To be Argued by:
LEE ALCOTT
(Time Requested: 15 Minutes)

New York Supreme Court

Appellate Division—Fourth Department

CAYUGA NATION,

Petitioner-Appellant,

– against –

DUSTIN PARKER and DUSTIN PARKER d/b/a PIPEKEEPERS TOBACCO & GAS,

Respondents-Respondents.

Docket No.: CA 23-00739

REPLY BRIEF FOR PETITIONER-APPELLANT

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PRELIMINARY STATEMENT

Supreme Court articulated two grounds in its initial Order for denying the Nation's Petition. First, after imposing artificial filing requirements not found in Section 202.71, it determined that the form of the Nation Court Judgment sought to be domesticated was not satisfactory. Second, it purported to find, *sua sponte*, that the Nation had failed to establish that Supreme Court had personal jurisdiction over Respondents.

When presented with a motion for leave to renew and reargue, Supreme Court abandoned the rulings contained in its initial Order and denied the Nation's Petition on new and additional grounds, claiming the Nation Court did not have jurisdiction to issue the Nation Court Judgment and disavowing the existence of the Cayuga Nation Reservation and the legitimacy of the Cayuga Nation's Judiciary and Police Department in the process.

The Nation's Opening Brief details why Supreme Court erred in making each of these rulings. Respondents have announced they do not oppose the Nation's arguments with respect to the initial Order,[1] nor do they dispute the continued existence of the Cayuga Nation Reservation, the legitimacy of the Cayuga Nation Judiciary or Police Department, or any of the other arguments asserted by the Nation

[1] Opp'n Br. pp. 4 n.2 and 22.

in its Opening Brief in support of reversing the appealed Order, or otherwise seek to have the appealed Order upheld on its own terms.

Instead, Respondents put forth three unpreserved arguments in support of affirming Supreme Court on alternate grounds and, in the process, seek to put before this Court materials not contained in the record on appeal or presented at the trial court level. For the reasons set forth below, each of Respondents' arguments should be rejected, Supreme Court's Order should be reversed, and the Petition should be granted.

ARGUMENT

I. Respondents' Argument That Judge Fahey Is Not Qualified Under the Cayuga Nation Judiciary Law Is Unpreserved, Improperly Relies on Materials Outside of the Record on Appeal, and Defies Settled Cayuga Nation Law

"It is a well-established general rule that an appellate court will not consider an issue raised for the first time on appeal." *Bogle-Assegai v. Connecticut*, 470 F.3d 498, 504 (2d Cir. 2006); *Snyder v. Newcomb Oil Co.*, 194 A.D.2d 53, 55 (4th Dep't 1993) ("argument was not raised in the trial court and is thus not preserved for appellate review."); *State Farm Mut. Auto. Ins. Co. v. Pantina*, 255 A.D.2d 592, 592 (2d Dep't 1998) (the "contentions . . . are not properly before this Court, as they were not raised in the Supreme Court." (citation omitted)). Yet, while expressly admitting the argument was not raised in Supreme Court, Opp'n Br., pp. 13 and 16, Respondents now claim that the underlying action should have been dismissed

because, they argue, the Nation Court trial judge, Hon. Joseph E. Fahey, was not validly appointed under the Cayuga Nation Judiciary Law as he is not an "enrolled member of the Nation." *Id.*, p. 12. Thus, they say, the Nation Court Judgment sought to be enforced by the Petition is invalid.

Respondents' newly-raised argument should not be considered by this Court for at least three reasons. First, because the argument was not raised in Supreme Court, and it is therefore not properly before this Court on appeal. *Snyder*, 194 A.D.2d at 55; *Pantina*, 255 A.D.2d at 592. Second, because the argument depends upon materials outside of the record on appeal. *Charlotte Lake River Assocs. v. Am. Ins. Co.*, 68 A.D.2d 151, 154–155 (4th Dep't 1979) ("It is well established that review by this court is limited to the record made before Special Term and the court is bound by the certified record on appeal. Matters contained in the brief, not properly presented by the record, are not to be considered by an appellate court."(citations omitted)). And, third, because the argument raises questions of fact that could have been addressed and resolved in Supreme Court. *Harriger v. State of N.Y.*, 207 A.D.3d 1045, 1045 (4th Dep't 2022) ("An issue may not be raised for the first time on appeal where it could have been obviated or cured by factual or legal countersteps in the trial court." (citations omitted)).

