

Frank L. Corrado (SBN 022221983)
Barry, Corrado & Grassi, P.C.
2700 Pacific Avenue
Wildwood, NJ 08260
fcorrado@capelegal.com
Tel: 609.729.1333

Gregory A. Werkheiser (admitted *pro hac vice*)
L. Eden Burgess (admitted *pro hac vice*)
Cultural Heritage Partners, PLLC
2101 L Street NW, Suite 800
Washington, DC 20037
greg@culturalheritagepartners.com
eden@culturalheritagepartners.com
Tel: 202.567.7594

U.S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

NANTICOKE LENNI-LENAPE TRIBAL NATION,)	SECOND AMENDED
)	COMPLAINT FOR
)	INJUNCTIVE AND
)	DECLARATORY RELIEF
Plaintiff)	
)	
v.)	
)	CASE NO. 15-cv-5645-RMB-JS
ROBERT LOUGY)	
ACTING ATTORNEY GENERAL OF NEW JERSEY,)	
IN HIS INDIVIDUAL AND IN OFFICIAL CAPACITIES,)	
)	
Defendant.)	
)	

The Nanticoke Lenni-Lenape Tribal Nation (“the Tribe”), by way of complaint against the Defendant, avers as follows:

1. This is a civil rights action. The Tribe says the Acting Attorney General of New Jersey has wrongfully repudiated state recognition of the Tribe as an American Indian tribe, and has thereby violated the Tribe’s rights under the Constitution of the United States to (1) procedural due process, (2) substantive due process, and (3) equal protection.

I. PARTIES

2. The Tribe is a constitutionally organized, self-governing, inherently sovereign American Indian tribe. Its principal place of business is 18 East Commerce Street, Bridgeton, New Jersey. Most of the Tribe's approximately 3,000 members reside in New Jersey.
3. Defendant Robert Lougy is Acting Attorney General of New Jersey. He is sued in his individual and official capacities. His principal place of business is the Richard Hughes Justice Center in Trenton. The Acting Attorney General is the chief legal advisor to New Jersey state government.

II. JURISDICTION AND VENUE

4. This action is for deprivation of federal constitutional rights under color of state law, brought pursuant to 42 U.S.C. § 1983, and under 28 U.S.C. § 1343(a)(3).
5. The Court has jurisdiction over the Tribe's federal claims pursuant to 28 U.S.C. § 1331, as an action arising under the Constitution of the United States, and under 28 U.S.C. § 1343(a)(3), to redress the deprivation, under color of state law, of rights secured by the Constitution.
6. The Court has the authority to grant declaratory and injunctive relief pursuant to the Declaratory Judgment Act, 28 U.S.C. § 2201 *et seq.*, and the rule of *Ex Parte Young*, 209 U.S. 123 (1908).
7. The Acting Attorney General is not immune from this suit because the Tribe is suing a state officer in his individual capacity for prospective injunctive and declaratory relief to end ongoing violations of federal law, as provided for in *Ex Parte Young*, 209 U.S. 123 (1908).
8. The Court has authority to award costs and attorneys' fees on the Tribe's federal claims pursuant to 42 U.S.C. § 1988.

9. Venue is properly laid in the District of New Jersey pursuant to 28 U.S.C. § 1391(b) because all parties reside in this district, and the events giving rise to this claim occurred in this district.

III. FACTS

A. History of the Lenni-Lenape in New Jersey

10. The lineage of the Lenni-Lenape people (also called “Delawares”) in what became New Jersey and the surrounding region dates back more 12,000 years and through 500 generations. The Lenni-Lenape were often referred to as "the Grandfather tribe" because of their diplomatic skills, and their reliable honesty in dealing with others, and because they provide the ancient root of many other American Indian nations.
11. Colonists’ diseases and violence took heavy tolls on the Lenni-Lenape. In 1758, the Colonies established an American Indian reservation in New Jersey, the Brotherton Reservation in present-day Burlington County, intended to provide a permanent safe haven.
12. The emerging American government saw in the Lenni-Lenape a potential ally in its fight against the British. So the first treaty the government signed after the Declaration of Independence with any party was with the Lenni-Lenape Nation. The government promised the Tribe statehood and seats in Congress if it would join them in the revolutionary cause. The Lenni-Lenape kept their end of the bargain, but the American government did not.
13. In 1802 the Brotherton Reservation was disbanded and New Jersey accelerated its expulsion of Lenni-Lenape. Members of the Tribe were forcibly relocated westward into Pennsylvania, and then Ohio, and then Indiana, and then Oklahoma, and eventually Canada after colonial governments broke successive treaties.
14. Some Lenni-Lenape families managed to evade forced removal to maintain a presence in their ancient homeland in what had become New Jersey. The Plaintiff in this case—the

Nanticoke Lenni-Lenape Tribal Nation—includes persons whose ancestors were Lenni-Lenape who remained in New Jersey and the Nanticoke, a documented tribe that resided on the Chesapeake Bay side of the Delmarva Peninsula. Many of Tribe’s families have lived for hundreds of years in what is now Fairfield Township, New Jersey, where the Tribe maintains tribal grounds, called “Cohanzick,” housing a community center, ceremonial grounds, and store.

