

**UNITED STATES DISTRICT COURT
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)

**PETITIONER'S MEMORANDUM OF LAW
IN SUPPORT OF PETITION FOR WRIT OF HABEAS CORPUS**

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Petitioner Dustin Parker (“Mr. Parker”) respectfully submits this Memorandum of Law in support of the Petition for a Writ of Habeas Corpus (the “Petition”) pursuant to this Court’s January 5, 2026, Order (ECF No. 64) and in response to 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’s (collectively, “Respondents”) Memorandum of Law (ECF No. 65).

PRELIMINARY STATEMENT

BACKGROUND¹

The Cayuga Nation (the “Nation”) has been embroiled in a years-long leadership dispute between the current-seated Cayuga Nation Council—Clint Halftown, Timothy Twoguns, Donald Jimerson, Gary Wheeler, Michael Barringer, and Jonathan Dekanski—and their supporters (the “Halftown Faction”) and the traditionalist members of the Cayuga Nation’s Council of Chiefs and Clan Mothers (the “Traditionalists”). A key aspect of this ongoing dispute involves Pipekeepers Tobacco and Gas (“Pipekeepers”), a smoke shop operated by Mr. Parker (a Traditionalists) that sells tobacco, marijuana, gas, and related products. Respondents allege Mr. Parker’s operation of Pipekeepers violates the Nation’s Amended and Restated Business License and Regulation Ordinance (ECF No. 1-2) (the “Business Ordinance”), which the Halftown Faction Respondents enacted under the guise of their authority to govern the Cayuga Nation. Over the years, the Halftown Faction have persistently brought actions against Mr. Parker before various tribal, state, and federal courts, repeatedly seeking, and failing, to silence Mr. Parker.

¹ Mr. Parker directs the Court to the Petition (ECF No. 1) for a full recitation of the applicable history.

Finally, after years of litigation have failed to silence Mr. Parker, the Halftown Faction has attempted to remove Mr. Parker entirely from the Nation by enacting the Cayuga Nation Banishment Ordinance on October 17, 2022 (ECF No. 1-5) (the “Banishment Ordinance”). On February 28, 2023, Respondents issued a Notice of Potential Banishment to Mr. Parker, listing four independent grounds for banishment:

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.
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 License Ordinance.
3. Failing to respond to criminal charges in the Nation’s Court and ignoring the warrant for your arrest
4. Occupying a Nation owned house at 25 Spruce Lane without paying rent on it and continuing to ignore judgments against you for the unpaid rent.

(ECF No. 1-6)

A one-hour hearing on Mr. Parker’s banishment was held on April 19, 2023, over Zoom. (ECF No. 48-3 pp. 826). Exhibits were exchanged two days before the hearing. (*Id.* pp. 833). Mr. Parker was not apprised of the standards by which the hearing was to be adjudicated, including whether the Nation or Mr. Parker carried the burden of proof, or what that burden of proof constituted. (ECF No. 1 ¶ 73). Despite the parties’ long and contentious history (*see generally*, ECF No. 1), Respondents themselves adjudicated the hearing (*see* ECF No. 48-3 pp. 826 – 904); issued the Notice of Potential Banishment by resolution of the Council (ECF No. 1-6); and enacted the underlying Banishment Ordinance (ECF No. 1-5).

On August 3, 2023, Respondents issued the Notice of Total Banishment to Mr. Parker, upon a unanimous finding that Mr. Parker committed all four independent, underlying bases for

the banishment, and adding a fifth basis: “[e]ngaging in behavior that poses a threat to the safety, welfare, and order of the Nation.” (ECF No. 1-7). Mr. Parker was officially banished from the Nation, ordered to immediately vacate its lands, entirely prohibited from entering Nation lands at any future time for any reason, and informed that violation of the order constituted a Class A Misdemeanor. (*Id.*)

On June 16, 2023, Mr. Parker filed a Petition for a Writ of Habeas Corpus in the Cayuga Nation Civil Court (the “Nation’s Court”) pursuant to Rule 31 of the Cayuga Nation Rules of Civil Procedure challenging the banishment hearing, and related actions taken by Respondents against Mr. Parker, pursuant to the rights afforded under 25 U.S.C. § 1302, or the Indian Civil Rights Act (“ICRA”) (ECF No. 48-2 pp. 94 – 111). Respondents moved to dismiss the Petition, and, on September 25, 2023, the Nation’s Court dismissed the Petition in its entirety. (ECF No. 1-14). In its Decision and Order, the Nation’s Court ruled that, under the Nation’s law, habeas corpus relief was not available to challenge banishment, as it does not constitute “detention” for the purposes of the writ. (*Id.* p. 5). The Nation’s Court further declined, under the principles of sovereign immunity, to extend the Second Circuit’s precedent that banishment constitutes detention for the purposes of habeas corpus. (*Id.*) The Nation’s Court also offered an analysis of the merits of the petition, but did not address the bulk of Mr. Parker’s due process arguments related to the banishment hearing, instead focusing solely on the allegations pertaining to notice. (*See id.*)

