UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

The CAYUGA NATION, by its Council of Chiefs and Clan Mothers; Clan Mother PAMELA TALLCHIEF; Clan Mother BRENDA BENNETT; Sachem Chief SAMUEL GEORGE; Sachem Chief WILLIAM JACOBS; Representative AL GEORGE; Representative KARL HILL; Representative MARTIN LAY; Representative TYLER SENECA, Plaintiffs, vs. The Honorable RYAN ZINKE, in his official capacity as Secretary of the Interior, United States Department of the Interior; JOHN TAHSUDA III, in his official capacity as Acting Assistant Secretary – Indian Affairs; MICHAEL BLACK, in his individual capacity; BRUCE MAYTUBBY, in his official capacity as Eastern Regional Director, Bureau of Indian Affairs; DARRYL LACOUNTE, in his official capacity as Acting Director, Bureau of Indian Affairs; UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS, Defendants, THE CAYUGA NATION COUNCIL, Defendant-Intervenor.	Civil Action No.: 17-cv-01923-CKK

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56 and LCvR 7(h), Plaintiffs the Cayuga Nation, Pamela Tallchief, Brenda Bennett, Samuel George, William Jacobs, Al George, Karl Hill, Martin Lay and Tyler Seneca respectfully move this Court for entry of an Order granting summary judgment to Plaintiffs on Counts I, II, III, IV and V of their Complaint for Declaratory and Injunctive Relief. Plaintiffs further request that this Court issue a permanent injunction against Defendants enjoining them from relying on the vacated decision of Acting Assistant Secretary for Indian Affairs Michael Black for any action of the Department of the Interior. Plaintiffs further request that this Court remand this matter to the Bureau of Indian Affairs for government-to-government consultation with a neutral decision-maker.

In support of this Motion, Plaintiffs rely on the attached Memorandum of Points and Authorities and the Statement of Material Facts with References to the Administrative Record in compliance with LCvR 7(h) & (n) and with the Sept. 27, 2017 Order Establishing Procedures for Cases Assigned to Judge Colleen Kollar-Kotelly, para. 12(A)(i). Pursuant to LCvR 7(f), Plaintiffs request an oral hearing on this Motion at the Court's earliest possible convenience and within 21 days after the filing of this Motion.

Date: May 24, 2018

Respectfully submitted,

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The Cayuga Nation, by its Council of Chiefs and Clan Mothers; Clan Mother PAMELA TALLCHIEF; Clan Mother BRENDA BENNETT; Sachem Chief SAMUEL GEORGE; Sachem Chief WILLIAM JACOBS; Representative AL GEORGE; Representative KARL HILL; Representative MARTIN LAY; Representative TYLER SENECA, Plaintiffs, vs. The Honorable RYAN ZINKE, in his official capacity as Secretary of the Interior, United States Department of the Interior; JOHN TAHSUDA III, in his official capacity as Acting Assistant Secretary – Indian Affairs; MICHAEL BLACK, in his individual capacity; BRUCE MAYTUBBY, in his official capacity as Eastern Regional Director, Bureau of Indian Affairs; DARRYL LACOUNTE, in his official capacity as Acting Director, Bureau of Indian Affairs; UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS, Defendants, THE CAYUGA NATION COUNCIL, Defendant-Intervenor.	Civil Action No.: 17-cv-01923-CKK

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page No.

TABLE OF CONTENTS (Cont'd)

Page No.

TABLE OF AUTHORITIES

Page No.

CASES

Page No.

Page No.

STATUTES

Page No.

RULES

REGULATIONS

OTHER AUTHORITY

I. INTRODUCTION

This action seeks vacatur of Department of the Interior ("DOI") and the Bureau of Indian Affairs ("BIA") decisions to support and promote an unprecedented method of governmental restructuring and, based on it, to recognize a new Cayuga Nation ("Nation") government for purposes of a federal contract. The decisions violated the Administrative Procedure Act and the Nation's right to determine its government under its own law.

The Cayuga Nation's sovereign governmental framework and foundational laws predate those of the United States and have served the Nation for centuries. Pursuant to its ancient law, Nation citizens choose their leaders through a consensual, clan-based process led by the Nation's Clan Mothers. In recent years, however, certain members of the Nation's governing Council of Chiefs have chafed against the authority held by the Clan Mothers, who are responsible for appointing, advising, and removing members of the Council. These Council members, known as the "Halftown Group," have refused to abide by Clan Mother directives, including orders removing them from the Council. Instead, they have attempted to restructure the Nation's government to purge their political opponents and eliminate the Clan Mothers' authority altogether.[1]

In 2012 and 2014, the Halftown Group asked the Bureau of Indian affairs ("BIA") to support and "verify" these efforts. The BIA declined, citing longstanding federal law and policy that recognizes the authority of the Cayuga Nation Clan Mothers and supports the Nation's right to continue its traditional governmental practices without federal interference. In 2016, however, the BIA abruptly reversed course. Following months of undisclosed meetings between DOI and BIA officials and the Halftown Group, to the exclusion of federally recognized leaders who are

[1] In proceedings below, Plaintiffs were referred to as the "Jacobs Group." Plaintiffs include both federally-recognized Clan Mothers and half of the last federally recognized government of the Cayuga Nation, with the Halftown Group comprising the other half.

Plaintiffs here, the BIA supported and assisted Halftown in restructuring the Nation's government to eliminate the authority of the Clan Mothers and Chiefs.

Even after these meetings were disclosed to Plaintiffs, the BIA refused to reconsider its judgment, made within seventy-two hours of receiving the Halftown Group's formal request, that a mail-in survey process opposed by Plaintiffs "would be… viable" as a means of choosing Nation leaders. Without disclosing its actions to Plaintiff Council members or Clan Mothers, the BIA provided federal funding, technical assistance and human resources to the Halftown Group's effort. Later, after the Halftown Group and Plaintiffs submitted competing proposals for a contract under the Indian Self Determination and Education Assistance Act ("ISDEAA"), the BIA relied on the survey process it had helped organize and supported to recognize a new Cayuga Nation government for contracting purposes.

This determination came not because Cayuga citizens lacked a government or because the Cayuga Nation had no resources absent federal funding; instead, the BIA acted "in order to provide this funding." The Acting-Assistant Secretary – Indian Affairs ("ASIA") affirmed the BIA's decision, and Plaintiffs filed suit in this Court under the Administrative Procedure Act seeking vacatur of the agencies' decisions and a permanent injunction against reliance on it.
In this Motion, Plaintiffs show that the agencies violated the Nation's right to self-government under its own law; that they acted arbitrarily and capriciously in crediting a deeply flawed mail-in survey as an accurate way to determine the composition of the Cayuga Nation government; and that they failed to provide the fair and impartial process due to Plaintiffs under the United States Constitution. Because there is no genuine issue as to any material fact in the Administrative Record ("AR"), Plaintiffs' Motion for Summary Judgment should be granted.

II. STANDARD OF REVIEW

A moving party is entitled to summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[W]hen a party seeks review of agency action under the APA, the district judge sits as an appellate tribunal. The 'entire case' on review is a question of law." *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083 (D.C. Cir. 2001) (internal citations omitted). Summary judgment is "the mechanism for deciding whether as a matter of law the agency action is supported by the administrative record and is otherwise consistent with the APA standard of review." *Southeast Conference v. Vilsack*, 684 F.Supp.2d 135, 142 (D.D.C. 2010); *Richards v. INS*, 554 F.2d 1173, 1177 (D.C. Cir. 1977). The appropriate APA standard of review hinges on the APA provision underlying a plaintiff's claims.

This Court has jurisdiction to review both Defendant Maytubby's Decision and Defendant Black's Decision affirming it. Though DOI initially delegated authority for Defendant Maytubby to take final agency action in issuing his Decision, Defendant Black later withdrew that delegation, rendering Maytubby's decision intermediate rather than final, and allowing Defendant Black to assume jurisdiction over its review. *Memo of Black Withdrawing Delegation*, Jan. 31, 2017, AR-003672. "A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704; *see also Fed. Trade Comm'n v. Standard Oil Co. of Cal.*, 449 U.S. 232, 245 (1980) (recognizing that under § 704, a court "reviewing a [final] cease-and-desist order has the power to review alleged unlawfulness in the issuance of a complaint"); *Yaman v. U.S. Dep't of State*, 634 F.3d 610, 613 (D.C. Cir. 2011) (recognizing plaintiff's challenge to hearing officer's

intermediate decision was reviewable because it was part of a case challenging the agency's final decision on the merits).

The APA directs the courts to "hold unlawful and set aside agency action" that is "arbitrary, capricious, [or] an abuse of discretion," 5 U.S.C. §§ 706(2)(A), as well as agency action that is "not in accordance with law…. [or] contrary to constitutional right." 5 U.S.C. §§ 706(2)(A), (B). In reviewing claims that an agency acted arbitrarily and capriciously, a court must ensure that the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Assn v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). The court's review must be "searching and careful," and the agency's action should be set aside if the court concludes after "a substantial inquiry" into the facts in the administrative record that "there has been a clear error of judgment." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378 (1989) (internal quotation marks omitted); *Lead Indus. Assn, Inc. v. Envtl. Prot. Agency*, 647 F.2d 1134, 1145 (D.C. Cir. 1980). Where an agency reverses its own prior decision or policy, it "must show that there are good reasons for the new policy." *F.C.C. v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009). "[A] reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *Id.* at 515-516.

By contrast, "[q]uestions of law are reviewed *de novo* under the APA." *Maniilaq Assn v. Burwell*, 72 F.Supp.3d 227, 234 (D.D.C. 2014); *see also Citizen Potawatomi Nation v. Salazar*, 624 F.Supp.2d 103, 114 (D.D.C. 2009) ("It is well established that *de novo* review is the appropriate standard" for review of agency legal determinations). "[A] reviewing court owes no deference to the agency's pronouncement on a constitutional question," and must instead make

"an independent assessment of a citizen's claim of constitutional right when reviewing agency decision-making." *Poett v. United States*, 657 F.Supp.2d 230, 241 (D.D.C. 2009) (internal quotations and citations omitted); *see also United States v. District of Columbia*, 897 F.2d 1152, 1158 (D.C. Cir. 1990) (review of constitutional claims under the APA "mirror[s] review under the Constitution itself"). A "searching and careful review" of this record reveals that the Agency's decision to transform and abandon the Cayuga Nation's traditional government was arbitrary, capricious and contrary to law and constitutional right.

III. DEFENDANTS VIOLATED FEDERAL AND CAYUGA NATION LAW BY PROMOTING AND SUPPORTING THE STATEMENT OF SUPPORT CAMPAIGN

The agencies' decisions were contrary to law. 5 U.S.C. § 706(2)(A). Their determination that "a plebiscite must be a valid mechanism by which [the Cayuga Nation] may decide matters of governance" violated Cayuga law and the Nation's right to self-governance. *Letter of Bruce W. Maytubby, BIA Eastern Regional Director to Clint Halftown and William Jacobs, December 15, 2016* ("BIA Decision"), AR 003570. Further, Defendant Black improperly deferred to Defendant Maytubby's legal conclusion that "Cayuga law permits the use of a plebiscite in order to ascertain the peoples' understanding of their governmental structures and leaders." *Decision of Assistant Secretary-Indian Affairs, July 13, 2017* ("ASIA Decision") AR 003889. Defendant Black affirmed this legal conclusion despite undisputed evidence that (1) such a plebiscite had never been utilized by the Cayuga Nation for any purpose, much less to override Clan Mother appointments to the Council; and that (2) fully half of the Nation's federally recognized Council and all of its federally recognized Clan Mothers found the plebiscite process to violate Nation law. Defendants based their conclusions on the slim reed of a single quotation from the Great Law of Peace, which by its plain language would be triggered only when three conditions, not

present here, were met. *ASIA Decision*, AR 003888. Under these circumstances the agencies' decisions were contrary to law and should be vacated.

A. Defendant Black Failed to Review Defendant Maytubby's Legal Conclusion *De Novo* as Required by Law

Like the federal courts and the IBIA, the Assistant Secretary – Indian Affairs reviews *de novo* BIA decisions on questions of law. *See Picayune Rancheria of the Chukchansi Indians v. Pacific Regional Director*, 62 IBIA 103, 114 (2016); *Maniilaq Assn. v. Burwell*, 72 F. Supp. 227, 234 (D.D.C. 2014). A thorough review of Indian nation law is particularly important in agency decisions related to recognition of Indian nation governments. *Tarbell v. Dep't of Interior*, 307 F.Supp.2d 409, 423 (2004). *De novo* review requires that a reviewer "make an original appraisal of all the evidence to decide whether or not it believes that judgment should be entered" for a party. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 514 (1984). "[T]he difference between a rule of deference and the duty to exercise independent review is 'much more than a mere matter of degree.' When *de novo* review is compelled, no form of appellate deference is acceptable." *Salve Regina Coll. v. Russell*, 499 U.S. 225, 238 (1991) (internal citation omitted).

Defendant Black impermissibly deferred to Defendant Maytubby's analysis of Cayuga law. He failed to make an original appraisal of all the evidence surrounding the central legal question underlying Defendant Maytubby's decision: whether use of a mail-in survey to establish a new government of the Cayuga Nation for federal contracting purposes violated Cayuga law. Instead, Defendant Black simply reviewed the Regional Director's consideration of that question and deemed it "reasonable." *ASIA Decision*, AR 003888. Although Defendant Black noted Plaintiffs' objections to the Regional Director's conclusion, he conducted no independent analysis of Cayuga law or review of the evidence of Cayuga law put forward by Plaintiffs. Defendant Black pointed to the Regional Director's consideration of both sides' arguments and

the Regional Director's characterization of the parties' positions as demonstrating a "true division," and "conclude[d] that [the Regional Director's] determination was valid." *ASIA Decision*, AR 003888-89. This approach conflicts with the Supreme Court's admonition that "no form of appellate deference is acceptable" for *de novo* review of questions of law. *Salve Regina Coll.*, 499 U.S. at 238

The conclusion that Defendant Black failed to consider key evidence of Cayuga law is supported by his failure to include that evidence in the Administrative Record he certified in February 2018. On February 21 and 22, 2018, Federal Defendants filed a set of documents deemed to comprise "the Administrative Record," Doc. 26, and the "Administrative Record Document Index," Doc. 27-1. On February 26, 2018, Federal Defendants filed the Declaration of Michael S. Black dated February 21, 2018. Doc. 32-1. In his Declaration, Defendant Black declared under penalty of perjury "that the Administrative Record filed in this case on February 21, 2018 was the entirety of the Administrative Record that was before and which I consulted during my consideration of Mr. Jacobs' administrative appeal of the Decision."

