, the Nation also offered Petitioner the opportunity for judicial review in the Nation's court, and

Petitioner exercised that opportunity. Collectively, the process provided by the Nation—banishment hearing plus judicial review—satisfies ICRA's due process requirement.

1. Petitioner received due process at the banishment hearing.

Petitioner alleges that the banishment hearing was unfair in five respects: (1) the adjudicators were biased, (2) the Banishment Ordinance is vague, (3) Petitioner was unable to take discovery or cross-examine witnesses, (4) the Nation did not abide by separation-of-powers principles, and (5) the banishment violated substantive due process.

Each of those arguments fails. Even if the Court focuses solely on the banishment hearing—and disregards Petitioner's opportunity for judicial review in the Nation's independent judicial system—the banishment hearing satisfied due process.

i. Bias.

Petitioner first contends that his right to due process was violated because the adjudicators were biased. *See* Pet. ¶ 96 ("Despite their well-documented enmity toward Parker, the Halftown Faction Respondents adjudicated the banishment proceedings against Parker."). Those allegations do not establish a due process violation. Courts apply "a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47 (1975). Indeed, "the traditional common-law rule was that disqualification for bias or prejudice was not permitted." *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 820 (1986). While "[t]he more recent trend has been towards the adoption of statutes that permit disqualification for bias or prejudice," "that alone would not be sufficient basis for imposing a constitutional requirement under the Due Process Clause." *Id.* In *Lavoie*, the Supreme Court declined to decide whether allegations of hostility towards one side could "ever be sufficient under the Due Process Clause to force recusal," but concluded that "only

in the most extreme of cases would disqualification on this basis be constitutionally required." *Id.* at 821.[4]

Here, Petitioner's allegations regarding prior interactions between Petitioner and the Nation's Council do not establish a due process violation. Crucially, Petitioner does not allege that any purported bias manifested at the banishment hearing itself. To the contrary, as the Tribal Court later concluded, "Petitioner and his counsel were extended every consideration and courtesy sought by them in [the] preparation and scheduling of the Banishment Hearing." ECF No. 1-14 at 14-15. For example, the Nation's Council accommodated Petitioner's counsel's request for a delayed hearing date and kept the record open for two weeks after the hearing to allow for the submission of additional evidence. *Supra*, at 7.

Instead, Petitioner's "bias" claim hinges on prior events separate from the banishment proceeding. Petitioner describes disputes between the Nation's leaders and "traditionalists" and describes himself as a "[t]raditionalist." Pet. ¶¶ 26, 31. Petitioner also recounts prior litigation between him and the Nation arising from Petitioner's operation of Pipekeepers. *E.g.*, Pet. ¶¶ 59-67 (describing federal and state litigation over Pipekeepers, including RICO suit); *id.* ¶¶ 78-91 (describing more litigation). But Petitioner's generalized allegations of bad blood do not establish bias that would disable the Nation's Council from presiding over the banishment proceeding. *Lavoie*, 475 U.S. at 820-21 (judge's "general hostility" towards insurance companies did not establish that he was required to recuse from case involving insurance company).

It would be a serious blow to the Nation's sovereignty if the Court held that the Nation's Council was "biased" and hence incapable of presiding over a banishment proceeding, and a

[4] Although the Supreme Court rejected bias-related arguments, it held that one judge was required to recuse because he was simultaneously the plaintiff in a class action raising the same issues as in the case the court was deciding. 475 U.S. at 823-24.

doubly serious blow if the Court held that the Nation's Council was "biased" merely because it has attempted to enforce the Nation's law against Petitioner in the past. The Court should not treat Petitioner's contumacy of the Nation's laws as a basis to excuse him from a banishment proceeding adjudicated by the Nation's leaders.

ii. Notice.

Petitioner argues that the Banishment Ordinance violates due process because he "was not permitted to know the standard upon which Halftown Faction Respondents determined" whether to banish him. Pet. ¶ 96. To the contrary, the Banishment Ordinance enumerates specific grounds for banishment, and outlines notice and hearing requirements. ECF No. 1-5 at 3-4. Further, Petitioner received a Notice of Potential Banishment describing the allegations against him and providing him an opportunity to be heard and be represented by counsel. ECF No. 1-18.

Petitioner does not explain the nature of his confusion over "the standard upon which" the Nation's Council made its decision. But if he required clarification of that "standard," he could have sought guidance at the banishment hearing, at which his counsel appeared. *Supra*, at 6-7.

iii. Discovery and cross-examination.