Mr. Parker appealed the Nation Court’s dismissal to the Cayuga Nation Court of Appeals (the “Nation’s Appellate Court”) on October 5, 2023. (ECF No. 48-2 p. 4). The Nation’s Appellate Court affirmed the dismissal of the petition on February 20, 2024. (ECF No. 48-1 pp. 1 – 3). In doing so, the Nation’s Appellate Court affirmed that banishment is not considered “detention” for the purposes of habeas corpus relief pursuant to Cayuga Nation Rule 31, that the Second Circuit

precedent on banishment constituting detention is inapplicable to the Cayuga Nation under tribal sovereignty, and that tribal sovereignty likewise precluded Mr. Parker from bringing these allegations under any other vehicle. (*See id.* p. 1 – 2). The Nation’s Appellate Court did not address the merits of the Petition nor the Nation Court’s discussion of the merits. (*See id.*)

Having exhausted all tribal remedies, Mr. Parker filed the Petition in this Court on July 17, 2024, pursuant to § 1303 of the ICRA. (ECF No. 1). On September 9, 2024, Respondents filed a motion to dismiss the Petition in its entirety. (ECF No. 39). After briefing the issue, the Court granted in part and denied in part the motion to dismiss. (ECF No. 45). The Court found that it had jurisdiction to hear the Petition as to the First Cause of Action (Deprivation of Liberty Without Due Process of Law) pursuant to the Second Circuit’s precedent as established by *Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 897 (2d Cir. 1996) and its progeny. (*See generally*, ECF No. 45). The Court likewise declined to rule on the merits of the Sixth Cause of Action (*Ex Post Facto* law) without further briefing. (*See generally, id.*) The Court dismissed all remaining Causes of Action for lack of jurisdiction, and the First Cause of Action as it pertains to the Nation’s Court for failure to exhaust tribal remedies. (*See generally, id.*)

ARGUMENT

I. THE COURT CORRECTLY DETERMINED THAT IT HAD SUBJECT MATTER JURISDICTION TO HEAR THIS CLAIM

Respondents begin by challenging this Court’s jurisdiction to hear Mr. Parker’s ICRA claim based upon the same general arguments raised in their motion to dismiss: (1) that Mr. Parker’s banishment was not permanent, (2) that Mr. Parker’s banishment was civil, not criminal, in nature, and (3) that *Poodry* requires something beyond permanent banishment to trigger a federal court’s jurisdiction to hear an ICRA claim. (*See* ECF No. 65 pp. 16 – 19; *see also* ECF No. 39-3 pp. 26 – 28). The Court’s Memorandum-Decision and Order on the motion to dismiss

addressed these arguments and correctly found that the allegations contained within the Petition are sufficient to trigger this Court’s jurisdiction to hear this Petition. (ECF No. 45 pp. 25 – 26). Aside from merely repeating the same arguments, Respondents provide no reason that the Court’s prior determination was made in error, nor any additional facts to suggest that the Court’s analysis of these arguments at dismissal was in any way incomplete. Accordingly, Mr. Parker incorporates his prior arguments in favor of the Court’s jurisdiction to hear this Petition and asks that the Court not disturb its prior ruling. (See ECF No. 41 pp. 15 – 19). However, for the purposes of preserving the record and clarifying the holding of *Poodry*, Mr. Parker will briefly address Respondents’ arguments below.

A. *Poodry* Held That Permanent Banishment Alone is Sufficient for a Federal Court’s Jurisdiction

Respondents state that *Poodry*’s holding states that permanent banishment *may* be sufficient to trigger ICRA review if that permanent banishment *also* includes further constraints on liberty, such as disenrollment. (See ECF No. 65 p. 17). Not so. Rather, *Poodry* unambiguously stated that permanent banishment is *itself* a sufficient restraint of liberty to invoke a federal court’s jurisdiction to hear an ICRA petition. *Poodry*, 85 F.3d at 897 (“Indeed, we think the existence of the orders of permanent banishment alone—even absent attempts to enforce them—would be sufficient to satisfy the jurisdictional prerequisites for habeas corpus”).

Courts within the Second Circuit have subsequently affirmed this clear ruling. See *Shenandoah v. Halbritter*, 366 F.3d 89, 92 (2d Cir. 2004) (“*Shenandoah II*”) (“We determine the majority in *Poodry*, in interpreting the court’s jurisdiction *to encompass banishment*, was concerned about the unique severity of that punishment”) (emphasis added); see also *Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708, 714 (2d Cir. 1998) (“*Shenandoah I*”) (“Habeas relief does address more than actual physical custody, and includes parole, probation, release on one’s own

recognizance pending sentencing or trial, *and permanent banishment*”) (emphasis added); *Mitchell v. Seneca Nation of Indians*, 12-CV-119-A, 2013 WL 1337299 at *3 (W.D.N.Y. Mar. 29, 2013) (“The Second Circuit has held that an order of permanent banishment by a tribe is a severe restraint on liberty sufficient to satisfy the detention requirement of the ICRA”).