The February 21 AR lacked multiple documents supporting Plaintiffs' claims that the mail-in survey violated Cayuga Nation law. *Compare* Doc. 27-1("Administrative Record Document Index," filed Feb. 28, 2018); *with* Doc. 46-1 ("[Revised] Administrative Record Document Index," filed Apr. 24, 2018) (demonstrating omission of multiple primary source materials providing evidence of Cayuga law). During proceedings before the agencies below, Plaintiffs provided this evidence to Defendant Maytubby and Defendant Black. It was part of the Administrative Record compiled for Defendant Black's review of Defendant Maytubby's

Decision. Nonetheless, according to Defendant Black's Declaration, he failed to consult it.[2] Doc. 32-1. Because he admittedly failed to review this key evidence, Defendant Black did not conduct an independent review or "original appraisal" of all the legal evidence as required by law and instead impermissibly deferred to Defendant Maytubby's determination as "reasonable" and "valid." *ASIA Decision*, AR 003888-89. Because Defendant Black failed to conduct the independent appraisal of Cayuga law required, and because Cayuga law does not and has never allowed plebiscites, his decision should be vacated.

B. Had Defendant Black Reviewed Cayuga Law De Novo, He Would Have Found the Statement of Support Campaign to be Inconsistent with that Law

Indian tribes and nations have the right to govern themselves according to their own law and custom. "For nearly two centuries now, [federal law has] recognized Indian tribes as 'distinct, independent political communities,' qualified to exercise many of the powers and prerogatives of self-government." *Plains Commerce Bank v. Long Family & Cattle Co.*, 554 U.S. 316, 327 (2008) (internal citations omitted). "A quintessential attribute of [an Indian nation's] sovereignty is the power to constitute and regulate its form of government. An Indian nation is free to maintain or establish its own form of government." *Cohen's Handbook of Federal Indian Law* § 4.01[2][a] (N. Newton ed., 2012). Federal agencies thus lack the authority to dictate a form of government for an Indian nation. Nonetheless, Defendant Maytubby concluded that "a plebiscite must be a valid mechanism by which a body politic may decide matters of governance," *BIA Decision*, AR 003570, and Defendant Black acknowledged that the Statement of Support ("SOS") campaign would require the Nation to temporarily, but not permanently,

[2] Alternatively, Defendant Black did consult this evidence but his February 21, 2018 declaration under penalty of perjury was inaccurate.

"discard their traditional governing structure." *ASIA Decision*, AR-003890.[3] Under well-established Federal law, "[j]urisdiction to resolve internal tribal disputes, interpret tribal constitutions and laws, and issue tribal membership determinations lies with Indian tribes." *In re Sac & Fox Tribe of the Mississippi in Iowa/Meskwaki Casino Litig.*, 340 F.3d 749, 763–64 (8th Cir. 2003).

1. Under Cayuga Law, the Clan Mothers Have Sole Authority to Appoint and Remove Council Members

The Clan Mothers occupy a critical role in the government of the Cayuga Nation. Pursuant to the authority vested in them by the Great Law and the citizens of each clan, Clan Mothers have sole responsibility for appointing and removing the men who make up the Council of Chiefs. This obligation to identify, advise, and – if necessary – remove Council members serves as the principal check on the power of the male Chiefs and Clan Representatives. *See George*, 49 IBIA at 167, AR 000068; *Letter of Franklin Keel, then BIA Eastern Regional Director, to Daniel J. French and Joseph J. Heath, August 19, 2011*, AR 000426-27. According to Tadadaho Sidney Hill, "[O]ne of the main sources of strength for our culture and government is…the leadership of the Clan Mothers within our Nations and our Confederacy." *Affidavit of Tadadaho Sidney Hill, June 29, 2011*, AR 000366-68.

The BIA, IBIA, and federal courts have consistently and uniformly acknowledged that the government of the Cayuga Nation follows the Great Law of Peace of the Haudenosaunee. *See, e.g., Samuel George v. Eastern Regional Director*, 49 IBIA 164, 167 (2009), AR 000068.

[3] As Plaintiffs have pointed out, Doc. 22 at 5-8, whether a particular democratic system allows for plebiscites in a particular context depends on the system, not on universal democratic principles related to the consent of the governed. United States Presidents are not elected via plebiscite, nor are Cabinet members or governmental officials in parliamentary systems. Democratic systems need not allow plebiscites in order for their governments to derive their just power from the consent of the governed.

Pursuant to this law, the will of the Cayuga people is expressed through their Clans, three of which are active today. *Id*. (Heron, Bear and Turtle are the three active clans at Cayuga); *ASIA Decision*, AR 003878; *see also Halftown Group Governance Process Document, Letter of Clint Halftown et. al to Cayuga Nation, July 6, 2016,* AR 003343; AR 003349 (Halftown Group confirming that Wolf Clan is not active at Cayuga and has no Clan Mother, but nonetheless purporting to install a Wolf Clan representative on the Council of Chiefs).

Clan Mothers are selected by consensus of the citizens of each Clan based on criteria and processes laid out in the Great Law. *Declaration of Bear Clan Mother Pamela Tallchief, Nov. 13, 2016*, AR 003514. The Clan's Chief confirms this selection. *Id*. Once in place, a Clan Mother is responsible for guiding the selection of new Chiefs and Clan Representatives to the Nation's Council; monitoring and advising these leaders; and if necessary removing them pursuant to Nation law. *Declaration of Chief William Jacobs, June 9, 2014*, AR 003485-88; *Declaration of Chief Samuel George, June 10, 2014*, AR 003497-501; *Letter of Franklin Keel, then BIA Eastern Regional Director, to Daniel J. French and Joseph J. Heath, August 19, 2011*, AR 000451-52 (Decision of BIA Recognizing Cayuga Nation Council, Aug. 19, 2011) ("[T]he Clan Mothers are the persons tasked with the responsibility of appointing representatives of their respective clans to serve on the Nation Council."); *George*, 49 IBIA at 167, AR 000068; *Letter of Franklin Keel, then BIA Eastern Regional Director, to Gary Wheeler et al, July 18, 2005*, AR 000053 ("It is our belief and understanding that… [Cayuga Nation] leaders are not elected, but are appointed by their respective clan mothers in accordance with the customs of the Cayuga Nation."). Chiefs serve for life and Clan Representatives serve as long as they are needed, so the Clan Mother's monitoring and advising role is critical to the smooth functioning of the Nation's Council of Chiefs. *Declaration of Chief William Jacobs, June 9, 2014*, AR 003485-88;

Declaration of Chief Samuel George, June 10, 2014, AR 003497-003501; *Declaration of Oren Lyons, Nov. 4, 2011*, AR 003493 ("We are a matrilineal society. It is the Clan Mother's duty to oversee … the conduct of the leaders with the authority to recall [them]. She does not tell her leaders what to say or do.").

The Nation's Council of Chiefs makes decisions by consensus. *George*, 49 IBIA at 168, AR 000069; *see also Poodry v. Tonawanda Band of Seneca Indians*, 85 F.3d 874, 877 (2nd Cir. 1996). Consensus in this context requires more than a majority. *See George*, 49 IBIA at 173 n.4, AR 000074 (Halftown Group arguing that consensus under Cayuga law requires unanimity); *id*. at 189, AR 000090 (IBIA upholding BIA finding that consensus under Cayuga law requires more than a majority). Citizen concerns are addressed through the clan structure. When a citizen has a complaint or concern, she may bring it to her Clan Mother, Chief, or Clan Representative to be addressed. *Declaration of Bear Clan Mother Pamela Tallchief, Nov. 13, 2016,* AR 003512. Together, Clan Mothers, Chiefs, and Clan representatives work to find consensus resolution to citizen concerns. *Declaration of Bear Clan Mother Pamela Tallchief, Nov. 13, 2016,* AR 003512-14. In this way, the Clans of the Cayuga Nation provide the central framework for Cayuga citizens to express their will, inform the decisions of their leaders, and seek resolution of their concerns. The Cayuga Nation is a representative democracy.

There is not "a single factual example from the history or oral tradition of the [Cayuga] Nation in which the Council acted by majority vote." *George*, 49 IBIA at 165, AR 000066. Referenda, elections, survey campaigns, and plebiscites are likewise inconsistent with and unprecedented in Cayuga law and history. Just over two decades ago, Defendant-Intervenor Halftown explained to the BIA:

> We are concerned… by your statement that the BIA will continue to accord…recognition to [Chief] Isaac until it is clearly shown that he "no longer enjoys the support of a majority of the tribal membership." We respectfully submit that such a standard for withdrawing recognition of Cayuga leaders is unlawful, inconsistent with Cayuga law and is ill-advised…Cayuga Chiefs and representatives are… accountable to the Cayuga People. That accountability is enforced according to traditional Cayuga law and the clan system, rather than Anglo concepts of pure majority rule.

Letter of Clint C. Halftown to Franklin Keel, BIA Eastern Regional Director, Sept. 26, 1997, AR 003276-77.

It is undisputed that the Cayuga Nation has never used a mail-in survey or election to determine the composition of its Council, and instead has since time immemorial relied on the authority of the Clan Mothers to appoint and remove Council members based on the will of the people of each clan. *George*, 49 IBIA at 167, AR 000068; *ASIA Decision*, AR 003877; AR 003891. Nor has any other Indian nation had ever used such a process.[4]

Neither Cayuga law nor the Great Law of Peace has changed in the twenty years since Defendant-Intervenor Halftown explained these fundamental legal principles to the BIA. These undisputed pillars of Cayuga law and governance are flatly inconsistent with the mail-in survey process approved by the agencies below. That process removed certain leaders from the Nation's Council and replaced them with others, contrary to the will of the Cayuga people as expressed through their clans by the actions of their Clan Mothers.

[4] While the Halftown Group argued below that the Oneida Nation once used a referendum process in the 1990s, that process differed dramatically from the SOS. Both sides in that governmental dispute, including the Clan Mothers, supported its use under agreed upon conditions. Further, it was not a mail-in survey at all, but a public referendum overseen by the League of Women Voters and distinguished by such basic electoral safeguards as an agreed-upon voter roll, anonymous ballots, unbiased ballot language, and more than one option for voters to choose. *Exhibit E and F attached to Letter of Joseph J. Heath to Bruce Maytubby et al., July 1, 2016*, AR 003280-87.

2. Under Cayuga Law the Council is Comprised of Chief Samuel George, Chief William Jacobs, Karl Hill, Alan George, Martin Lay and Tyler Seneca

The Cayuga Nation has never lacked a government, and Defendants erred in suggesting otherwise. *See, e.g.*, *ASIA Decision*, AR 003890 (deeming the survey campaign a "limited… [i]nitiative, designed to establish a baseline tribal government…"). Prior to Defendant Maytubby's embrace of the survey campaign and provision of federal support for it, the United States had consistently recognized Cayuga Nation governments formed pursuant to longstanding Cayuga Nation law and custom. Leading up to the survey, no party disputed that the Nation had a government; instead, dispute centered on who comprised the Council of Chiefs.[5]

In the early 2000s, following the death of Chief Vernon Isaac, Clint Halftown moved to assert control over the Nation's Council and governmental affairs. *See, generally, George*, 49 IBIA 164, AR 000065-95. Cayuga citizens reported experiencing heavy-handed and arbitrary treatment by the Halftown group with respect to employment and housing. *Facsimile Transmittal of Brenda Bennett to Darlene Whitetree, June 1, 2011,* AR 000100-09 (Turtle Clan Mother statement detailing serious concerns of Cayuga Nation citizens); *Letter of Joseph J. Heath to Franklin Keel, then BIA Eastern Regional Director, June 25, 2011,* AR 000301-48 (citizen statements describing retaliatory firings and other illegal actions by Mr. Halftown); *see also Affidavit of Clan Mother Brenda Bennett, Sept. 29, 2011,* AR 000568-76 (detailing findings of preliminary audit of Halftown administration; use of armed security forces to intimidate citizens; and refusal of Halftown, Twoguns and Wheeler to abide by Clan Mother directives).

[55] Indeed, until the SOS campaign, no party disputed that Chief Samuel George and Chief William Jacobs were members of the Nation's Council of Chiefs. The SOS materials offered Cayuga citizens no option to express support for these two undisputed Council members; the only option offered was to support the Halftown Group as a whole. *Halftown Group Governance Process Document, Letter of Clint Halftown, et al., to Cayuga Nation, July 6, 2016,* AR 003349.

Cayuga citizens reported that the Halftown Group retaliated against citizens who questioned them. *See Letter of Joseph J. Heath to Franklin Keel, then BIA Eastern Regional Director, June 25, 2011*, AR 000301-48 (statements of multiple Cayuga citizens describing retaliatory firings and other illegal actions by Mr. Halftown). Citizens reported being fired, suspended or demoted without notice or due process; being subjected to unannounced housing inspections; and being served with state court eviction pleadings. *Id.*; *see also Cayuga Nation's Reply to Appellant's Response to Motion to Make August 19, 2011 Decision by Eastern Area Director Immediately Effective*, Docket. No. IBIA 12-005 (filed Nov. 7, 2011), AR 001144-161; *Affidavit of Clan Mother Brenda Bennett, May 18, 2012*, AR 001790-96; see also *Affidavit of Clan Mother Brenda Bennett, Sept. 29, 2011*, AR 000573 (attaching communication of Mr. Halftown stating "[n]o one has been layed [sic] off yet! But it is going to happen, as well as firings! That you can count on."); *Employment Termination Notices from Clint Halftown to Justin Bennett et al, May 31, 2011,* AR 000096-99 (notices of termination). Mr. Halftown referred to his own Heron Clan Mother as "clan monster." *Letter of Joseph J. Heath with Exhibits to Franklin Keel, then BIA Eastern Regional Director, June 9, 2011*, AR 000147.