Petitioner contends that he was "not permitted to engage in discovery or to cross-examine the Halftown Faction Respondents witnesses." Pet. ¶ 96. The Tribal Court correctly rejected Petitioner's discovery-related claim: "Contrary to Petitioner's assertion that he was afforded only a brief hearing" with "no discovery," "both parties agreed to a mutual exchange of exhibits two days prior to the hearing" and the "hearing was kept open for two weeks following its conclusion to provide Petitioner with opportunity to submit additional material in his defense." ECF No. 1-14 at 14-15. As for Petitioner's claim regarding cross-examination, there was no one to cross-examine: the Nation's attorney informed him before the hearing he would not call any witnesses.

Id. at 14. Instead, both the Nation and Petitioner put forth their cases through written exhibits. *Id.* at 14-15.

In addition, any error on this issue was harmless. When courts consider habeas petitions challenging state convictions, a petitioner "must show that the error had a substantial and injurious effect or influence on the outcome of his trial." *Brown v. Davenport*, 596 U.S. 118, 126 (2022) (internal quotation marks omitted). Given the principles of tribal sovereignty that ICRA embodies, ICRA habeas petitioners should face a similar burden. Here, Petitioner cannot show prejudice from the asserted violations. As to discovery: Petitioner does not identify any discovery he requested that he did not receive, or any discovery that would have been helpful. Nor does he explain how additional discovery might have made a difference at the hearing. As to cross-examination: Petitioner does not explain who he wanted to cross-examine and how that would have affected the hearing. Significantly, Petitioner "did not appear, make a statement, put on any proof or otherwise participate" in the banishment hearing. ECF No. 1-14 at 15. Given that Petitioner refused to avail himself of the process he did receive, he cannot show prejudice from the lack of additional process.

iv. Separation of powers.

Petitioner advances a separation-of-powers argument: "The Halftown Faction Respondents have, in essence, acted as a legislature, executive, and judiciary in the banishment proceeding." Pet. ¶ 97. The Court should reject Petitioner's view that ICRA's due process principle requires Indian nations to adhere to traditional separation-of-powers principles. Indian nations have the "power to constitute and change [their] form[s] of government." *Cohen's Handbook*, § 5.01[2][a], at 259 (explaining that this is "[a] quintessential attribute of [tribal] sovereignty"). "Constitutional provisions such as … the doctrine of separation of powers[] … do not apply to tribes and have not been imposed on them by Congress." *Id.*; *see Talton v. Mayes*, 163 U.S. 376, 384-85 (1896). And

even if they did, administrative agencies can combine rulemaking, enforcement, and adjudicative functions into a single body, and the Supreme Court has rejected the view that combining those functions inherently violates due process. *Withrow*, 421 U.S. at 52 (rejecting "bald proposition" that "agency members who participate in an investigation are disqualified from adjudicating").

Any other rule would carry harmful consequences. Exercising their sovereign authority, Indian nations today commonly empower their tribal leaders to exercise a tribe's power of expulsion. *See, e.g.*, *Chegup v. Ute Indian Tribe of Uintah & Ouray Rsrv.*, 28 F.4th 1051, 1056-58 (10th Cir. 2022); *Tavares v. Whitehouse*, 851 F.3d 863, 867-68 (9th Cir. 2017). Finding a violation here, therefore, would upend countless Indian nations' existing practices and directly intrude on their sovereign prerogative to determine their own forms of government, in derogation of the Supreme Court's longstanding recognition of "[n]onjudicial tribal institutions" as "competent law-applying bodies." *Santa Clara Pueblo*, 436 U.S. at 66. And in any event, as noted below, the Nation *does* have an independent judiciary: Petitioner received judicial review from the Nation's independent court.

v. Substantive due process.

Finally, Petitioner argues that his "banishment is a violation of his right to substantive due process." Pet. ¶ 98. It is doubtful that ICRA's reference to "due process" authorizes a federal court to create a free-floating doctrine of substantive due process that binds Indian nations. Petitioner does not identify any judicially manageable standards for determining the scope of substantive due process for Indian nations and how it differs from the Supreme Court's body of substantive due process precedents. In any event, any doctrine of tribal substantive due process would not bar an Indian nation from excluding an individual from its reservation. "A tribe's power to exclude" persons "entirely or to condition their presence on the reservation is … well established." *E.g.*,

New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 333 (1983). Indeed, that power extends even to non-members, *see id.*, and represents "a fundamental sovereign attribute intimately tied to a tribe's ability to protect the integrity and order of its territory and the welfare of its members." *Cohen's Handbook* § 5.01[2][d], at 264. The Court should reject Petitioner's argument that banishment is an inherent substantive due process violation.