15. American Indians were not considered "persons within the meaning of the law" until 1879.

Not until 1924 did Congress recognize American Indians as United States citizens.

16. Beginning in the late 19th century and continuing for almost 100 years until the 1980s, New Jersey pursued an official practice of administrative racial reassignment. Public officials altered the race indicated on birth certificates of American Indian infants to either white or black in an attempt to eliminate American Indian racial identity. This “racial purity” practice by the state injured New Jersey’s American Indian tribes in profound ways, including socially, economically, and politically.

B. The Meaning of State Recognition

17. When a system of federal recognition of tribes took shape in the late 1970s, the federal Bureau of Indian Affairs demanded birth records as evidence of American Indian ancestry. This placed *federal* recognition virtually beyond reach of tribes like the Lenni-Lenape in New Jersey and tribes in other “racial purity law” states like Virginia. It is also a reason that *state* recognition, which is wholly separate from and historically predates federal recognition, became even more critical to tribes like the Plaintiff to help strengthen their modern communities.

18. A real-world implication of state-recognition is revealed when federal agencies ask state agencies to confirm that they want American Indians located within the state to have access to federal services reserved for state-recognized American Indian tribes.
19. American Indians are among the poorest people in the United States and suffer greatly from the maladies attendant to poverty. While benefits to state-only recognized tribes are much more limited than those available to federally recognized tribes, such services are critical to a tribe's ability to achieve economic and social self-determination. Examples include:
 - a. Grants and services to address health challenges of women, children, and seniors, education, job-readiness, and other basic quality of life deficits.
 - b. College scholarships.
 - c. Authorization to sell artwork and crafts as "Indian-made" under the Indian Arts and Crafts Act, 25 U.S.C. §§ 305 *et seq.*
 - d. Favored contractor status under the U.S. Small Business Administration 8(a) Business Development Program, which helps small, disadvantaged businesses compete in the marketplace, and supports small businesses owned by American Indians and other socially disadvantaged groups.
20. In addition, federal funds and services provided to state-recognized tribes directly, or to state agencies serving tribes, save the state from spending its own dollars.

C. New Jersey Recognizes Its American Indian Tribes.

21. In the late 1970s and early 1980s, New Jersey began to reverse the its nearly three centuries' course of maltreatment of American Indians by implementing a process of state recognition.
22. Over the course of several decades, New Jersey recognized and reaffirmed recognition of three American Indian tribes dozens of times in a multitude of ways, including, most notably:

- (a) concurrent resolutions of the state legislature, (b) two statutes granting and reserving certain powers and privileges only to the specifically-named tribes—recognition *ipso facto*,
- (c) official declarations of a statutorily created Commission on American Indian affairs, and
- (d) the long record of acknowledging recognition in the regular course of state business.

23. It has been the practice of federal agencies to accept each of these means, as well as other means, as conveying state recognition.

24. New Jersey described its process of state recognition to the federal government as follows:

The New Jersey State Legislature, comprised of the Senate and Assembly, is the law-making body that is responsible for the legal recognition of Indian tribes. Formal recognition is accomplished by State Resolutions, which remain in effect until rescinded.

25. In 1979, the New Jersey legislature initiated its recognition process for the Ramapough Mountain Indians. The legislature went to significant lengths to collect data on the tribe: requesting, receiving, and examining tribal genealogical records, evidence of self-governance, and testimony of tribal representatives.

26. In 1980, the legislature passed a concurrent resolution recognizing the Ramapough and explaining clearly the state's intent:

The purpose of this concurrent resolution is to *recognize* The Ramapough Mountain People of Western Bergen and Passaic County as the Ramapough Indian Tribe to assist them in obtaining *similar recognition* by the Federal Government and receive Federal assistance as an Indian tribe, so they may become self-determined [emphasis added].

27. Former New Jersey Attorney General Cary Edwards, who as a state senator led the effort to adopt the Ramapough resolution in the legislature, prepared a sworn affidavit before his death. The affidavit attests to the lengths to which he and others went to ensure that all legislators and other relevant parties in state government knew the intended purpose of the resolution was to convey state recognition.

28. The concurrent resolution process recognizing the Ramapough Indian Tribe served as the model for two subsequent concurrent resolutions recognizing the Powhatan Renape Nation, also in 1980, and the Nanticoke Lenni-Lenape Tribal Nation in 1982. The legislature again requested, received, and examined tribal genealogical records, evidence of self-governance, and testimony of tribal representatives. The title of the resolution for the Tribe is: “A Concurrent Resolution designating the [Tribe] as such and memorializing the Congress of the United States to acknowledge the [Tribe] in order to qualify the [Tribe] for appropriate federal funding for Indians.”