Respondents’ attempts to distinguish Mr. Parker’s banishment from the banishment in *Poodry* are irrelevant for the purposes of federal jurisdiction. Respondents’ sole authority in support of their assertion, likewise, does not support the assertion that permanent banishment *plus* further restraint is necessary to trigger ICRA review. *See Napoles v. Rogers*, 2017 WL 2930852 (E.D. Cal. July 10, 2017), *affd*, 743 Fed. Appx. 136 (9th Cir 2018)². The issue before the *Napoles* court involved an alleged taking of the petitioners’ land by the respondent tribal council for the purposes of expanding a casino owned by the tribe. *Id* at *1-2. The petitioners argued that the taking of the land and subsequent trespass citations constituted a constructive banishment; the court rejected this argument and distinguished the restraint alleged by the petitioner from *Poodry*, which involved a permanent banishment and disenrollment. *Id.* at *6.

Here, unlike in *Napoles*, the matter before the Court involves an order of permanent banishment and falls directly within the jurisdictional scope set by *Poodry*. As such, the Court should reject Respondents’ attempts to create a stricter requirement for jurisdiction than that laid out in *Poodry* and find it has jurisdiction to hear the Petition.

B. *Poodry* Did Not Distinguish Between Criminal and Civil Banishment

² Further, though Ninth Circuit’s analysis of *Poodry* has no binding authority over this Court, the Ninth Circuit has nonetheless recognized that *Poodry* and its progeny established that permanent banishment was the basis for invoking federal jurisdiction over an ICRA claim. *Tavares v. Whitehouse*, 851 F.3d 863, 874-75 (9th Cir. 2017) (noting that *Shenandoah I* “clarified that *Poodry* had only recognized federal habeas jurisdiction for cases involving permanent banishment”).

Respondents next argue that *Poodry* recognized “strong evidence” that the ICRA only applies in the context of criminal, not civil, banishment. This too is incorrect. *Poodry* declined to address the issue of whether federal habeas jurisdiction is limited to cases involving tribal criminal convictions, but nonetheless stated that such a distinction is most likely irrelevant. *Poodry*, 85 F.3d at 897 (“[E]ven if the dispute at hand is properly characterized as arising from a ‘civil’ determination by a tribal government, that does not necessarily deprive a district court of subject matter jurisdiction to review tribal action under the substantive provisions of the ICRA if § 1303 would otherwise confer it”).

Indeed, in holding that banishment is a sufficient restraint on liberty for the purposes of habeas review, *Poodry* recognized that the Supreme Court has already recognized denaturalization and denationalization—revocation of United States citizenship—to be extraordinarily severe penalties, despite often being characterized as administrative or civil in nature. *Id.* at 895. Accordingly, Respondents’ argument that Mr. Parker’s banishment is “civil” in nature is likewise irrelevant for the purposes of this Court’s jurisdictional analysis.

C. Respondents’ Own Opinion on the Nature of the Banishment Does Not Render It a Civil Penalty

Though Respondents’ distinction between a “civil” and “criminal” banishment is irrelevant to the Court’s analysis for jurisdictional purposes, Mr. Parker’s banishment *was* criminal in nature. The Notice of Total Banishment lists five grounds for banishment including failing to respond to criminal charges in the Nation’s Court and ignoring a warrant for his arrest and engaging in behavior that poses a threat to the safety, welfare, and order of the Nation. (ECF No. 1-7 p. 3). Parker’s banishment is also based upon his operation of Pipekeepers, which Respondents have

repeatedly claimed—in this litigation, in the underlying banishment hearing, and elsewhere³—to be illegal and criminal activity. (ECF No. 1-7 p. 3; No. 39-3 p. 1; 48-3 p. 868 ¶¶ 9 – 16).

Respondents attempt to distance themselves from their past statements and actions by pointing out that the Notice of Potential Banishment only states that Mr. Parker was *charged* with crimes, not that he *committed* them, and that Mr. Parker’s alleged failure to respond to criminal charges or a warrant for his arrest are not *themselves* crimes under tribal law. (ECF No. 65 pp. 18 – 19). However, as stated in *Poodry*, a tribal government’s own definition of what constitutes a crime is irrelevant to a federal court’s jurisdiction. *Poodry*, 85 F.3d at 889.

In *Poodry*, the respondent attempted to avoid habeas review by stating that treason, though considered a crime under American jurisprudence, is not treated as such within their tribe. *Id.* The Court rejected this argument, finding no authority to suggest that the scope of a habeas remedy explicitly created by federal statute is bound to a tribe’s own understanding of criminal activity and further noted that such a rule “would permit a tribal government to evade the federal court review specifically provided in the Indian Civil Rights Act *simply by characterizing every tribal government action as ‘civil’ or non-punitive.*” *Id.* Here, Respondents themselves have previously characterized Mr. Parker’s actions as criminal and should not now be permitted to avoid this Court’s jurisdiction by simply rephrasing their description of Mr. Parker’s actions when it is no longer convenient for them to paint them as criminal.

For all the above reasons, and those already stated before this Court (*see* ECF No. 41 pp. 15 – 19), Mr. Parker respectfully requests that the Court not disturb its previous ruling and find that it has jurisdiction to hear the Petition.