At a Turtle Clan meeting on May 31, 2011, Turtle Clan Mother Bennett removed Mr. Twoguns and Mr. Wheeler from their positions on the Nation Council and appointed Samuel Campbell and Justin Bennett to serve in their places. *Letter of Joseph J. Heath with Exhibits to Franklin Keel, then BIA Eastern Regional Director, June 9, 2011,* AR 000163-170; AR 000133-162. On June 1, 2011, the Cayuga Nation Council held an open citizens' meeting. *Id*. At the Nation's June 1 meeting, the Heron Clan Mother affirmed her removal of Clint Halftown from the Nation Council and affirmed Karl Hill and Chief William Jacobs' position as Heron Clan

representatives to the Council. *Id*. The Bear Clan Mother likewise confirmed the appointments of Chief Sam George and Chester Isaac to Council as Bear Clan representatives.

In support of the Clan Mothers' actions, a unanimous Cayuga Nation Council, with the participation and agreement of all three Clan Mothers, adopted a consensus resolution affirming the composition of the Nation's government. *Cayuga Nation Resolution 11-001, June 1, 2011,* AR 000134-135. Resolution 11-001 was thus the result of a consensus action by the reformed Council, with the full support of each of the Nation's three clans and Clan Mothers. It was the first such consensus action taken by the Cayuga Nation Council in over five years and the first of dozens of such consensus decisions subsequently enacted by the Nation Council between 2011 and 2016. *See, e.g., Exhibits B-G of Unity Council's Memorandum of Law and Facts, June 26, 2014,* AR 002224-40; *Letter of William Jacobs, et al., to Poitra, et al., February 18, 2015*, AR 003201-04; AR 003211-13.

The Clan Mothers and the Council notified the Eastern Region of the changes in its government on June 1, 2011. *Facsimile Transmittals of Brenda Bennett to Darlene Whitetree, June 1, 2011,* AR 000100-09 and *June 2, 2011,* AR 000100-16. The Halftown group – each of whom had been removed from the Council -- objected, claiming the Clan Mothers could not remove them because the BIA had earlier identified them as Nation leaders. After requesting and reviewing briefing from each side on the validity of the governmental reform under Cayuga law, the BIA recognized the new Council and rejected the Halftown Group's contentions. *Letter of Franklin Keel, then BIA Eastern Regional Director, to Daniel J. French and Joseph J. Heath, August 19, 2011,* AR 000449-52. Appropriately, the BIA's 2011 decision placed great weight on the role of the Clan Mothers in the Cayuga Nation governmental system:

> All three [Clan Mothers] have submitted affidavits as to their status and actions on May 31 [2011]… **[N]either party has ever denied the authority of Clan Mothers, under ancient Haudenosaunee custom, to choose clan representatives who sit on the Nation's Council. Nor has either party denied the legitimacy or status of the Clan Mothers involved in this matter**. [A]ll three women's names appear as acknowledged Clan Mothers on [Clint Halftown's] website…
> Based on the foregoing, I conclude that the source of the changes outlined above was the action of each clan mother in carrying out her traditional clan responsibilities. I would be remiss if I failed to recognize the results of this exercise of ancient traditional authority by the Clan Mothers. As noted above, **the Clan Mothers are the persons tasked with the responsibility of appointing representatives of their respective clans to serve on the Nation Council**.

Id. (Decision of Eastern Regional Director Recognizing Cayuga Nation Council, August 19, 2011) (emphasis added).

Rather than stepping down, the removed Council members set in motion legal appeals that stayed the Bureau's recognition decision. In January 2014, the IBIA ruled that the BIA lacked sufficient "federal need" to rule on the composition of the Nation's government. The IBIA passed no judgment on the merits of the Bureau's 2011 determination that the Clan Mothers have the sole authority under Cayuga law to appoint and remove Council members (a tenet undisputed by any party at the time) or that the Halftown group had been lawfully removed from the Nation's Council. *See Cayuga Indian Nation of New York v. Eastern Regional Director, 58 IBIA 171 (2014),* AR 002126-42.

In 2016, the Turtle Clan Mother informed the BIA that Turtle Clan representatives Justin Bennett and Samuel Campbell had been replaced on the Nation Council by Martin Lay and Tyler Seneca. *Letter of Brenda Bennett to Bruce Maytubby, BIA Eastern Regional Director, August 31, 2016,* AR 003358. Bear Clan Mother Pamela Tallchief informed the BIA that Bear Clan representative Chester Isaac had been replaced on the Nation Council by Al George. *Letter of Pamela Tallchief to Bruce Maytubby, BIA Eastern Regional Director, August 31, 2016, AR*

003359. No further changes to the Cayuga Nation Council have been made or approved by any Clan Mother since that time. Under longstanding Cayuga Nation law, the Great Law of Peace, the Clan Mothers' appointments govern the composition of the Nation Council, which cannot be changed by a mail-in survey and should be recognized and respected by the United States.

3. The Lone Provision of Cayuga Law on Which the Agencies Relied Has Never Been Interpreted to Allow a Statement of Support Campaign and By Its Terms Does Not Apply to Nation Council Composition

Defendant Black failed to review *de novo* the Halftown Group's argument that a provision of the Great Law authorized using a mail-in survey to override Clan appointments to the Council. Instead, he reviewed Defendant Maytubby's consideration of that legal question and pronounced it "reasonable." *ASIA Decision*, AR 003888. Much of Defendant Black's review of Maytubby's decision and of Maytubby's decision itself dealt not with the specific question whether Cayuga law allowed for a mail-in survey to choose leaders, but with the broader and uncontested question of whether Cayuga citizens have the right to choose their leaders.[6] The agencies erred in their focus on this question, which sheds no light whatsoever on the mechanisms provided by Cayuga law for the exercise of that right.

On the core question of the survey's legality, Maytubby and Black relied on (1) a single provision from the Great Law; and (2) the fact that three of the six members of the Nation's then-recognized Council argued the survey process was legal.[7] See *ASIA Decision*, AR 003887-89; *BIA Decision*, AR 003568-70. They discounted multiple affidavits from Haudenosaunee leaders, including the Clan Mothers, three Council members, Tadadaho, and others interpreting the Great

[6] *See, e.g.*, *BIA Decision*, AR 003569 (finding the SOS valid under Cayuga law because "to reject the principle that a statement of support could be valid [under Cayuga law] would be to hold that the Cayuga Nation's citizens lack the right to choose a government that reflects their choices.")
[7] *See ASIA Decision*, AR 003888 (finding that "[t]he Regional Director premised the Decision on a provision from the Haudenosaunee Great Law of Peace").

Law, which is an oral tradition, and explaining that Cayuga law does not allow for surveys to override Clan Mother appointments. *See, e.g.*, *Affidavit of Clan Mother Brenda Bennett, Sept. 29, 2011*, AR 000568-76; *Declaration of Brenda Bennett, June 10, 2014*, AR 002260-63; *Declaration of Clan Mother Brenda Bennett, Nov. 11, 2016*, AR 003507; *Declaration of Clan Mother Pamela Tallchief, Nov. 13, 2016*, AR 003512-14, *Declaration of Clan Mother Pamela Tallchief, June 9, 2014*, AR 003478, *Declaration of Bear Clan Mother Pamela Tallchief, Nov. 13, 2016*, AR 003514; *Affidavit of Clan Mother Bernadette Hill, Sept. 28, 2011*, AR 000579-82; *Declaration of Bernadette Hill, June 9, 2014*, AR 002326; *Declaration of Oren Lyons, Nov. 4, 2011*, AR 00392-95; *Affidavit of Tadadaho Sidney Hill, June 29, 2011*, AR 000366-68; *Declaration of Chief Samuel George, June 10, 2014*, AR 003497-501; *Declaration of Chief William Jacobs, June 9, 2014*, AR 003485-88; *see also Letter of Clint C. Halftown to Franklin Keel, then BIA Eastern Regional Director, Sept. 26, 1997*, AR 003276-77 (informing BIA that basing recognition of Cayuga leaders on "majority support" from the Nation's citizens "is unlawful [and] inconsistent with Cayuga law.").

The sole provision of the Great Law proffered as support for the SOS by its terms does not apply to the selection of members of the Cayuga Nation Council. The provision reads:

> Whenever a specially important matter or a great emergency is presented before the Confederate Council and the nature of the matter affects the entire body of the Five Nations, threatening their utter ruin, then the Lords of the Confederacy must submit the matter to the decision of their people and the decision of the people shall affect the decision of the Confederate Council. This decision shall be a confirmation of the voice of the people.

ASIA Decision, AR 003888; *BIA Decision*, AR 003568.

The cited provision by its terms requires three conditions be met. The first is that "a specially important matter or a great emergency *is presented before the Confederate Council*." (emphasis added). It is undisputed that no such matter was presented before the Confederate

Council, also known as the Grand Council. The second requirement is that "the matter *affect[] the entire body of the Five Nations, threatening their utter ruin*." (emphasis added). No evidence to support this factual predicate was proffered below and none exists: the desire of two competing factions of the Cayuga Nation to submit ISDEAA contract applications does not threaten the utter ruin of the Haudenosaunee Confederacy. The third requirement is that "the Lords of the Confederacy" put the matter before the people *of the Confederacy*. The provision thus specifically addresses serious Confederacy-wide threats requiring action by the Confederacy as a whole, not procedures by which individual Nations conduct their business or form their governments. Those procedures are spelled out in other parts of the Great Law, including provisions on the role of the clans and Clan Mothers in appointing Council members.

In the proceedings below, the Halftown Group initially altered the language of the quoted provision, removing the terms "Confederate" and "Confederacy" throughout to make it appear the provision related to individual Nation Councils, not the Confederate or Grand Council. *See Halftown Group's Opening Brief to Bruce Maytubby, BIA Eastern Regional Director, November 14, 2016,* AR 003419. When Plaintiffs objected, the Halftown Group claimed that since the Great Law applies to all Nations in the Confederacy, the provision does not mean what it says when it refers to matters threatening the utter ruin of "the entire body of the Five Nations;" presentation to "the Confederate Council;" or actions to be taken by "the Lords of the Confederacy." *See, e.g., Halftown Group's Response Brief to Bruce Maytubby, BIA Eastern Regional Director, November 29, 2016,* AR 003522. The Halftown Group offered up a different Great Law excerpt on the fact that while all member Nations of the Confederacy follow the Great Law, each member Nation of the Confederacy has its own Council. *Id*. That general principle

cannot and does not override language specific to the Grand Council and emergency matters threatening the ruin of the entire Confederacy.

Nonetheless, Defendant Maytubby found that although the passage did not address individual Nation Councils, "in light of the fundamental principle[] [that governments 'deriv[e] their just powers from the consent of the governed'], I cannot conclude that the citizens of each Haudenosaunee Nation have less authority with respect to their own Nation than they have within the overall Confederacy." *BIA Decision*, AR 003568-69. Defendant Black deferred to Maytubby's legal conclusion as reasonable solely because one side had made that argument: "[T]he RD had further received briefing that this specific passage was applicable to both the Confederate Council and to each member nation of the Council." *ASIA Decision*, AR 003888. That conclusion begs the question of whether that argument is a valid interpretation of the Great Law. There is no evidence in the record that the "utter ruin" provision has ever been applied to a single member Nation of the Confederacy, much less used by a Nation to override Clan Mother appointments or alter the composition of its Council of Chiefs.

The agencies' decision to accept the Halftown Group's counter-textual legal argument – Maytubby in his review of the law and Black in his deferral to Maytubby's review – constitutes clear error, especially where, as here, the altered provision provided the sole support in Haudenosaunee law for a *sui generis* survey process to remove and install governmental representatives. Even had the provision applied, it says nothing about using a mail-in survey to put to the Cayuga people a question already decided by the Clan Mothers, in whom the Great Law rests responsibility for such decisions. This Court need not determine the lawful composition of the Cayuga Nation Council but should vacate the agencies' erroneous legal rulings and remand for proceedings before the BIA. The decisions are contrary to law.

IV. DEFENDANTS' CHANGE IN POSITION ON THE STATEMENT OF SUPPORT CAMPAIGN WAS NOT SUPPORTED BY REASONED EXPLANATION

The BIA acted arbitrarily and capriciously by failing to provide a reasoned explanation for its change in policy regarding the verification and confirmation of the Halftown Group's 2016 SOS campaign and by failing to reasonably assess the evidence in the record as a whole regarding reliability of the SOS.

A. Standard of Review

A reviewing court must determine whether the agency's conclusions "are supported by substantial evidence in the record *as a whole*." *Arizona Pub. Serv. Co. v. United States*, 742 F.2d 644, 649 (D.C. Cir. 1984) (emphasis added). Where an agency reverses its prior decision, it "must show that there are good reasons for the new policy." *F.C.C. v. Fox*, 556 U.S. at 515. "Agencies are free to change their existing policies as long as they provide a reasoned explanation for the change." *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2125 (2016). "[I]t is not that further justification is demanded by the mere fact of the change; but that a reasoned explanation is needed for disregarding facts and circumstances that underlay or were engendered by the prior policy." *F.C.C. v. Fox*, 556 U.S. at 515-516.

Reliance on a false premise cannot constitute a reasoned explanation for an agency's change in position. *See Animal Legal Def. Fund, Inc. v. Perdue*, 872 F.3d 602, 619 (D.C. Cir. 2017) (where USDA based its explanation for decision in part on false basis, court determined that agency's explanation for its decision ran counter to the evidence allegedly before it); *Nat. Res. Def. Council, Inc. v. Rauch*, 244 F.Supp.3d 66, 96 (D.D.C. 2017) *(*"Suffice it to say, it is arbitrary and capricious for an agency to base its decision on a factual premise that the record plainly showed to be wrong").