29. Numerous contemporaneous news items – as well as scholarly articles, books, and national registries – reported that the resolutions conveyed state recognition, with public officials offering unqualified congratulations.

30. For decades thereafter, New Jersey routinely reaffirmed recognition of the three tribes, including:

- a. In 1992, New Jersey enacted N.J.S.A. 26:8-49 to empower the three state-recognized tribes to attempt to correct the state’s past racial purity practice of changing American Indian birth certificates to either black or white. The law ceded previously exclusive state powers to the governments of the three tribes, stating, in part:

[C]orrection to the birth record of a member of *one of the three New Jersey tribes* of American Indians, the Powhatan-Renape Nation, the Ramapough Mountain Indians, or the Nanticoke Lenni-Lenape Indians, the substantiating documentary proof may include, but shall not be limited to, an affidavit, satisfactory to the State registrar or any local registrar and signed by the *chief of the tribe* that according to tribal records the person whose certificate is to be amended is a member of the tribe of the chief whose signature appears on the affidavit [emphasis added].

This statute is, *ipso facto*, state recognition of the Tribe.

- b. This statute also differentiates the rights and privileges to be afforded the three named tribes from those afforded to non-recognized American Indian groups.
- c. In September 1992, the Office of Governor James Florio sent a letter to the federal Indian Arts & Crafts Board, which ensures that only products produced by American Indian tribes recognized by the state or federal government are labeled “Indian-made.” The letter affirms that the state recognized the three tribes:

Governor Florio has asked me to respond to your recent letter about the state of state-recognized Indian tribes in New Jersey. The New Jersey State Legislature, comprised of the Senate and Assembly, is the law-making body that is responsible for the legal recognition of Indian tribes. Formal recognition is accomplished by State Resolutions, which remain in effect until rescinded. To date, three tribes have been recognized.

- d. In 1995, during the administration of Governor Christine Todd Whitman, New Jersey formed by statute the Commission on American Indian Affairs. The Commission, which still operates, “...serves as the liaison among the *governments of the tribes*, New Jersey, and the United States [emphasis added].” The statute reserves two seats each for representatives of the Nanticoke Lenni-Lenape Tribal Nation, Ramapough Mountain Indians, and Powhatan Renape Nation. N.J.S.A. 52:16A-53. Other seats are reserved for “American Indians who reside in New Jersey and are not members of the Nanticoke Lenni Lenape Indians, the Ramapough Mountain Indians, or the Powhatan Renape Nation, but are enrolled members of *another tribe* recognized by *another state* or the federal government [emphasis added].” N.J.S.A. 52:16A-53. This statute is, *ipso facto*, state recognition of the three tribes.
- e. In February 2000, the Office of New Jersey’s Secretary of State stated:

The Department [of State] has confirmed, upon inquiry, that the State of New Jersey has recognized three groups of Indians. They are referred to *in*

the law as the Nanticoke Lenni-Lenape Indians, the Ramapough Mountain Indians, and the Powhatan Renape Nation [emphasis added].

- f. In 2000, Governor Whitman's office confirmed to the U.S. Department of Commerce, Census Bureau, that the Tribe is one of New Jersey's three state-recognized American Indian tribes. New Jersey's census designation of a State Designated American Indian Statistical Area ("SDAISA") is to mark geographic concentrations of American Indians belonging to "state recognized American Indian tribes that do not have a state recognized land base (reservation)." The U.S. Census Bureau confirmed the designation in a letter to the state Commission on American Indian Affairs, stating: "Our records show that the state of New Jersey has granted recognition to...tribal governments [including the Tribe]."
- g. In November 2000 the statutorily created Commission on American Indian Affairs formally reported to the governor and legislature, stating:

There are only three tribes in the state of New Jersey that are *legally recognized by the State,*" (and then identifying the Tribe, the Ramapough, and the Powhatan Renape).
- h. In 2001, a private citizen claiming to represent his own newly constituted tribe sued the state seeking the acquire lands in the geographic area of the former Brotherton Reservation. The state defended itself, in part, by asserting that the citizen was not affiliated with one of its three existing tribes. The Tribe simultaneously sued the citizen to prevent him from implying any association with it, and prevailed.
- i. In 2000 and 2001, multiple federal governmental environmental assessments prepared in consultation with the state in advance of improvements at McGuire Air Force Base confirmed that the Tribe is state-recognized.

