State of New York
Court of Appeals

OPINION

No. 70
Cayuga Nation, &c.,
Respondent,
v.
Samuel Campbell, et al.,
Appellants,
County of Seneca,
Intervenor.

Margaret A. Murphy, for appellants.
David W. DeBruin, for respondent.
Tonawanda Seneca Nation, et al., amici curiae.

FEINMAN, J.:

Members of the Cayuga Nation, a federally-recognized Indian[1] tribe, have been embroiled in a leadership dispute for more than a decade. One faction commenced this

[1] To conform with the statutes at issue and with the phrasing adopted by the parties, the term "Indians" will be used to refer to the members of the Cayuga Nation, or more generally, to the indigenous peoples of North America.

action, purportedly on behalf of the Nation, against individuals comprising the rival faction, asserting tort claims that are premised solely on defendants' alleged lack of authority to act on behalf of the Nation. To resolve these claims, New York courts would have to decide whether defendants were, at various times, or remain legitimate leaders of the tribe, a question that turns on disputed issues of tribal law that are not cognizable in the courts of this state given the Nation's exclusive authority over its internal affairs. Contrary to plaintiff's contentions, we cannot avoid this fundamental jurisdictional problem by decontextualizing a limited recognition determination issued by the Federal Bureau of Indian Affairs (BIA) that recognized the plaintiff faction as the tribal government for the purpose of distributing federal funds. We therefore hold that New York courts lack subject matter jurisdiction to consider this dispute.

I.

The Cayuga Nation (the Nation) owns and occupies land in western New York State, including several properties at issue here. As part of the Iroquois Confederacy, the Nation entered into several treaties yielding certain pre-existing rights to the federal government during the late eighteenth century. However, certain inherent rights were retained. Specifically, the Nation maintains its right to sovereignty over its internal affairs. The Nation adheres to unwritten oral law and tradition, instructed by the Great Law of Peace, Gayanashagowa (the Great Law). The Great Law governs the process by which the Nation's clan mothers select, approve, and retain the power to remove the condoled chiefs who comprise the Cayuga Nation Council (the Nation Council), which governs the Nation

by consensus decision-making (George et al v Eastern Regional Director, Bureau of Indian Affairs, 49 IBIA 164, 167, 2009 WL 1664693, at **2-3 [2009]).[2] The Nation relies on "the Council itself" and not any "written law, court, or body other than the Council . . . for resolving disputes that arise within the Council" (George, 49 IBIA at 167).

The Nation's present leadership dispute arose in 2004 when the Nation Council fragmented—certain Council members (which included defendant William Jacobs and comprise part of the defendant "Jacobs Council") claimed that other Council members (which included Clint Halftown and comprise part of plaintiff "Halftown Council") had been removed from their positions on the Nation Council under Cayuga law.[3] After a decade of continued division that is well-chronicled in numerous proceedings before the Interior Board of Indian Appeals (IBIA) and federal courts (see Cayuga Nation v Tanner, 824 F3d 321 [2d Cir 2016]; Cayuga Indian Nation of New York v Eastern Regional

[2] The Nation is one of "[t]he [Six Nations of the Iroquois] Confederacy, or the 'Haudenosaunee' (People of the Longhouse), as they call themselves" and which refers to the historical alliance between the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora Nations" (Robert B. Porter, Note, The Jurisdictional Relationship Between the Iroquois and New York State: An Analysis of 25 U.S.C. §§ 232, 233, 27 Harv J on Legis 497, 497 & n 1 [1990] [internal citation omitted]). There are five clans comprising the Nation (Heron, Bear, Snipe, Wolf, and Turtle), and the clan mothers from each respective clan are empowered to designate two "full-blooded chiefs" to be approved through a condolence ceremony held before the "Grand Council of chiefs" from the Six Nations to form the Nation Council (see George, 49 IBIA at 167). The clan mothers play a central role in Nation governance including, upon consultation with clan members, providing recommendations to the chief of her clan on tribal matters (see Poodry v Tonawanda Band of Seneca Indians, 85 F3d 874, 877 [2d Cir 1996]).

[3] Plaintiff in this action is the Halftown Council (on behalf of the Nation) and defendants are members or affiliates of the Jacobs Council. For ease of reference, throughout this opinion we refer to the parties by the names of their respective councils.

Director, Bur. Of Indian Affairs, 58 IBIA 172 [2014]; George, 49 IBIA at 164),[4] in April 2014, the Jacobs Council entered and thereafter took possession of the Nation's security office and seized several sets of keys to the Nation's offices, businesses, vehicles, and certain personal property.[5] The Halftown Council initially filed a lawsuit alleging trespass and other claims premised on these events in 2014, which was dismissed for lack of subject matter jurisdiction (see Cayuga Nation v Jacobs, 44 Misc 3d 389, 394 [Sup Ct, Seneca County 2014]). Supreme Court reasoned that it lacked jurisdiction over the claims before it because "the underlying allegations . . . are fundamentally founded upon the longstanding question of who has the right to lead the Nation" (id.). Thus, it could not adjudicate the

[4] As relevant here, in 2006, the BIA declined to withdraw recognition of Halftown as the Nation's federal representative, despite a five-to-one Council vote to remove him and allegations of misuse of funds. That determination was affirmed by the IBIA in part due to a lack of evidence that the Nation permitted decisions by majority vote over the objections of a member (George, 49 IBIA at 165). Subsequently, in 2011, the clan mothers of the Nation "reformed" the Nation Council pursuant to the Great Law, by replacing three of its six members previously recognized by the BIA, including Halftown. Although the BIA initially recognized the reformation, which reflected the Council composition supported by the Jacobs Council, the BIA's determination was subsequently vacated by the IBIA (see Cayuga Indian Nation, 58 IBIA at 171 [concluding that the BIA should not have addressed the leadership dispute because it has no independent authority to do so and there was no separate matter pending before the BIA that made such a decision necessary for the purposes of the federal government's relationship with the tribe]).

[5] To the extent it is suggested that the disputed properties were purchased by the Halftown Council (Garcia, J., dissenting op at 2), the record indicates that the Nation purchased the land in 2004, at a time when members of both factions sat on the Nation Council. The parties agree—and we accept for purposes of this appeal—that the disputed real property is owned by the Nation and is located on reservation land (Respondent's Br. at 8-9). Our resolution of this appeal, however, does not depend on the reservation status of the property (see Tanner, 824 F3d at 325 n 3 [finding that the Supreme Court's decision in City of Sherrill, N.Y. v Oneida Indian Nation of New York, 544 US 197 (2005) has "no bearing on the issues of subject matter jurisdiction or standing"]).

dispute "without interfering with tribal sovereignty and self[-]government" (id.).

As the leadership dispute persisted, federal contracting processes prompted further BIA involvement. The Nation provides infrastructure, education, and other services to its citizens with funds issued under the Federal Indian Self-Determination and Education Assistance Act (ISDA) (see PL 93-638). For the purpose of modifications to the Nation's ISDA contract, in 2015, the BIA recognized the last undisputed Nation Council (comprised of both Halftown and Jacobs Council members) on an interim basis. At that time, the BIA declined to make a more formal recognition decision or verify the results of a "statement of support" campaign undertaken by the Halftown Council, noting the absence of any authority permitting such campaign and that Halftown previously had rejected majority vote concepts as contrary to tribal law. The BIA urged the Nation to resolve the leadership dispute internally.

In 2016, the Halftown Council undertook another statement of support campaign. This time, the Halftown Council transmitted to members of the Nation—based upon the Halftown Council's own records of the Nation's membership roll—a governance document setting forth the leadership selection process, a statement of support for that process, and a statement of support recognizing the members of the Halftown Council as the Nation's lawful leadership, asking the recipients to return mailers indicating their support if they agreed with those proposals. The Jacobs Council opposed the initiative, refused to participate, and sent a counterstatement to each individual who received the Halftown Council's mailing objecting to the statement of support process as incompatible with Cayuga law and traditional consensus decision-making by chiefs and clan mothers.

Meanwhile, the Halftown and Jacobs Councils submitted competing proposals for new ISDA contracts to the BIA (see 25 USC § 5321), and the BIA notified them that it needed to recognize one faction for the purpose of executing the contract.

In recognizing the Halftown Council as the governing body authorized to contract on behalf of the Nation for ISDA funding, the BIA's Eastern Regional Director relied upon the results of the statement of support initiative—which it now deemed consistent with the Great Law—as "adequate evidence" that the Halftown Council represented the Nation. The Regional Director observed, however, that while his decision "accept[ed] the arguments put forward by the Halftown Council that the statement of support campaign . . . demonstrated the legitimacy of that Council . . . [,] [f]urther application of the statement of support campaign to determine future Cayuga Nation decisions will be in the hands of the Cayuga citizens and leaders." Thus, "[g]oing forward, the meaning of the statement of support campaign [would be] a question of Cayuga Nation law."

That 2016 determination was upheld on administrative appeal by the Assistant Secretary of Indian Affairs. Although the Assistant Secretary agreed that the statement of support process was consistent with the Great Law and that "[the] BIA may interpret tribal law in the limited circumstances [here]," he emphasized that "[f]ederal officials must still be cautious to defer to the tribe's interpretation of its own laws and its ability to internally resolve its disputes." The 2016 BIA determination was also upheld in a related federal action, in which the United States District Court for the District of Columbia denied the Jacobs Council's motion for summary judgment, and held that the Jacobs Council had not established that the BIA determination violated the federal Administrative Procedure Act

or due process (see The Cayuga Nation v Bernhardt, 374 F Supp 3d 1 [D DC 2019]).

In July 2017, the Halftown Council, styled as the "Cayuga Nation, by and through its lawful governing body, the Cayuga Nation Council," commenced this action against the Jacobs Council raising causes of action sounding in trespass, conversion, tortious interference with prospective business relations, replevin, and ejectment, and seeking monetary and injunctive relief arising from the Jacobs Council's ongoing possession and control of the Nation's property. The complaint sought damages from the date of the "takeover" to the present. Unlike in the 2014 action, Supreme Court denied the Jacobs Council's motion to dismiss for lack of subject matter jurisdiction (see Cayuga Nation v Campbell, No. 51342, 2017 WL 4079004, at *1 [Sup Ct, Seneca County Sept 8, 2017]). The court "d[id] not dispute the defendants' assertion that the [c]ourt lacks subject matter jurisdiction over internal Indian Nation government disputes" but reasoned that it would not be required to determine the rightful leader of the Nation because it could instead "accept and act upon the determination made by the BIA that Clint Halftown is the recognized representative of the Nation" (id. at *2). The court further held that "it is too early to determine which defendants, if any, are immune from suit regarding their actions prior to the BIA decision," and opined that "defendants have failed to prove they are immune from this suit as far as their present and future occupancy of the Nation premises is concerned" (id.). To that end, the court issued a preliminary injunction requiring the Jacobs Council to vacate the Nation's properties (id. at *3).

The Jacobs Council appealed, as relevant here, from the denial of their motion to dismiss the complaint for lack of subject matter jurisdiction, and the Appellate Division

affirmed with two Justices dissenting (163 AD3d 1500 [4th Dept 2018]). Like Supreme Court, the majority concluded that although New York courts "lack authority to resolve internal disputes about tribal law or governance," it would accord "due deference" to the BIA's conclusion that the Nation had resolved its leadership dispute in favor of the Halftown Council, thus allowing it to address the merits of the action (id. at 1504, 1505). The majority stressed that it was not determining which party "is the proper governing body of the Nation, nor d[id] [its] determination prevent the Nation from resolving that dispute differently according to its law in the future" (id. at 1505).