³ Mr. Parker again notes that Respondents brought a RICO suit in the Northern District of New York against Mr. Parker, alleging that Mr. Parker’s operation of Pipekeepers is a criminal enterprise in violation of federal law. [5:22-cv-00128-BKS ATB].

II. THE COURT SHOULD ISSUE A WRIT OF HABEAS CORPUS AS TO THE FIRST AND SIXTH CAUSES OF ACTION

A. Due Process

Respondents argue that the banishment hearing was fair by removing the overall context of the hearing and breaking down the allegations in the Petition into five distinct points that they argue are not, in a vacuum, inherent violations of due process. However, Respondents fail to address the Petition's actual allegations: that the banishment hearing, taken in context of Respondents' bias, was fundamentally and impermissibly unfair.

Mr. Parker actually alleges three interconnected bases in which the banishment hearing was procedurally void of due process: (1) the Halftown Faction Respondents' well-documented animosity toward Mr. Parker and interest in seeing him removed; (2) that those same Respondents drafted the Banishment Ordinance, determined to enforce the Banishment Ordinance against Mr. Parker, and adjudicated the banishment hearing against Mr. Parker; and, (3) that Mr. Parker was not granted sufficient notice of the burden of proof for a violation of the Banishment Ordinance, nor the means to properly defend himself in the hearing. (*See* ECF No. 1 ¶¶ 92 – 98). All three of these bases, read in the context of the actual events surrounding banishment hearing, clearly demonstrate that Mr. Parker's banishment hearing was fundamentally unfair and in violation of Mr. Parker's procedural due process rights. For the reasons discussed below, Mr. Parker has shown that his banishment hearing was held in violation of his right to due process.

1. Process Due Under the ICRA

§ 1302(a)(8) of the ICRA states that “no Indian Tribe in exercising powers of self-government shall—deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law.” 25 USC § 1302. The due process right established under the ICRA is similar, though not identical to those contained within

the Fifth and Fourteenth Amendments to the U.S. Constitution. *United States v. Bryant*, 579 U.S. 140, 156-57 (2016), *as rev* (July 7, 2016). Rather, the rights afforded under the ICRA should be read in mind of a tribe's cultural and governmental autonomy and may be modified where they threaten basic tribal interests. *McCurdy v. Steele*, 353 F. Supp. 629, 633 (D. Utah 1973).

Due process, as understood under the U.S. Constitution, has no precise legal definition but is rather a principle of "fundamental fairness." *Lassiter v. Dept. of Social Services of Durham County, N. C.*, 452 U.S. 18, 24 (1981). Given this principle of fundamental fairness, the process due in any one particular situation is highly contextual and cannot be answered with any single model of fairness or particular form of procedure. *Kremer v. Chem. Const. Corp.*, 456 U.S. 461, 483 (1982); *Buck v. Bd. of Ed. of City of New York*, 553 F.2d 315, 318 (2d Cir. 1977). Instead, "federal courts must look to the whole substance of a proceeding, not merely to its bare form, in determining whether the process at issue abides by the constitutional minimum of protection." *Buck*, 553 F.2d at 318; *Rodriguez-Acurio v. Almodovar*, 2:25-CV-6065 (NJC), 2025 WL 3314420 at *28 (E.D.N.Y. Nov. 28, 2025). However, when process is due under the Constitution, regardless of the context, it must be granted at a meaningful time and in a meaningful manner; it is not sufficient for officials to "go through the motions of nominally conducting a review" with a pre-review conclusion already drawn. *Baltas v. Jones*, 162 F.4th 68, 72 (2d Cir. 2025).

In bringing due process rights within the ICRA, Congress intended to modify due process principles, where applicable, to fit within the unique cultural, political, or economic needs of the tribe in which it applies. *Bryant*, 579 U.S. at 149; *Johnson v. Mashantucket Pequot Gaming Enter.*, CV-AA-1997-0132, 1998 WL 35234937 at *4 (Mash. Pequot Tribal Ct. Jan. 21, 1998). Tribal courts, in analyzing the boundaries of the ICRA within their particular tribe, often rely on their own constitutions and bodies of law and look to analogous federal or state authorities as helpful,

albeit non-binding, support. *Johnson*, 1998 WL 35234937 at *4 (“[D]ecisions of federal and state courts, while not binding on this court, are a useful source of guidance”); *Cole v Kaw Hous. Auth.*, CIV-95-1, 1995 WL 1073446 at *3 (Kaw. D. Ct. July 10, 1995) (“When Tribal customs and usages of the Tribe, federal laws, regulations or Tribal ordinances do not address an issue, this Court may then look to State law for guidance”); *see also Big Medicine v. Cheyenne and Arapaho Tribes*, SC-2008-05, 2008 WL 10675382 at *2 (Cheyenne-Arapaho Nov. 25, 2008) (evaluating due process claims under the Cheyenne and Arapaho Constitution). The *Johnson* court, in analyzing the reach of the Mashantucket Pequot Tribe’s own customs and traditions, declined to create a departure from federal and state standards where a particular issue does not impact an identifiable tribal custom. *Johnson*, 1998 WL 35234937 at *5.