- j. From 2002 through 2005, the Tribe and its *pro bono* counsel sued a New Jersey municipality that sought to challenge the validity of New Jersey's statewide historic preservation process. The Tribe prevailed, protecting the state's process and preserving the Black Creek Site, one of only four American Indian sites among the 1,600 sites listed on the New Jersey Register of Historic Places. In formal ceremonies at the State Capitol, the Governor presented the Tribe, its legal counsel, and community leaders with the Governor's Award for Historic Preservation, commending the Tribe for validated its state-recognized status by demonstrating its commitment to the interests of all residents of New Jersey.
- k. In March 2003, U.S. Senator Jon S. Corzine wrote to the U.S. Department of the Interior, Bureau of Indian Affairs, stating:
- The Nanticoke Lenni-Lenape have been functioning as a designated tribe in New Jersey since a concurrent resolution passed the New Jersey Legislature to designate them as such in 1982. As a result, the Nanticoke Lenni-Lenape has received grants and services from federal programs for [state-recognized] Indians.
- l. In 2006, Governor Corzine created the Committee of Native American Community Affairs to research and report on the social and economic conditions of New Jersey's state-recognized American Indian tribes and other American Indian communities.
- m. Released in December 2007, the Committee's report identified continuing issues of unfair treatment in areas of civil rights, education, environmental protection, employment, fair housing, health care, and infrastructure for American Indians in New Jersey.
- n. The Committee's report observed that the state's prior recognition of the three tribes was *legally* sufficient. However, it was proving *politically* insufficient, because over

time members of the state bureaucracy had begun to undermine the tribes' status out of confusion and prejudice. It recommended that further steps be taken to *reaffirm* the tribes' recognition, with options including refreshed concurrent resolutions, an executive order, or legislation. The Report found:

Concurrent New Jersey legislative resolutions passed in 1980 and 1982 *recognized* three New Jersey Native American tribes—the Nanticoke Lenni-Lenape, the Powhatan Renape, and the Ramapough Lenape.... [The Committee] determined that the 1980 and 1982 concurrent legislative resolutions *did recognize* the three New Jersey American Indian tribes... [emphasis added].

New state action might be taken to further “*affirm* state recognition for [the] three tribes *previously recognized...*,” even if such legislation was not required [emphasis added].

- o. In 2010, New Jersey again certified to the U.S. Census Bureau that the three tribes were state-recognized and that New Jersey had commensurate SDAISAs.

31. Since 1982, the Tribe has reasonably relied on New Jersey's recognition to claim eligibility for, and entitlement to, certain federal benefits, and to obtain them. The Tribe and its members have expended time, money, and energy in reliance on the state's recognition. The Tribe has also, to a significant degree, associated its tribal identity with that recognition.

D. New Jersey's Recognition Was and Remains Legally Sufficient.

32. The federal government, for the purposes of providing access to certain of its programs, does not require states to adopt a particular process for state recognition or that the state's process adhere to a level of formality that might be required by the state in other policy-making circumstances.

33. The federal government adopts this flexibility for valid public policy reasons. Because obtaining services through federal recognition is unrealistic for some tribes, accepting

multiple methods of state recognition makes it more likely that critical services will get to those tribes.

34. Accordingly, states have adopted multiple processes. For example:

- a. South Carolina originally used statutes to recognize tribes. In 2003, the legislature granted the State Commission on Minority Affairs authority to recognize any additional tribes.
- b. Virginia has utilized executive orders, concurrent legislative resolutions, and state statutes for tribal recognition. Two tribes were recognized by executive order, eight tribes were recognized by concurrent legislative resolutions in 1983, 1985, and 1989, and one tribe was recognized by state statute.
- c. Georgia originally recognized four tribes by statute; any additional tribes will be recognized by concurrent legislative resolution.
- d. Connecticut originally recognized tribes through executive order. The state now recognizes any additional tribes by statute.
- e. Delaware recognized the Lenape Indian Nation of Delaware with a single letter from the Secretary of State to the U.S. Census Bureau. The letter states that upon inquiry by the federal government, Delaware conducted a review of historical and anthropological references to the tribe and previous actions by the state legislature and state agencies and concluded that the tribe had obviously been state-recognized in practice, even absent a concurrent resolution, state statute, executive order, or other means.

35. Consistent with this well-established landscape of state recognition, New Jersey recognized the Tribe through each, or any, of the following: (a) the 1982 concurrent resolution; (b) the

1992 and 1995 statutes granting and reserving certain powers to the named tribes – constituting recognition *ipso facto*; (c) official declarations, such as that of the statutorily created Commission on American Indian Affairs in 2000 (see Paragraph 30(g)); and (d) the long record of the state acknowledging recognition in the regular course of its dealings with the tribes and federal agencies.

36. The federal government accepts that states can change their processes for recognizing tribes. Indeed, in 2002 New Jersey amended the law governing its Commission on American Indian Affairs to require recognition of New Jersey tribes beyond the original three by “specific statutory authorization....” N.J.S.A. 52:16A-56(g). No language in the amendment applies this new method to the three previously recognized tribes.