The dissent contested the majority's assumption that it was required to defer to the BIA's determination and exercise jurisdiction over the dispute (id. at 1506). Emphasizing the narrow scope of that determination, the dissent opined that the BIA undertook only to resolve which governing council to recognize for purposes of maintaining a governmental relationship with the Nation given the competing ISDA contract proposals (id. at 1507). Thus, the dissent concluded that New York state courts could not exercise jurisdiction because "the issue of defendants' legitimate authority or justification is material to each of the causes of action in the complaint" (id. at 1508, 1506). The dissent also observed that the complaint encompassed conduct that predated the 2017 affirmation of the BIA's recognition decision by the Assistant Secretary of Indian Affairs by approximately three years, requiring courts to resolve issues of tribal law as to that period regardless of the BIA decision (id. at 1506). With regard to the remainder of the period addressed by the complaint, the dissent explained that deference to the BIA decision did not resolve the jurisdictional problem as, due to its limited scope and import, that decision did not

foreclose the Jacobs Council's defense—that they continued to be the rightful leaders authorized to occupy the properties at issue under Cayuga law (id. at 1506-1507).

The Appellate Division granted leave to appeal to this Court and certified the question as to whether its order was properly made (see 164 AD3d 1673 [4th Dept 2018]). We reverse and answer the certified question in the negative.

II.

The Halftown Council primarily contends—and the courts below agreed—that although New York courts generally lack the ability to resolve an intra-tribal leadership dispute, here, they need not do so because the BIA's recognition determination established the Halftown Council as the Nation's lawful Council. To that effect, the Halftown Council argues that the courts of this state are required to defer to that determination in order to allow the Halftown Council to vindicate the Nation's legal rights through commencing litigation. Conversely, the Jacobs Council characterizes this matter as an internal tribal governance dispute over which the Nation has exclusive sovereignty, regardless of the BIA's limited recognition of the Halftown Council as the Nation's governing leadership for federal contracting purposes. We agree with the Jacobs Council. While it may be appropriate to defer to the BIA's determination for the purpose of permitting the Halftown Council to commence litigation on behalf of the Nation, the BIA determination does not resolve the disputed issues of tribal law implicated by the merits of this action. Thus, permitting this action to proceed would require our state courts to pass upon an internal tribal governance dispute over which we lack subject matter jurisdiction.

A.

The question of subject matter jurisdiction occasioned by this appeal is a "question of judicial power: whether the court has the power, conferred by the Constitution or statute, to entertain the case before it" (Ballard v HSBC Bank USA, 6 NY3d 658, 663 [2006] [internal quotation marks and citation omitted]).

Our analysis begins with an overview of governing principles of federal Indian law. The United States Supreme Court has reiterated that "[i]f state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law" (Iowa Mut. Ins. Co. v LaPlante, 480 US 9, 15 [1987]; New Mexico v Mescalero Apache Tribe, 462 US 324, 334 [1983]). In conducting our analysis, we "avoid reliance on platonic notions of Indian sovereignty and . . . look instead to the applicable treaties and statutes which define the limits of [our] power" (McClanahan v State Tax Commn. of Arizona, 411 US 164, 171-172 [1973]).

"Indian tribes are 'distinct, independent political communities, retaining their original natural rights' in matters of local self-government" (Santa Clara Pueblo v Martinez, 436 US 49, 55-56 [1978], quoting Worcester v Georgia, 6 Pet 515, 559 [1832]; see also 1 Cohen's Handbook of Federal Indian Law § 1.03 [4] [b]). "They have [exclusive] power to make their own substantive law in internal matters, and to enforce that law in their own forums" (Santa Clara Pueblo, 436 US at 55-56 [internal quotation marks and citation omitted]; Bowen v Doyle, 880 F Supp 99, 112-113 [WD NY 1995], affd 230 F3d 525 [2d Cir 2000]). These internal matters include "tribal election disputes . . . governed by tribal constitutions, statutes, or regulations" (Attorney's Process, 609 F3d

at 943; Wheeler v Swimmer, 835 F2d 259, 262 [10th Cir 1987]). "The Federal Government's longstanding policy of encouraging tribal self-government . . . . reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory,' to the extent that sovereignty has not been withdrawn by federal statute or treaty" (LaPlante, 480 US at 14, quoting United States v Mazurie, 419 US 544, 557 [1975]; see also 1 Cohen's Handbook of Federal Indian Law § 1.03 [4] [b]). Because tribes have a fundamental, "bedrock" right to self-govern, internal tribal leadership disputes are, as a general rule, not cognizable in federal or state court (see Tanner, 824 F3d at 327; see also Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig., 340 F3d 749, 764 [8th Cir 2003]; Bowen, 880 F Supp at 113).

Congress, too, has "extraordinarily broad . . . authority over Indian matters" (Santa Clara Pueblo, 436 US at 56, 72; LaPlante, 480 US at 14, citing United States v Mazurie, 419 US 544, 557 [1975]; see also US Const, art I, § 8, cl 3). Accordingly, "tribal sovereignty is dependent on, and subordinate to, only the Federal Government, not the States" (Washington v Confederated Tribes of Colville Indian Reservation, 447 US 134, 153-154 [1980]). To that end, our subject matter jurisdiction must be predicated on explicit authorization from Congress to address matters of tribal self-government (see Barnes v White, 494 F Supp 194, 199 [ND NY 1980], citing Williams v Lee, 358 US 217, 221 [1959]; Williams, 358 US at 220-221 & n 6 ["when Congress has wished the States to exercise . . . power (to assume jurisdiction over Indian affairs that take place on the Indian reservation) it has expressly granted them th(is) jurisdiction"]).

The dissents assert that the sources of our jurisdiction to resolve this case are 25

USC § 233 and Indian Law §§ 5 and 11-a. As relevant to this appeal, section 233 provides that New York state courts "shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings" as defined by New York law.[6] However, the provision was intended to subject New York-based Indians to New York's civil laws "without impairing any of their . . . rights under existing treaties with the United States" (Senate Rep No. 1137, 80th Congress, 2d Session, at 2 [Apr 20, 1948]). These statutes do not provide any clear or express authority for a New York court to decide internal tribal disputes, even if they would otherwise confer jurisdiction over similar state law claims which do not at their core rest on internal governance disputes (see Bowen, 880 F Supp at 118; see also Bryan v Itasca Cty., Minnesota, 426 US 373, 388-389 [1976]).

In reaching a contrary conclusion, Judge Wilson's dissent asserts arguments on behalf of the Halftown Council that are incompatible with the Council's own statements concerning tribal sovereignty. The Halftown Council does not argue that Congress intended that section 233 would provide New York courts with jurisdiction over an Indian tribe's internal affairs or matters of self-government nor does any party seriously contend that New York state courts could or should exercise subject matter jurisdiction over the

[6] The assimilationist underpinnings of section 233 are revealed by its legislative history. Significantly, Congress anticipated that section 233 would "lead to the gradual assimilation of the Indian population into the American way of life, and the gradual but final complete removal of governmental supervision and control" (H. Rep. 2720 & Conf. Rep. 3040, 81st Cong [1950]).

merits of this internal governance dispute absent deference to the 2016 BIA determination.

Though 25 USC § 233 and Indian Law §§ 5 and 11-a of course reflect important federal and state interests in preserving Indians' access to New York courts, they in no way constitute an "express grant of authority" (Wilson, J., dissenting op at 7) from Congress that would be necessary to assume jurisdiction over this particular dispute implicating the Nation's right to self-govern, and do not bear on our ability to resolve the Halftown Council's claims (see United States v Dion, 476 US 734, 739-740 [1986] ["Congress' intention to abrogate Indian treaty rights [by statute] [must] be clear and plain"]).[7] The Supreme Court has clarified that Congress' primary and overriding interest in Indian affairs shifted from the assimilationist lens reflected in 25 USC § 233 toward "[the] [p]resent federal policy" of "strengthening tribal self-government" and self-determination (see e.g. Bryan, 426 US at 389 [internal quotation marks and citations omitted] [observing that "courts are not obliged in ambiguous instances to strain to implement (an assimilationist) policy Congress has now rejected, particularly where to do so will interfere with the present congressional approach to what is, after all, an ongoing relationship" [internal quotation marks and citations omitted]; see also National Farmers Union Ins. Companies v Crow Tribe of Indians, 471 US 845, 856 [1985] ["Our cases have often recognized that Congress is committed to a policy of supporting tribal self-government and self-determination"] [collecting cases]; White Mountain Apache Tribe v Bracker, 448 US 136, 143-144 [1980]).

[7] Moreover, as "tribes are not even subject to the laws of a state except insofar as the United States has given its consent" (see Barnes, 494 F Supp at 199, citing Williams, 358 US at 221), the dissent's exposition of a plethora of New York legislative history and background is of marginal value in determining the breadth of jurisdiction conferred by section 233.

Yet, Judge Wilson's dissent emphasizes in a vacuum the plain language of section 233 and sections 5 and 11-a and the nature of the causes of action at issue here as dispositive while ignoring the applicable contexts in which those provisions were enacted and the events on which those claims are based (Wilson, J., dissenting op at 19, 20, 29). In doing so, the dissent overlooks the "crucial backdrop . . . [of] [t]he traditional notions of Indian sovereignty . . . against which any assertion of State authority must be assessed" (Mescalero Apache Tribe, 462 US at 334 [internal quotation marks and citations omitted]).

This Court's decision in Spota ex rel. Unkechaug Indian Nation v Jackson (10 NY3d 46, 49-50 [2008]) is instructive. In Spota, we held that we lacked the discretion to determine whether the defendant qualified as a statutorily-defined "intruder" on Indian land "independent of" and in contravention of the Indian nation's determination that the defendant was an "intruder" (id. at 49-50). We reasoned that "[t]he tribes' right to make internal substantive law, and to determine their own membership according to such law, is diminished if county courts have the discretion independently to decide who is an 'intruder' on Indian lands" (id. at 54). Thus, we declined to exercise subject matter jurisdiction after considering, in the context of the claims at issue, the "implications with regard to the tribes' inherent rights as quasi-sovereign nations" (id. at 49-50; see also Patterson v Council of Seneca Nation, 245 NY 433, 446-447 [1927] [decision whether to enroll an individual as a member of a tribal nation was outside the jurisdiction of the state courts]).