B. The Agencies' Approval of the Statement of Support Campaign Sharply Reversed Longstanding Agency Policy

The BIA has consistently rejected requests that it support mail-in surveys to determine the composition of the Cayuga Nation government, finding in 2015 that "we are aware of no applicable authority that provides for [BIA] verification of election results [at Cayuga] or allows BIA to provide an independent confirmation of the results of a [mail-in survey process]." *Letter of Acting Eastern Regional Director Tammie Poitra to Cayuga Nation et al., Feb. 20, 2015,* ("2015 Poitra Decision") AR 003223 (rejecting 2014 survey verification request). Rather, BIA and DOI policies have been consistent: internal governmental disputes at the Cayuga Nation must be resolved internally according to the Nation's own law and traditional processes, and Cayuga law vests the Clan Mothers with exclusive authority to appoint and remove Council members. *Id.; see also George*, 49 IBIA at 165, AR 000066.

In 1997, the BIA recognized that the Cayuga Nation does not use an electoral system. *See Letter of Clint C. Halftown to Franklin Keel, then BIA Eastern Regional Director, Sept. 26, 1997*, AR 003276-77 (Halftown thanking BIA for refusing to recognize the results of an election campaign and noting that "federal law plainly prohibits the Bureau from imposing its own notions of popular government or other governmental procedures onto Indian governments.").

Again in 2005, the BIA rejected an electoral process proposed by members of the Halftown Group. *See Letter of Franklin Keel, then BIA Eastern Regional Director, to Gary Wheeler et al, July 18, 2005,* AR000053-54 ("It is our belief and understanding that the Cayuga Nation is governed by a traditional government…and that…leaders are not elected but are appointed by their respective clanmothers (*sic*) in accordance with the customs of the Cayuga Nation."). In 2012, the BIA rejected a statement of support campaign proposed by the Halftown Group. *See Halftown Group's Opening Brief to Bruce Maytubby, BIA Eastern Regional*

Director, November 14, 2016, AR 003411. In September 2014, the BIA once again rejected an effort to use a mail-in survey campaign to determine the composition of the Nation's government. *2015 Poitra Decision,* AR 003223. The agencies' decisions to provide technical support to the mail-in survey campaign; to expend federal funds "verifying" its results; and to approve it as a lawful means of determining the composition of the Cayuga Nation government thus represented a profound departure from previous agency practice. The agencies failed to provide the reasoned explanation required for such policy reversals.

C. The Agencies' Proffered Explanations for the Change Were Unreasonable Because They Were Based on False Premises

1. Change Related to 2006 Council ISDEAA Submission

In explaining the BIA's 2016 policy reversal, the agencies incorrectly asserted that the 2006 Cayuga Nation Council submitted an ISDEAA proposal in 2015, and that its failure to do so in 2016 led the agency to change its policy. *ASIA Decision*, AR 003897. The record plainly shows this factual premise for the BIA's explanation to be false: the 2006 Council did not submit an ISDEAA proposal in 2015. *See 2015 Poitra Decision*, AR 003216-003233 (denying ISDEAA requests from two competing governmental factions and instead authorizing ISDEAA fund access only to the last undisputed leadership of the Nation, the Nation 2006 Council, which did not submit a proposal). Because the BIA based its explanation for its decision on a false premise, the BIA's decision to verify the Halftown Group's SOS results was made without reasoned explanation. *Nat. Res. Def. Council, Inc.,* 244 F.Supp.3d at 96.

2. Change in Other Circumstances

As the second rationale for their change in policy, Defendant agencies pointed to the "under these circumstances" qualification of the Acting-Regional Director's 2015 Decision rejecting the SOS. *ASIA Decision,* AR003897; *BIA Decision*, AR 003575-76 (finding that prior

policy was "based on the circumstances at the time" and that "[t]he different circumstances and decision facing BIA now…more than justify the different approach that BIA is taking to this year's statement of support campaign."). However, the agencies failed to provide a reasoned explanation of *how* the circumstances had changed to justify reversing course. Instead, the agencies pointed to contested allegations of "worsening disputes" unsupported by the record and to the passage of twenty-two months. Because the BIA failed to provide "good reasons for the new policy" to support and verify the results of the Halftown Group's 2016 SOS campaign, its decision to do so was unreasonable. *F.C.C. v. Fox*, 556 U.S. at 515.

In fact, the BIA's 2015 "under the circumstances" qualification referred to dispute over whether an SOS campaign would be consistent with the requirements of Cayuga Nation law, "which all parties describe as requiring consensus decision making." *2015 Poitra Decision*, AR-003222, *quoting George*, 49 IBIA at 165 (undisputed finding "that, under Cayuga law and tradition, 'consensus' requires unanimity and is achieved only when all of the members of the Nation's Council are 'of one mind'"). That dispute has not been resolved. *Compare Letter of Joseph J. Heath to Deputy Bureau Director Michael Black et al. with Exhibits attached, July 1, 2016*, AR 003267-337 (detailing Plaintiffs' position that the SOS was inconsistent with Cayuga law) *with 2015 Poitra Decision*, AR 003223 (holding that the factions within the Nation needed to "come to a common understanding of what role, if any, a campaign of support should play in the selection or retention of its leadership.").

Nor did the passage of time or unsupported allegations regarding violence justify the change. *Cf. BIA Decision*, AR 003575-76; *ASIA Decision*, AR 003896-98. In the context of a ten-year-old governmental dispute, the mere passage of twenty-two months cannot justify a wholesale reversal of agency policy. And Defendant-Intervenors' vague assertions regarding

violence and unrest were unsupported in the record. *See, e.g., Letter of Brenda Bennett, et al., to Bruce Maytubby, BIA Eastern Regional Director, Jan. 27, 2016,* AR 003268 (notifying federal government regarding resolution of disputes); *Cayuga Nation Mediation Peace Agreement, July 2015,* AR 003273-74 (preserving the peace on the ground through establishing non-interference principles between Halftown and Jacobs Groups).

Because Defendant agencies failed to provide a reasoned explanation for the BIA's new policy to support and verify the results of the Halftown Group's 2016 SOS campaign, the BIA's policy reversal was arbitrary and capricious. *Encino Motorcars, LLC,* 136 S.Ct. at 2125.

D. The Agencies' Proffered Explanation Based on Reliability of the Statement of Support Campaign was not Based on Substantial Evidence in the Record as a Whole

A reviewing court must determine whether the agency's conclusions "are supported by substantial evidence in the record *as a whole*." *Arizona Pub. Serv. Co.*, 742 F.2d at 649 (emphasis added). The only expert evidence submitted to Federal Defendants on the soundness of the SOS campaign concluded that it was "plagued by problems of biased language, confounding financial influences, insufficient response categories, acquiescence and social desirability biases, compound questions, and a potential lack of representativeness," all of which suggested "a deeply flawed method of assessment from which no information may be confidently gathered." *Report of James N. Druckman, Ph.D., and Jacob E. Rothschild, M.A., Nov. 25, 2016 ("Expert Report"),* AR 003559. *See also BIA Decision,* AR-003575 (acknowledging that "the statement of support process lacked mechanisms to safeguard accuracy and transparency.") Because the agencies failed to consider the flaws explicated by this expert evidence together as a whole or to articulate a rational connection between it *as a whole* and the conclusion that the SOS nonetheless validly assessed Cayuga citizens' will, they committed a

"clear error of judgment," *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360 (1989), and their decisions should be vacated.[8]

The SOS campaign offered Cayuga citizens only one choice: to support the Halftown Group and its slate of purported Council members. *Halftown Group Governance Process Document, Letter of Clint Halftown et. al to Cayuga Nation, July 6, 2016,* AR003402. The SOS offered no option to support some but not all of that slate. It offered no option to support any of Plaintiffs. *Id*. This was true even though Plaintiffs include members of the Council of Chiefs whose status on the Council had never before been disputed by any party. *Expert Report,* AR 003556; *2015 Poitra Decision,* AR 003217 (Halftown Group supporting Plaintiffs Jacobs and George as lawful Council members).

In stark contrast to the form of ballot generally acceptable in democratic societies, the SOS campaign materials used biased language that the agencies admitted to be "not neutral" and "clearly favoring the Halftown Group." *BIA Decision,* AR 003573; *ASIA Decision,* AR 003900. For example, the SOS campaign documents described the Plaintiffs as having "inappropriately adopted the name of the Nation's Council" and as attempting "to take over our government," while at the same time describing the Halftown Group as being responsible for "the significant progress that the Cayuga Nation Council has made to strengthen the Cayuga Nation and help improve the lives of all Cayuga citizens." *Halftown Group Governance Process Document, Letter of Clint Halftown et. al to Cayuga Nation, July 6, 2016,* AR003349. The experts noted that asking "a respondent not to recognize a group that is described unfavorably and to support a

[8] The agencies also improperly required federally recognized Plaintiffs to "disprove" the validity of the SOS under Cayuga law and as implemented. *BIA Decision,* AR003575 (finding that multiple admitted flaws in the SOS were not "sufficient to disprove" his conclusion that the SOS showed Cayuga citizens supported the Halftown Council).

group that is depicted in a positive light is unlikely to yield useful information." *Expert Report*, AR 003555.[9]

Problems related to biased language were compounded, the experts found, by "[t]he amount of material the respondents were asked to read, including both the governance document as well as both statements of support [totaling seven pages and dozens of discrete statements regarding Cayuga law and governance]." *Expert Report*, AR 003556. Unremarkably, the experts suggested that "[a] more valid method of assessing…attitudes [of Cayuga Nation citizens on the legitimacy of their governmental representatives] would be to provide balanced, competing accounts or descriptions, and then to have respondents select from these options." *Expert Report*, AR 003556-57. The record contains no evidence of similarly biased materials used in any recognized democratic process approved by the United States.

[9] This unsurprising principle has led the federal government to expressly ban biased ballot language and single choice ballots in federally-supported tribal elections. *See* 25 C.F.R. Part 81. Although this prohibition did not technically apply to the SOS, the agencies failed to provide any reasoned explanation why citizens of Tribes holding Part 81 elections deserve to have this fundamental democratic principle protected while Cayuga Nation citizens do not. Such language is also prohibited in federal, state and local elections. Further, based on the uncontroversial principle that biased language yields biased results, many states regulate the use of biased language in polling surveys, *see, e.g.*, Idaho Code § 67-6629(2) (2016) (regulating "persuasive polls, defined as "the canvassing of persons, by means other than an established method of scientific sampling, by asking questions or other information concerning a candidate… designed to advocate the election, approval or defeat of a candidate or measure. The term does not include a poll that is conducted only to measure the public's opinion about or reaction to an issue, fact or theme."); Nev. Rev. Stat. Ann. § 294A.341 (2017) (defining "persuasive poll" as "the canvassing of persons, by means other than an established method of scientific sampling, by asking questions or offering information concerning a candidate which is designed to provide information that is negative or derogatory about the candidate."); La. Stat. Ann. § 42:1130.5 (2017) (regulating "push polls," defined as surveys that "do not use an established method of scientific survey research, that reference a candidate or group of candidates other than in a basic preference question, and that ask any question or offer information concerning a candidate or candidates which states, implies, or conveys any negative or derogatory information or insinuation about the candidate or candidates and the primary purpose of which is to support or oppose a candidate in an election and not to measure public opinion.")

Reliance on a disputed voter roll the BIA refused to share with Plaintiffs further undermined the reliability of the SOS campaign. Reviewing the campaign, Defendant Black found that "there are multiple [conflicting] estimates of Cayuga citizenship, and… in light of the Halftown Council's fairly narrow margin of victory, even a slight difference in membership could change the results of the election." *ASIA Decision*, AR-003898 (citing Census data suggesting more than twice the number of Cayugas than claimed by the Halftown Group, as well as Halftown Group's own conflicting statements regarding number of citizens). He deemed it "troubling that, as the Regional Director noted, [Plaintiffs] credibly alleged they were denied permission to independently review and cross-verify the membership roll used for purposes of the [SOS], which was created by and remained in the custody of the Halftown Council." *Id*. Nonetheless, the agencies chose to credit the SOS, relying heavily on the BIA's close scrutiny of the SOS materials sent in by the Nation's citizens, *see, e.g.*, *ASIA Decision*, AR 003899; and on the fact that the parties had offered a range of population estimates in different contexts, *see, e.g.*, *BIA Decision*, AR 003570-71. The significant dispute over the secret voter roll alone should have prevented the agencies from crediting the SOS with changing the Nation's government, particularly where margins were "fairly narrow."[10]

The distribution of cash to SOS respondents further diminished the survey's reliability. It is undisputed that 92% of Cayuga citizens received and cashed checks from the Halftown Group within the three weeks prior to receiving the Statement of Support materials from the Halftown Group. *ASIA Decision*, AR 0030901. Expert evidence confirmed what common sense suggests:

[10] The non-anonymous nature of the "ballots" further undermined the reliability of the SOS. Experts noted that each survey was addressed to an individual citizen and required a signature. *Expert Report*, AR-003348-49. This meant that "a failure to respond would be known" by the Halftown Group (but not Plaintiffs, who were not allowed access to the voter roll, mailing list, or returned SOS materials), which could "later create negative impacts" on respondents who did not respond in support of the Halftown Group. *Expert Report*, AR-003557.

those who receive cash from a candidate are more likely to support that candidate. *Expert Report*, AR 003555. Where, as here, that candidate was also the only choice presented on the "ballot," it is unreasonable to conclude otherwise. Notably, the SOS materials also required respondents to affirm multiple compound statements regarding Cayuga law and governance. The expert evidence concluded that a more accurate process would have provided "balanced, competing accounts or descriptions," allowing respondents to select from a few options which would then "ask for a response to each important item individually." *Expert Report*, AR 003557-58.

Plaintiff's expert evidence was the only evidence put forth regarding the reliability of the SOS campaign. This evidence demonstrated that the SOS campaign was unreliable for a number of independent reasons. Yet, despite this clear evidence of a flawed survey process, Defendant Maytubby ultimately determined that the "vulnerabilities of the statement of support process were insufficient to disprove Cayuga citizen's support of the Halftown Group." *BIA Decision*, AR 003575. In doing so, Defendant Maytubby focused on the difference between surveys of the public at large verses a tribal body politic, and the lack of concrete evidence that the biased language affected any person's response, to find that the responses received were prima facie evidence that Cayuga citizens endorsed the SOS campaign. *BIA Decision,* AR 003573. In affirming Defendant Maytubby's Decision, Defendant Black held that the Regional Director "considered the experts findings and did not find them dispositive." *ASIA Decision*, AR 003901.