Here, Respondents do not actually state whether the Cayuga Nation’s particular political, cultural, and economic needs customs conflict, in any way, with American due process jurisprudence and, if they do conflict, how due process is properly measured under Cayuga Nation law.⁴ Instead, Respondents merely recite the general legal principle that ICRA protections must fit the Cayuga Nation’ tribal customs and then address the merits of the Petition through U.S. case law. (See ECF No. 65 pp. 20 – 26). However, at bottom, process due under the ICRA in any instance must ensure that Mr. Parker’s banishment hearing was fundamentally fair and gave him an opportunity to defend himself at a meaningful time and in a meaningful manner. *Lassiter*, 452 U.S. at 24; *Baltas*, 162 F.4th at 72. With these boundaries in mind, it is clear that Mr. Parker’s banishment hearing violated his due process rights.

2. Respondents’ Bias Toward Mr. Parker

⁴ As the Nation itself states, the Haudenosaunee Great Law of Peace was greatly admired by many of the founding fathers and served as an inspiration for the democratic ideals underpinning the US Constitution itself, logically necessitating at least some similarities in the application of those ideals. <https://cayuganation-nsn.gov/about/history-and-culture/#element-panel-2>.

Mr. Parker's banishment hearing was void of procedural due process because Respondents adjudicated the hearing despite their well-documented instances of personal bias toward Mr. Parker and due to Respondents' pecuniary interest in removing a competitor to the Nation's own gas station business, which is controlled by Respondents.

One of the most fundamental aspects of due process is the right to a fair trial in a fair tribunal that is free of personal bias. *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 876 (2009). As explained by the Supreme Court, "[n]ot only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.'" *Withrow v. Larkin*, 421 U.S. 35, 47 (1975) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Though there is a general presumption of honesty and integrity afforded to those serving as adjudicators, and adjudicator's personal or pecuniary interest in the outcome of a case can raise a probability of bias that is too high to be constitutionally tolerable. *Id.*

Due to the difficulty in accurately determining a person's subjective opinions, the proper determination for bias is not whether an adjudicator harbors an actual, subjective bias—due process requires an objective standard to measure whether the risk of bias is constitutionally intolerable: "whether, 'under a realistic appraisal of psychological tendencies and human weakness,' the interest 'poses such a risk of actual bias or prejudice that the practice must be forbidden if the guarantee of due process is to be adequately implemented.'" *Caperton*, 556 U.S. at 883 (quoting *Withrow*, 421 U.S. at 47).

An adjudicator's pecuniary interest in the outcome of a case can serve as a level of potential bias that exceeds constitutional tolerance, even if that interest does not directly benefit them personally. *Ward v. Vil. of Monroeville, Ohio*, 409 U.S. 57, 60 (1972). In *Ward*, the Supreme Court reversed the Ohio Supreme Court and found that a local mayor's adjudication of matters in

the “mayor’s court” to be in violation of due process due to the mayor’s pecuniary interest in the outcome of the cases, as the fines, costs, and fees imposed by the mayor’s court constituted a significant portion of the village’s income. *Id.* at 58. Though the mayor himself did not directly share in the fees and costs imposed in the court, the Supreme Court noted that the mayor’s executive responsibilities for village finances itself posed a potentially serious temptation to impermissibly make partisan decisions that help maintain the high level of contribution from the mayor’s court. *Ward*, 409 U.S. 60 (holding that the mayor “occupies two practically and seriously inconsistent positions, one partisan and the other judicial”) (internal citations omitted).

Here, the record is replete with numerous examples of Respondents’ open and continuous enmity toward Mr. Parker and Respondents’ tacit omission of the Nation’s pecuniary interest in removing Mr. Parker as a competitor. The Petition discusses how the Halftown Faction have been aggressively targeting Traditionalists, including Mr. Parker, as a means to consolidate power, legitimize their disputed leadership, and silence dissent. (*See* ECF No. 1 ¶¶ 16 – 91).

As to Mr. Parker specifically, the Petition likewise alleges that Respondents have engaged in repeated, oppressive attempts to shut down Pipekeepers and remove Mr. Parker from the Nation prior to the adoption of the Banishment Ordinance, including: filing suit in the Western District of NY and the Nation’s court for an injunction against Pipekeepers, filing an Order to Show Cause for contempt of tribal court with one-day advance notice, purchasing the land upon which the original Pipekeepers sat and raiding the store at 2 am (within only ten days of the finding of contempt), seizing over \$400,000 worth of retail items from Pipekeepers without compensation to Mr. Parker, opening a Nation store at the site of the first Pipekeepers and selling the inventory seized from Mr. Parker for a profit, initiating a RICO action against Mr. Parker before this Court, and securing a writ of execution that permitted the Nation to seize the deed to Mr. Parker’s

privately-owned residence and all of his personal property and money to satisfy contempt fines. (*See id.* ¶¶ 48 – 67). An objective view of Respondents’ past actions against Mr. Parker show a clear intent and continued effort to swiftly remove Mr. Parker from Nation lands by any means possible, even before Respondents issued Notice of Potential Banishment, and raise reasonable concern as to Respondents’ ability to have impartially heard Mr. Parker’s case for banishment. *Caperton*, 556 U.S. at 883.