Similarly, in context, the Halftown Council's claims asserted against a rival leadership faction defy classification as ordinary torts. Both factions agree that the property at issue belongs to the Nation and that the Halftown Council has commenced the

action ostensibly on behalf of the Nation. The only disputed question is who may lawfully possess and control the property, a question that necessarily turns on which faction—either plaintiff or defendants—is the rightful leadership council that speaks for the Nation. Therefore, the six causes of action raised by the Halftown Council unquestionably implicate the Nation's leadership dispute because they all require a finding that the defendants acted unlawfully without justification or permission to exercise dominion or control over the property at issue—in other words, that defendants do not speak for the Nation and their claim to represent it is unfounded. The Jacobs Council does not contest that they have continued to occupy and control the properties at issue; they claim only that they were entitled to do so because they view themselves—and not the Halftown Council—as the lawful Nation Council pursuant to Cayuga law. Although the Halftown Council and the dissents have attempted to repackage this dispute as a straightforward matter of state tort law, it necessarily "involv[es] internal tribal affairs of [the Cayuga Nation] [and] may appropriately be characterized as [a] political as opposed to [a] judicial" matter that is beyond our power to adjudicate (Holcombe v Dimmler, 55 AD2d 808, 808 [4th Dept 1976] [dispute implicating "[t]he legitimacy of the government of [a tribal nation] or the proceedings by which its chiefs are chosen are, by their very nature, of such political sensitivity as to fall within the ambit of decisional circumscription of the court"]).[8]

[8] Judge Wilson's dissent ignores the substance of the claims before us, maintaining that 25 USC § 233 and Indian Law § 5 provide New York state courts with subject matter jurisdiction over this case simply because "[t]he case at bar is a civil action between Indians" (Wilson, J., dissenting op at 6). That statement misconceives this action. The Halftown Council does not merely request access to a New York court for the purpose of enforcing the tribe's rights or even resolving a private dispute between tribal members

Both of our dissenting colleagues seem troubled by the fact that the Cayuga do not have a system of tribal courts and use other mechanisms to resolve disputes, including tribal leadership disputes. We reject the implication that the Nation is disadvantaged or left "entirely without recourse" (Garcia, J., dissenting op at 2) by its inability to rely on New York courts to determine which faction is the leader entitled to possession and control of certain real and personal property. This paternalistic view fails to appreciate that the use of dispute resolution mechanisms other than courts is itself an exercise of the right to self-govern in a manner consistent with tribal traditions and oral law (see Santa Clara Pueblo, 436 US at 65-66). "Simply stated, when it comes to Indian affairs, state courts are courts of limited jurisdiction" (Bowen, 880 F Supp at 114).

B.

We further reject the notion that the BIA's 2016 recognition decision deferring to the outcome of the statement of support process enables a New York court to resolve this

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under settled Cayuga law. Instead, in seeking a determination that Jacobs Council members have been unlawfully occupying Nation offices and other property since 2014 and requesting ejectment, it necessarily asks a New York court to resolve a disputed non-cognizable internal tribal governance question: which leadership faction in a years-long and well-documented tribal dispute is authorized under Cayuga law as the tribe's rightful leaders. Judge Garcia's suggestion that it is unnecessary to resolve the leadership dispute to adjudicate some of the claims, such as the conversion claim, is no more persuasive (Garcia, J., dissenting op at 7). Like the other claims, the conversion claim turns on which faction is entitled to control Nation property. There is no indication in the complaint that allegations that the Jacobs Group accessed, retained, and used the Nation's funds "for their own personal benefit" is grounded on anything other than the premise that the Jacobs Group lacks the authority to control the funds on behalf of the Nation. Tellingly, the Halftown Council does not ask this Court to resolve that dispute, contending instead that the claim is cognizable in New York state courts because the courts may defer to the BIA's 2016 decision recognizing the Halftown Council for federal contracting purposes.

action, which turns upon the outcome of the Nation's internal leadership dispute, as dictated by tribal law. Although it is true that courts are generally bound to "follow the action of the executive and other political departments of the government" in matters of tribal recognition (United States v Holliday, 70 US 407, 419 [1865]; Timbisha Shoshone Tribe v Salazar, 678 F3d 935, 938 [DC Cir 2012]), the decisions on which plaintiff relies do not sweep as broadly as plaintiff asserts but merely address the circumstances under which a court may recognize the capacity of one tribal group to bring a claim against a third party on behalf of the tribe (see Tanner, 824 F3d at 330 [noting the practical implications of declining to defer to a BIA recognition decision for purposes of determining whether a group is authorized to commence or defend lawsuit on behalf of the tribe]; Timbisha Shoshone Tribe, 678 F3d at 938). At most, those decisions permit us to assume without deciding (though we do not conclude) that given the BIA's 2016 determination, the Halftown Council "is authorized by tribal law to initiate this lawsuit on behalf of the Nation" (Tanner, 824 F3d at 327; Timbisha Shoshone, 678 F3d at 938; Nooksack Indian Tribe v Zinke, No. C17-0219-JCC, 2017 WL 1957076, at *4 [WD Wash May 11, 2017]).

By way of Congress's partial delegation to the Secretary of the Department of the Interior of its authority to manage Indian affairs (see 25 USC § 2; 43 USC § 1457 [10]), the BIA "has the authority to make recognition decisions regarding tribal leadership" and interpret tribal law based upon its "special expertise in dealing with Indian affairs" (Tanner, 824 F3d at 328). However, the BIA may exercise this authority only "when the situation has deteriorated to the point that recognition of some government [i]s essential for *Federal* purposes" and "when necessary to carry out the government-to-government relationship

with the tribe" (id. at 328 [internal quotation marks and citation omitted]; Frank's Landing Indian Cmty. v National Indian Gaming Commn., 918 F3d 610, 613-614 [9th Cir 2019]; see e.g. Richards v Acting Pacific Regional Director, Bureau of Indian Affairs, 45 IBIA 187, 191-192, 2007 WL 3022563, at *3). The Second Circuit has cautioned that "[i]nternal dysfunction or paralysis within tribal governance standing alone . . . does not permit the BIA to decide who constitutes the legitimate leadership of a tribe" (Tanner, 824 F3d at 327; Attorney's Process & Investigation Servs., Inc. v Sac & Fox Tribe of Mississippi in Iowa, 609 F3d 927, 943 [8th Cir 2010]; Wheeler v U.S. Dept. of Interior, Bureau of Indian Affairs, 811 F2d 549, 552 [10th Cir 1987]). In fact, a 2011 BIA determination recognizing members of the Jacobs Council as the Nation's governing body was vacated because there was, at that time, no federal need for the BIA to address the leadership dispute. Significantly, no party contends that this action implicates any federal purpose whatsoever.

It would be incongruous for us to acknowledge that the BIA's recognition authority in this case was premised only on a dispute over the proper recipient of federal funds on behalf of the Nation, but to apply concomitantly the BIA's recognition determination so broadly as to embroil this Court in a leadership dispute that—absent government contracting requirements—would not have triggered the BIA's recognition authority. Moreover, nothing in the BIA decision suggested the Jacobs Council was required as a matter of Cayuga law to defer to that decision as resolving which leadership faction was properly authorized to occupy tribal property. Indeed, by its own terms the BIA decision recognized that a fundamental disagreement persisted within the Nation on this point and that the statement of support process was not binding going forward. Thus, the limited

nature of the BIA determination, taken together with BIA precedent indicating that it may recognize one leadership faction over the other only when there is a specific government-to-government purpose to do so, militate against giving that determination such wide-reaching effect (see Samish Indian Nation v United States, 419 F3d 1355, 1369-1370 [Fed Cir 2005]). There is no federal or state precedent that would permit the Halftown Council to use a determination regarding federal funding as a sword against its competing leadership faction in order to have New York courts end a persistent fifteen-year-old internal dispute regarding tribal governance which is implicated by the claims presented here.

Despite the contentions of the Halftown Council and Judge Wilson's dissent to the contrary, Tanner does not mandate a different result. The issue in that case was whether an anti-gambling ordinance passed by the defendant village was preempted by a federal statute (824 F3d at 327). The Second Circuit determined that a group including Halftown had the authority to commence the action on behalf of the Nation to protect the Nation's rights as against a third party, reasoning that "where the authority of the individual initiating litigation on behalf of a tribe has been called into dispute, the only question [the courts] must address is whether there is a sufficient basis in the record to conclude, without resolving disputes about tribal law, that the individual may bring a lawsuit on behalf of the tribe" (id. at 328). Drawing on the 2015 interim BIA decision recognizing a 2006 leadership council with members from both the Halftown and Jacobs factions, the Second Circuit concluded that this determination provided a "sufficient basis" in the record to conclude that Halftown was authorized to bring the suit on behalf of the Nation (id. at 327,

328).

This litigation is entirely different. The Halftown Council now seeks to enforce the Nation's property rights against a long-recognized competing faction, not an unrelated third party raising a claim to represent the Nation that is wholly unsupported by the record (see Wilson, J., dissenting op at 21). Further, the BIA determination is relied on here to resolve the merits, not to determine whether there is a "sufficient basis" in the record to decide who is authorized to vindicate the Nation's rights against third parties (Tanner, 824 F3d at 328).[9]

III.

The Nation's fundamental and exclusive right to sovereignty over its internal customs, traditions, and processes for selecting its government is paramount to today's decision (see Bracker, 448 US at 143-144; Sac & Fox Tribe of the Mississippi in Iowa, Election Bd. v Bureau of Indian Affairs, 439 F3d 832, 835 [8th Cir 2006]). Because the Halftown Council's legal claims depend on its allegations that it speaks for the Nation, and the Jacobs Council does not, the Nation's leadership dispute permeates its claims and New

[9] Although the Halftown Council reads the BIA determination to conclude that the Nation has resolved its leadership dispute, and claims that it may use the state courts to enforce that resolution, this argument similarly fails. Even if the BIA determination could be read so broadly—it cannot be—principles of tribal sovereignty extend to the power of Indian tribes "to enforce . . . their own substantive law in internal matters . . . in their own forums" (Santa Clara Pueblo, 436 US at 55-56 [emphasis added]; Babbitt Ford, Inc. v Navajo Indian Tribe, 710 F2d 587, 591-592 [9th Cir 1983]; Bowen, 880 F Supp at 112-113). Even though the Nation resolves its disputes by way of a non-judicial forum, "[n]onjudicial tribal institutions have also been recognized as competent law-applying bodies" (Santa Clara Pueblo, 436 US at 65-66).

York state courts lack the constitutional or statutory power to adjudicate them.

Accordingly, the order of the Appellate Division should be reversed, with costs, the motion to dismiss the complaint granted, and the certified question answered in the negative.

Cayuga Nation, by and through its lawful governing body, the Cayuga Nation Council v Campbell, et al.

No. 70

GARCIA, J. (dissenting):

The majority's holding is appropriately sensitive to longstanding concerns of tribal sovereignty. But its analysis fails to grapple with the precise allegations leveled in the complaint and the relevance, if any, of the tribe's internal dispute to the resolution of those

claims. It also ignores the strong interests, shared by the State and the Cayuga Nation, in resolving this long-running dispute concerning property—purchased on the open market—in the City of Seneca Falls. And its reliance on abstract sovereignty concerns leaves the Nation entirely without recourse. In my view, a blanket invocation of "tribal law" issues cannot, at this early stage, justify wholesale dismissal of the complaint. Accordingly, I dissent.

I.

The facts and procedural history are ably recounted by the majority and my dissenting colleague (majority op at 2-9; Wilson, J., dissenting op at 3). I will not repeat that history here, but emphasize only what I consider to be particularly pertinent. Beginning in 2004, the Halftown Council, on behalf of the Nation, began purchasing land on the open market in Seneca Falls, New York (see aff of Cayuga Nation Chief Financial Officer at 1 ["The five properties which are the subject of this action were purchased by the Cayuga Nation at the direction of Clint Halftown, the nation's federally recognized representative using funds belonging to the Cayuga Nation"]; affirmation of defendants' counsel at 2 [same]). All told, five parcels were purchased (the "acquired land") within the boundaries of what was the Nation's original 65,000-acre reservation. The reservation land was transferred to the State approximately 200 years ago and was subsequently purchased by private owners (see Cayuga Indian Nation of New York v Gould, 14 NY3d 614, 630 [2010]). The deeds for the property list the Cayuga Nation as the owner in fee simple. The

Nation operates several businesses on the acquired land, including a convenience store and gas station. The businesses generate substantial revenue.