A reviewing court must determine whether the agency's conclusions "are supported by substantial evidence in the record *as a whole*." *Arizona Pub. Serv. Co. v. United States,* 742 F.2d 644, 649 (D.C. Cir. 1984) (emphasis added). Defendants Maytubby and Black failed to properly consider the impact of the evidence as a whole on the reliability of the SOS campaign, and

improperly placed the burden on Plaintiffs to "disprove" the reliability and legality of this sui generis survey process. Viewed as a whole, the evidence in the record demonstrates that the SOS should not have been credited as a reliable means of gauging Cayuga citizens' views. Further, nothing in the record provides "good reasons for the new policy" adopted by the agency to support and verify the results of the SOS campaign. The BIA's decision to do so was unreasonable and should be set aside as arbitrary and capricious.

V. DEFENDANTS UNCONSTITUTIONALLY DEPRIVED PLAINTIFFS OF A NEUTRAL DECISION-MAKER

Basic principles of procedural due process apply to informal agency adjudications that resolve "conflicting claims to a valuable privilege" or right, such as the BIA's recognition proceeding at issue here. *See, e.g., Sangamon Valley Television Corp. v. United States*, 269 F.2d 221, 224 (D.C. Cir. 1959). The process due varies with the particulars of the proceeding but at minimum requires a neutral decision-maker. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) (the neutrality requirement "preserves both the appearance and reality of fairness" by ensuring that "no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him."). This neutrality requirement is violated when "a disinterested observer may conclude that the [agency] has in some measure adjudged the facts as well as the law of a particular case in advance of hearing it." *Cinderella Career & Finishing School v. Federal Trade Commission*, 425 F.2d 583, 591 (D.C. Cir. 1970). The essence of due process in informal adjudications is "fair play" in a "fair tribunal," so that the participants may be assured that the agency has not "already thrown [its] weight on the other side." *Amos Treat & Co., Inc. v. Securities and Exchange Commission*, 306 F.2d 260, 264 (D.C. Cir. 1962) (internal quotation and citation omitted). The trust relationship between the United States and Indian nations imposes a heightened obligation on

federal officials to treat Indian governments fairly. *North Slope Borough v. Andrus*, 642 F.2d 589 (D.C. Cir. 1980).[11]

Although *ex parte* contacts are not per se violative of due process, such secrecy may implicate due process concerns when it "raise[s] serious questions of fairness." *Home Box Office, Inc. v. F.C.C.*, 567 F.2d 9, 57 (D.C. Cir. 1977) (noting that secrecy in agency decision-making is inconsistent "with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law."); *see also Sierra Club v. Costle*, 657 F.2d 298, 400 (D.C. Cir. 1981) ("When agency action resembles . . . quasi-adjudication among 'conflicting private claims to a valuable privilege,' the insulation of the decisionmaker from ex parte contacts is justified by basic notions of due process to the parties involved.").

The BIA's handling of the Cayuga ISDEAA recognition proceeding violates Plaintiffs' right to due process under these authorities. Although Plaintiffs ultimately had an opportunity to brief the validity of the process, the BIA did not respond to Plaintiffs' initial objections to the process and instead allocated federal funding and human resources to support and "verify" it. Only after providing this federally-funded technical support to the Halftown Group's effort did the BIA offer a second opportunity for briefing on issues including whether the effort violated Cayuga law. Because the critical decision to commit federal funds to the effort was made over Plaintiffs' objections and before full briefing opportunities were provided, the BIA's process impermissibly favored the Halftown Group to the disadvantage of Plaintiffs.

[11] The applicability of this heightened standard to Plaintiffs' claims does not depend on determination of the Nation's lawful government: it is undisputed that Plaintiffs include Council members and Clan Mothers recognized by the United States at the time of the agency decisions as governmental officials for the Cayuga Nation.

The AR demonstrates that beginning in June 2016, the BIA quickly threw its administrative apparatus behind the Halftown campaign, offering financial support, technical advice, onsite visits from multiple federal officials, and "verification" of Halftown's campaign documents before the validity of the campaign under Cayuga law was briefed or determined.[12]

The BIA decided to provide technical support to the effort despite the opposition of fully half the Nation's recognized Council of Chiefs and all of the Nation's Clan Mothers. *Letter of Joseph J. Heath to Deputy Bureau Director Michael Black et al. with Exhibits attached, July 1, 2016,* AR 003267-337. The BIA never requested or received authorization for its actions from the governing body of the Cayuga Nation. *Id*. It ignored Plaintiffs' proposal for alternative means of resolving the internal governance dispute, *id.*, and it determined the proposed effort would be "valid" without first determining whether the effort would be valid under Cayuga law. *Letter of Bruce W. Maytubby, BIA Eastern Regional Director, to Anita Thompson, June 17, 2016,* AR 003262.These actions were particularly egregious because of the BIA's longstanding recognition that the Council of the Cayuga Nation makes decisions by consensus. At the time of the BIA's actions in support of the SOS, the federally recognized Cayuga Nation Council lacked even a majority, much less consensus, in support of the process. *Compare George*, 49 IBIA at 189, AR 000090 (affirming finding that consensus means more than a majority of Council).

BIA support also included help with planning for Halftown's campaign. Fully six months before the Plaintiffs learned that Halftown was planning to install a new government through a mail-in survey, the BIA was regularly consulting with him about the design and structure of the campaign. *Letter of Joseph J. Heath to Bruce Maytubby, BIA Eastern Regional*

[12] The BIA provided funding, technical support and "verification" between June 2016 and September 2016 but did not request briefing on the legality of the effort until November 2016. *Letter of Regional Director Bruce Maytubby to Clint Halftown and William Jacobs, Nov. 01, 2016,* AR 003407-08.

Director, June 20, 2016, AR 003264-65 (summarizing phone call in which Defendant Maytubby acknowledged that consultations between Halftown and the BIA on this issue included "at least one meeting [ ] in December 2015 and several conference calls" thereafter). Those discussions led to Halftown's formal request for "technical assistance" on June 14, 2016. *Letter of Clint Halftown et al. to Bruce Maytubby et. al, June 14, 2016,* AR 003246-61.

The record demonstrates that the request had been made long before that date, and that BIA had been working closely with the Halftown Group on Cayuga governance issues to the exclusion of the Plaintiffs for months, if not years. *See, e.g., Letter of Clint Halftown et al to Deputy Bureau Director Michael Smith et al, August 2, 2016,* AR 003356-57 (expressing gratitude for "the assistance you have provided the Cayuga Nation over the past two years. . . ." on governance issues).[13] Within seventy-two hours of receiving Halftown's voluminous letter detailing the SOS and requesting technical assistance for it, Defendant Maytubby wrote to Plaintiffs expressing BIA's "agree[ment]" that the SOS "would be a viable way of involving the Cayuga people in determination of the form and membership of their government." *Letter of Bruce W. Maytubby, BIA Eastern Regional Director, to Anita Thompson, June 17, 2016,* AR 003262-63. The speed with which Defendant Maytubby embraced the SOS process as "viable" to "determin[e]…the form" of the Cayuga Nation government and committed to providing federal support for it demonstrates a failure to uphold the Due Process clause's requirement of

[13] The full extent of the coordinated efforts of the Halftown Group and BIA officials is not presently known, because the BIA and DOI have thus far failed to meet their obligation under the Freedom of Information Act to provide documents relating to these efforts requested by Plaintiffs nearly a year ago. *See* Page Aff., Pls.' Mot. to Supp. the Admin. Record and Expedite Discovery, Feb. 9, 2018, Doc. No. 23-2. At no time during the six to eight months in which he admittedly consulted with the Halftown Group on this matter did Defendant Maytubby contact Plaintiffs to discuss it.

neutrality, which protects against both the appearance and the reality of unfairness. *Marshall*, 446 U.S. at 242.

Based on its expressed agreement with the Halftown Group about the viability of the SOS, the BIA appeared determined to move ahead in supporting it, as evidenced by its refusal to provide Plaintiffs more than six business days to respond to the SOS proposal. In the BIA's view, that short deadline was justified because "the campaign described in [the Maytubby] letter and in the letter you received from the [Halftown Group] is going to be getting underway," regardless of the concerns of the Plaintiffs. *Letter of Acting Regional Director Johanna Blackhair to Joseph J. Heath, June 29, 2016*, AR 003266. From these facts—a months-long period of consultation with the Halftown Group; a seventy-two-hour window between purported receipt of the Halftown proposal and a decision and letter deeming it "viable;" and an exceptionally short period for the Plaintiffs to respond to threshold questions about the legitimacy of the campaign—the record shows that the BIA unfairly favored the Halftown Group. That Plaintiffs had a subsequent opportunity in November 2016 to brief the questions of the legality and fairness of the campaign does not undermine this conclusion. By then, the campaign had already been carried out, federal funds had been devoted to the process, the BIA had "verified" the results, and it was too late to correct the deficiencies that rendered the campaign fundamentally unfair and violative of Cayuga law.

The role of the BIA in monitoring the mail-in survey and verifying the results likewise points to unfair bias against the Plaintiffs. Without informing the Plaintiffs or inviting their participation, Halftown requested the help of the BIA to "complete this process" and more specifically, to enlist the expertise of the BIA in "reviewing this initiative and verifying the results." *Letter of Clint Halftown et al. to Deputy Bureau Director Michael Smith et al., August*

2, 2016, AR 003356-57. Unbeknownst to Plaintiffs at the time, the BIA responded by sending multiple federal officials to Plaintiffs' own sovereign reservation territory for a three-day visit to review the results of the SOS and later hosting the Halftown Group at BIA offices in Nashville to go over the results again. *See BIA Decision,* AR 003567. Two meetings were held in September 2016, one for a "preliminary review of the signed statements," and a second to "crosscheck[] and verify[]" the results. *Letter of Clint Halftown et al. to Deputy Bureau Director Michael Smith et al., Oct. 6, 2016,* AR 003384; AR 003385. The fact that informal contacts between agencies and the public are the "bread and butter of the process of administration" does not justify secrecy under these circumstances, where the BIA knew that half the federally recognized government of the Cayuga Nation opposed the process. *See, e.g. Home Box Office, Inc.,* 567 F.2d at 57. The BIA's conduct violated the fundamental principle that "the very legitimacy of general policymaking performed by unelected administrators depends in no small part upon the openness, accessibility and amenability of these officials to the needs and ideas of the public from whom their ultimate authority derives, and upon whom their commands must fall." *Sierra Club,* 657 F.2d at 400-401.

The BIA thus applied the kind of pressure for governmental change at Cayuga that this Court found to be contrary to law in *Ransom v. Babbitt,* 69 F.Supp.2d 141, 154-155 (D.D.C. 1999). In that case, this Court invalidated BIA recognition of a change in the government for the St. Regis Mohawk Tribe in part on the basis of BIA actions that suggested that the "BIA wanted the Tribe to embrace a constitutional form of government" because the constitution and tribal court set up thereunder had been funded by the BIA through "grants, contracts, and other financial assistance." *Id.* at 154. There, as here, the BIA's active efforts to bring about the government it preferred turns subverts the principle of tribal self-determination. *Id.* at 155.

Finally, Defendant BIA has put forward no legal basis for its provision of federal support and technical assistance to the Halftown Group. As noted *infra*, the BIA has previously held that "we know of no applicable authority that provides for verification of election results [at Cayuga] or allows BIA to provide any independent confirmation of results of a 'Campaign of Support'" for the Cayuga Nation. *2015 Poitra Decision*, AR 003223. Under federal regulations, a "Local Bureau Official" may informally review a tribal proposal to "adopt or amend a governing document" to offer comments on whether any of the provisions "may be contrary to applicable laws." 25 C.F.R. § 81.5(a)(2). BIA may provide assistance with "drafting governing documents, bylaws, charters, amendments and revocations [to constitutions]; explanations of how the 'Secretarial election process' works; and guidance on 'methods of voter education.' Section 81.5(a)(1). These provisions apply only to elections called and held by the Secretary of the Interior, however, and Defendants admit the SOS neither conformed to nor was governed by such regulations. *ASIA Decision*, AR 003902-03.

Under 25 C.F.R. § 900.7, the BIA may provide technical assistance to "tribal organizations" in preparing ISDEAA contract proposals. That section could not authorize the technical assistance the BIA provided to the Halftown Group, however, because "tribal organization" is defined as the recognized tribal government, which the Halftown Group plainly was not. 25 C.F.R. § 900.6 ("*Tribal Organization* means the recognized governing body of any Indian tribe . . .."). As discussed above, at the time of the SOS, the recognized government included individual Plaintiffs here; fully half of the recognized government the SOS. In any event, the scope of ISDEAA contract assistance authorized by 25 C.F.R. § 900 does not include assistance to change an Indian Nation government or resolve an internal governance dispute.

Providing assistance to "develop a contract proposal" cannot mean providing assistance to "develop a new tribal government."

In sum, in providing funding, support and technical assistance to the Halftown Group, the BIA supported one side in this internal Indian Nation governmental dispute to the disadvantage of the other, creating a likelihood of bias that was "too high to be constitutionally tolerable." *Wildberger v. Am. Fed'n of Gov't. Emps.*, 86 F.3d 1188, 1196 (D.C. Cir. 1996). "With regard to judicial decisionmaking, whether by court or agency, the appearance of bias or pressure may be no less objectionable than the reality." *D.C. Federation of Civic Assns. v. Volpe,* 459 F.2d 1231, 1246-47 (D.C. Cir.1971), *cert. denied,* 405 U.S. 1030 (1972). The agencies' decisions should be vacated.

VI. CONCLUSION

For all the foregoing reasons, Plaintiffs' Motion for Summary Judgment should be granted and Defendant agencies' decisions should be vacated.