While a narrow exception to the preservation rule exists where the newly-raised issue exclusively "involves a question of law appearing on the face of the

record that could not have been avoided by the opposing party if brought to that party's attention in a timely manner," *id.* at 1046 (citation omitted), that exception does not apply here. To start, the question of Judge Fahey's qualifications is not exclusively a question of law, but necessarily involves questions of fact. What is more, the question indisputably does not appear on the face of the record, rendering it outside the scope of appellate consideration. *Charlotte Lake River Assocs.*, 68 A.D.2d at 154–155. And Respondents' request that this Court reach outside of the record and take judicial notice of the original Cayuga Nation Judiciary Law pursuant to CPLR 4511(b), Opp'n Br. pp. 10 and 11, is improper. CPLR 4511(b) provides "[n]otice *shall* be given in the pleadings or prior to the presentation of any evidence at trial" (emphasis added), and Respondents concede they did not in any way raise the Cayuga Nation Judiciary Law in the Supreme Court proceedings. *Id.*, pp. 13 and 16. Thus, it cannot be raised now.

But even were this Court to consider the issue, and the text of the Cayuga Nation Judiciary Law, Respondents' argument is without merit. The Nation's lawful governing body, the Cayuga Nation Council, enacted the original Cayuga Nation Judiciary Law on August 2, 2018. Opp'n Br., Add. A.[2] The original Cayuga Nation Judiciary Law provided: "A person shall be *eligible* to stand for election, or be

[2] Respondents' Opposition Brief attaches the original Cayuga Nation Judiciary Law as an addendum pursuant to 22 N.Y.C.R.R. § 1250.8(k). Opp'n Br., Add. A. The Nation makes reference to that document as such, without conceding that it is properly subject to judicial notice.

eligible for appointment in accordance with Rule 11.9, and to serve as a Judge if such individual: (1) Is an enrolled member of the Nation and is at least thirty (30) years of age on the date of the election or appointment . . . ." *Id.*, Add. A, p. 12 (emphasis added). The Judiciary Law thus makes certain persons *eligible* to serve, without excluding other persons as ineligible.

The Cayuga Nation's Federal Representative and Member of the Cayuga Nation Council that enacted the original Cayuga Nation Judiciary Law, Clint Halftown, has explained: "In enacting the Nation's Judiciary Law, in particular, Section 11 concerning 'Qualifications for Judges,' it was never the intent of the Nation to limit members of the Nation's judiciary to citizens of the Nation, and, indeed, Section 11.1(a) of the Nation's Judiciary Law does not so state. Rather, the purpose of Section 11 was only to make citizens of the Cayuga Nation eligible to serve as judges in the Nation's Courts, not to require all Nation judges to be Nation citizens."[3]

Indeed, as Respondents admit, Judge Fahey's qualifications to serve as a Cayuga Nation Tribal Court Judge, in accordance with the provisions of the original Cayuga Nation law, have been specifically addressed by the Cayuga Nation Court of Appeals, the Cayuga Nation's highest court. (R. 40–45 (*Cayuga Nation v.*

[3] *Cayuga Nation v. Wanda John*, CA 23-00740 (4th Dep't) (Record on Appeal, p. 38) (Affidavit of Clint Halftown sworn to September 16, 2022) set to be argued together with this appeal by calendar preference Ordered by this Court on September 6, 2023.

Jimerson, Lead Index No. CV-008-21, Mem. and Order in Cons. Cases (Cayuga Nation Court of Appeals, Sep. 29, 2022) (Carni, J.))). In that case, Appellants made the exact argument Respondents seek to make here: that Judge Fahey was not qualified to serve as a Cayuga Nation Tribal Court Judge because he is not an enrolled member of the Cayuga Nation, and that a judgment entered by him was therefore invalid. (R. 42). The Cayuga Nation Court of Appeals rejected that argument, holding:

> [A]dopting Appellants' literal reading of Section 11.1 would result in there being no candidates who could be found properly qualified under Cayuga Nation law. Certainly, that is not the overarching intent of the statute. This Court need not blindly adhere to a literal reading of a statute where doing so would frustrate the general purpose of the law, or where such a reading would result in inequity, injustice, or absurdity. This Court finds that the general purpose of Cayuga Nation Judiciary Law § 11.1 is to ensure that properly qualified judges are elected or appointed to serve in its tribal court. Respondent demonstrated that it was unable to find a qualified judicial candidate who was a member of the Nation and, thus, selected a qualified jurist who met the remaining qualifications set forth in Cayuga Nation Judiciary Law 11.1. This Court finds no reason to disturb the Lower Court's decision on this basis.