For years, a protracted leadership dispute has persisted between the Halftown Council and the Jacobs Council (see majority op at 2-6). On April 28, 2014, the Jacobs Council gained entry to the Nation's security office and seized keys to the Nation's offices, businesses, and vehicles, as well as other personal property belonging to the Nation (see majority op at 4). Two days later, the Halftown Council filed suit in Supreme Court for trespass, conversion, tortious interference with business relations, replevin, and ejectment.

Supreme Court reluctantly dismissed the action (see Cayuga Nation v Jacobs, 44 Misc 3d 389, 394 [Sup Ct, Seneca County 2014]). There was "no question," the court noted, that "the businesses and property involved are Cayuga Nation property," and that "the actions of the defendants disrupted business activity" (id. at 391). Dismissal was nonetheless required, the court reasoned, because resolution of the issues would "interfer[e] with tribal sovereignty"—even though "it would seem to fly in the face of reason to argue that there is nothing this court can do" (id. at 392, 394). Supreme Court also determined that it was powerless to punish defendants' violation of its earlier temporary restraining order, despite defendants' "actual contempt" for that order (id. at 395).

The leadership dispute continued. In 2016, the Federal Bureau of Indian Affairs (BIA), in need of a contracting party for certain federal programs, recognized the Halftown Council as the governing body authorized to enter into the relevant contracts on behalf of

the Nation. In 2017, a BIA Assistant Secretary affirmed the decision.[1] In July 2017, armed with the BIA determination, the Halftown Council commenced this action on behalf of the Cayuga Nation against the Jacobs Council and others, again alleging, among other things, trespass, tortious interference, and conversion of real and personal property for "misappropriating all revenues" of the businesses and for "accessing, retaining, and using funds belonging to the Nation for their own personal benefit." The complaint also alleged that defendants used "violence and other unlawful tactics to remain in control" of the property. The trial court denied defendants' motion to dismiss and issued a preliminary injunction requiring defendants to vacate the acquired land. The Appellate Division affirmed.

II.

There is much here on which my colleagues and I agree. First, we all agree that New York courts have jurisdiction to adjudicate civil disputes involving the Nation or its members (see 25 USC § 233; Indian Law §§ 5 and 11-a). No one contests, for instance, that the Nation may bring an action in a New York court to assert a breach of contract, to eject an intruder, or to vindicate its property rights (see majority op at 9-16; Wilson, J., dissenting op at 4-17).

We all also appear to agree—or at least assume—that the Halftown Council is the appropriate representative to litigate those claims on behalf of the Nation (majority op at

[1] As did a federal district court in 2019 (see Cayuga Nation v Bernhardt, 374 F Supp 3d 1 [D DC 2019]; majority op at 6-7).

9, 14-15 [noting that it may be "appropriate to defer to the BIA's determination for the purpose of permitting the Halftown Council to commence litigation on behalf of the Nation"]; Wilson, J., dissenting op at 2, 20-21). As the Court of Appeals for the Second Circuit explained, "where the authority of the individual initiating litigation on behalf of a tribe has been called into dispute, the only question [the courts] must address is whether there is a sufficient basis in the record to conclude, without resolving disputes about tribal law, that the individual may bring a lawsuit on behalf of the tribe" (Cayuga Nation v Tanner, 824 F3d 321, 328 [2d Cir 2016]). Here, as in Tanner, the BIA's determination—recognizing the Halftown Council as the Nation's governing body for federal contracting purposes—provides sufficient basis to conclude that the Halftown Council has authority to bring this lawsuit on behalf of the Nation (see id.).

III.

Now to the issue that divides us: whether, in determining the merits of these claims, New York courts would be required to resolve the ongoing internal leadership dispute and determine which faction is the rightful governing body of the Cayuga Nation.

My dissenting colleague essentially concludes that Congress's grant of authority (25 USC § 233) and this State's Indian Law (Indian Law §§ 5, 11-a) confer on New York courts the power to adjudicate "all civil disputes among Indians and tribes," irrespective of the resulting interference—for instance, by resolving whether a rival leadership claim "has merit" (Wilson, J., dissenting op at 13 [emphasis added]). Like the majority, I do not believe that those statutory provisions allow us to bypass the sovereignty concerns

implicated by our courts' interference with internal tribal matters (majority op at 12). As the majority notes, the federal statutory grant of authority to New York was not intended to impair any rights under existing Indian treaties with the United States (majority op at 12, quoting Senate Rep No. 1137, 80th Congress, 2d Session, at 2 [Apr 20, 1948]), and treaties between the Cayuga Nation and the United States unequivocally recognize the Nation's right to sovereignty (see Treaty With the Six Nations at Canandaigua, 7 US Stat 44 [1794]; 1784 Treaty of Fort Stanwix, 7 US Stat 15 [1784]; History Timeline, Cayuga Nation, http://cayuganation-nsn.gov/history-timeline.html [last accessed on Oct. 10, 2019]). We must, therefore, independently consider whether adjudication of this dispute would impinge on the Nation's sovereignty.

In explaining tribal sovereignty, the United States Supreme Court has made clear that "the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members" (Montana v United States, 450 US 544, 564 [1981] [emphasis added]; accord United States v Wheeler, 435 US 313, 322 n 18 [1978]). Analogous claims—like internal leadership disputes—similarly implicate tribal sovereignty concerns, and therefore, the majority reasons, New York courts cannot render determinations in the absence of an express grant of jurisdiction from both Congress and the New York Legislature (majority op at 12-14). Until the Supreme Court rules otherwise, it may well be prudent to assume that New York courts do not have the power to resolve internal leadership disputes (see

Montana, 450 US at 564; see also In re Sac & Fox Tribe of Mississippi in Iowa/Meskwaki Casino Litig., 340 F3d 749, 763-764 [2003]).

But even a cursory review of the complaint suggests that several (if not all) of the Nation's claims can be safely adjudicated without resolving the internal tribal dispute. For instance, plaintiff's conversion claim—asserting theft of *the Nation*'s money—is unlikely to depend on which faction properly leads the Nation, or who rightfully possesses the acquired land. Specifically, the complaint alleges that defendants are using money generated by commercial activities on the Nation's land for personal profit, and that defendants have refused to cooperate in an audit by the Nation's accounting firm. Of course, where an official misappropriates an organization's funds, it is no defense that the official is a duly elected leader (Wen Kroy Realty Co. v Pub. Natl. Bank & Trust Co. of New York, 260 NY 84, 90 [1932]; see also Asdourian v Konstantin, 93 F Supp 2d 296, 299 [ED NY 2000]). The Nation's conversion claim, then, might well rise or fall without any assessment of the tribe's leadership conflict.[2]

While the Halftown Council is authorized to bring this suit (see majority op at 9, 14-15; Wilson, J., dissenting op at 2, 20-21), the party seeking relief is *not* the Halftown

[2] The majority speculates that the Nation's conversion claim is based solely on the premise that defendants "lack[] the authority to control the funds on behalf of the Nation" (majority op at 16 n 8). That suggestion is belied by the plain language of the pleadings, which assert that defendants "misappropriated funds belonging to the Nation for their own personal use." Even if we did not liberally construe the complaint—and we must (see Leon v Martinez, 84 NY2d 83, 87-88 [1994])—the obvious import of these allegations is that defendants are stealing the tribe's money. The conversion claim, then, does not "turn[] on which faction is entitled to control Nation property" (majority op at 16 n 8).

Council—it is *the Nation*. As a result, plaintiff's claims depend largely on the propriety of defendants' use of *the Nation*'s property, regardless of who possesses a rightful claim to the Nation's leadership. At minimum, further factual development would clarify whether any (or all) of the Nation's claims may be resolved without interference in internal tribal affairs. The majority's blanket assertion that "[t]he six causes of action . . . unquestionably implicate the Nation's leadership dispute" (majority op at 15)—and its wholesale dismissal of the complaint—fails to grapple with the nuances of the asserted claims and, particularly at this early stage, needlessly denies the Nation any opportunity to ensure transparency and accountability with respect to its valuable commercial property.

Additionally, the Nation's and the State's interests are aligned in seeking resolution of these claims in New York's courts. The Cayuga Nation clearly has a strong interest in vindicating its rights with respect to the acquired land. Business concerns on that land generate millions of dollars in revenue—revenue that, the Nation alleges, is no longer dispersed for the benefit of the tribe, and instead has been diverted for personal profit. In addition, as noted by my dissenting colleague, the Nation has not established a tribal court and therefore requires an alternative forum in order to obtain relief (Wilson, J., dissenting op at 12).

The State also has a strong interest in resolving these claims concerning land within the City of Seneca Falls. While former reservation land repurchased by a tribe may retain some attributes of sovereignty, reacquisition does not allow a tribe to "exert full sovereign authority" over the reacquired property (Gould, 14 NY3d at 641; City of Sherrill v Oneida

Indian Nation, 544 US 197, 203 [2005] ["(T)he Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue. The Oneidas long ago relinquished the reins of government and cannot regain them through open-market purchases from current titleholders"]). Indeed, reacquired land may be taxed by the local municipality (City of Sherrill, 544 US at 203; see also Gould, 14 NY3d at 643 n 11 ["The Cayuga Indian Nation acknowledges its obligation to pay real property taxes"]). It also remains subject to local zoning regulations and land use laws (City of Sherrill, 544 US at 220; Cayuga Indian Nation of New York v Vill. of Union Springs, 390 F Supp 2d 203, 206 [ND NY 2005]; see also Gould, 14 NY3d at 643 n 11 ["The Cayuga Indian Nation acknowledges its obligation to . . . comply with local zoning and land use laws"]). As Gould and City of Sherrill make clear, the Nation's reacquisition of previously held property—long since relinquished to non-Nation owners—does not transform the acquired land into fully sovereign territory (Gould, 14 NY3d at 641; City of Sherrill, 544 US at 203).[3] In other words, contrary to the parties' self-interested assertion, the acquired

[3] While the Court in Gould held that the property at issue was located on a "qualified reservation" for purposes of taxing cigarettes, Gould's definition of "qualified reservation land" was expressly limited to New York Tax Law § 470 (14 NY3d at 641; see also Oneida Indian Nation of New York v Madison County, 665 F3d 408, 438 [2d Cir 2011] [distinguishing Gould and concluding that it was not clear New York courts would reach the same conclusion with respect to application of the State's real property law]). Indeed, in Gould, the Nation expressly disclaimed any assertion that its "reacquisition of the convenience store parcels revive[d] its ability to exert full sovereign authority over the property" (Gould, 14 NY3d at 641).

The majority asserts that, in Tanner, the court found that "the Supreme Court's decision in City of Sherrill, N.Y. v Oneida Indian Nation of New York, 544 US 197 (2005) has 'no bearing on the issues of subject matter jurisdiction or standing'" (majority op at 4 n 5). In

property is not reservation land; it is land within the City of Seneca Falls and, in most respects, is no different than property held by any other owner.

This dispute over Nation-held property has raged for five years. The allegations in the present complaint speak of violence, force, and theft, and Supreme Court's earlier decision attests to a lack of respect for court process. It is "essential in an ordered society that" we "rely on legal processes rather than self-help to vindicate [our] wrongs" (Gregg v Georgia, 428 US 153, 183 [1976]). Dismissing this case leaves the State and the Nation without any legal process for resolving this fierce and ongoing dispute.