Date: May 24, 2018

Respectfully submitted,

By: */s/Alexandra C. Page*

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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

The Cayuga Nation, by its Council of Chiefs and Clan Mothers; Clan Mother PAMELA TALLCHIEF; Clan Mother BRENDA BENNETT; Sachem Chief SAMUEL GEORGE; Sachem Chief WILLIAM JACOBS; Representative AL GEORGE; Representative KARL HILL; Representative MARTIN LAY; Representative TYLER SENECA, Plaintiffs, vs. The Honorable RYAN ZINKE, in his official capacity as Secretary of the Interior, United States Department of the Interior; JOHN TAHSUDA III, in his official capacity as Acting Assistant Secretary – Indian Affairs; MICHAEL BLACK, in his individual capacity; BRUCE MAYTUBBY, in his official capacity as Eastern Regional Director, Bureau of Indian Affairs; DARRYL LACOUNTE, in his official capacity as Acting Director, Bureau of Indian Affairs; UNITED STATES DEPARTMENT OF THE INTERIOR; BUREAU OF INDIAN AFFAIRS, Defendants, THE CAYUGA NATION COUNCIL, Defendant-Intervenor.	Civil Action No.: 17-cv-01923-CKK

STATEMENT OF MATERIAL FACTS WITH REFERENCES TO THE ADMINISTRATIVE RECORD IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

1. Defendant Regional Director Maytubby determined that "a plebiscite must be a valid mechanism by which a body politic may decide matters of governance."

- *Letter of Bruce W. Maytubby, BIA Eastern Regional Director to Clint Halftown and William Jacobs, December 15, 2016,* AR 003570 ("BIA Decision")

2. Though the DOI initially delegated authority for Defendant Maytubby to take final agency action in issuing his Decision, Defendant Black later withdrew that delegation, rendering Maytubby's decision intermediate, not final, and allowing Defendant Black to assume jurisdiction over its review.

- *Memo of Black Withdrawing Delegation, Jan. 31, 2017*, AR 003672

3. Defendant Black deferred to Defendant Maytubby's conclusion that "Cayuga law permits the use of a plebiscite in order to ascertain the peoples' understanding of their governmental structures and leaders."

- *Decision of Assistant Secretary-Indian Affairs, July 13, 2017*, AR 003889 ("ASIA Decision")

4. The Great Law of Peace includes a provision that holds: "Whenever a specially important matter or a great emergency is presented before the Confederate Council and the nature of the matter affects the entire body of the Five Nations, threatening their utter ruin, then the Lords of the Confederacy must submit the matter to the decision of their people and the decision of the people shall affect the decision of the Confederate Council. This decision shall be a confirmation of the voice of the people." Defendants later relied on that language.

- *ASIA Decision*, AR 003888

5. Defendant Black deferred to Defendant Maytubby's consideration of the question whether use of a mail-in survey to establish a new government of the Cayuga Nation for federal contracting purposes violated Cayuga law, and found Defendant Maytubby's conclusion to be "reasonable."

- *ASIA Decision*, AR 003888

6. Defendant Black pointed to the Regional Director's consideration of both sides' arguments and the Regional Director's characterization of the parties' positions as demonstrating a "true division," and "conclude[d] that [the Regional Director's] determination was valid."

- *ASIA Decision*, AR 003888-89

7. Defendant Black deferred to Defendant Maytubby's determination as "reasonable" and "valid."

- *ASIA Decision*, AR 003888-89

8. The IBIA and the BIA have held that, pursuant to the authority vested in them by the Great Law and the citizens of each clan, Cayuga Nation Clan Mothers have sole responsibility for appointing and removing the men who make up the Council of Chiefs. This obligation to identify, advise, and – if necessary – remove Council members serves as the principle check on the power of the male Chiefs and Clan Representatives.

- *Samuel George v. Eastern Regional Director*, 49 IBIA 164, 167 (2009), AR 000068
- *Letter of Franklin Keel, then BIA Eastern Regional Director, to Daniel J. French and Joseph J. Heath, August 19, 2011*, AR 000426-27

9. According to Tadadaho Sidney Hill, "[O]ne of the main sources of strength for our culture and government is… the leadership of the Clan Mothers within our Nations and our Confederacy."

- *Affidavit of Tadadaho Sidney Hill, June 29, 2011,* AR 000366-68.

10. Pursuant to the Great Law of Peace of the Haudenosaunee, the will of the Cayuga people is expressed through their Clans, three of which are active today.

- *George,* 49 IBIA at 167, AR 000068
- *ASIA Decision, July 13, 2017*, AR 003878

11. The Halftown Group confirmed that the Wolf Clan is not active at Cayuga and has no Clan Mother, but nonetheless purported through the SOS campaign to install a Wolf Clan representative on the Council of Chiefs.

- *Halftown Group Governance Process Document, Letter of Clint Halftown et. al to Cayuga Nation, July 6, 2016,* AR 003343; 003349

12. Clan Mothers are selected by consensus of the citizens of each Clan based on criteria and processes laid out in the Great Law. The Clan's Chief confirms this selection.

- *Declaration of Bear Clan Mother Pamela Tallchief, Nov. 13, 2016,* AR 003514

13. Once in place, a Clan Mother is responsible for guiding the selection of new Chiefs and Clan Representatives to the Nation's Council; monitoring and advising these leaders; and if necessary removing them pursuant to Nation law.

- *Declaration of Chief William Jacobs, June 9, 2014,* AR 003485-88
- *Declaration of Chief Samuel George, June 10, 2014,* AR 003497-501
- *George*, 49 IBIA at 167, AR 000068

14. The BIA has recognized the traditional authority of the Clan Mothers and concluded that "[t]he Clan Mothers are the persons tasked with the responsibility of appointing representatives of their respective clans to serve on the Nation Council."

- *Letter of Franklin Keel, then BIA Eastern Regional Director, to Daniel J. French and Joseph J. Heath, August 19, 2011,* AR 000451-52

15. The BIA has confirmed that "[i]t is our belief and understanding that… [Cayuga Nation] leaders are not elected but are appointed by their respective clan mothers in accordance with the customs of the Cayuga Nation."

- *Letter of Franklin Keel, then BIA Eastern Regional Director, to Gary Wheeler et al, July 18, 2005,* AR 000053

16. Cayuga Nation Chiefs serve for life and Clan Representatives serve as long as they are needed, so the Clan Mother's monitoring and advising role is critical to the smooth functioning of the Nation's Council of Chiefs.

- *Declaration of Chief William Jacobs, June 9, 2014*, AR 003485-88
- *Declaration of Chief Samuel George, June 10, 2014*, AR 003497-501
- *Declaration of Oren Lyons, Nov. 4, 2011*, AR 003492-95

17. The Nation is "a matrilineal society. It is the Clan Mother's duty to oversee… the conduct of the leaders with the authority to recall [them]. She does not tell her leaders what to say or do."

- *Declaration of Oren Lyons, Nov. 4, 2011*, AR 003493

18. The Nation's Council of Chiefs makes decisions by consensus. Consensus in this context requires more than a majority.

- *George*, 64 IBIA at 168, AR 000069; *Id.* at 173 n.4, AR 000074; *Id.* at 189, AR 000090

19. Cayuga Nation Citizen concerns are addressed through the clan structure. When a citizen has a complaint or concern, she may bring it to her Clan Mother, Chief, or Clan Representative to be addressed.

- *Declaration of Bear Clan Mother Pamela Tallchief, Nov. 13, 2016*, AR 003512

20. Together, Clan Mothers, Chiefs, and Clan representatives work to find consensus resolution to citizen concerns.

- *Declaration of Bear Clan Mother Pamela Tallchief, Nov. 13, 2016*, AR 003512-14

21. There is not "a single factual example from the history or oral tradition of the [Cayuga] Nation in which the Council acted by majority vote."

- *George*, 49 IBIA at 165, AR 000066

22. Referenda, elections, survey campaigns, and plebiscites are unprecedented in Cayuga law and history. Just over two decades ago, Defendant-Intervenor Clint Halftown explained to the BIA: "We are concerned… by your statement that the BIA will 'continue to accord…recognition to [Chief] Isaac until it is clearly shown that he no longer enjoys the support

of a majority of the tribal membership.' We respectfully submit that such a standard for withdrawing recognition of Cayuga leaders is unlawful, inconsistent with Cayuga law and is ill-advised…Cayuga Chiefs and representatives are… accountable to the Cayuga People. That accountability is enforced according to traditional Cayuga law and the clan system, rather than Anglo concepts of pure majority rule."

- *Letter of Clint C. Halftown to Franklin Keel, then BIA Eastern Regional Director, Sept. 26, 1997,* AR 003276-77

23. It is undisputed that the Cayuga Nation has never used a mail-in survey or election to determine the composition of its Council, and instead has since time immemorial relied on the authority of the Clan Mothers to appoint and remove Council members based on the will of the people of each clan.

- *George,* 49 IBIA at 167, AR 000068*; ASIA Decision,* AR 003877; AR 003891

24. There is no evidence that the Cayuga Nation has ever lacked a government. Nonetheless, Defendant Black deemed the survey campaign a "limited… [i]nitiative, designed to establish a baseline tribal government…"

- *ASIA Decision,* AR 003890

25. There is no evidence that any other Indian nation has ever used a mail-in survey to determine the composition of its government. While the Halftown Group argued below that the Oneida Nation once used survey process in the 1990s, that process differed dramatically from the SOS. Both sides in that governmental dispute, including the Clan Mothers, supported its use under agreed upon conditions. Further, it was not a mail-in survey, but a public referendum overseen by the League of Women Voters and distinguished by such basic electoral safeguards as an agreed-upon voter roll, anonymous ballots, unbiased ballot language, and more than one option for voters to choose.

- *Exhibit E and F attached to Letter of Joseph J. Heath to Bruce Maytubby et al., July 1, 2016,* AR 003280-87

26. The SOS materials did not provide Cayuga citizens with the option to express support for two undisputed Council members who are Plaintiffs here; the only option the SOS materials provided was to express support for the Halftown Group as a whole.

- *Halftown Group Governance Process Document, Letter of Clint Halftown et. al to Cayuga Nation, July 6, 2016,* AR 003349

27. In the early 2000s, following the death of Chief Vernon Isaac, Clint Halftown asserted control over the Nation's Council and governmental affairs.

- *George,* 49 IBIA 164, AR 000065-95

28. In the early 2000s, Cayuga citizens reported experiencing heavy-handed and arbitrary treatment by the Halftown group with respect to employment and housing including retaliatory firings and other illegal actions by Mr. Halftown.

- *Facsimile Transmittal of Brenda Bennett to Darlene Whitetree, June 1, 2011,* AR 000100-09
- *Letter of Joseph J. Heath to Franklin Keel, then BIA Eastern Regional Director, June 25, 2011,* AR 000301-48

29. Turtle Clan Mother Brenda Bennett reported to the BIA details regarding the preliminary audit of Halftown administration; the Halftown Group's use of armed security forces to intimidate citizens; and refusal of Halftown, Twoguns and Wheeler to abide by Clan Mother directives.

- *Affidavit of Clan Mother Brenda Bennett, Sept. 29, 2011,* AR 000568 -76

30. Cayuga Nation citizens reported being fired, suspended or demoted without notice or due process; being subjected to unannounced housing inspections; and being served with state court eviction pleadings.

- *Letter of Joseph J. Heath to Franklin Keel, then BIA Eastern Regional Director, June 25, 2011,* AR 000301-48

- *Cayuga Nation's Reply to Appellant's Response to Motion to Make August 19, 2011 Decision by Eastern Area Director Immediately Effective*, Docket. No. IBIA 12-005 (filed Nov. 7, 2011), AR 001144-161

31. Clan Mother Brenda Bennett detailed at length to the BIA the specific concerns expressed by Turtle clan members.

- *Facsimile Transmittal of Brenda Bennett to Darlene Whitetree, June 1, 2011*, AR 000100-09
- *Facsimile Transmittal of Brenda Bennett to Darlene Whitetree, June 2, 2011*, AR 000110-16

32. Clint Halftown wrote that citizens must choose "[e]ither me or the [the clan mothers and chiefs]. There [sic] choice. No one has been layed [sic] off yet! But it is going to happen, as well as firings! That you can count on."

- *Affidavit of Clan Mother Brenda Bennett, Sept. 29, 2011*, AR 000573

33. Clint Halftown fired Nation employees who had criticized him.

- *Employment Termination Notices from Clint Halftown to Justin Bennett et al, May 31, 2011*, AR 000096-99

34. Clint Halftown launched state court eviction actions against Cayuga employees whom he had fired.

- *Letter of Daniel J. French to Franklin Keel, then BIA Eastern Regional Director, June 24, 2011*, AR 000292-300
- *Letter of Joseph J. Heath to Franklin Keel, then BIA Eastern Regional Director, June 25, 2011*, AR 000301-48

35. Clint Halftown has referred to his Clan Mother as "clan monster."

- *Letter of Joseph J. Heath with Exhibits to Franklin Keel, then BIA Eastern Regional Director, June 9, 2011*, AR 000147

36. At a Turtle Clan meeting on May 31, 2011, pursuant to the will of her clan, Turtle Clan Mother Bennett removed Mr. Twoguns and Mr. Wheeler from their positions on the Nation Council and appointed Samuel Campbell and Justin Bennett to serve in their places.

- *Letter of Joseph J. Heath with Exhibits to Franklin Keel, then BIA Eastern Regional Director, June 9, 2011*, AR 000163-170; AR 000133-162

37. Affidavits from Turtle Clan members confirm the events of the Turtle Clan meeting on May 31, 2011, including Turtle Clan Mother Bennett removing Mr. Twoguns and Mr. Wheeler from their positions on the Nation Council and appointing Samuel Campbell and Justin Bennett to serve in their places.

- *Facsimile Transmittal of Brenda Bennett to Darlene Whitetree, June 1, 2011*, AR 000100-09
- *Facsimile Transmittal of Brenda Bennett to Darlene Whitetree, June 2, 2011*, AR 000110-16
- *Letter of Joseph J. Heath with Exhibits to Franklin Keel, then BIA Eastern Regional Director, June 9, 2011*, AR 000163-170; AR 000133-162
- *Letter of Joseph J. Heath to Franklin Keel, then BIA Eastern Regional Director, with Affidavits, June 10, 2011*, AR 000171-81
- *Letter of Joseph J. Heath to Franklin Keel, then BIA Eastern Regional Director, with Affidavits, June 15, 2011*, AR 000191-201
- *Letter of Joseph J. Heath to Franklin Keel, then BIA Eastern Regional Director, June 25, 2011*, AR 000301-48

38. On June 1, 2011, the Nation Council held an open citizens' meeting.

- *Letter of Joseph J. Heath with Exhibits to Franklin Keel, then BIA Eastern Regional Director, June 9, 2011*, AR 000163-170; AR 000133-162

39. At the Nation's June 1, 2011 meeting, Heron Clan Mother Bernadette Hill affirmed her removal of Clint Halftown from the Nation Council and affirmed Karl Hill and Chief William Jacobs' position as Heron Clan representatives to the Council. Bear Clan Mother Pamela Tallchief likewise confirmed the appointments of Chief Sam George and Chester Isaac to Council as Bear Clan representatives.