37. Following passage of this amendment, several bills were introduced to *reaffirm* and further clarify the three tribes’ existing recognition via additional state statutes. The bills were introduced *not* as a concession that the tribes were not yet recognized, but in acknowledgment of the political reality that casino gaming interests were seeking to undermine the tribes’ status motivated by a race-based stereotype and a failure to understand that state recognition is not a pathway to federal gaming rights. These legislative proposals aimed to assure certain state legislators that the tribes had no interest in gaming, as plainly reflected in the legislative history and language of the bills.

E. The Acting Attorney General Wrongfully Attempts to Withdraw Recognition of the Tribes

38. In 2011, the United States General Accounting Office (GAO) contacted the New Jersey Commission on Indian Affairs as part of a national study and was informed by the state employee assigned to staff – but not authored to speak for – the Commission that New Jersey had no state-recognized tribes. A year later, Commissioners were surprised to read about the

tribes' purported non-existence in a published GAO report. Upon information and belief, in denying the tribes' status to the GAO, the staffer relied on counsel from the Acting Attorney General.

39. The confusion in multiple federal agencies about the tribes' status is traceable to the Acting Attorney General's position and its conveyance to the GAO. For example, comments by the U.S. Department of Health and Human Services (HHS) on the draft GAO report reveal this was the first instance that New Jersey had told HHS that the tribes were not recognized. During regular contacts with state officials, "state officials never told them [HHS] that the tribe was not state recognized." Further "[the Administration for Children and Families (ACF)] notes that at no time was information provided to ACF by New Jersey...or any other Federal or State entity, that would call into question the eligibility of the tribes."
40. In mid-2012, as a result of the growing confusion and resulting damage caused to the tribes by the Acting Attorney General's statements, the Tribe sought answers. The Acting Attorney General's Chief of Staff took up the matter and liaised between the Tribe, the Attorney General's Office, and the Office of the Governor. In addition, the Tribe was required to provide multiple detailed explanations of how state recognition does not provide a pathway to federal gaming rights and assurances that the tribes had no interests in gaming. After investigating the issue, the Chief of Staff proposed that the Acting Attorney General issue a formal written retraction of prior statements from his office questioning the state recognition of the tribes. The Chief of Staff circulated multiple drafts of the retraction letter.
41. After months of awaiting the Acting Attorney General's signature on a final draft of the retraction letter, the Tribe was informed that certain political crises had caused the attention of the Acting Attorney General to shift and that he would take no voluntary steps to stanch or

reverse the damage being caused by his attempt without due process to undo state recognition of the three tribes.

F. New Jersey Continues to Tell Federal Agencies That It Recognizes Three Tribes

42. Even after 2012, state agencies continued to represent to the federal government that New Jersey recognized three tribes, including in instances where federal funding and services flow to state agencies instead of directly to the tribes. Examples include the following:

- a. In 2014, New Jersey's Department of Children and Families reported to HHS on its use of federal funds and services in support of New Jersey's 2014-2019 Child and Family Services Plan. The state agency maintains that "New Jersey has ... three State-recognized tribes," and that the state agency serves children who are members of one of New Jersey's three state-recognized tribes.
- b. In June 2015, New Jersey's Department of Children and Families submitted its Annual Progress and Services Report to HHS on its use of federal funds and services. The state agency again stated that "New Jersey has ... three State-recognized tribes," and that the state agency serves "children who are members of one of NJs State-recognized tribes."
- c. New Jersey continues to rely on its designation of state-recognized tribes to create economic development opportunities for non-tribal business owners. New Jersey has several historically underutilized business zones (HUBZones). The HUBZone program, managed by the federal Small Business Administration, establishes preferences for federal contracts to small businesses located in designated areas. Due to New Jersey's representations to the Census Bureau that it has state-recognized tribes (see Paragraph 30 (f), (o)), New Jersey maintains its ability provide access to

these preferences to its non-tribal communities that are proximate to the tribes. New Jersey continues to leverage the Tribe's lands in Cumberland County in this manner.

- d. In securing a five year \$4.1 million grant from the U.S. Centers for Disease Control and Prevention for ShapingNJ, the state listed the Tribe as partner, through which partnership the Tribe received a \$100,000 state grant to address diabetes.
- e. Upon information and belief, New Jersey agencies continue to leverage its three tribes recognized status to benefit from tourism monies when promoting the tribes' well-attended pow wows and visits to the tribes' cultural and religious sites, including the Black Creek Site (see Paragraph 30(j)).

G. Facts Belie New Jersey's Purported Rationales for Denying the Tribe's Status

- 43. Notwithstanding New Jersey's prior actions over three decades recognizing and then repeatedly reaffirming the Tribe as state recognized, the Acting Attorney General now wrongfully attempts to deny and repudiate such recognition—and that of the other two tribes—without affording the Tribe procedural and substantive due process and in violation of the Tribe's equal protection rights.
- 44. The Acting Attorney General advances several groundless and contradictory rationales for denying that the Tribe is state-recognized.
 - a. Defendant has argued that it only “acknowledged” or “designated” the three tribes, and did not *recognize* them. Upon information and belief, no law, rule, or practice distinguishes between these terms in the context of state recognition of American Indian tribes. Defendant has used the terms “acknowledged,” “designated,” and “recognized” interchangeably in statements and communications regarding the Tribe.