IV.

The majority dismisses the Nation's claims, cutting off further factual development, without any assessment of the specific claims and defenses asserted in the parties' pleadings. At this stage, giving due deference to the allegations in the complaint, as our dismissal standard requires, I would deny defendants' motion to dismiss (see Leon v Martinez, 84 NY2d 83, 87-88 [1994]). At minimum, discovery is "desirable, indeed may be essential, and should quite probably lead to a more accurate judgment than one made solely on the basis of inconclusive preliminary affidavits" (Peterson v Spartan Indus., Inc., 33 NY2d 463, 467 [1974]). I would give the Cayuga Nation its day in court.

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fact, the omitted portion of the majority's Tanner quote makes clear that, while City of Sherrill had "no bearing" on the Halftown Council's authority to initiate the suit (which the Tanner court termed "issues of subject matter jurisdiction or standing"), City of Sherrill *was* "potentially relevant to the merits" of the case (Tanner, 824 F3d at 325 n 3). I agree with Tanner that City of Sherrill has "no bearing" on the Halftown Council's authority to bring suit, and that it *is* "relevant to the merits" of this case (id.).

Cayuga Nation, by and through its lawful governing body, the Cayuga Nation Council v Campbell, et al.

No. 70

WILSON, J. (dissenting):

I agree with the majority that the Board of Indian Affairs' decision to recognize the Halftown Group as the legitimate governing body of the Cayuga Nation for purposes of a federal grant does not bind the courts of New York. However, that proposition is irrelevant

to whether New York courts have subject-matter jurisdiction. Both the United States Congress and New York's legislature have specifically granted New York courts jurisdiction to hear civil cases brought by Indian[1] tribes. Those jurisdictional grants authorize claims by tribes in their institutional capacity against individual members of the tribe, including claims to recover unlawfully occupied lands and the damages resulting therefrom. The effect of the majority's holding is to disable all Indian tribes in New York from suing to recover lands taken by any intruder, so long as the intruder claims the right to tribal leadership.

The oddest inconsistency in the majority's position is that it assumes the Halftown Group is the proper party to sue on behalf of the Cayuga Nation, yet although the Nation is suing—necessarily to dispossess persons who are not the Nation—the majority refuses to permit the Nation the right to avail itself of the courts to regain its property. Despite the clear mandate that New York courts are to be open to Indian tribes just as they are open to any other person, the majority slams the courthouse door in the face of the Cayuga Nation, even though the tribe has sought to avail itself of the state courts, even though there is no other forum to which it can turn, and even though the decision is contrary to the laws of the United States and of New York.

[1] To conform with the statutes at issue and with the phrasing adopted by the majority and the parties, I use the term "Indian" to refer to the indigenous peoples of North America.

I.

The plaintiff here is not the leadership group led by Clint Halftown. The plaintiff is the Cayuga Nation, a federally recognized tribe that, as a member of the Iroquois Confederacy, has been conducting relations with every non-Indian laying claim to lands in present-day New York since the first Dutch settlers arrived in the early 17th century (see Gerald Gunther, Governmental Power and New York Indian Lands—A Reassessment of a Persistent Problem of Federal-State Relations, 8 Buff L Rev 1, 2 [1958]). The majority assumes, for the purpose of its analysis, that the Halftown Group "is authorized by tribal law to initiate this lawsuit on behalf of the Nation" (majority op at 17, quoting Cayuga Nation v Tanner, 824 F3d 321, 330 [2d Cir 2016]). Thus, the question before us is whether the Cayuga Nation may bring an action in New York court to reclaim property it owns, or whether, as the majority holds, New York courts lack subject-matter jurisdiction based on the mere claim by someone else to tribal leadership.[2] This case does not ask us broadly to

[2] The parties assert that the property at stake is reservation land, as set forth in treaties made with the United States in the late 18th century, which the majority assumes to be true (majority op at 4, n 5). I will assume the same, but I note the question is long contested. The Nation sold its ancestral lands to the State of New York in 1795, following its first treaty with the federal government the year before. In 1980, the Nation sued in federal court to invalidate any claims maintained by the State over the original 64,000 acres of Cayuga lands and those claims were adjudicated in no fewer than 17 proceedings over 22 years (see Cayuga Indian Nation of NY v Pataki, 413 F3d 266, 266-73 [2d Cir 2005]). In 2005, the Second Circuit, following the US Supreme Court's ruling in City of Sherrill v Oneida Indian Nation (544 US 197 [2005]), dismissed the Nation's suit because the doctrine of laches barred any claim brought to reassert tribal sovereignty over lands that had been out of the Nation's possession for over 200 years (Pataki, 413 F3d at 277). The Nation purchased the instant properties on the open market in the 2000s. In Cayuga Indian Nation of NY v Gould (14 NY3d 614, 641 [2010]) we held that these properties could be classified as "qualified reservations" for the purposes of taxing cigarettes under Tax Law

decide who is the lawful head of the tribe but instead, as in Tanner, whether a group with authority to bring suit in the tribe's name can have its claim adjudicated in court. Nothing in my dissent should be read to suggest that the Cayuga Nation is in any way impaired in reaching any decision as to who is in charge of the tribe, just as neither the BIA's decision nor the Second Circuit's decision in Tanner did.

Subject matter jurisdiction is granted to the courts by the constitution and statute (NY Const, art VI, § 7; CPLR § 301). The legislature granted New York courts jurisdiction over civil suits brought by individual Indians and by tribes in their official capacity (see Indian Law §§ 5, 11-a). New York's jurisdiction over these civil cases is expressly delegated by Congress (see 25 USC § 233). According to the majority, abrogating that jurisdiction is as simple as taking land by force and claiming to be the tribal leader. Perhaps our policy towards Indians has changed less in the past four-hundred years than we would like to believe.

A.

Three statutes explicitly grant New York courts subject matter jurisdiction over this case, one federal and two state (25 USC § 233; Indian Law §§ 5, 11-a). Their texts and

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§ 470(16)(a), with the caveat that "the Nation does not suggest that its reacquisition of the convenience store parcels revives its ability to exert full sovereign authority over the property" which would be at odds with City of Sherrill. Counsel for the Jacobs faction conceded at oral argument that if the subject lands are not reservation land, then New York courts would have subject matter jurisdiction in this matter, and they would lose this appeal (oral argument tr at 37). Because it was in neither party's interest to claim that the properties are not reservation land, the Court does not consider that potentially dispositive fact (see n 8, supra). In my view, the courts possess subject-matter jurisdiction over the Nation's claims regardless of the reservation status of the property.

their common legislative history—all emerged during a crucial 15 years of the history of New York's legal relationship to Indian tribes, 1943-58—leave no doubt that jurisdiction is proper in this case.

Section 233 reads in relevant part:

> "The courts of the State of New York under the laws of such State shall have jurisdiction in civil actions and proceedings between Indians or between one or more Indians and any other person or persons to the same extent as the courts of the State shall have jurisdiction in other civil actions and proceedings, as now or hereafter defined by the laws of such State."

Under Indian Law § 5:

> "Any action or special proceeding between Indians or between one or more Indians and any other person or persons may be prosecuted and enforced in any court of the state to the same extent as provided by law for other actions and special proceedings."

Indian Law § 11-a adds:

> "In addition to any other remedy provided by this chapter or by any other law, the council, chiefs, trustees or headmen constituting the governing body of any nation, tribe or band of Indians may in the name and on behalf of such nation, tribe or band, maintain any action or proceeding to recover the possession of lands of such nation, tribe or band unlawfully occupied by others and for damages resulting from such occupation."

Evaluating these statutes, "the primary consideration . . . is to ascertain and give effect to the intention of the Legislature" (Riley v County of Broome, 95 NY2d 455, 463 [2000]). In so doing, "text is the clearest indicator of legislative intent and courts should construe unambiguous language to give effect to its plain meaning" (Matter of DaimlerChrysler Corp. v Spitzer, 7 NY3d 653, 660 [2006] [citation omitted]).

The case at bar is a civil action between Indians. According to 25 USC § 233 and Indian Law § 5, the jurisdiction of the courts of New York over it is coterminous with their jurisdiction over the same case between non-Indians, which is to say, Supreme Court has general jurisdiction over all common law claims, including these (NY Const, art VI, § 7).[3] More specifically, this case is brought "in the name and on behalf of" the Cayuga Nation, to recover lands "unlawfully occupied by others" (Indian Law § 11-a). There is no plausible reading of these statutes that fails to cover the Cayuga Nation's suit. The majority suggests that the state laws are inapplicable because there is no express grant of federal authority (majority op at 13) dismissing the express grant of federal authority found in section 233 by the vague assertion that section 233 was not intended to impair rights existing under some treaties with the United States (majority op at 12). The majority does not say what treaty rights might be impaired by New York courts' exercise of that jurisdiction, and the legislative history of section 233 points to the alienation of reservation lands and immunity from taxation of reservation lands as the treaty rights to be preserved (see S Rep No 1836, 81st Cong at 2 [1950]). Neither is implicated here.

Determining the subject-matter jurisdiction of the courts is first and foremost an exercise in statutory interpretation (see Matter of Fry v Village of Tarrytown, 89 NY2d 714, 718 [1997]). Here, the statutes are clear. The legislature has granted the courts the

[3] Although the majority holds that the Cayuga Nation's claims "defy classification as ordinary torts" (majority op at 14), the Nation complained of trespass, conversion, tortious interference with prospective business relations, replevin, and ejectment. There is nothing extraordinary about those claims.

power to hear civil cases between Indians as it would hear the case if the litigants were not so. That power was specifically extended to cover suits brought by tribes, in the name and official capacity of the tribe, to recover lands held by intruders. Any such case would necessarily require the courts to determine that the plaintiff was properly acting on behalf of the tribe and that the defendant is an intruder, and the majority is willing to assume the Halftown Group may bring suit as the Nation. All of this was countenanced by the United States Congress in an express grant of authority. To hold that New York's courts are not competent to hear this case flies in the face of the statutory text.

B.

As the majority's analysis suggests, there are two limiting factors potentially implicated by the extension of subject matter jurisdiction over this case, even if the statutes authorize it. The first is the primacy of the federal government in managing the relationship between the United States and Indian tribes (see United States v Holliday, 70 US 407, 419 [1865]). The second is the quasi-sovereign nature of the tribes, which retain the power to make and enforce their law in matters of local self-government (see Santa Clara Pueblo v Martinez, 436 US 49, 55 [1978]). We must determine whether enforcement of the plain statutory text would offend either of those principles.[4] Not surprisingly, the drafters of the

[4] Contrary to my dissenting colleague's view, I do not claim that section 233 and Indian Law §§ 5, 11-a "confer on New York courts the power to adjudicate all civil disputes, among Indians and tribes, irrespective of the resulting interference" with tribal sovereignty (Garcia, J., dissenting op at 5 [quotation marks omitted]). Plainly, there are circumstances, such as those involved in Bowen v Doyle, (880 F Supp 99, 118 [WD NY 1995]; n 6 infra), in which state-court adjudication would be barred by tribal sovereignty. Instead, I, like Judge Garcia, disagree with the majority's view that it is a per se violation of sovereignty

statutes considered the same issues and determined they did not. I agree. Examining the legislative history of the relevant statutes shows (1) a clear federal intent to transfer jurisdiction over civil suits brought by tribes in New York to New York state courts; and (2) a desire to open state courts to Indian tribes, should they choose to avail themselves of New York's courts, to grant them the same legal protections enjoyed by every other person in the state.

