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Court of Appeals

of the

State of New York

CAYUGA NATION, by and through its lawful governing body,
the CAYUGA NATION COUNCIL,

Plaintiff-Respondent,

– against –

SAMUEL CAMPBELL, CHESTER ISAAC, JUSTIN BENNETT KARL HILL, SAMUEL GEORGE, DANIEL HILL, TYLER SENECA, MARTIN LAY, WILLIAM JACOBS, WARREN JOHN, WANDA JOHN, BRENDA BENNETT, PAMELA ISAAC, *et al*.,

Defendants-Appellants,

– and –

DUSTIN PARKER,

Defendant in Default,

– and –

COUNTY OF SENECA,

Defendant-Intervenor-Respondent.

BRIEF OF PLAINTIFF-RESPONDENT IN RESPONSE TO *AMICUS* BRIEF

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Plaintiff-Respondent the Cayuga Nation respectfully files this brief pursuant to Rule 500.12(f).

INTRODUCTION

Amici have filed a brief that rehashes the same arguments made by Defendants. Like Defendants, *Amici* say that "[b]ecause the present action would require this Court to pass judgment on the Nation's ongoing leadership dispute," the case is beyond this Court's jurisdiction and must be dismissed. *Amici* Br. 7; *see* Br. for Defts/Appellants 28-29 ("Defts' Br."). And like Defendants, *Amici* claim that Defendants should be regarded as the Cayuga Nation's true leaders under Cayuga law. *Amici* Br. 1-4, 11-14; Defts' Br. 6-9.

These parallels in argument are no coincidence. Although the named *Amici* are two law professors and two tribes, the brief's *author* is the same lawyer who represented Defendants in a federal suit they brought challenging the Department of the Interior's decision to recognize Plaintiff as the governing body of the Cayuga Nation, as identified by the Cayuga people. The District Court recently granted summary judgment to the Department of the Interior regarding that challenge, and the time to appeal the decision has expired. *Cayuga Nation v. Bernhardt*, No. CV 17-1923 (CKK), __ F. Supp. 3d __, 2019 WL 1130445, at *1 (D.D.C. Mar. 12, 2019).

Regardless, Defendants' arguments are no more persuasive when recycled through *Amici*. *Amici* simply ignore the 150-year-old rule that controls this case. When courts—state or federal—must identify the proper government of a foreign nation or an Indian tribe, they do not decide for *themselves* whom to recognize. They "follow the action of the executive and other political departments of the government, whose more special duty it is to determine such affairs." *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 419 (1865). That rule means New York courts have no occasion to undertake the inquiry *Amici* say is forbidden—to "pass judgment on the Nation's … leadership dispute." *Amici* Br. 7. And here, there is no dispute that the federal government has recognized Plaintiff, based on a Statement of Support process in which more than 60% of Cayuga citizens identified Plaintiff as the Nation's governing body. While Defendants and *Amici* insist that this process was not lawful under Cayuga law, they are in the wrong forum. In exercising its executive function to recognize another sovereign—here, a federally recognized Indian nation—the federal government has rejected those arguments, in decisions now affirmed by the U.S. District Court for the District of Colombia.

ARGUMENT

I. *Amici* Ignore The Controlling Rule, Which Is That Courts Follow Decisions Of The Federal Executive Branch Recognizing Other Sovereigns.

Amici's brief, filed three months after the parties had completed their briefing, does not respond to the central thrust of Plaintiff's argument and the decisions below—namely, that this case is controlled by the long-settled rule that, in matters of recognition of tribal and foreign sovereigns, courts do not make their own determinations, but rather "follow the action of the executive." *Holliday*, 70 U.S. (3 Wall.) at 419. The Supreme Court applied that rule in *Holliday*. The Second and D.C. Circuits more recently did so in *Cayuga Nation v. Tanner*, 824 F.3d 321 (2d Cir. 2016), and *Timbisha Shoshone Tribe v. Salazar*, 678 F.3d 935 (D.C. Cir. 2012). And this Court has long applied this rule in the context of foreign sovereigns. Br. for Pltf./Respondent 44-46 ("Pltf's Br."); *see Russian Socialist Federated Soviet Republic v. Cibrario*, 235 N.Y. 255, 261-62 (1923). *Amici*'s silence is no surprise: Defendants' reply brief also did not even attempt an answer.

Ignoring this rule, however, does not make it less dispositive. *Amici* and Defendants build their argument on the premise that this case calls upon New York courts to *themselves* resolve the Nation's leadership dispute. *Amici* Br. 7; Defts' Br. 28-29. But as this settled rule shows, this premise is false. There is thus no obstacle to New York courts exercising the jurisdiction that the State Assembly conferred.

Pltf's Br. 26-27. And far from undermining the "right of Indian nations to determine their leadership," *Holliday*'s rule furthers that right—by ensuring that citizens of Indian nations, like citizens of foreign nations, can resolve their governmental disputes and have those resolutions respected by courts. Pltf's Br. 28. By contrast, the contrary approach of Defendants and *Amici* would undermine both tribal self-government and law-and-order. It would leave Indian nations with no rights of access to the courts, as all other persons and entities possess, whenever there were any claim of any kind to rightful leadership within the nation. *Id.* at 48-49.