Further, Respondents openly admit, both in the Notice of Potential Banishment and at the banishment hearing, that Mr. Parker’s operation of Pipekeepers threatened the Nation’s economic interests and the Cayuga Nation Council’s authority over the Nation’s economic matters. (ECF No. 48-3 p. 851 ¶¶ 8 – 20) (“As the Council is well aware the Nation operates several convenience stores and marijuana dispensaries. Those are the lifeblood of the Nation’s revenue... and Mr. Parker is attempting to take it from the Nation by unjustly competing with the Nation on its own business operations”); (*id.* p. 872 ¶¶ 18 – 20) (“The Council, you know, has chartered a number of businesses”). This interest is by no means small, Respondents alleged in separate litigation that Mr. Parker’s operation of Pipekeepers injured the Nation in the amount of five million dollars. (*See* 5:22-cv-00128-BKS-TWD).

Importantly, Mr. Parker is not stating, as Respondents suggest, that the Cayuga Nation Council is prohibited from adjudicating *any* banishment hearing, nor is Mr. Parker arguing that the Nation is prohibited from operating and overseeing Nation-approved businesses or limiting economic competition. Rather, the issue before the Court is whether *these* Respondents violated *this* Mr. Parker’s due process rights by adjudicating *this* specific banishment hearing, given the context of Respondents’ enmity toward Traditionalists generally, Mr. Parker specifically, and Respondents’ admitted and serious interest in preserving the Nation’s revenues from a direct

business competitor. *Ward*, 409 U.S. 60. Taking the entirety of the parties’ histories, and Respondents’ own representations, in their full context, it is clear that Respondents’ adjudication of the banishment hearing presented a massive potential for bias in violation of Mr. Parker’s right to a fair and impartial trial. *See Withrow*, 421 U.S. at 46-47.

3. Respondents’ Impermissible Combination of All Functions of Government

Mr. Parker’s banishment hearing was further void of procedural due process because Respondents drafted the Banishment Ordinance, determined to issue the Notice of Potential Banishment to Mr. Parker, and adjudicated the hearing themselves. Mr. Parker is not, as Respondents assume, suggesting that the Nation is required to have a three-branched system of government akin to that of the United States. The salient point is that Respondents, who (as stated above) evince significant bias toward Mr. Parker and significant pecuniary interest in his removal, further foreclosed any meaningful opportunity for Mr. Parker to defend himself by subsuming all vital functions of the creation, implementation, and interpretation of the Banishment Ordinance against Mr. Parker.

The doctrine of separation of powers exists to preserve the liberty of the people by preventing the concentration of power in the hands of any one person or entity. *Collins v. Yellen*, 594 U.S. 220, 245 (2021). In the context of tribunals, this principle is demonstrated in the due process axiom that “no man can be a judge in his own case.” *Williams v. Pennsylvania*, 579 U.S. 1, 8 (2016) (quoting *In re Murchison*, 349 US 133, 136 (1955)). In *Murchison*, the Supreme Court applied this principle in reversing convictions obtained through a process, then permitted under Michigan law, in which a judge could act as a “one-man grand jury” by calling witnesses to testify about suspected crimes in a closed court. *Id.* at 137 (“It would be very strange if our system of law permitted a judge to act as a grand jury and then try the very persons accused as a result of his investigations”).

As such, the proper question before the Court is not whether the Cayuga Nation is required to have a three-branched system of government but whether Respondents' omnipresent role in every major aspect surrounding the enactment and application (as to Mr. Parker) of the Banishment Ordinance created a level of bias that deprived Mr. Parker of his right to a meaningful and fair opportunity to defend himself. *Baltas*, 162 F.4th at 72. As with all due process analyses, this question cannot be answered by reliance on formulaic procedure or by viewing the doctrine of separation of powers in a vacuum; the Court must evaluate the entire context of the events leading up to the banishment hearing, the hearing itself, and the relationship between the parties to determine whether Respondents deprived Mr. Parker of his fundamental right to a fair trial. *Buck*, 553 F.2d at 318.

In that context, the answer is obviously "yes." As stated above, Respondents' enmity toward Mr. Parker and pecuniary interest in seeing him removed from the Nation already created sufficient bias to deprive Mr. Parker of his due process rights. Respondents made this bias even more impactful by assuming the role of drafting the Banishment Ordinance, investigating Mr. Parker's violation of the ordinance, determining to issue charges, and adjudicating the banishment hearing. This consolidation of authority increased the impact of Respondents' bias toward Mr. Parker in the banishment hearing, as it removed the possibility of other, more neutral, members of the Nation from balancing Respondents' particular interest in the outcome of the proceeding.