New York's Indian Law, which has existed in some form since the formation of the state in 1777, saw substantial revision in the years 1943-58.[5] The primary impetus came from the Second Circuit's decision in United States v Forness (125 F2d 928 [2d Cir 1942]), where the court, finding that Congress had not authorized application of the Civil Practice Act (the forerunner of the modern CPLR) to bar the cancellation of leases for lands on the

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to allow a tribe's leadership to assert claims in court against other members of the tribe contesting their legitimacy. In other words, if a tribe's leadership attempts to eject an intruder, and the intruder claims to be the true leader of the tribe, it does not violate sovereignty to ask whether the leadership's claim has merit. The trial court is within its discretion to determine that it cannot exercise jurisdiction without deciding a question of tribal law committed to the tribe. That is what Justice Bender did in a previous iteration of this case in 2014 (Cayuga Nation v Jacobs, 44 Misc 3d 389, 394 [Sup Ct, Seneca County 2014]). But where there are sufficient facts to demonstrate that a tribe's proper leadership seeks to assert legitimate claims on the tribe's behalf, section 233 and Indian Law § 5 permit the court to hear the case.

[5] Amendments and additions in that period to Article 2, the general provisions of the Indian Law, include § 3 (power to contract) (L 1951, ch 572; L 1953, ch 670; L 1956, ch 243; L 1957; ch 624); § 4 (marriage and divorce) (L 1957, ch 229); § 5 (actions in state courts) (L 1953, ch 671); § 5-a (surrender of tribal records) (L 1958, ch 830); § 8 (intrusion on tribal lands) (L 1955, ch 400); § 11-a (recovering possession of reservation land) (L 1958, ch 400); § 17 (guaranteeing voting rights for women in all tribal elections and meetings) (L 1957, ch 425).

Allegany Reservation, held: "state law does not apply to the Indians except so far as the United States has given its consent" (id. at 932).

The legislature, noting that a "[c]laim has been made from time to time" that New York law was inferior to tribal and federal law, most recently in the Forness opinion, established a joint legislative committee to study all aspects of the state's relationship with Indian tribes and to make a report to the full legislature (1944 NY Legis Doc No. 52 at 32-34). The committee held hearings at every reservation in the state and published its findings and recommendations (S Rep No 1137, 80th Cong [1948]). From the beginning, the main concern was that "[g]eneral application of [the Forness holding] would largely nullify the New York Indian Law" (1944 NY Legis Doc No. 51 at 4). The committee was particularly concerned about the effects on civil litigation involving Indians because civil courts existed on only two reservations in the state and Indians did not count as citizens of a state other than New York, making it impossible for them to establish diversity of citizenship for federal jurisdictional purposes in a dispute with another New York Indian (see 28 USC § 1332). The committee wrote: "Of necessity, therefore, Indians have litigated most of their civil disputes in the State courts. An extreme application of the Forness case doctrine would deprive State courts of jurisdiction over many of these matters" (id.).

To address the problems created by Forness, the committee drafted two bills that it urged Congress to approve, one clarifying New York's jurisdiction over criminal offenses involving Indians and their lands, and an analogous bill for civil jurisdiction (1945 NY Legis Doc No. 51 at 3). Senator Hugh Butler of Nebraska, Chair of the US Senate

Committee of Interior and Insular Affairs, held hearings on the two bills, which he characterized as having "the unmistakable purpose . . . to fill the void from (1) an almost total lack of tribal or Federal law of any character available to New York reservations other than the inadequate Federal Ten Major Crimes Law and (2) literal application of the recent declaration of the" Second Circuit in Forness (1948 NY Legis Doc No. 64 at 3 [citation omitted]).

The majority asserts that section 233 was "in no way" an express grant of authority to New York from the federal government (majority op at 13). Congress said just the opposite. The Senate emphasized in its report on the bill that the "United States has never had over [New York Indian lands] any powers except those that were ceded by the State in ratifying the Constitution" (S Rep No 1137, 80th Cong [1948] at 2). It went on to describe the "peculiar situation" in New York, where the state "has heretofore exercised the usual prerogatives of sovereignty and jurisdiction over these Indians, while the Federal Government to a large extent has not" (id.). The problem with Forness was that it jeopardized the jurisdiction that New York had always held by requiring federal approval; the solution, in the form of section 233, was to give New York explicit federal approval to continue to exercise jurisdiction. Justice Abe Fortas, then Acting Secretary of the Interior, characterized section 233 and its criminal counterpart explicitly as a "transfer of jurisdiction" from the federal government to New York state (1945 NY Legis Doc No. 51 at 3).

The majority is willfully blind to that federal legislative history. In place of an examination of Congressional intent, it offers a naked assertion that section 233 interferes with treaties, but it does not name any or explain the nature of the interference. The majority offers that Congress must be clear in transferring jurisdiction by statute, but the text and history of section 233 is clear as day, and the majority offers nothing to undermine it.[6]

The relevant Congressional and New York state legislative committees both concluded that New York needed to be assured of jurisdiction over civil disputes involving Indians because, as the joint legislative committee reported, "the State recognizes an obligation to Indians and other citizens, who are neighbors, fellow workmen and school-mates of Indians, to establish certainty and security in their relationships without which

[6] The majority cites to Bowen v Doyle (880 F Supp 99, 118 [WD NY 1995]) to support its contention that anything that implicates a question of tribal self-government is excluded from section 233's ambit. That reliance is misplaced. In Bowen, an individual sought an injunction to prevent Supreme Court for Erie County from applying Seneca Nation law to determine who should lead the tribe. The federal court held that under section 233, courts could not determine questions of tribal government, finding it significant that "section 233 does provide for State Court jurisdiction over suits against the Nation itself" (Bowen, 880 F Supp at 118 [emphasis added]). The key distinction is that the underlying cause of action in Bowen was a suit against tribal leadership to decide under Seneca law who led the tribe. In contrast, this case is brought by the tribe, in its official capacity, as a plaintiff, sounding in common law tort, not Seneca law. By declaring it "significant" that section 233 barred suits against the tribe, the Bowen court clearly takes as given that section 233 allows for suits brought by the tribe, which would not implicate sovereignty or sovereign immunity. The majority should consider Bowen's conclusion with respect to section 233: "ambiguities in statutes affecting Indian rights must be construed in favor of the Indian tribes" (id. at 120) as it uses the case as a sword against the Cayuga Nation, contrary to the Bowen.

there can never be complete harmony and understanding" (1947 NY Legis Doc No. 88 at 13; accord S Rep No 1137, at 2 [noting New York's ongoing commitment to Indians living in the state, via youth, transportation, sanitation, health, and other social welfare programs, "all without expenses to the Federal Government"]). Passage of the bill ensuring civil jurisdiction in New York courts "would for the first time guarantee all Indians the opportunity to adjudicate civil claims against other Indians. In addition it would have the important social significance of establishing Indians on substantially the same footing as other citizens with respect to individual rights and responsibilities" (1948 NY Legis Doc No. 64 at 7). Congress passed the criminal jurisdiction bill in 1948 (62 Stat 1224, 25 USC § 232) and the civil jurisdiction bill in 1950 (64 Stat 845, 25 USC § 233).

The purpose of section 233 was to grant Indians and their tribes the equal protection of state courts to vindicate their non-federal rights—rights that could not be adjudicated elsewhere. A tribe could always establish tribal courts, for which provision is specifically made in the State Constitution (NY Const, art VI, § 31). The Cayuga Nation did not then, and does not now, have a tribal court. Given how few of those courts existed, the Department of Interior urged passage of section 233 to remedy the lack of "adequate opportunities for resort to the courts for a redress of wrongs" (US Senate Report 1836, 81st Cong at 6 [1950]).[7] As the majority recognizes, the federal government has a significant

[7] It is wholly irrelevant whether I am troubled, as the majority charges, by the Cayuga Nation's lack of tribal courts (majority op at 16). It is crucially relevant that Congress and the New York legislature were troubled, which led them to pass 25 USC § 233 and Indian Law § 5 (see also 1944 NY Legis Doc No. 51 at 4). Calling those legislative enactments "paternalistic" may not be accurate, because Congress and the legislature did not force state

interest in encouraging tribal self-sufficiency. Through section 233, Congress explicitly ensured civil jurisdiction to New York courts not to impugn but to ensure fair fora for Indian tribes, if the tribes chose them. Congress believed New York courts were not just competent but uniquely competent to hear these claims, and until today, that confidence was well-placed.

With section 233 in hand, the legislature amended Indian Law § 5 to make clear that, consistent with the new federal law, New York courts were now fully open to hear all civil disputes among Indians and tribes (see Attorney General's Mem to the Governor, Bill Jacket, L 1953, ch 671 at 4-5).

C.

Among the many problems that the Congress and the legislature intended to address with section 233 was the very problem at the root of the dispute here: contested government within tribes. The Interior Department urged the Congressional committee to extend state jurisdiction over civil disputes specifically to protect individuals living on lands governed by tribes locked in governance disputes, such as the St. Regis and Tonawanda tribes. In those tribes, "rump" organizations claiming to be "the true tribal governing body" had undermined the authority of the recognized tribal governments, destroying "any semblance of tribal authority" (US Senate Report 1836, 81st Cong. at 5 [1950]). Section 233 would

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jurisdiction upon the Nation, they permitted tribes to seek redress in state courts, if they so choose. But even if those statutes were decidedly paternalistic – which various New York tribes asserted in opposition to their passage – no court is entitled to void a statute on the ground that it is "paternalistic" or "assimilationist." If Congress or the legislature wishes to update statutory laws, they may. We may not.

help, the Department said, by opening the state courts so that Indians and tribes would have "means of protecting or enforcing any rights they may have" (id.).

The committee's interest in the St. Regis tribe's dispute is particularly noteworthy for two reasons. First, the nature of the dispute is strikingly similar to the present dispute in the Cayuga Nation. From the 1880s through the 1940s, the titular leadership of the St. Regis tribe had been elected by a system opposed by a subgroup of the tribe, called the "Council of Life Chiefs". The Council of Life Chiefs believed that elections were antithetical to the traditional decision-making practices of the tribe (see William Sterna, The Repeal of Article 8: Law, Government, and Cultural Politics at Akwesasne, 18 Am Indian L Rev 297, 302-306 [1993]).[8]

Second, the St. Regis tribe's leadership dispute was a motivating factor to the legislature in adopting Indian Law § 11-a, just as it had been to the Congress for section 233. Section 11-a, passed five years after section 5 was amended to match section 233, ensures jurisdiction of the state courts over actions brought by Indian tribes to recover lands unlawfully occupied by others. The law supplemented Indian Law § 11 (L1909, ch 31), that allows the District Attorney of the relevant county to bring an action "against any person other than an Indian trespassing upon tribal lands." The Assembly sponsor in his memorandum of support stated that section 11-a was "another suggestion of the St. Regis chiefs" (Sponsor's Memorandum of Support, Bill Jacket, L 1958, ch 400 at 5). The St.

[8] A judge of the Surrogate's Court referred the Council's claim as a "coup d'etat" in upholding the authority of the leadership group chosen by the tribe's electoral process (In re Terrance's Estate, 32 NYS 2d 540, 547 [Sur Ct, Franklin County 1942]).