Similarly, many federal agencies use “acknowledged” and “recognized” interchangeably.

- b. Defendant has argued that “it does not now and has not previously had any process that provides any tribes with state recognition.” To the contrary, prior to the adoption of the 1980 and 1982 concurrent resolutions the legislature required and received evidence of the tribes’ genealogy and self-governance and formal testimony from tribal government representatives. New Jersey has described its exact process to the federal government (see Paragraphs 24, 30(b), 30(j)). In addition, the 2002 amendments to the Commission on American Indian Affairs law describe an evolved process, through which the Governor requests input from the Commission on new candidates for state recognition, the Commission generates a report with recommendations, and the legislatures votes.
- c. Defendant has argued that “only the federal government has the authority to recognize tribes,” and thus no action by any state to recognize its tribes is valid. This position contradicts decades of accepted practice and policy in the United States, as well as the New Jersey legislature’s 2002 amendments to the Commission on American Indian Affairs statute, through which the state reaffirmed its own powers to confer state recognition.
- d. Defendant has argued that it was improper for New Jersey to use concurrent resolutions to recognize the tribes because such resolutions “do not have the force of law.” The federal government requires no particular mode or formality of expression of state recognition. When it does set forth a mode, as in the case of eligibility for protections under the Indian Arts and Crafts Act, it requires only that *the state*

legislature express its intent to recognize, not that a governor sign such recognition into law. Indeed, numerous states have and continue to use concurrent resolutions in the same way that New Jersey did and without issue. Further, the Tribe does not rely on the concurrent resolutions alone in asserting that it has been recognized by the state.

- e. While taking the position that it does not recognize the three New Jersey tribes, Defendant has yet to articulate what exactly the tribes are, except to imply that they are something lesser and undefined.

H. The Acting Attorney General is Acting on Racial Stereotypes

45. Defendant's purported justifications for its position are pretextual. The Acting Attorney General is motivated by a racial-stereotype-driven and irrational fear that because an American Indian tribe seeks state recognition, it must want to seek to conduct gaming. The Acting Attorney General has repeatedly requested that the Tribe provide detailed explanations of the lack of connection between state recognition and casino gaming rights, and assurances that the tribes do not intend to pursue gaming.
46. On information and belief, the Acting Attorney General does *not* require that Caucasian and other non-American-Indian residents of New Jersey, disclaim their interests in gaming before evaluating their questions of state policy pending before his office. Thus, he shockingly treats the Tribe differently than similarly situated persons on the basis of their race.
47. State recognition of tribes plays no part in securing rights to conduct gaming under federal law. The separate process of federal recognition, which itself is no guarantee of gaming rights, can take tribes decades and millions of dollars to navigate, in part because it requires

tribes to produce the very same birth records that states such as New Jersey altered in prior decades.

48. The majority of American Indian tribes, whether federally or state recognized, have no gaming operations whatsoever. The Tribe is deeply and publicly opposed to gaming. Its opposition is written into its governing documents, flows from the Tribe's members' religious beliefs, and has been repeatedly conveyed to the State. The three state-recognized tribes in New Jersey are parties to a pact prohibiting economic benefit from gaming and have offered to have proscriptions written into law if such assurances meant the state would cease undermining their status. In the three decades since New Jersey recognized the Tribe, the Tribe has never attempted to leverage its state-recognized status for gaming.

49. Upon information and belief, the first instance in which a state official attempted to undermine the tribes' state-recognized status was tied to this irrational fear of gaming. In 2001 the federal Indian Arts and Crafts Board sent its standard annual inquiry to the state Commission on American Indian Affairs asking to be informed of any additions to the state's list of recognized tribes. Before the Commission replied or was even made aware of the Board's inquiry, the Division of Gaming Enforcement – part of the Attorney General's office – intervened, asserting that it was up to the federal Indian Arts and Crafts Board, not New Jersey, to determine whether New Jersey had effectively recognized its tribes. On information and belief this strange posture was adopted as an accommodation to the reactionary fears of gaming interests during the pendency of an unsuccessful lawsuit by a private citizen (not a member of the tribes) against the state asserting a purported tribal land claim. The Commission responded to the same standard federal inquiry in subsequent years by *confirming* the Nation's state-recognized status, state and federal agencies continued to

treat the tribes as recognized, and the Corzine Committee Report reviewed and rejected the arguments reflected in the 2001 letter. Nevertheless, Defendant Acting Attorney General has adopted and expanded upon the flawed reasoning first articulated in that letter to do substantial harm to the Tribe.