(R. 43).

Furthermore, on October 17, 2022, the Cayuga Nation Council amended the Cayuga Nation Judiciary Law. (R. 46–59). Section 11.1(a) of the Amended and Restated Judiciary Law provides: "The appointments of the currently sitting judges shall continue uninterrupted by the amendment and restatement of this law until the end of their current appointments." (R. 54). Section 11.1(b) further provides: "The

Judges of the Trial Court and the Court of Appeals shall be persons qualified to practice law in a state of the United States and possess at least ten years of judicial experience in the court of the Cayuga Nation, another Indian nation, or a court of the United States and who shall from time to time agree to serve as Judges of the Trial Court at a rate of pay to be set in advance of their appointment by the Cayuga Nation Council." (*Id.*). Taken together, these amendments only further confirm the qualifications of Judge Fahey to serve as a Cayuga Nation Tribal Court Judge.

In all events, Respondents seek to raise to this Court an issue strictly of Cayuga Nation law—specifically, who is qualified to serve as a Cayuga Nation Tribal Court Judge under the provisions of the Cayuga Nation Judiciary Law. The Cayuga Nation's highest court has resolved that matter, and that determination is binding on other courts. *Wainwright v. Goode*, 464 U.S. 78, 84 (1983) ("the views of the state's highest court with respect to state law are binding on the federal courts"); *Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co*., 138 S. Ct. 1865, 1874 (2018) (same); *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 16 (1986) ("tribal courts are best qualified to interpret and apply tribal law"). Moreover, Respondents' request that this Court ignore the Cayuga Nation Court of Appeals' determination and hold that Judge Fahey is not qualified both defies the plain language of the Cayuga Nation Judiciary Law, and the settled principle that state and federal courts lack jurisdiction to resolve disputes about tribal law. *Cayuga Nation*

v. Campbell, 34 N.Y.3d 282, 298 (2019); *Cayuga Nation v. Tanner*, 824 F.3d 321, 327 (2d Cir. 2016).

Judge Fahey's appointment being valid, there is simply no basis for any finding that his service as a judge was even remotely deficient or improper, or that the proceedings before him were otherwise irregular or unfair so as to violate due process. In fact, Respondents have waived any argument to the contrary by not asserting it in their brief.[4] *Lehigh Portland Cement Co. v. Assessor of the Town of Catskill*, 263 A.D.2d 558, 560 (3d Dep't 1999) ("[A] party's failure to raise an issue in its appellate brief is tantamount to abandonment or waiver of the issue." (citations omitted)).

More broadly, the Nation Court Judgment is entitled to recognition under the "principles of the common law of comity" test that Section 202.71 prescribes, and that Supreme Court erred in failing to apply. 22 N.Y.C.R.R. § 202.71 ("If the court finds that the judgment, decree or order is entitled to recognition under principles of the common law of comity, it shall direct entry of the tribal judgment, decree or order as a judgment, decree or order of the Supreme Court of the State of New York."). "Historically, New York courts have accorded recognition to the judgments rendered in a foreign country under the doctrine of comity absent some showing of

[4] Indeed, Respondents make "clear[] Parker is not challenging the integrity of Judge Fahey or any of his other qualifications, but rather, this challenge is limited to whether Judge Fahey met the qualifications set forth in the applicable Cayuga Nation Judiciary Law[.]" Opp'n Br., p. 12 n.6.

fraud in the procurement of the foreign country judgment or that recognition of the judgment would do violence to some strong public policy of this State." *Abu Dhabi Commercial Bank PJSC v. Saad Trading*, 117 A.D.3d 609, 610 (1st Dep't 2014) (citation and internal alterations omitted).