Amici's citations underscore that they have no answer to *Holliday*'s rule. In each of the cases they invoke, there was no federal recognition decision that the courts could follow. *Amici* Br. 5. Indeed, in *Healy Lake Village v. Mt. McKinley Bank*, 322 P.3d 866 (Alaska 2014), the BIA expressly "rescinded [the] letter" in which it had previously recognized a tribal government, making clear that the BIA took no position. *Id.* at 869. In *First Bank & Trust Co. v. Cheyenne & Arapaho Tribes*, No. 110,909, 2015 WL 1029945, at *4 (Okla. Civ. App. Feb. 23, 2015), there was no hint of any federal involvement at all. And *People ex rel. Becerra v. Huber*, 32 Cal. App. 5th 524, 537 (2019), did not even involve a leadership dispute—it merely cited *Healy Lake* in dicta immaterial to this case. As for *Bowen v. Doyle*, 880 F. Supp. 99 (W.D.N.Y. 1995), Plaintiff has explained at length why it is

irrelevant—without any response from Defendants in their reply or *Amici* in their new filing. Pltf's Br. 52-54.[1]

II. *Amici* Cannot Avoid The Fact That The Federal Sovereign Recognizes Plaintiff As The Cayuga Nation Sovereign.

Amici do not dispute that the federal government has recognized Plaintiff as the Cayuga Nation's governing body. Nor could they. In 2016, the Bureau of Indian Affairs ("BIA") "recognize[d] the Halftown Council [*i.e.*, Plaintiff] as the governing body of the Cayuga Nation." A-38.[2] It explained that the Nation's "Statement of Support" process, in which a "significant majority of the Cayuga citizens" identified Plaintiff as the Nation's governing body, reflected the "resolution of a tribal dispute by a tribal mechanism" that the BIA was "obligated to recognize"—and that this process was consistent with Cayuga law reserving "specially important" matters for decision by the Cayuga people. A-5-6, A-29-30. In 2017, that decision was affirmed by the Assistant Secretary–Indian Affairs of the Department of the Interior. Pltf's Br. 15-16; RA-33-60. And in March 2019, a federal district court reached the same result, rejecting Defendants' challenges under the federal Administrative Procedure Act and due process. *Bernhardt*, 2019 WL 1130445, at *1. The time to appeal that

[1] *Amici* emphasize that this case concerns land on the Nation's reservation. *Amici* Br. 5-6. But they ignore that New York courts have long exercised jurisdiction over property on a reservation, even where ownership is a question of tribal law. Pltf's Br. 25. *Amici* also ignore that the properties here are owned in fee simple and are thus subject to certain state authority under *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). *See* Pltf's Br. 8-9, 54-55.

[2] "RA-__" refers to Respondent's Appendix filed with this brief; "A-__" refers to Appellants' Appendix.

ruling has expired, and Defendants did not challenge it. Although *Amici* attempt to downplay the significance of those decisions, their arguments are meritless.

First, *Amici* suggest that the Statement of Support was unlawful under Cayuga law. *Amici* Br. 1-4, 11-14. But *Amici*—none of whom have any expertise in Cayuga law[3]—direct those arguments to the wrong forum. The decision about whether to recognize the results of the Statement of Support rested with the federal executive, and the federal executive has made its choice. This Court has no occasion to, and cannot, reweigh that choice for itself. While *Amici* claim that the federal government "never passed judgment" on the relevant questions "under Cayuga law," *see Amici* Br. 8, that is simply false. *Amici*'s various arguments have now been considered and rejected by the BIA, the Department of the Interior, and the U.S. District Court.[4]

[3] While *Amici* claim knowledge of "the Haudenosaunee Great Law of Peace," *see* Affirmation of Alexandra C. Page in Support of Motion for Leave to File Brief As *Amicus Curiae* ¶ 4, the Great Law is an unwritten tradition, and different Haudenosaunee Nations have different understandings of the Great Law, *Bernhardt*, 2019 WL 1130445, at *9.

[4] *Compare Amici* Br. 1-4, 13-14 (arguing that Statement of Support was inconsistent with Cayuga law concerning clans, clan representatives, and clan mothers), *with Bernhardt*, 2019 WL 1130445, at *8-10 (the federal government's "determination that the [Statement of Support] was a valid mechanism for selecting members of the Cayuga Nation Council was not contrary to Cayuga law," notwithstanding Defendants' arguments that it was inconsistent with "the Nation's traditional clan-based framework," "clan mothers[']traditional authority," and Defendants' views of the "lawful Cayuga Nation Council"), *and* RA-44-48 (similar), *and* A-30-32, A-33-35 (similar); *compare Amici* Br. 12 (claiming inaccuracies in the "membership roll" used for the Statement of Support), *with Bernhardt*, 2019 WL 1130445, at *14 (the federal government "carefully scrutinized the membership roll as it related to the [Statement of Support] campaign" and there is no "evidence showing that … [the] decision to rely on the membership roll maintained by the Nation's secretary was unreasonable"), *and* RA-55-56 (similar), *and* A-32-33 (similar); *compare Amici* Br. 12 (arguing that the Statement of Support was invalid because Cayuga citizens received "cash payments"), *with Bernhardt*, 2019 WL 1130445, at *13 (in fact, these payments reflected "pre-planned distribution[s]" that Cayuga citizens were entitled to receive, and "it is speculation at best