I. The Acting Attorney General's Actions Continue to Harm the Tribe

50. The Tribe has suffered and continues to suffer significant and escalating financial and non-financial losses as a consequence of the Acting Attorney General's position regarding state recognition, including but not limited to:

- a. Since 2012, the loss of the ability to market and sell artwork and crafts, including beadwork, walking sticks, drums, headdresses, regalia, and pottery as "Indian-made" under the Indian Arts and Crafts Act, 25 U.S.C. §§ 305 *et seq.* The Tribe conservatively estimates that the Tribe's artisans are losing an aggregate of \$260,000 each year, or approximately \$1 million dollars to date. They have also lost a primary vehicle through which the Tribe sustains and educates the public about its culture.
- b. Since 2012, the loss of more than \$600,000 from grants from HHS's Administration for Native Americans (42 U.S.C. § 2991c(3)).
- c. The threatened loss of the Tribe's 8(a) entity's ability to do business as a certified tribal company. The Small Business Association program restricts the special status for tribe-owned businesses to federally or state recognized tribes. Even individual American Indians cannot have their privately owned companies certified, unless the individual is enrolled in or acknowledged by a federal or state tribe. This poses an immediate threat of the loss of approximately 30 tribal jobs, as well as revenue for tribal programming and services that result from 8(a) contracts. The Tribe estimates

- that through its 8(a) entity NLT Enterprises, it has secured an average of approximately \$650,000 per year in tribal employment and services revenue, and approximately \$7.8 million since the company was formed ten years ago.
- d. The loss of educational opportunities and funding. Young tribal members have had to forfeit college scholarships reserved for members of state-recognized tribes. On information and belief, after the Acting Attorney General placed the Tribe's status in question, additional students ceased applying for scholarship support for fear of subsequently losing that support after enrollment.
 - e. Since 2012, the loss of funding—approximately \$45,000 a year or \$180,000 to date—from HHS's Office of Community Services Community Service Block Grant Program, given only to federally and state-recognized American Indian tribes and tribal organizations.
 - f. The loss of access to business loans. For instance, Wells Fargo Bank initially approved the Tribe's application for a line of business credit, then recently withdrew its approval specifically citing the Acting Attorney General's actions attempting to disavow the Tribe's state recognition.
 - g. Continuing harm from the ineligibility for recurring grants previously secured by the Tribe, and for other benefits available only to recognized tribes.
 - h. The threat of loss of the Tribe's membership or standing in professional organizations, including the National Congress of American Indians, the oldest and largest political organization of American Indian nations in the United States; the Alliance of Colonial Era Tribes, an intertribal league of sovereign American Indian nations dating from the colonial era of the United States; and the United League of

Indigenous Nations, an international treaty organization of indigenous sovereign nations working to promote indigenous rights and governmental development.

51. On information and belief, the Acting Attorney General's actions also have caused and continue to cause serious harm to the approximately 4,500 members of the Ramapough Mountain Indians and the 300 members of the Powhatan Renape Nation.
52. As a result of Defendant's attempt to repudiate its recognition of the Tribe, the Tribe and its members have suffered, and continue today to suffer, the loss of benefits to which they are entitled, the loss of revenues that accrue from those benefits, and a concomitant loss of tribal identity and prestige.
53. Defendant's actions were taken under color of state law.
54. Defendant's attempts to repudiate or deny official recognition of the Tribe were undertaken pursuant to, and in furtherance of, an official policy, practice, or custom of the state of New Jersey, and represent the state's current official position on the issue.
55. Defendant's actions have caused the Tribe immediate and irreparable harm.

IV. SUBSTANTIVE CLAIMS

COUNT I (Procedural Due Process under the United States Constitution)

56. The Tribe incorporates the averments of the prior paragraphs as if fully set forth.
57. The Tribe has a property interest, protected under state law, in protecting and preserving its tribal identity and in its recognition by New Jersey as an official American Indian tribe, eligible for various benefits under federal law.
58. Defendant's actions, as described above, in denying or repudiating the state's official recognition of the Tribe were undertaken without proper notice to the Tribe or an opportunity

for the Tribe to be heard, or without any of the process required by law before the state can interfere with the Tribe's protected interest.

59. Defendant's actions therefore deprived the Tribe of its right to procedural due process under the Fourteenth Amendment of the United States Constitution.

60. As a proximate result of Defendant's actions, the Tribe has been irreparably injured in that it has been stripped of its proper status as a state-recognized American Indian tribe and wrongfully deprived of the benefits of that status.

COUNT II
(Substantive Due Process under the United States Constitution)

61. The Tribe incorporates the averments of the prior paragraphs as if fully set forth.

62. The Tribe has fundamental, constitutionally protected property and liberty interests in its identity and status as an American Indian tribe.