4. Mr. Parker's Lack of a Meaningful Opportunity to Defend Himself

The banishment hearing also violated Mr. Parker's right to due process in that it denied Mr. Parker sufficient notice of the charges before him, and sufficient mechanisms within the hearing to have a meaningful opportunity to defend himself. Again, the Court must analyze these allegations within the entire context of the events leading up to the banishment hearing and the hearing itself, not in a vacuum. *Buck*, 553 F.2d at 318.

As stated in the Petition, Respondents never apprised Mr. Parker of the burden of proof that the Nation's attorney needed to meet in order for Respondents to validly find Mr. Parker satisfied the elements of banishment, or whether the burden was on the Nation's attorney or Mr. Parker himself. (ECF No. 1 ¶ 74). Mr. Parker was likewise not afforded a full attempt at discovery prior to hearing and was only permitted an opportunity to review Respondents' evidence two days prior to trial. (ECF No. 65 p. 17). This raises further concerns as to whether Respondents provided Mr. Parker a meaningful opportunity to defend himself. *Baltas*, 162 F.4th at 72.

In sum, the above allegations, taken in their whole, demonstrate a severe level of bias that denied Mr. Parker his due process right to a fair and meaningful hearing. Respondents' general appeals to tribal self-governance and vague, unsubstantiated assertions of "tribal customs" are irrelevant to the question of what process was due to Mr. Parker *in the banishment hearing* and whether such process was denied by Respondents' actions. For those reasons, the Court should find that the banishment hearing was held in violation of Mr. Parker's due process rights.

5. The Nation's Court Did Not Provide an Adequate Remedy

Respondents finally attempt to avoid liability for their denial of Mr. Parker's due process rights by pointing out that he had, and exercised, the right to review Respondents' determination in the Nation's Court. However, the Nation's Court does not provide an adequate remedy in this case, as the Nation's Court does not consider banishment "detention" for the purposes of habeas corpus, and otherwise does not permit challenges to government action under the principle of tribal sovereignty.

The Second Circuit has ruled that New York Article 78 court provides an adequate post deprivation remedy because it provides a hearing, a means of redress, and a trial if needed; Article 78 Courts also have jurisdiction to determine constitutional issues. *Hellenic Am. Neighborhood Action Comm. v City of New York*, 101 F3d 877, 881 (2d Cir. 1996).

Here, the Nation’s Courts provide no mechanism to actually bring a habeas corpus petition challenging the Banishment Ordinance, as Cayuga Nation Rule 31 does not consider banishment to constitute detention and refused to acknowledge *Poodry* as a basis for jurisdiction pursuant to the ICRA, under the Cayuga Nation’s principles of sovereign immunity. (ECF No. 1-14 pp. 4 – 5). Further, though the Court addressed some of the merits of the Petition, it did not address the most significant allegations—that Respondents’ bias deprived Mr. Parker of his due process rights at the banishment hearing—and focus solely on the issue of notice. (*Id.*) On appeal, the Cayuga Nation Court of Appeals affirmed that banishment did amount to detention for the purposes of habeas corpus under Cayuga Nation Rule 31, affirmed that the Cayuga Nation did not adopt *Poodry*, and stated that “to the extent Appellants assert these five causes of action as claims separate and distinct from the application of the writ of habeas corpus, such claims are barred by sovereign immunity.” (ECF. No. 48-1 pp. 1 – 2). The Court of Appeals did not address the merits of the allegations. *Id.*

As such, Respondents cannot credibly claim that Mr. Parker was given a sufficient post deprivation remedy, as the Cayuga Nation *expressly does not permit a litigant to challenge a banishment*, either under habeas corpus, or general suit. Judge Fahey’s discussion of the merits likewise did not constitute any kind of remedy, both due to the bar of litigation under sovereign immunity, and because it ignored the bulk of the allegations as to the merits of the due process claim.

For this reason, the Court should find that Mr. Parker was not granted an adequate post deprivation remedy and find that the banishment hearing violated Mr. Parker’s right to due process.

B. Ex Post Facto Law

The Court should additionally find that Mr. Parker’s banishment constitutes an *ex post facto* punishment as it specifically listed the past operation of Pipekeepers, prior to the passage of

the Banishment Ordinance, as one of the grounds for Mr. Parker's Banishment. "When a law increases the penalty for an offense, the *Ex Post Facto* Clause forbids its application to an offense that was completed before the law's enactment." *United States v. Labeille-Soto*, 163 F.3d 93, 102 (2d Cir. 1998); *see also Weaver v. Graham*, 450 U.S. 24, 28 (1981). The purpose of this prohibition is to ensure "that legislative acts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." *Weaver*, 450 U.S. at 28-29.

For a law to have an *ex post facto* impact, it must apply to events that occurred prior to the law's enactment, and it must disadvantage the offender affected by it. *Id.* at 29. Because the *ex post facto* clause prohibition is related to fair notice and government restraint, rather than any one individual's right to "less punishment," a law need not touch upon an affirmative, enforceable right in order to be prohibited under the *ex post facto* clause. *Id.* at 30. For the purposes of retroactivity, an offense is considered "completed" as soon as every element within the crime occurs. *United States v. Sampson*, 898 F.3d 270, 277 (2d Cir. 2018); *see also Labeille-Soto*, 163 F.3d at 102 (holding that increase in special assessment amount constituted *ex post facto* law because crime of attempted entry into U.S. was completed as of date of arrest, over a year before effective date of new assessment amount).