- *Letter of Joseph J. Heath with Exhibits to Franklin Keel, then BIA Eastern Regional Director, June 9, 2011*, AR 000163-170; AR 000133-162

40. Plaintiff Clan Mothers and Council reported that a unanimous Cayuga Nation Council, with the participation and agreement of all three Clan Mothers, adopted a consensus resolution confirming the composition of the Nation's government.

- *Cayuga Nation Resolution 11-001, June 1, 2011*, AR 000134-135

41. By its terms, Resolution 11-001 was the result of a consensus action by the Nation Council, with the support of each of the Nation's three clans and Clan Mothers.

- *Exhibits B-G of Unity Council's Memorandum of Law and Facts, June 26, 2014*, AR 002224-40*; Letter of William Jacobs, et al., to Poitra, et al., February 18, 2015,* AR 003201-04; AR 003211-13

42. The Council members and Clan Mothers reported that Resolution 11-001 was the first consensus action taken by the Cayuga Nation Council in over five years. Dozens of such consensus decisions were enacted by the Nation Council between 2011 and 2016.

- *Exhibits B-G of Unity Council's Memorandum of Law and Facts, June 26, 2014*, AR 002224-40*; Letter of William Jacobs, et al., to Poitra, et al., February 18, 2015,* AR 003201-04; AR 003211-13

43. The Clan Mothers and the Council notified the Eastern Region of the changes in its government on June 1, 2011.

- *Facsimile Transmittal of Brenda Bennett to Darlene Whitetree, June 1, 2011*, AR 000100-09

44. The BIA requested and reviewed briefing from each side on the validity of the governmental reform under Cayuga law after the Halftown Group objected, claiming the Clan Mothers could not remove them because the BIA had earlier identified them as Nation leaders.

- *Letter of Franklin Keel, then BIA Eastern Regional Director, to Daniel J. French and Joseph J. Heath, August 19, 2011*, AR 000426-27

45. In 2011, the BIA recognized the new Council and rejected the Halftown Group's arguments that they remained in power. The BIA's 2011 decision placed great weight on the role of the Clan Mothers in the Cayuga Nation governmental system, stating: "All three [Clan Mothers] have submitted affidavits as to their status and actions on May 31 [2011]… [N]either party has ever denied the authority of Clan Mothers, under ancient Haudenosaunee custom, to choose clan representatives who sit on the Nation's Council. Nor has either party denied the

legitimacy or status of the Clan Mothers involved in this matter. [A]ll three women's names appear as acknowledged Clan Mothers on [Clint Halftown's] website… Based on the foregoing, I conclude that the source of the changes outlined above was the action of each clan mother in carrying out her traditional clan responsibilities. I would be remiss if I failed to recognize the results of this exercise of ancient traditional authority by the Clan Mothers. As noted above, the Clan Mothers are the persons tasked with the responsibility of appointing representatives of their respective clans to serve on the Nation Council."

- *Letter of Franklin Keel, then BIA Eastern Regional Director, to Daniel J. French and Joseph J. Heath, August 19, 2011*, AR 000451-52

46. In January 2014, the IBIA ruled that the BIA lacked sufficient "federal need" to rule on the composition of the Nation's government. The IBIA passed no judgment on the merits of the Bureau's 2011 determination that the Clan Mothers have the sole authority under Cayuga law to appoint and remove Council members (a tenet undisputed by any party at the time) or that the Halftown group had been lawfully removed from the Nation's Council.

- *Cayuga Indian Nation of New York v. Eastern Regional Director*, Docket No. IBIA 12-005, January 16, 2014, AR 002126-42

47. In 2016, the Turtle Clan Mother informed the BIA that Turtle Clan representatives Justin Bennett and Samuel Campbell had been replaced on the Nation Council by Martin Lay and Tyler Seneca.

- *Letter of Brenda Bennett to Bruce Maytubby, BIA Eastern Regional Director, August 31, 2016,* AR 003358

48. In 2016, the Bear Clan Mother informed the BIA that Bear Clan representative Chester Isaac had been replaced on the Nation Council by Al George.

- *Letter of Pamela Tallchief to Bruce Maytubby, BIA Eastern Regional Director, August 31, 2016,* AR 003359

49. Defendant Black reviewed Defendant Maytubby's consideration of the legal question whether the SOS was valid under Cayuga law and deemed it "reasonable."

- *ASIA Decision*, AR 003888

50. Defendant Maytubby found that the SOS must be valid under Cayuga law because "to reject the principle that a statement of support could be valid [under Cayuga law] would be to hold that the Cayuga Nation's citizens lack the right to choose a government that reflects their choices."

- *BIA Decision*, AR 003569

51. Defendant Black found that "[t]he Regional Director premised the Decision on a provision from the Haudenosaunee Great Law of Peace."

- *ASIA Decision*, AR 003888

52. On the core question of the survey's legality, Defendants Maytubby and Black relied on (1) a single provision from the Great Law; and (2) the position of three of the six members of the Nation's then-recognized Council that the survey process was legal.

- *ASIA Decision*, AR 003887-003889
- *BIA Decision*, AR 003568-003570

53. The record contains multiple affidavits from Haudenosaunee leaders, including the Clan Mothers, three Council members, Tadadaho, and others, interpreting the Great Law, which is an oral tradition, and explaining that Cayuga law does not allow for surveys to override Clan Mother appointments.

- *Affidavit of Clan Mother Brenda Bennett, Sept. 29, 2011*, AR 000568-76; *Declaration of Brenda Bennett, June 10, 2014*, AR 002260-63; *Declaration of Clan Mother Brenda Bennett, Nov. 11, 2016*, AR 003507; *Declaration of Clan Mother Pamela Tallchief, Nov. 13, 2016*, AR 003512-14; *Declaration of Clan Mother Pamela Tallchief, June 9, 2014*, AR 003478; *Declaration of Bear Clan Mother Pamela Tallchief, Nov. 13, 2016*, AR 003514; *Affidavit of Clan Mother Bernadette Hill, Sept. 28, 2011*, AR 000579-82; *Declaration of Bernadette Hill, June 9, 2014*, AR 002326; *Declaration of Oren Lyons, Nov. 4, 2011*, AR 003495; *Affidavit of Tadadaho Sidney Hill, June 29, 2011*, AR 000366-68; *Declaration of*

Chief Samuel George, June 10, 2014, AR 003497-501; *Declaration of Chief William Jacobs, June 9, 2014*, AR 003485-88

54. The provision of the Great Law proffered as legal support for the SOS was: "Whenever a specially important matter or a great emergency is presented before the Confederate Council and the nature of the matter affects the entire body of the Five Nations, threatening their utter ruin, then the Lords of the Confederacy must submit the matter to the decision of their people and the decision of the people shall affect the decision of the Confederate Council. This decision shall be a confirmation of the voice of the people."

- *ASIA Decision*, AR 003888
- *BIA Decision*, AR 003568

55. There is no evidence in the record that "a specially important matter or a great emergency [was] presented before the Confederate Council;" that the parties' competing ISDEAA applications "affect[ed] the entire body of the Five Nations, threatening their utter ruin;" or that "the Lords of the Confederacy" put the matter before the people of the Confederacy.

- *ASIA Decision*, AR 003888

56. In the proceedings below, the Halftown Group initially altered the language of the quoted provision, removing the terms "Confederate" and "Confederacy" throughout to make it appear the provision related to individual Nation Councils, not the Confederate or Grand Council.

- *Halftown Group's Opening Brief to Bruce Maytubby, BIA Eastern Regional Director, November 14, 2016*, AR 003419

57. When Plaintiffs objected to the alterations made in the Great Law provisions, the Halftown Group claimed that since the Great Law applies to all Nations in the Confederacy, the provision does not mean what it says when it refers matters threatening the utter ruin of "the entire body of the Five Nations;" presentation to "the Confederate Council;" or actions to be

taken by "the Lords of the Confederacy." The Halftown Group relied on a different Great Law excerpt stating the general principle that while all member Nations of the Confederacy follow the Great Law, each member Nation of the Confederacy has its own Council.

- *Halftown Group's Response Brief to Bruce Maytubby, BIA Eastern Regional Director, November 29, 2016,* AR 003522

58. Defendant Maytubby in his December 15, 2016 Decision found that although the passage of the Great Law quoted by the Halftown Group did not address individual Nation Councils, "in light of the fundamental principle[] [that governments 'deriv[e] their just powers from the consent of the governed'], I cannot conclude that the citizens of each Haudenosaunee Nation have less authority with respect to their own Nation than they have within the overall Confederacy." By this reasoning, he deemed the Great Law passage to apply to allow the SOS.

- *BIA Decision,* AR 003568-69

59. Defendant Black deferred to Defendant Maytubby's legal conclusion regarding the passage of the Great Law as reasonable because "the RD had further received briefing that this specific passage was applicable to both the Confederate Council and to each member nation of the Council."

- *ASIA Decision,* AR 003888

60. The BIA has consistently rejected requests that it support mail-in surveys to determine the composition of the Cayuga Nation government. Acting Regional Director Poitra rejected the Halftown Group's 2014 survey verification request, holding in 2015 that "we are aware of no applicable authority that provides for [BIA] verification of election results [at Cayuga] or allows BIA to provide an independent confirmation of the results of a [mail-in survey process]."

- *Letter of Acting Eastern Regional Director Tammie Poitra to Cayuga Nation et al., Feb. 20, 2015,* AR 003223 ("2015 Poitra Decision")

61. BIA and DOI policy has been consistent: internal governmental disputes at the Cayuga Nation must be resolved internally according to the Nation's own law and traditional processes, and Cayuga law vests the Clan Mothers with exclusive authority to appoint and remove Council members.

- *2015 Poitra Decision,* AR 003223
- *George*, 49 IBIA at 165, AR 000066

62. Acting-Regional Director Tammie Poitra's interim decision ("2015 RD Decision") recognized the last undisputed government of the Cayuga Nation identified by the BIA in 2006 as the government with the authority to draw down funds from the Nation's then-existing ISDEAA contract.

- *2015 Poitra Decision*, AR 003216-24

63. The BIA found that the Cayuga Nation government in 2006 consisted of Clint Halftown, Tim Twoguns, Gary Wheeler, William Jacobs, Samuel George and Chester Isaac ("2006 Council"). The 2006 Council thus included members from both the Jacobs Group and the Halftown Group, Plaintiffs and Defendant-Intervenors here. The 2006 Council did not submit an ISDEAA proposal or drawdown request in 2015. Instead, competing factions of the Council – split then as they are now and were in 2016 -- asserted competing claims to ISDEAA funds previously awarded to the Nation.

- *2015 Poitra Decision*, AR 003216-33

64. In response to receiving two competing drawdown requests, Acting Regional Director Poitra denied both requests and chose instead to authorize use of the funds by the last undisputed leadership of the Nation, the Nation 2006 Council.

- *2015 Poitra Decision,* AR 003223

65. Defendant Black stated that "[T]he Regional Director explained the changed circumstances that required a reevaluation of the [2015] Decision's rejection of the Statement of Support Process. First, the Regional Director noted that unlike the Acting Regional Director in 2015, [Regional Director Maytubby] could not simply 'enter into a contract with the Nation 2006 Council, which did not submit a[n] [ISDEAA] proposal.'"

- *ASIA Decision*, AR 003897

66. Acting Regional Director Poitra did not receive "competing Cayuga 638 proposals," nor did the Nation 2006 Council "submit a proposal" or other ISDEAA-related request to the BIA in 2015 or 2016.

- *2015 Poitra Decision,* AR 003223

67. Acting Regional Director Poitra issued the 2015 RD Decision in order to resolve two competing claims of authority to sign, on behalf of the Nation, contract modifications necessary to draw down funds from the Nation's then-existing ISDEAA contract.

- *2015 Poitra Decision*, AR 003217

68. In his June 17, 2016 letter to Plaintiffs, Defendant Maytubby said that "under the current circumstances" the BIA agreed with the Halftown Group that a SOS campaign "would be a viable way of involving the Cayuga people in a determination of the form and membership of their tribal government."

- *Letter of Bruce W. Maytubby, BIA Eastern Regional Director, to Anita Thompson, June 17, 2016,* AR 003262

69. In his 2016 Decision, Defendant Maytubby noted that "[t]he 20l5 decision was based on the circumstances at the time," and that the BIA's decision to support the Halftown Group's SOS campaign in 2016 "was not made suddenly."

- *BIA Decision,* AR 003621

70. Defendant Maytubby concluded in his December 15, 2016 Decision that "[t]he different circumstances and decision facing BIA now, as opposed to in 2015, more than justify the different approach that BIA is taking to this year's statement of support campaign."

- *BIA Decision*, AR 003622; AR 003565

71. Defendant Black stated that Acting Regional Director Poitra's 2015 Decision "reject[ed] the Statement of Support process because there was no need, at that time and under those circumstances, to determine whether Cayuga law authorizes such a process."

- *ASIA Decision*, AR 003897

72. In affirming Regional Defendant Maytubby's Decision, Defendant Black said that "the current circumstances" allowed the BIA to support the Halftown Group's SOS campaign.

- *ASIA Decision, July 13, 2017*, AR 003897

73. Defendant Black noted "'one year and ten months' had passed since the issuance of the Interim Decision without any internal resolution of the leadership dispute."

- *ASIA Decision*, AR 003897
- *BIA Decision*, AR 003565

74. In 1997, the BIA recognized that the Cayuga Nation does not recognize or use an electoral system and Clint Halftown thanked BIA for refusing to recognize the results of an election campaign, noting that "federal law plainly prohibits the Bureau from imposing its own notions of popular government or other governmental procedures onto Indian governments."