63. The Tribe also has a fundamental, protected interest in self-determination and freedom of association.

64. Defendant's actions, as described above, in denying and repudiating the Tribe's status infringed on those interests and do so in a way that is arbitrary, capricious, invidiously motivated, and shocking to the conscience of a reasonable person, thereby violating the Tribe's right to substantive due process under the Fourteenth Amendment of the Constitution.

65. As a proximate result of Defendant's actions, the Tribe has been irreparably injured in that it has been stripped of its legitimate status as a state-recognized American Indian tribe and wrongfully deprived of the benefits of that status.

COUNT III
(Equal Protection under the United States Constitution)

66. The Tribe incorporates the averments of the prior paragraphs as if fully set forth.

67. Defendant's actions, as described above, were improperly and invidiously motivated and were based on the Tribe's status as an American Indian tribe. Defendant's action were based on erroneous and shocking race-based presumptions that the Tribe's desire for continued state recognition is motivated by the intention to conduct casino gaming, despite plentiful evidence that the Tribe, like many American Indian tribes, is deeply and publicly opposed to gaming and that state recognition of tribes plays no part in securing rights to conduct gaming.

68. Insofar as Defendant's actions against the Tribe were motivated by the fact of the Tribe's racial classification as American Indians, the Tribe comprises a suspect class and the Defendant's actions constitute discrimination against the Tribe on the basis of race.

69. Defendant's actions, and their discriminatory impetus, were intentional and deliberate and unjustified by any legitimate state interest, compelling or otherwise.

70. Defendant does not require that similarly situated non-American-Indian New Jersey residents with questions of state policy pending before his office disclaim interests in casino gaming before he evaluates their concerns.

71. Defendant's actions violated the Tribe's rights under the equal protection clause of the Fourteenth Amendment to the U.S. Constitution.

72. As a proximate result of Defendant's actions, the Tribe has been irreparably injured in that it has been stripped of its proper status as a state-recognized American Indian tribe and wrongfully deprived of the benefits of that status.

WHEREFORE, the Nanticoke Lenni-Lenape Tribal Nation demands judgment in its favor, and

against Defendant, as follows:

- a. Declaring, pursuant to 28 U.S.C. § 2201, that the Tribe has been officially recognized as an American Indian tribe by the State of New Jersey.
- b. Enjoining Defendant from denying, repudiating, or otherwise impairing the Tribe's status as an American Indian tribe officially recognized by the State of New Jersey.
- c. That Defendant's actions violated the Tribe's substantive and procedural due process rights under the Fourteenth Amendment to the United States Constitution.
- d. That Defendant's actions violated the Tribe's substantive and procedural due process right under Article I, paragraph 1 of the New Jersey Constitution.
- e. That Defendant's actions violated the Tribe's right to equal protection of the laws under the Fourteenth Amendment to the United States Constitution.
- f. That Defendant's actions were arbitrary, capricious, unreasonable, and otherwise contrary to law.
- g. That Defendant is estopped from denying or repudiating the Tribe's status as an American Indian tribe officially recognized by the State of New Jersey.
- h. For costs and fees pursuant to 42 U.S.C. § 1988.
- i. For all other appropriate relief.

/s/ Frank L. Corrado

Frank L. Corrado
Attorney ID No. 022221983
Barry Corrado & Grassi PC
2700 Pacific Avenue
Wildwood NJ 082603
fcorrado@capelegal.com
Tel: 609.729.1333

Gregory A. Werkheiser (admitted *pro hac vice*)
L. Eden Burgess (admitted *pro hac vice*)
Cultural Heritage Partners PLLC
2101 L Street NW, Suite 800
Washington, DC 20037
greg@culturalheritagepartners.com
eden@culturalheritagepartners.com
Tel: 202.567.7594

Attorneys for Plaintiff
May 6, 2016

FED. R. CIV. P. 7.1 DISCLOSURE

I am a Partner with Barry, Corrado & Grassi, PC, having offices at 2700 Pacific Avenue, Wildwood, NJ 08260. I am familiar with the proceedings and documents related to the above-captioned matter and declare that the following is true and accurate to the best of my knowledge: the Nanticoke Lenni-Lenape Tribal Nation is an American Indian Nation. There is no corporation or parent corporation that owns stock in the Nanticoke Lenni- Lenape Tribal Nation.

I hereby certify that the foregoing statements made by me are true. I am aware that if any of the foregoing statements made by me are willfully false, I am subject to punishment.

/s/ Frank L. Corrado
Attorney for Plaintiff

DATED: May 6, 2016

CERTIFICATION PURSUANT TO L. CIV. R. 11.2

I hereby certify pursuant to L. Civ. R. 11.2 that there is a related case pending in Superior Court of New Jersey, Law Division, Mercer County, Docket No. MER-L-2343-15.

/s/ Frank L. Corrado
Attorney for Plaintiff

DATED: May 6, 2016