There has been no allegation, let alone showing, of fraud here, and no claim or finding that recognition of the Nation Court Judgment violates any public policy of the State. To the contrary, expeditious recognition of the Nation Court Judgment vindicates the public policy specifically embodied in Section 202.71, while Supreme Court's cynical approach accomplishes the opposite. *See Wilson v. Marchington*, 127 F.3d 805, 811 (9th Cir. 1997) ("Federal courts must also be careful to respect tribal jurisprudence along with the special customs and practical limitations of tribal court systems. Extending comity to tribal judgments is not an invitation for the federal courts to exercise unnecessary judicial paternalism in derogation of tribal self-governance.").

At bottom, Respondents' first alternate grounds for affirmance based upon the Cayuga Nation Judiciary Law are without merit. Supreme erred when it dismissed the Petition, and its Order should now be reversed and the Petition granted.

II. Respondents' Arguments Questioning Judge Fahey's Engagement to Serve as Civil Court Judge and His Independence Are Unpreserved, Improperly Rely on Materials Outside of the Record on Appeal, and Are Entirely Without Merit

Respondents go even further afield in support of their second alternate grounds for affirming Supreme Court, which they likewise raise for the first time on appeal. First, they ask the Court to reach into the NYSCEF docket in two cases before Cayuga County Supreme Court and take judicial notice of an "Engagement Agreement" between the Cayuga Nation and Judge Fahey. Opp'n Br., p. 17 n.7. Then, they argue that the terms of that Engagement Agreement—as they strain to interpret them—"raise[] significant doubts concerning Judge Fahey's authority to issue the Nation Court judgment rendered against Parker and Pipekeepers, and whether the Nation Court possesses the attributes of an independent judiciary." *Id.*, p. 17.

In addition to arguments not asserted in the trial court being unpreserved for appellate review, *Snyder*, 194 A.D.2d at 55, "[t]he general rule [is] that documents which were not submitted to the court of original instance may not be considered on appeal." *Brandes Meat Corp. v. Cromer*, 146 A.D.2d 666, 667 (2d Dep't 1989); *Slater v. Herkimer*, 73 A.D.2d 1061, 1061 (4th Dep't 1980). The exception to this rule are records taken into account by judicial notice, "which may be taken by a court at any stage of the litigation, even on appeal." *Caffrey v. N. Arrow Abstract & Settlement Servs., Inc.,* 160 A.D.3d 121, 127 (2d Dep't 2018) (citations omitted).

"The test is whether the fact rests upon knowledge or sources so widely accepted and unimpeachable that it need not be evidentiarily proven. The most obvious illustrations are matters such as calendar dates, and such unassailably established facts as, for example, geographical locations or sunrise times." *Ptasznik v. Schultz*, 247 A.D.2d 197, 198 (2d Dep't 2009) (citations omitted). The terms of the Engagement Agreement are not such "unassailably established facts."

And while it is true that "[i]n New York, courts may take judicial notice of a record in the same court of either the pending matter or some other proceeding," *Matter of Allen v. Strough*, 301 A.D.2d 11, 18 (2d Dep't 2002) (citations omitted), that authority is not nearly as broad as Respondents lead on. "In some instances, and under certain circumstances, undisputed portions of court files or official records, such as prior orders or kindred documents, may be judicially noticed." *Ptasznik*, 247 A.D.2d at 199 (citations omitted). But several courts "have aptly and repeatedly commented on the seemingly widespread but mistaken notion that an item is judicially noticeable merely because it is part of the 'court file.'" *Id.* (collecting cases). "[T]he mere presence of a document in a court file does not mean that judicial notice can be taken of any factual material in the document." *Walker v. City of N.Y.*, 46 A.D.3d 278, 282 (1st Dep't 2007) (citation omitted).

All told, the Engagement Agreement is not a simple "fact" of which this Court can take judicial notice. *See id.* It is a two-page agreement between two parties, the

terms, content, and meaning of which are subject to interpretation by a fact-finder. Accordingly, it would be inappropriate for this Court to take judicial notice of the Engagement Agreement and consider it in the context of this appeal. *Michael R. Gianatasio, PE, P.C. v. City of N.Y.*, 159 A.D.3d 659, 660 (1st Dep't 2018) ("It is inappropriate to take judicial notice of a fact that is controverted." (citations omitted)). Respondents' arguments based upon the Engagement Agreement necessarily fail as a result and, in any event, having failed to raise them in Supreme Court, Respondents are barred from making any arguments based upon the Engagement Agreement for the first time here. *Harriger*, 207 A.D.3d at 1046 ("Whether an employee acted within the scope of employment is a fact-based inquiry" and "[a]n issue may not be raised for the first time on appeal where it could have been obviated or cured by factual showings or legal countersteps in the trial court." (citation and internal quotation marks omitted)).