2. Petitioner received due process because he had the opportunity for judicial review in the Nation's courts.

All of Petitioner's arguments hinge on his claim that he was deprived of due process at the banishment hearing itself. But Petitioner overlooks that the process provided by the Nation included not only the banishment hearing itself, but also the ability to bring a subsequent habeas corpus petition in the Nation's court. Even assuming that the banishment proceeding itself provided insufficient process—which the Nation strongly disputes—the process provided by the Nation *as a whole*, including judicial review, satisfied the Nation's due process obligation.

On several occasions, the Second Circuit has held that states may satisfy their due process obligation by offering judicial review after, rather than before, a state action alleged to deprive a person of property or liberty. For example, in *Campo v. New York City Employees' Retirement System*, 843 F.2d 96 (2d Cir. 1988), the plaintiff brought a due process challenge to the termination of her retirement benefits without a hearing. The Second Circuit rejected that challenge because the plaintiff had the opportunity for post-termination judicial review in state court. *Id.* at 101. The Second Circuit walked through several prior cases holding that when an administrative tribunal takes an action, the state could satisfy its due process obligations by providing subsequent judicial review in state court. *Id.* at 101-03. It concluded there was no due process violation because "a state may provide procedural due process in either an administrative or a judicial setting." *Id.* at 103.

Similarly, in *Storey v. Morris*, the plaintiff brought a due process challenge to his expulsion from SUNY Potsdam, complaining that the "Director of Code of Conduct" had a "conflict of interest" because "she represented the school in the judiciary hearing to expel [him]." No. 7:16-CV-206, 2017 WL 933212, at *2 (N.D.N.Y. Feb. 1, 2017) (internal quotation marks omitted), *report and recommendation adopted by* 2017 WL 916418 (N.D.N.Y. Mar. 8, 2017). The court rejected the plaintiff's claim because the plaintiff had the ability to bring an after-the-fact challenge to his expulsion in New York state court. In the court's view, "the availability of such a remedy precludes plaintiff in this case from stating a plausible due process claim." *Id.* at *4 (footnote omitted).

The same reasoning applies here. Even if the Court concludes that Petitioner received inadequate process at the banishment proceeding, there was no due process violation because Petitioner had the opportunity to challenge the banishment in tribal court, and he in fact fully exercised that right, with counsel. The Nation's independent court undertook a detailed analysis of Petitioner's procedural challenges, providing all the process that was due.

Tribal sovereignty principles require allowing the Nation to organize its proceedings in this way. Banishment proceedings go to the essence of the Nation's sovereignty—they address whether a member can be present on the Nation's sovereign territory. In structuring its system of government, the Nation should be able to have its leaders—the Nation's Council—make this consequential decision in the first instance, subject to judicial review by an independent tribal court. In view of the substantial "tribal interest," *Alvarez*, 835 F.3d at 1028-29 (quotation marks omitted), in allowing the Nation's Council to determine access to the Nation's sovereign territory in the first instance subject to judicial review in the Nation's independent court, the Court should find that there is no due process violation under ICRA.

B. Petitioner's Ex Post Facto Claim Fails.

Petitioner asserts that the "Banishment Ordinance also constitutes an *ex post facto* law, as it was passed with the purpose of aggravating the punishment Parker may face for violating the Business Ordinance and has led to Parker's banishment for actions taken prior to passage of the Banishment Ordinance." Pet. ¶ 142; *see* 25 U.S.C. § 1302(a)(9). That claim fails.

First, for the reasons stated above, *supra*, at 12, the Banishment Ordinance is not a criminal law that triggers the Ex Post Facto Clause. *See also Ellingburg v. United States*, No. 24-482, 2026 WL 135982, at *2 (U.S. Jan. 20, 2026) ("When determining whether a law violates the Ex Post Facto Clause, the Court must evaluate whether the law imposes a criminal or penal sanction as opposed to a civil remedy."). To the extent the Court's motion to dismiss order holds to the contrary, the Nation respectfully preserves this issue for appeal.