Regis chiefs had complained that section 11 allowed only for actions "against any person other than an Indian trespassing upon tribal lands" and that "the district attorney is too busy with other duties to pay enough attention to complaints of this kind" (id. [emphasis in original]). To resolve the dispute, the legislature adopted section 11-a to give tribes the explicit authority to bring a suit against all intruders, whether Indian or not, which was impossible under section 11.

To put as fine a point on this legislative history as possible: Indian Law § 11-a was passed by the legislature at the request of a tribe's leadership whose election was contested by a faction of the tribe that insisted the election was out-of-step with traditional practices. The purpose of the law was to supplement the existing law to make sure that tribes could bring suits in their tribal capacity to recover land that was unlawfully occupied by others, including when those others were other members of the tribe. That is precisely what the Cayuga Nation is doing here.

Given the text and historical background of these statutes, when the majority holds that the New York courts do not possess subject-matter jurisdiction to hear the Cayuga Nation's case, it is rewriting the text, purpose, and history of the laws of the state and of the United States.

D.

Charitably put, the legislative history cited above is, like many such historical materials, racially tinged and paternalistic. For instance, in Director Crocker's letter, he opined that the "only impartial court" to an Indian at odds with the ruling faction of a tribe

is the "white man's court" (Letter of J.D. Crocker, Director of Indian Services, in support, Bill Jacket, L 1953, ch 671 at 3). The joint legislative committee in its 1947 report cited the language of People of State of New York ex rel. Cutler v Dibble, (62 US 366, 370 [1858]): "New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion", written by Justice Grier just one year after he joined the majority of Dred Scott v Sanford (60 US 393 [1857]).

The policy goal of these statutes, to open New York courts to Indians and tribes, was strenuously opposed by tribes at the time. The Tonawanda Nation commented that the proposed legislation was a "millstone about the Indian's neck" (1948 Legis Doc No. 88 at 11). Hattie Halftown herself, appearing before the US House Committee as it considered Senate Bill 192 (now section 233) was blunter, accusing the committee of an attempt to abolish Indian tribes, and asking "Why do they not leave us alone?" because "they are not helping us at all" (Hearing, S 192 [81st Cong], July 11, 1950, at 12-13). The committee's response was to assure the tribes of the federal government's sincerity that it intended Indians "to be treated as equals of the white man" (1948 Legis Doc No. 88 at 12-13). That the committee would not put the proposals to a vote of Indians was "not meant to imply that New York Indians are deficient in intelligence" but only that it was impossible because of "the prejudices and misconceptions that confuse so many minds" (id.).

Despite the cursed history that haunts all precedents concerning the legal fate of Native Americans, we are left to apply the statutes as they have come to us. To deny a

tribe the ability to vindicate its rights in court when the United States and New York have expressly granted it perpetuates the terrible legacy of American Indian policy under the thin veil of quasi-sovereignty.

II.

The majority assumes without deciding the answer to the most difficult question before the courts in this matter: is there enough evidence in the record to support a finding that the Halftown Group has the authority to bring a lawsuit on behalf of the Cayuga Nation? (majority op at 17). The statutory scheme is clear that if the answer is yes, then the suit can be maintained in state court. The evidentiary question is one that Supreme Court must answer in order to determine if the court has subject matter jurisdiction under Indian Law §§ 5 and 11-a. Justice Bender answered in the negative in 2014 (Cayuga Nation v Jacobs, 44 Misc 3d 389, 394 [Sup Ct, Seneca County 2014]) and in the affirmative in 2017 (Cayuga Nation v Campbell, No. 51342, 2017 WL 4079004, at *1 [Sup Ct, Seneca County Sept 8, 2017]). The two decisions, though conflicting, were reasonable given the evidentiary record before him.

In 2014, Supreme Court considered the evidence before it and determined that "the preliminary question in the case" had not yet been answered. In other words, were there sufficient evidence that the plaintiff faction had a legitimate claim to maintain a suit on behalf of the Nation, the court would have jurisdiction. In 2017, there was new evidence as a result of the BIA's factual determination in the matter, whose conclusions were affirmed by the Assistant Secretary of the Interior for Indian affairs and, in light of an

Administrative Procedure Act challenge, by the U.S. District Court in Cayuga Nation v Bernhardt et al (374 F Supp 3d 1 [D DC 2019]). Justice Bender did not "accord deference" to the BIA's determination of law, as the Appellate Division did (163 AD3d 1500, 1504 [4th Dept 2018]). I agree with the majority that the BIA's decision cannot and should not apply broadly when the Agency explicitly acted only insofar as it was necessary to determine to whom payments should be made under the Indian Self-Determination and Education Assistance Act, which was the extent of its authority in the matter (majority op at 18-19; see Decision of Michael S. Black, Assistant Secretary – Indian Affairs, US Dept of Interior at 12 [July 13, 2017], Record on Appeal at 65). Rather, Justice Bender acted within his authority to determine, based on the record, whether the Halftown Group had the authority to initiate this lawsuit on behalf of the Cayuga Nation. The majority assumes so, and I agree with Justice Bender that it does.

As Supreme Court noted, the question before it was analogous to the question before the Second Circuit in Tanner (824 F3d 321 [2d Cir 2016]): could the court competently assert its subject-matter jurisdiction over a tribe, suing as a plaintiff in its official capacity, when another group contested its ability to assert claims on behalf of the tribe? The Tanner court held that finding sufficient evidence that the Halftown Group was authorized to bring a suit on behalf of the tribe, and thereby within the subject-matter jurisdiction of the court, was not the same as resolving a tribal dispute, which the federal courts are not permitted to do (id. at 328). The court looked to the BIA's decision and reasoning as evidence to

consider, holding that it was "entitled to defer" to the BIA's determination in order to evaluate whether the proper litigants brought the case, not that it was required to.

Just as the federal courts have subject-matter jurisdiction to hear disputes arising under federal statutes like the Indian Gaming Regulatory Act (25 USC §§ 2701-2721) at issue in Tanner, New York courts have subject-matter jurisdiction to hear claims arising under state law, including common law torts, pursuant to section 233 and Indian Law § 5. As the Second Circuit recognized, tribes have rights as a matter of tribal law, and non-tribal courts cannot disturb those rights. But tribes also have rights under federal law and under state law, and "rendering the tribe helpless to defend its rights in court" because of a question of tribal law on which the court may have no opinion, is "disastrous for the tribe's rights" (Tanner, 824 F3d at 328). Settling tribal law is an interest for the tribe. The state has an interest in maintaining a forum for the tribe to vindicate its rights under state law, if the sovereign tribe so chooses. Just as the Tanner court could consider facts to establish its own jurisdiction to resolve questions of federal law without resolving any questions of tribal law, we can determine if the Cayuga Nation has properly come before the court to adjudicate its claims under state law.

In Tanner, the issue before the court was the Nation's right to operate a bingo parlor; here it is the possession and operation of other properties, including a building that serves as headquarters, and commercial properties including a gas station and a convenience store. In both cases, the federal government and the state have certain interests in the properties but cannot decide every interest. The same can be said of nearly every property in the state

that is subject to both law and private agreements. For example, New York can enforce its zoning laws over my house, even if it cannot disturb the negotiated terms under which I bought the house. The Cayuga Nation's land is subject to certain tribal laws, and it is subject some of the state's public laws. Just because the state courts cannot hear cases about the tribal laws encumbering the Nation's property does not mean it cannot hear any suit that concerns the Nation's property. The existence of non-justiciable tribal claims does not defeat all justiciable state tort claims, especially when federal and state laws explicitly authorize them.

To evaluate the propriety of its jurisdiction, any court must evaluate whether the proper litigant is before it.[9] That is what the Tanner court did, and that is what Justice Bender did. Making that determination does not infringe on sovereignty, it accepts the Cayuga Nation, in its sovereign status, as a proper litigant before the court. If the Nation decided tomorrow that the Jacobs Council rather than the Halftown Council was its proper leader, the court would not be obliged to dismiss the case unless the Nation chose to, because it is the Nation in court. It is up to the Nation to determine who leads it; but the

[9] The issue on this appeal is the subject-matter jurisdiction of the New York courts. We are bound by the Constitution and by statutes, not by the arguments of the litigants, contrary to the majority's suggestion (see majority op at 13). The court may consider or raise the issue of its own jurisdiction at any time, even on its own motion (see, e.g., Rules of Practice of Court of Appeals, § 500.10). Indeed, in 2018, the Court dismissed 53 appeals *sua sponte* for lack of jurisdiction. The issue of the court's jurisdiction is always properly before the court and "cannot be changed or enlarged by the stipulation of the parties" (Hoes v Edison Gen. Elec. Co., 150 NY 87, 89 [1896]). The parties cannot alter our jurisdiction acting together by stipulation, and they certainly cannot alter it acting alone by choosing which arguments to make before us.

legislature requires the New York courts to hear the Nation's state law claims, just as the federal courts must hear its claims under federal law.

The Tanner court rejected the argument that "the possibility that Halftown's actions run contrary to tribal law requires dismissal of this lawsuit" because "[s]uch a conclusion would again lead to an untenable result: tribes could be thrown out of federal court by the mere suggestion that the individual or group of individuals initiating litigation on behalf of the tribe had overstepped their tribal authority" (id. at 330).[10] Unfortunately, that is precisely the result that the majority now reaches.

According to the majority, the problem is not that Supreme Court erroneously found the Halftown Group's evidence of its leadership claim to be sufficient. The majority instead holds that Supreme Court is not competent to adjudicate a tribe's claim against any person or faction claiming to be the tribe's lawful representative. There is no room in that logic for a court to find that tribal leadership is properly established, no matter how spurious the competing claim is. If I, a person with no claim to Indian heritage or tribal membership, took over a tribe's headquarters by force, claiming to be its rightful leader, no state court would have jurisdiction to eject me under the majority's position. Neither would any federal court, nor would any tribal court, except for the few places where such courts exist.

[10] Ultimately, the Tanner court opted to defer to the BIA's position because the case concerned the preemptive effect of another federal law, the Indian Gaming Regulatory Act. The Tanner court's analysis of its subject-matter jurisdiction in the face of the Jacobs Group's leadership claim is germane to the issue of subject matter jurisdiction under the relevant New York statutes and section 233, even though the issue of deference on a question of federal law in federal court is not.

The result for that tribe (and the communities around it) could be chaos or worse. That result does not respect the sovereignty of tribes; it denies them basic legal protection that is available to everyone else, and has been made available to them, after years of legislative study and deliberation, by multiple federal and state statutes.

The majority rests its conclusion on the "Nation's fundamental and exclusive right to sovereignty" (majority op at 20), ignoring the fact that it was the Cayuga Nation, as the Nation, which brought the dispute to state court and asked for the protection of state law. The Cayuga Nation has the sovereign right to settle this dispute internally. But it also has the right to seek redress in New York courts. Now, the majority deprives them of the rights all other New Yorkers have, claiming that this Court is in a better position than the Cayuga Nation to decide what is best for Cayuga sovereignty.

III.