Even were this Court to consider the Engagement Agreement, and Respondents' arguments relating to it, there is no basis to uphold Supreme Court's Order on alternate grounds. The Engagement Agreement, fully titled "Engagement Agreement Trial Judge," provides: "This Agreement ("Agreement") sets forth the terms under which the Cayuga Nation (the "Nation") shall engage the Honorable Joseph E. Fahey ("Judge Fahey") as a *Trial Judge*, to hear and decide matters in the

Nation Trial Court." Opp'n Br., Add. B, p. 1 at ¶ 1 (emphasis added).[5] Both the title and the opening paragraph of the Engagement Agreement establish an expansive position for Judge Fahey to serve as a "trial judge" in the Nation trial court (which hears both civil and criminal matters). Yet Respondents argue that because the second paragraph of the Engagement Agreement states "Judge Fahey shall hear and decide matters involving criminal violations in the Nation Trial Court," *id.*, Add. B. p. 1 at ¶ 2, his authority to preside over civil matters in the Nation Trial Court is questionable, "cast[ing] further doubt regarding the validity of the default judgment the Nation seeks to recognize and enforce here." *See id.*, p. 19.

That argument defies both the principles of contract interpretation and common sense. Respondents' cribbed reading of the Engagement Agreement ignores the convention that "effect and meaning must be given to every term of the contract[], and reasonable effort must be made to harmonize all of its terms." *Maven Techs., LLC v. Vasile*, 147 A.D.3d 1377, 1378 (4th Dep't 2017) (citations omitted). All of the provisions of the Engagement Agreement taken together, and its title, make clear it is intended to encompass judgeship over all matters—civil and criminal—before the Nation Trial Court. Indeed, the Engagement Agreement is dated October 14, 2018, indicating Judge Fahey has been the presiding judge of the

[5] Respondents' Opposition Brief attaches the Engagement Agreement as an addendum pursuant to 22 N.Y.C.R.R. § 1250.8(k). Opp'n Br., Add. B. The Nation makes reference to that document as such, without conceding that it is properly subject to judicial notice.

Cayuga Nation Civil Court for the past *five years.* Common sense dictates that he is engaged by the Cayuga Nation in that capacity.

Despite earlier stating that they are "not challenging the integrity of Judge Fahey or any of his other qualifications," *supra* n. 4, Respondents go on to do just that. They claim Judge Fahey is "not independent," Opp'n Br., p. 20, because, Respondents say, the Engagement Agreement allows the Nation to reduce Judge Fahey's compensation during his term, and because either party may terminate the Engagement Agreement for any reason upon 30 days' notice. *Id.*

As they did with the scope of the Engagement Agreement, Respondents take the compensation provisions entirely out of context. The Engagement Agreement begins by acknowledging "[t]he parties recognize that the position of a Trial Court Judge is a new position and the duties and scope of work involved has not yet been determined." Opp'n Br., Add. B, p. 1 at ¶ 3. It continues that "Judge Fahey shall keep reasonably detailed time entry records identifying the number of hours worked and a description of the work performed in connection with any Nation Trial Court matters." *Id.* Then it states: "Within three months following execution of the Agreement, the parties shall meet and confer in order to reevaluate the compensation associated with the position of a Trial Court Judge, based on the time entry records." *Id.* Yet Respondents quote only this last sentence, and claim "[t]his language seems to empower the Nation to diminish Judge Fahey's compensation during his term of

office, thus calling into question the independence of his judicial position." Opp'n Br., p. 20.