Second, *Amici* claim that the federal government's recognition decision is not controlling because the federal government made that decision for a specific purpose—namely, because the federal government had to identify the proper governing body to receive federal funds under a federal statute. *Amici* Br. 8. Plaintiff has already answered this argument. Pltf's Br. 30-31, 33-35. The kind of "limiting language" on which *Amici* rely is present in *every* BIA decision—because BIA's view is that it may not "issu[e] a recognition decision" unless some BIA "purpose requires recognition." *Tanner*, 824 F.3d at 329. But this does not mean courts *ignore* the federal government's recognition decision. When the federal executive recognizes the government of (say) Russia, it does so because there is some specific federal need to do so—yet courts do not limit their deference to whatever matter happened to spur the federal government's recognition decision. *Russian Socialist Federated Soviet Republic*, 235 N.Y. at 263-65 (following, in common-law suit, a federal recognition decision adopted in connection with "armistice negotiations" and "trade proposals"). And so it is with Indian tribes. Thus, the Second Circuit in *Tanner* followed the federal government's recognition

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to assume that voters would have felt beholden to support the [Statement of Support] simply because they had recently received" these payments), *and* RA-58-59 (similar), *and* A-36 (similar); *compare Amici* Br. 12 (arguing that the Statement of Support was invalid because it used "biased language"), *with Bernhardt*, 2019 WL 1130445, at *13 ("[T]here was no evidence that this" supposedly biased language "would have confused or otherwise misled Cayuga voters given their small numbers, network of communal knowledge, and deep familiarity with the dispute …."), *and* RA-57-58 (similar), *and* A-35-37 (similar).

decision even though that decision was expressly "interim" and made "for purposes of administering existing ISDA contracts." *Tanner*, 824 F.3d at 329. Were it otherwise, Indian nations could *never* sue in court in the face of any leadership challenge—because, again, the Department of the Interior will make a recognition decision only when some particular federal purpose requires it. Pltf's Br. 33.

Here, *Amici*'s attempt to limit the federal recognition decision is especially meritless. Although the BIA indeed made that decision because a specific federal contracting statute required it, the BIA specifically foresaw and intended that its decision would have broader effects. It "identif[ied] five other reasons," besides the federal contract, that made a recognition decision necessary—including the need to identify who could "represent the Nation in court" and the very "instances of unrest and even violence" in Seneca County associated with Defendants' forcible takeover of the businesses and property at issue in this case. A-27-28; *see* Pltf's Br. 13-14, 35.

Amici also invoke other caveats on the federal government's recognition decision, stressing that it remained "the Nation's right, and responsibility, to determine how its governance will operate moving forward." *Amici* Br. 9 (quoting RA-47). But that merely means that the Nation's citizens, having resolved the leadership dispute through the Statement of Support process, are not forever bound to continue on their present path. Like other citizens, they remain free to make a

different choice in the future. And if they do, the federal government will defer to that new choice. *Amici*, however, do not suggest that anything has changed within the Nation since the Statement of Support process. Certainly, no one has prevailed upon the Department of the Interior to withdraw its recognition of Plaintiff as the sovereign authority of the Cayuga Nation. For present purposes, that is all that matters.

III. *Amici*'s Arguments About Sovereign Immunity Are Irrelevant.

Attempting to sow confusion, *Amici* claim that "sovereign immunity" may bar certain claims against certain Defendants. *Amici* Br. 6. But that issue is not part of this appeal. Below, Supreme Court held that sovereign immunity did not protect Defendants from the prospective injunctive relief that it granted in entering a preliminary injunction, and Supreme Court found it "too early to determine which defendants, if any, are immune from suit regarding their actions prior to the August 2, 2017 decision" of the Department of the Interior that recognized Plaintiff as the sovereign authority of the Nation. RA-9. And in this Court, Defendants have not argued that, even if Supreme Court was correct to follow the federal government's recognition decision, they are nonetheless immune from the injunction that Supreme Court awarded below. Instead, they have staked their case solely on the argument that Supreme Court "lacked subject matter jurisdiction" *entirely* because adjudicating the suit would inherently require New York courts "to resolve internal

governance disputes." Defts' Br. 2 (citing A-6-7). As *Amici*'s own citations recognize, sovereign immunity is a separate issue—and one outside the scope of this appeal. *See, e.g.*, *Healy Lake*, 322 P.3d at 878; *First Bank*, 2015 WL 1029945, at *4. "[A]n [*A*]*micus* has no status to present new issues." *Lezette v. Bd. of Educ.*, 35 N.Y.2d 272, 282 (1974).

CONCLUSION

The Appellate Division's order of July 25, 2018 was properly made, and it should be affirmed.

Dated: May 17, 2019

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NEW YORK STATE COURT OF APPEALS
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Dated: May 17, 2019

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