The majority arrives at a result that is completely at odds with the federal and New York statutes, including their clear legislative history, by clipping sound bites from United States Supreme Court decisions that are irrelevant or contrary to the propositions for which the majority cites them. The majority begins its discussion by quoting dicta from Iowa Mut. Ins. Co. v LaPlante (480 US 9, 15 [1987]): "[i]f state-court jurisdiction over Indians or activities on Indian lands would interfere with tribal sovereignty and self-government, the state courts are generally divested of jurisdiction as a matter of federal law." But LaPlante did not involve a situation in which Congress had authorized the courts of a state to act; the tribe involved in LaPlante had a tribal court (unlike the Cayuga Nation); and

LaPlante's holding is that the federal court, sitting in diversity, possessed jurisdiction, but needed to wait for the defendant insurance company to exhaust its remedies in the tribal court first. Thus, the Ninth Circuit "should not have affirmed the District Court's dismissal for lack of subject-matter jurisdiction" (id. at 19-20). National Farmers Union Ins. Companies v Crow Tribe of Indians (471 US 845, 856 [1985]) is to the same effect, holding that the "federal court [should] stay[] its hand until after the Tribal Court has had a full opportunity to determine its own jurisdiction" — not that the federal court lacked jurisdiction. It is precisely because Congress and the New York Legislature recognized that all but two New York tribes lacked tribal courts that section 233 and the successive state legislation was passed.

The majority next moves to New Mexico v Mescalero Apache Tribe (462 US 324, 334 [1983]) and McClanahan v State Tax Commn. of Arizona (411 US 164, 171-72 [1973]). But the holding of the former is that New Mexico's regulation of hunting and fishing conflicted with the joint federal and tribal regulatory scheme;[11] the latter case cites Mescalero for the proposition that "the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption." Here, there is no federal preemption of state authority; indeed, Congress specifically enacted

[11] The same is true of White Mountain Apache Tribe v Bracker (448 US 136, 143-44 [1980]), which held that the federal regulation of timbering activities on reservation land was pervasive, so that Arizona's attempt to levy fuel taxes on logging on reservation land was preempted.

section 233 to reverse the preemption of New York's jurisdiction caused by the Forness case.

Without paying attention to their holdings, the majority relies on Bryan v Itasca County (426 US 373 [1976]) and United States v Dion (476 US 734 [1986]) as supporting its conclusion that section 233 does not grant authority to New York courts to adjudicate the claim at issue here. In Bryan, the Supreme Court held that the grant of civil jurisdiction to Minnesota found in 28 USC § 1360 did not authorize the state to levy a personal property tax on the mobile home of a Chippewa Tribe member located "on land held in trust by the United States for the Chippewa Tribe on the Leech Lake Reservation in Minnesota." The Court reasoned that "the total absence of mention or discussion regarding a congressional intent to confer upon the States an authority to tax Indians or Indian property on reservations" in the legislative history was "of special significance" because "some mention would normally be expected if such a sweeping change in the status of tribal government and the reservation Indians had been contemplated by Congress" (id. at 381). The Court further noted that the "only mention of taxation" in the legislative history was a colloquy in which the Chief Counsel for the Bureau of Indian Affairs assured Congressman Young that Indians would not pay state taxes even though the extension of civil jurisdiction would impose costs on the states (id. at 382-83).

The majority also omits to mention the Supreme Court's explanation that 28 USC § 1360—which, unlike section 233, had a "sparse legislative history" — "seems to have been primarily intended to redress the lack of adequate forums for resolving private legal

disputes between reservation Indians, and between Indians and other private citizens, by permitting the courts of the States to decide such disputes" (id.). The Court further explained that Indian tribes with tribal courts were "completely exempted" from state-court jurisdiction because "Congress plainly meant only to allow state courts to decide criminal and civil matters arising on reservations not so organized." Thus, Bryan holds that even though 28 USC § 1360 provides a general grant of civil jurisdiction over tribes lacking tribal courts, it cannot be read to grant Minnesota the power to tax Indian-owned property on reservation land, particularly in view of the longstanding lack of authority states had to levy such taxes. Here, by contrast, the grant of authority to New York is supported by the text and history of section 233.

The majority likewise neglects any analysis of Dion or its holding; that case cuts against it. Under an 1858 treaty, the Yankton Sioux tribe of South Dakota had the right to hunt bald and golden eagles within their reservation lands for noncommercial purposes. A member of the tribe was convicted of shooting four bald eagles on reservation land, in violation of the Eagle Protection Act, 16 USC 668. The Supreme Court upheld his conviction, holding that the Eagle Protection Act's provision authorizing the Secretary of the Interior to permit the taking, possession and transportation of eagles for religious purposes abrogated the Yankton's treaty rights, even though (1) the Act made no mention of the treaty rights of the Yanktons or any other tribe; and (2) the legislative history showed that the exception was created with regard to the "Hopi, Zuni, and several of the Pueblo groups of Indians in the southwest" – not tribes in the Dakotas. Thus, a perfectly plausible

reading of the Eagle Protection Act was to permit tribes without treaty rights, such as the Pueblo and Zuni, to continue to hunt eagles upon approval of the Secretary of the Interior, but to leave the tribes with treaty rights unaffected. Nevertheless, the Supreme Court concluded that the Eagle Protection Act was sufficiently specific to extinguish the Yanktons' treaty rights without expressly acknowledging them. In contrast, section 233 and the companion New York legislation, together with the legislative history of those statutes, is pointedly specific: those statutes were enacted to permit New York Indians, including Indian tribes, to avail themselves of the courts of the state to the same extent as all others.

I come then to Williams v Lee (358 US 217, 221 [1959]), which the majority quotes as stating, "when Congress has wished the States to exercise . . . power [to assume jurisdiction over Indian affairs that take place on the Indian reservation] it has expressly granted them th[is] jurisdiction" (majority op at 11; alterations by majority). However, the very example given by the Supreme Court of an express grant of state jurisdiction comes in the footnote attached to the majority's quote: "See, *e.g.*, 62 Stat. 1224, 64 Stat. 845, 25 U.S.C. §§ 232, 233 (1952) (granting broad civil and criminal jurisdiction to New York)" (id. at n 6; emphasis added). It could hardly be clearer then that the Supreme Court views section 233 as the paradigmatic "broad grant" of civil jurisdiction -- to the courts of New York.

The Court of Appeals cases cited by the majority do not advance its position. I agree with the majority that Spota ex rel. Unkechaug Indian Nation v Jackson (10 NY3d

46 [2008]) is instructive, particularly its first two sentences: "The question before us is whether Indian Law § 8 granted the County Court the discretion to determine, independent of the Indian nation, that respondent…was not an 'intruder' upon tribal land. We conclude that the court did not have that discretion" (emphasis added). We held that disagreeing with the tribe's determination of who is an intruder was "inconsistent with the sovereignty retained by the tribes" and so we sided with the tribe and granted the expulsion (id. at 53). Today's majority does the opposite, siding against the tribe with the alleged intruders. The majority substitutes its own judgment for that of the Cayuga Nation, which is suing in its sovereign capacity to remove people whom it has identified as intruders. If anything, the majority has overruled Spota or at least made it inoperable if the purported "intruder" merely claims to have authority to lead the tribe.

In Patterson v Council of Seneca Nation (245 NY 433 [1927]), we also sided with the tribe, not the outsiders, in determining who was rightfully a member of the tribe. In Patterson, the Seneca Nation was brought into court as a defendant by a person who claimed he was improperly denied enrollment as a member of the Seneca Nation and sought a mandamus order to compel the Nation to enroll him. We held that under Indian Law § 5,[12] "it cannot be understood that the Legislature intended to include within the phrase 'any demand or right of action' mandamus orders, the essential nature of which is to 'command,' not to 'demand'" (id. at 446). Here, it is the Cayuga Nation that has availed itself of the state courts, seeking to "demand" not "command."

[12] As it existed in 1927, before the amendments post-enactment of section 233.

Patterson was also decided on a statutory basis that was later expressly changed to grant the state courts jurisdiction, because of section 233. The Patterson court held that the Seneca Constitution, acknowledged in Article 4 of the Indian Law by the legislature, had committed all actions between Seneca Indians arising on its reservation to its peacemaker courts (id.). That was important because section 5, at the time, read: "Any demand or right of action, jurisdiction of which is not conferred upon a peacemakers' court, may be prosecuted and enforced in any court of the state, the same as if all the parties thereto were citizens" (L 1909 ch 31) (emphasis added). Twenty-six years after Patterson, in the post-section 233 amendments to Indian Law § 5, the language about peacemakers courts was struck because Congress had granted concurrent jurisdiction over all such matters to state court by passing section 233 (Memorandum of the Attorney General, Bill Jacket, L 1953, ch 671 at 4-5, ["The instant bills provide for concurrent jurisdiction of state and peacemaker courts in such actions and conform the language of section five of the state Indian law to the federal Civil Jurisdiction Act (Title 25 USCA 233)"]). The Seneca Nation petitioned the Governor to veto the 1953 amendments to section 5. They claimed the new law would "nullify" Seneca courts and wanted the Governor not to accept the powers granted to the state in section 233, which they also opposed on the same grounds (Letter on Behalf of the Seneca Nation, Bill Jacket, L 1953, ch 671 at 6). The Governor signed the bill over those objections, which is now Indian Law § 5.

Thus, Patterson held that tribes could not be brought into court under section 5 because (1) they could only avail themselves of state court as plaintiffs, they could not be

brought in as defendants; and (2) the statute textually committed jurisdiction in such matters to the courts of the Seneca Nation. But that provision was later struck from the statute because of section 233, which both the Governor and the Seneca Nation understood to transfer jurisdiction to the state courts. All of this is a strong argument in favor of jurisdiction over a tribe who sues as a plaintiff in court under the amended section 5, which is the case at bar.

IV.

At bottom, the majority's position is this: when Congress delegated civil jurisdiction over Indians to the New York courts, it did so in a paternalistic, assimilationist fervor, now abandoned. Therefore, we should not interpret section 233 as it was intended by Congress, and not read the follow-on New York legislation as our legislature intended it, because doing so would better comport with today's emphasis on tribal sovereignty. Of course, allowing Indian tribes lacking tribal courts access to New York's courts hardly seems assimilationist. In addition, the very Supreme Court cases relied on by the majority say that the modern conception of tribal authority has moved from one of sovereignty to one of federal preemption. But even if section 233 and Indian Law §§ 5 and 11-a were widely recognized as inconsistent with the federal government's (or New York's) current Indian policy, it is not our job to say so. Through a dicta-lite version of jurisdictional analysis, the majority has transformed itself into a legislative body, overruling duly-enacted federal and New York legislation on its view that those statutes have outlived whatever misguided purposes they may once have had. That is not our job.

Our job is to treat the plaintiff – the Cayuga Nation – as we would any other civil litigant claiming a right to property. The majority concludes that the Halftown group has the legal authority to bring this lawsuit on behalf of the Cayuga Nation. If so, all relevant statutes, legislative history and caselaw say that New York courts may adjudicate this claim. To be sure, the resolution of that dispute will leave the property in the hands of one group or the other, but that determination would not in any way bar the Nation from selecting whomever it wishes as its leaders, now or later. New York courts are supposed to be open to Indians and their tribes if they choose to come to them. Today the majority throws the Cayuga Nation out of court against its will, and with it, statutory law that is clear in its text, purpose, and history.

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Order reversed, with costs, defendants-appellants' motion to dismiss the complaint granted and certified question answered in the negative. Opinion by Judge Feinman. Chief Judge DiFiore and Judges Rivera and Stein concur. Judge Garcia dissents in an opinion. Judge Wilson dissents in a separate dissenting opinion. Judge Fahey took no part.

Decided October 29, 2019