Taken in the context of the other related terms on the same page, it is clear the Engagement Agreement establishes provisional compensation that will soon be settled upon the parties determining the time required to serve in the newly-created trial judge position. It does not create the unchecked ability to change Judge Fahey's compensation during the term of office. In fact, Section 1.11-10(b) of the original Cayuga Nation Judiciary Law expressly forbids that, providing: "The compensation of Judges *shall not be diminished during their term of office*, unless a majority of a particular court votes to reduce that entire Court's own compensation equally for that Court's term." Opp'n Br., Add. A, p. 12 (emphasis added).[6] Nor, taken in context, does the provision allowing *either* party to terminate the Engagement Agreement at its own election raise any concerns regarding Judge Fahey's independence. To remove any doubt, the Engagement Agreement expressly provides Judge Fahey *must* take an Oath of Admission swearing "to abide by the Canons of Judicial Ethics, and impartially administer justice[.]" Opp'n Br., Add. B, p. 1 at ¶ 4. There is absolutely no basis to claim Judge Fahey has not honored that oath.

Ultimately, Respondents' second alternate grounds for affirmance based upon the Engagement Agreement are without merit. Supreme Court erred when it

[6] The current Cayuga Nation Judiciary Law contains the same provisions. (R. 55–56, §§ 11.9(b)).

dismissed the Petition, and its Order should now be reversed and the Petition granted.

III. Respondents' Pleading Argument is Unpreserved, and is Foreclosed by Court of Appeals Precedent and Cayuga Nation Law

Respondents begin their final argument by conceding that Supreme Court erred in dismissing the Petition for lack of personal jurisdiction contrary to this Court's precedent in *Lenchyshyn v. Pelko Elec., Inc*., 281 A.D.2d 42, 47 (4th Dep't 2001). Opp'n Br., p. 22 ("Parker does not argue that the Nation's petition was properly dismissed on the grounds that Supreme Court lacked personal jurisdiction . . . as that argument is admittedly foreclosed by *Lenchyshyn*). That resolves the matter of whether the jurisdictional portion of Supreme Court's Order should be reversed by this Court. Still, Respondents contend Supreme Court "clarified its personal jurisdiction conclusion in its April 2023 Order denying the Nation's renewal and reargument motion," stating that it intended to rule on the grounds that the *Nation Court* lacked jurisdiction over Respondents. Opp'n Br., pp. 22–23. That position is belied by the plain language of the Order, which begins by confirming "[o]n July 19, 2022, this Court issued an Order denying the Petition on the ground that Petitioner failed to establish that *this Court* has *personal jurisdiction* over Respondents." (R. 4 (emphasis added)).

Putting aside the plain language of the Order, Respondents contend the Supreme Court's dismissal of the Petition should be affirmed on alternate grounds

"because it is unclear on the face of the petition whether the Nation Court had personal jurisdiction over [Respondents] and whether the Nation Court had subject matter jurisdiction to adjudicate the Nation's claims" Opp'n Br., p. 21, "render[ing] the Nation's Article 4 petition deficient on its face as a matter of law." *Id.*, p. 22. But Respondents point to no precedent in support of this argument, nor to any provision of the CPLR. That is because there is none. Indeed, the Court of Appeals has foreclosed Respondents' argument, making clear that there is no pleading requirement for subject matter or personal jurisdiction under the New York law. *Fischbarg v. Doucet*, 9 N.Y.3d 375, 381 n.5 (2007) ("Nowhere in the CPLR's rules of pleading is there any requirement of an allegation of the court's jurisdiction." (citation omitted)).

All the same, the Nation Court unquestionably had the requisite jurisdiction to issue the Nation Court judgment. The Ordinance establishing the Cayuga Nation Civil Court provides: "The Cayuga Nation Civil Court shall have subject matter jurisdiction over all civil suits, claims, and causes of action arising out of or pertaining to conduct, activities, or undertakings within the territorial jurisdiction of the Nation by Nation citizens" and "[i]n matters over which it has subject matter jurisdiction, the Cayuga Nation Civil Court may exercise personal jurisdiction over persons properly served with process or consenting to jurisdiction. (R. 26–27).

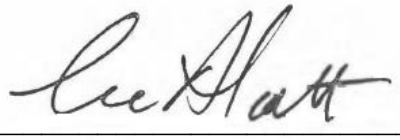
No matter how framed, Respondents' third, and final, alternate grounds for affirmance are without merit. Supreme erred when it dismissed the Petition, and its Order should now be reversed and the Petition granted.

CONCLUSION

For the reasons set forth herein, and those set forth more fully in the Nation's Opening Brief, Supreme Court's Order should be reversed and the Nation's Petition granted.

Dated: October 3, 2023

BARCLAY DAMON LLP

By: 

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Dated: October 3, 2023