Here, the imposition of banishment as a punishment for Mr. Parker's past violation of the Business Ordinance constitutes an *ex post facto* law. The Business Ordinance states that "[a]ny person who engages or operates a business on Nation land without a business license issued pursuant to this Ordinance" is subject to fines and penalties including (a) revocation of an issued license, (b) civil fines not to exceed \$1,000 a day, plus interest, following notice of the relevant violation, with each day that a violation continues to *constitute a separate violation for purposes of calculating fines*, or (c) seizure of property located on Nation land to satisfy unpaid

fines/eviction. (ECF No. 1-2 Art. X). Mr. Parker was served with notice that he was operating Pipekeepers without a license on October 21, 2021. (ECF No. 1 ¶ 46). On February 28, 2023, Mr. Parker received the Notice of Potential Banishment, which listed four bases for the potential banishment “each of which, if established, constitutes independent grounds for banishment under Section 2.3 of the Banishment Ordinance.” (ECF No. 1-6). Two of these bases were: (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; and (2) Previously 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. (ECF No. 1-6). The Notice of Total Banishment, served on Mr. Parker after the banishment hearing, confirmed that the Halftown Respondents “unanimously made factual findings that Dustin Parker engaged in the following conduct” which includes the two above-stated grounds for banishment. (ECF No. 1-7).⁵

As such, both essential elements of the *ex post facto* clause are present here. *Weaver*, 450 U.S. at 29. The Notice of Potential Banishment clearly distinguishes between two independent grounds for banishment, the current (and continuing) operation of Pipekeepers and the *past* operation of Pipekeepers. This distinction carves out punishment for previous, concluded operation of the Business license that, at the time of those violations, were punishable by fines not to exceed \$1,000 per day or seizure of property. At the time of the Notice of Potential Banishment, the punishment for those already concluded past events was upgraded from fines to banishment,

⁵ Further, in the banishment hearing, counsel for the Nation discussed Mr. Parker’s operations of Pipekeepers as far back as 2021 as part of its case for banishment. (ECF No. 48-3 pp. 832 – 851).

which the Second Circuit expressly held as a severe restraint of liberty beyond that of economic restraint. *Shenandoah II*, 366 F.3d at 92.

As Respondents found that Mr. Parker's prior operation of Pipekeepers constituted an independent basis to permanently banish him from the Nation, Mr. Parker was unable to avoid the punishment of banishment upon receiving notice of the new penalty, regardless of the action taken. Even if Mr. Parker immediately stopped the operation of Pipekeepers in response to the newly created Banishment Ordinance, he still would have been banished based on the operation of Pipekeepers that occurred prior to the creation of the ordinance.

Respondents' argument that the Banishment Ordinance is not a criminal penalty is unavailing for the same reasons stated above (*Supra*, I). Respondents' further argument that the violation of the Business Ordinance constituted an ongoing conduct is likewise foreclosed by the language of the Notice of Potential Banishment and Notice of Permanent Banishment, which distinguished between the *prior* operation of Pipekeepers and the *current* operation of Pipekeepers as two separate, independent grounds for banishment. (ECF No. 1-6; 1-7). Such a distinction is logically inconsistent with Respondents' argument here that Mr. Parker's operation of Pipekeepers was treated as a single, continuous violation.

Finally, Respondents' argument that the prior operation of Pipekeepers was simply an enhancement statute is incorrect. An enhancement statute is one that does not change the penalty imposed for a previous conviction, but rather affects the penalty of *only the last offense* based on a pattern of repeated convictions. *Nichols v. United States*, 511 U.S. 738, 747 (1994). Here, the Notices of Potential and Permanent Banishment listed the prior operation of Pipekeepers as an *independent ground* for banishment, not as a basis to justify banishment for the current operation of Pipekeepers. The Banishment Ordinance simply states that operation of a business without a

license under the Nation’s Business Ordinance is punishable by banishment; it does not require any specific period or pattern of non-compliance, nor does the ordinance include any heightened punishment upon a finding of willful or continuous action. (*See* ECF No. 1-5). The banishment hearing itself contained no discussion of Mr. Parker’s conduct being considered for the purposes of “enhancement.” Simply, the prior and current operation of Pipekeepers were both found to be an independent basis for Mr. Parker’s banishment and the penalty for each violation is the same, singular penalty afforded under the ordinance—banishment. There is no basis to find that the Banishment Ordinance served in anyway as an “enhancement statute.”

For this reason, the Court should find that the Banishment Ordinance, as applied to Mr. Parker, constituted an *ex post facto* law and order that the Notice of Total Banishment be vacated as to the prior operation of Pipekeepers.

CONCLUSION

For the foregoing reasons, Mr. Parker respectfully requests the Court grant the Petition and issue a Writ of Habeas Corpus vacating the Notice of Total Banishment.

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