Second, and in any event, the Banishment Ordinance was not applied retroactively. As the Tribal Court explained, "the Banishment Ordinance does not amount to an *ex post facto* law since it is directed at conduct subsequent to its enactment and that is ongoing and continuous today." ECF No. 1-14 at 17. "While the Notice of Banishment embraces conduct in years prior to its adoption, that conduct is encompassed in the Banishment Proceedings as evidence of the Petitioner's continuous, repeated and flagrant violations of the Nation's Business Ordinance." *Id.* "It additionally supplies evidence of the magnitude and severity of these continuous violations by encompassing the thousands of dollars Petitioner diverted to himself through the operation of his illegal businesses and which deprived the Tribal members of these revenues which, rightfully, belong to them." *Id.*

The Tribal Court was correct as to both the law and the facts. Even assuming that ICRA's Ex Post Facto Clause is as broad as the Constitution's Ex Post Facto Clause, it was not violated

here. As to the law, "criminal punishments may be applied to conduct occurring before enactment of a statutory provision as long as the conduct continued after enactment." *United States v. Kalish*, 626 F.3d 165, 168 (2d Cir. 2010); *see United States v. Josephberg*, 562 F.3d 478, 502 (2d Cir. 2009) ("[A]s to a continuing offense that was begun prior to the effective date of a Guidelines amendment and completed after that date, application of the amendment does not violate the Ex Post Facto Clause."). Further, the Ex Post Facto Clause does not bar courts from using crimes committed before a statute's enactment as a basis for enhancing a penalty for post-enactment conduct. When a court does so, the "sentence … is not to be viewed as … additional penalty for the earlier crimes. It is a stiffened penalty for the latest crime, which is considered to be an aggravated offense because of a repetitive one." *Gryger v. Burke*, 334 U.S. 728, 732 (1948); *see Nichols v. United States*, 511 U.S. 738, 747 (1994) ("[T]his Court consistently has sustained repeat-offender laws as penalizing only the last offense committed by the defendant." (quotation marks omitted)). Hence, the Nation could permissibly punish Petitioner for criminal conduct that began before and continued after the Banishment Ordinance's enactment, and could permissibly consider Petitioner's pre-enactment conduct for purposes of assessing the severity of his post-enactment conduct.

As to the facts: the Notice of Total Banishment makes clear it is almost entirely premised on post-enactment conduct. It stated that Petitioner is liable for "1. Operating a smoke shop and marijuana dispensary in Montezuma, New York, on the Nation's Reservation and without first obtaining a license under the Nation's Business License Ordinance"; "3. Failing to respond to criminal charges in the Nation's court and ignoring the warrant for his arrest;" "4. Occupying a Nation house … without paying rent on it and continuing to ignore judgments against him for unpaid rent;" and "5. Engaging in behavior that poses a threat to the safety, welfare, and order of

the Nation." ECF No. 1-19 at 3. All of that conduct occurred, or at least continued, after the Banishment Ordinance's enactment. As for the Notice's statement that Petitioner is liable for "2. Previously operating a smoke shop, marijuana dispensary, and gas station in Seneca Falls, New York on the Nation's Reservation and without first obtaining a license under the Nation's Business Ordinance," *id.*, the Nation was permitted to consider that conduct as part of Petitioner's course of conduct that continued post-enactment, and was permitted to use that pre-enactment conduct as a basis to find that Petitioner's post-enactment conduct was particularly serious. Moreover, the five findings were explicitly characterized as "independent grounds for banishment under Section 2.3 of the Banishment Ordinance." *Id.* Thus, even if the second banishment ground were excised from the banishment order, the result would not change.

C. At a Minimum, Petitioner's Banishment Claims Should Be Dismissed with Respect to Respondent Timothy Twoguns.

At a minimum, Petitioner's banishment challenges should be dismissed against Respondent Twoguns. While Mr. Twoguns was previously a member of the Cayuga Nation Council, he was no longer a member at the time of Petitioner's banishment, and he did not take part in the ultimate determination to banish Petitioner. *See* Notice of Total Banishment at 21, Ex. D, ECF No. 2-6 (including list of signatories but not including Mr. Twoguns). Discovery in this case confirms that Mr. Twoguns was no longer a member of the Council at the time of the banishment order: Mr. Twoguns ceased to be a Council member on June 30, 2023, and the banishment order was issued on July 11, 2023. Ex. A at 2.

CONCLUSION

The petition for habeas corpus should be dismissed for lack of jurisdiction, or, in the alternative, denied.

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