- *Letter of Clint C. Halftown to Franklin Keel, then BIA Eastern Regional Director, Sept. 26, 1997*, AR 003276-77

75. In 2005, the BIA rejected an electoral process proposed by members of the Halftown Group, saying "It is our belief and understanding that the Cayuga Nation is governed by a traditional government…and that…leaders are not elected but are appointed by their respective clanmothers (sic) in accordance with the customs of the Cayuga Nation"

- *Letter of Franklin Keel, then BIA Eastern Regional Director, to Gary Wheeler et al, July 18, 2005*, AR 000053-54

76. In 2012, the BIA rejected a similar statement of support campaign proposed by the Halftown Group.

- *Halftown Group's Opening Brief to Bruce Maytubby, BIA Eastern Regional Director, November 14, 2016*, AR 003411

77. In September 2014, the Halftown Group requested that BIA verify the results of a campaign of support and recognize the 2006 Council as the Nation's government. The BIA rejected this effort to use a mail in survey campaign to determine the composition of the Nation's government.

- *Letter of David DeBruin to Johnna Blackhair, then BIA Acting Eastern Regional Director, September 2, 2014*, AR 003075

78. BIA Acting Regional Director Poitra rejected the Halftown Group's request, stating that BIA was unaware of "applicable authority that provides for verification of election results or allows BIA to provide any independent confirmation of results of a 'Campaign of Support' under these circumstances."

- *Letter of Acting Eastern Regional Director Tammie Poitra to Cayuga Nation et al., Feb. 20, 2015*, AR 003223

79. Acting Regional Director Poitra found that "all parties describe [Cayuga law] as requiring consensus decision making."

- *2015 Poitra Decision*, AR 003222
- *George*, 49 IBIA at 165, AR 000066

80. Acting-Regional Director Poitra noted that "the Nation has not used elections to select leaders, relying instead upon customary processes based on a longstanding oral tradition and a commitment to government by consensus."

- *2015 Poitra Decision*, AR 003222

81. Poitra found that "under Cayuga law and tradition, 'consensus requires unanimity and is achieved only when all of the members of the Nation's Council are of one mind.'"

- *2015 Poitra Decision*, AR 003222
- *George*, 49 IBIA at 165, AR 000066

82. Acting-Regional Director Poitra noted that 2014 SOS campaign was "purely a matter of Nation law and policy, upon which it would not be appropriate for BIA to intrude."

- *2015 Poitra Decision*, AR 003223

83. Plaintiffs detailed a wide range of objections to the Halftown Group's 2016 SOS campaign within days of learning of it and proposed alternatives for resolution of the governmental dispute.

- *Letter of Joseph J. Heath to Deputy Bureau Director Michael Black et al. with Exhibits attached, July 1, 2016*, AR 003267-337

84. In a letter dated January 27, 2016, Brenda Bennett notified the federal government that an earlier dispute had been resolved through re-unification of Turtle Clan with Bear and Heron Clans.

- *Letter of Brenda Bennett et. al to Bruce Maytubby, BIA Eastern Regional Director, Jan. 27, 2016*, AR 003268

85. The Mediation Peace Agreement of July 2015 established non-interference principles between the Halftown and Jacobs Groups to preserve the peace on the ground.

- *Cayuga Nation Mediation Peace Agreement, July 2015*, AR 003273-74

86. Defendant Maytubby found that that multiple admitted flaws in the SOS were not "sufficient to disprove" his conclusion that the SOS showed Cayuga citizens supported the Halftown Council.

- *BIA Decision*, AR 003575

87. Expert evidence submitted to Federal Defendants concluded that the SOS was "plagued by problems of biased language, confounding financial influences, insufficient response categories, acquiescence and social desirability biases, compound questions, and a potential lack of representativeness," all of which suggested "a deeply flawed method of assessment from which no information may be confidently gathered."

- *Report of James N. Druckman, Ph.D., and Jacob E. Rothschild, M.A., Nov. 25, 2016*, AR 003559 ("Expert Report")

88. Defendant Black acknowledged that "the statement of support process lacked mechanisms to safeguard accuracy and transparency."

- *BIA Decision*, AR 003575

89. The SOS campaign offered Cayuga citizens only one choice: to support the Halftown Group and its slate of purported Council members. The SOS offered no option to support some but not all of that slate. It offered no option to support any of Plaintiffs.

- *Halftown Group Governance Process Document, Letter of Clint Halftown et. al to Cayuga Nation, July 6, 2016*, AR 003402

90. The SOS campaign failed to offer an option to support any of the Plaintiffs, even though Plaintiffs include members of the Council of Chiefs whose status on the Council had never been disputed by any party.

- *Halftown Group Governance Process Document, Letter of Clint Halftown et. al to Cayuga Nation, July 6, 2016*, AR 003402

91. In contrast to the form of ballot generally acceptable in democratic societies, the SOS campaign materials used biased language that the agencies declared "not neutral" and "clearly favoring the Halftown Group."

- *BIA Decision*, AR 003573
- *ASIA Decision*, AR 003900

92. The Halftown Group's 2016 SOS campaign documents described the Plaintiffs as having "inappropriately adopted the name of the Nation's Council" and attempting "to take over our government," while at the same time describing the Halftown Group as being responsible for "the significant progress that the Cayuga Nation Council has made to strengthen the Cayuga Nation and help improve the lives of all Cayuga citizens."

- *Halftown Group Governance Process Document, Letter of Clint Halftown et. al to Cayuga Nation, July 6, 2016,* AR 003349

93. The experts who reviewed the documents included in the Halftown Group's 2016 SOS campaign concluded that requiring "a respondent not to recognize a group that is described unfavorably and to support a group that is depicted in a positive light is unlikely to yield useful information." This problem was compounded, the experts found, by "[t]he amount of material the respondents were asked to read [and agree to], including both the governance document as well as both statements of support [totaling seven pages comprising dozens of discrete statements regarding Cayuga law and governance]."

- *Expert Report*, AR 003555; AR 003556

94. Reviewing the campaign, Defendant Black found that "there are multiple [conflicting] estimates of Cayuga citizenship, and… in light of the Halftown Council's fairly narrow margin of victory, even a slight difference in membership could change the results of the election." Defendant Black cited Census data that suggests more than twice the number of Cayugas than claimed by the Halftown Group, as well as Halftown Group's own conflicting statements regarding number of citizens. Defendant Black deemed it "troubling that, as the Regional Director noted, [Plaintiffs] credibly alleged they were denied permission to independently review and cross-verify the membership roll used for purposes of the [SOS], which was created by and remained in the custody of the Halftown Council."

- *ASIA Decision*, AR 003898

95. Defendant Black chose to credit the SOS, relying heavily on the BIA's close scrutiny of the SOS materials sent in by the Nation's citizens, and on the fact that the parties had offered a range of population estimates in different contexts.

- *ASIA Decision*, AR 003899
- *BIA Decision*, AR 003570-71

96. The SOS materials included multiple compound statements and asked respondents to agree with all of them. The expert evidence found that "[a] more valid method of assessing…attitudes [of Cayuga Nation citizens on the legitimacy of their governmental representatives] would be to provide balanced, competing accounts or descriptions, and then to have respondents select from these options,... ask[ing] for a response to each important item individually."

- *Expert Report*, AR 003556-58

97. The expert evidence found flaws in the SOS campaign to include the fact the respondents' identities were known, as each survey was addressed to each citizen and required a signature. This meant that "a failure to respond would be known" by the Halftown Group (but not Plaintiffs, who were not allowed access to the voter roll, mailing list, or returned SOS materials), which could "later create negative impacts" on respondents who did not respond in support of the Halftown Group.

- *Expert Report*, AR 003348-49; AR 003557

98. Plaintiff and Turtle Clan Mother Brenda Bennett attested that some Cayuga Citizens who received the Statement of Support materials received them together with a distribution check from the Halftown Group.

- *Declaration of Clan Mother Brenda Bennett, Nov. 11, 2016*, AR 003507

99. The expert evidence concluded that a perception that the distribution checks were intended to persuade the Cayuga citizens would affect the results of the SOS, as it "would clearly

induce the expression of more favorable attitudes toward the group conducting the support measurement campaign in a way that does not reflect true underlying attitudes."

- *Expert Report*, AR 003555

100. 92% of Cayuga citizens received and cashed checks from the Halftown Group within the three weeks prior to receiving the Statement of Support materials from the Halftown Group.

- *ASIA Decision*, AR 0030901

101. Only a single response option was offered on both statement of support forms: reject the "Unity Council" and simultaneously support the Halftown Council.

- *Expert Report*, AR 003556
- *Halftown Group Governance Process Document, Letter of Clint Halftown et. al to Cayuga Nation, July 6, 2016*, AR 003349

102. Due to evidence that some Cayuga citizens did not receive the SOS campaign, the experts concluded a fundamental concept in survey sampling, having a representative survey sample, may have been violated during the SOS campaign.

- *Expert Report*, AR 003558
- *Declaration of Clan Mother Brenda Bennett, Nov. 11, 2016*, AR 003507

103. Defendant Maytubby found that the language used in the SOS campaign was "not neutral, clearly favoring the Halftown Council" and that "the statement of support process lacked mechanisms to safeguard accuracy and transparency."

- *BIA Decision*, AR 003573-75

104. Regional Director Maytubby ultimately determined that the "vulnerabilities of the statement of support process were insufficient to disprove Cayuga citizen's support of the Halftown Group."

- *BIA Decision*, AR 003575

105. Regional Director Maytubby focused on the difference between surveys of the public at large verses a tribal body politic, and the lack of concrete evidence that the biased language affected any person's response, to find that the responses received were prima facie evidence that Cayuga citizens endorsed the SOS campaign.

- *BIA Decision*, AR 003573

106. Defendant Black held that the Regional Director "considered the experts findings and did not find them dispositive."

- *ASIA Decision*, AR 003901

107. The BIA provided funding, technical support and "verification" to the Halftown Group between June 2016 and September 2016.

- *Letter of Bruce W. Maytubby, BIA Eastern Regional Director, to Anita Thompson, June 17, 2016,* AR 003262-63
- *Halftown Group Governance Process Document, Letter of Clint Halftown et. al to Cayuga Nation, July 6, 2016,* AR 003340-49
- *Letter of Clint Halftown et al to Deputy Bureau Director Michael Smith et al, August 2, 2016,* AR 003356-57
- *BIA Summary of Statement of Support Verification Meeting, Sept. 21, 2016,* AR 003374
- *Letter of Clint Halftown et al to Cayuga Nation Citizens, Oct. 6, 2016,* AR 003383
- *Letter of Clint Halftown et al to Deputy Bureau Director Michael Smith et al, Oct. 6, 2016,* AR 003384-404
- *Letter of Regional Director Bruce Maytubby to Clint Halftown and William Jacobs, Nov. 01, 2016,* AR 003407-08

108. The BIA decided to provide technical support to the effort despite the opposition of fully half the Nation's then-recognized Council of Chiefs and all of the Nation's Clan Mothers. The BIA did not receive authorization for its actions from the then-recognized governing body of the Cayuga Nation and did not respond to Plaintiffs' proposal for alternative means of resolving the internal governance dispute.

- *Letter of Joseph J. Heath to Deputy Bureau Director Michael Black et al. with Exhibits attached, July 1, 2016,* AR 003267-337

109. The BIA determined the proposed SOS process would be "valid" before it determined whether the effort would be lawful under Cayuga law.

- *Letter of Bruce W. Maytubby, BIA Eastern Regional Director, to Anita Thompson, June 17, 2016,* AR 003262

110. The BIA consulted with the Halftown Group about the SOS for at least six months before informing Plaintiffs of it. Defendant Maytubby acknowledged that consultations between Halftown and the BIA on this issue included "at least one meeting [ ] in December 2015 and several conference calls" thereafter.

- *Letter of Joseph J. Heath to Bruce Maytubby, BIA Eastern Regional Director, June 20, 2016,* AR 003264-65

111. In a letter to BIA Deputy Director Michael Smith on August 2, 2016, the Halftown Group expressed their gratitude for "the assistance you have provided the Cayuga Nation over the past two years. . . ." on governance issues.

- *Letter of Clint Halftown et al to Deputy Bureau Director Michael Smith et al, August 2, 2016,* AR 003356-57

112. Within seventy-two hours of receiving Halftown's letter detailing the SOS and requesting technical assistance for it, Defendant Maytubby wrote to Plaintiffs expressing BIA's "agree[ment]" that the SOS "would be a viable way of involving the Cayuga people in determination of the form and membership of their government."

- *Letter of Bruce W. Maytubby, BIA Eastern Regional Director, to Anita Thompson, June 17, 2016,* AR 003262-63

113. According to the BIA, the short deadline given to Plaintiffs to respond to Defendant Maytubby's June 17 letter was justified because "the campaign described in [the Maytubby] letter and in the letter you received from the [Halftown Group] is going to be getting underway," regardless of the concerns of the Plaintiffs.

- *Letter of Acting Regional Director Johanna Blackhair to Joseph J. Heath, June 29, 2016,* AR 003266

114. The Halftown Group requested the help of the BIA to "complete this process" and more specifically, to enlist the expertise of the BIA in "reviewing this initiative and verifying the results."

- *Letter of Clint Halftown et al to Deputy Bureau Director Michael Smith et al, August 2, 2016,* AR 003356-57

115. The SOS neither conformed to nor was governed by federal regulations designed to ensure that BIA-supported tribal elections include safeguards to ensure fairness and transparency, 25 C.F.R. § 81.5(a)(2).

- *Letter of Bruce W. Maytubby, BIA Eastern Regional Director to Clint Halftown and William Jacobs, December 15, 2016,* AR 003570
- *ASIA Decision,* AR 003902-03

116. The BIA held meetings with the Halftown Group to discuss the nature and scope of the support the BIA would provide, and to subsequently review and ratify the results. These meetings were closed to Plaintiffs. Two such meetings were held in September 2016, one for a "preliminary review of the signed statements," and a second to "crosscheck[] and verify[]" the results.

- *Letter of Clint Halftown et al to Deputy Bureau Director Michael Smith et al, Oct. 6, 2016,* AR 003384; AR 003385

Date: May 24, 2018

Respectfully submitted,

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