NANTICOKE LENNI-LENAPE TRIBAL NATION, Plaintiff, v. JOHN JAY HOFFMAN, ACTING ATTORNEY GENERAL OF NEW JERSEY, IN HIS INDIVIDUAL AND OFFICIAL CAPACITY, Defendant.	SUPERIOR COURT OF NEW JERSEY MERCER COUNTY LAW DIVISION Docket No. MER-L-2343-15 Civil Action

BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS PLAINTIFF'S COMPLAINT

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I. PRELIMINARY STATEMENT

Plaintiff Nanticoke Lenni-Lenape Tribal Nation (the "Nation" or "Plaintiff") asks the Court to order Acting Attorney General of New Jersey John Jay Hoffman ("Defendant") to honor New Jersey's long-standing position that the Nation is a state-recognized American Indian tribe. In 1982, the Legislature granted state-recognition status by concurrent resolution – a common and accepted means among states to convey recognition – and the Attorney General should honor that status unless and until it is withdrawn in a manner consistent with due process.

The Nation alleges that Defendant, in his official and individual capacities, has violated, and continues to violate, its rights of procedural due process, substantive due process, and equal protection under the New Jersey state constitution, and the state common law doctrine of estoppel. After decades of treatment by New Jersey and the federal government as a state-recognized tribe entitled to attendant benefits and privileges, Defendant – in part through the Division of Gaming Enforcement, which has no authority over American Indians – purports to revoke the Nation's status without due process.

Defendant tries to strip the Nation of its status because he fears that the Nation will seek authorization to open gaming facilities. That is, his actions are motivated by the race-based assumption that all American Indian tribes want to open casinos. Defendant failed to provide the Nation with any notice or opportunity to be heard on the fundamental change to its status, causing significant harm to the Nation with respect to access to grants and scholarships, ability to sell its crafts as Indian-made, authority to run a tribal business, and standing and reputation in the American Indian community.

While Defendant relies heavily on his argument that the Nation's claims pose non-justiciable political questions, the Nation's claims are well within the Court's authority to

adjudicate. Defendant cites *no* case in which a court declined jurisdiction over state tribal recognition as a non-justiciable political question. In addition, the Nation is not asking the Court to determine the Nation's status; it asks the Court to enforce state recognition as previously provided by the state Legislature and confirmed for 30 years thereafter.

Defendant also argues that the Nation fails to state cognizable claims to any procedural due process rights, making the circular argument that because Defendant provided no process, the Nation is entitled to none. To the contrary, the Nation alleges that it has a state-protected property interest in its tribal identity and in benefits received due to state recognition in light of centuries of assault by the state on that tribal identity and the Nation's very existence. Deprivation of that interest requires some form of pre-termination process, and cannot be accomplished by Defendant's unilateral, unauthorized reversal of a decades-long state policy.

Defendant similarly contends that the Nation has not alleged a state substantive due process claim. The Nation's Complaint establishes its fundamental right to be treated as a distinct ethnic or racial group, and to avail itself of the benefits accorded in partial recompense for the shameful treatment it suffered. Furthermore, the Nation alleges arbitrary conduct by Defendant to deny those benefits – a unilateral, improperly authorized, invidiously motivated series of actions undertaken in derogation of a contrary legislative act. Such arbitrary conduct shocks the conscience.

Defendant also asserts that the Nation does not adequately claim a violation of its state equal protection rights because it does not allege it was treated differently than other similarly situated groups. The Nation need not, however, allege that it was treated differently than similarly situated groups because there are none. The Nation alleges that Defendant's actions

evidence an express, racial classification that discriminates against American Indian tribes, and therefore properly states an equal protection claim.

Finally, Defendant argues that Plaintiff has failed to state claims for estoppel, and for arbitrary and capricious action. In both instances, Defendant is wrong. Equitable estoppel applies in these circumstances, where a state agency is attempting to repudiate 30 years of legislative and executive action affirming the Nation's state-recognized status, and on which the Nation justifiably relied. Moreover, New Jersey courts have long recognized a litigant's ability to challenge arbitrary agency action – at common law by way of prerogative writ and now by way of an action in lieu of certiorari, specifically established by the state constitution and governed by R. 4:69-1. Defendant's attempt to remove or deny the Nation's status as a state-recognized tribe, a status on which the Nation has relied for more than 30 years, must be prevented. The Nation should not be held hostage to Defendant's racially motivated and autonomous political whims.

II. STATEMENT OF THE CASE

The Nation filed a Complaint ("Complaint" or "Compl.") for injunctive, declaratory and monetary relief against Defendant, in his individual and official capacities. *Compl.* ¶ 1. Defendant has moved to dismiss the Nation's claims (*Brief in Support of State Defendant's Motion to Dismiss Plaintiff's Complaint*, Dec. 24, 2015 ("Brief")). The Nation alleges that after enjoying more than 30 years of recognition by New Jersey as an American Indian Tribe, Defendant seeks to remove that status without due process, thus violating the Nation's rights to procedural and substantive due process and equal protection under the New Jersey Constitution, and the state doctrines of estoppel, and arbitrary and capricious conduct. *Compl.* ¶ 1.

The Nation has a long history in New Jersey and the surrounding region, dating back approximately 12,000 years. *Compl.* ¶ 4. Nevertheless, the Nation and its members suffered poor

treatment for centuries at the hands of the State. *Compl.* ¶¶ 5-10. In the late 1970s, New Jersey finally began the long-overdue process of providing official state recognition to tribes (*Compl.* ¶¶ 11-13), granting state recognition to the Nation in 1982 (*Compl.* ¶ 14). States have used and continue to use the legislative resolution process, as well as other processes (*Compl.* ¶ 15), to confer state recognition upon American Indian tribes (*Compl.* ¶¶ 19, 20).[1] New Jersey followed this approach in the early 1980s, granting state recognition to three tribes. *Compl.* ¶¶ 12-14.

Following adoption of the concurrent resolution, New Jersey repeatedly affirmed the Nation's status as a state-recognized tribe by adopting multiple laws granting special privileges and powers to the Nation and its members (*Compl.* ¶¶ 16(a), (c), (e)), confirming to the federal government that New Jersey has state-recognized tribes (*Compl.* ¶¶ 16(b), (h), (j), (k), (l), (m)), and providing public support to the state tribes (*Compl.* ¶¶ 16(d), (f), (g), (i)). As a result, beginning in 1982 the Nation operated as a state-recognized tribe and received federal benefits connected to that status. *Compl.* ¶ 18.

Nevertheless, Defendant – operating on the basis of a racially driven belief that all American Indians want to run gaming facilities – unilaterally professes to change the Nation's status. *Compl.* ¶¶ 21-24. Inexplicably, Defendant referred a 2001 inquiry from the U.S. Arts & Crafts Board about state tribes to the Division of Gaming Enforcement, which has no authority over or expertise in the subject; the Division sent a letter to the Board reporting that New Jersey has no state-recognized tribes. *Compl.* ¶ 27. The substance and conclusions of that 2001 letter

[1] Defendant ignores this history as pled by the Nation, relying on federal recognition standards (*Brief* at 6-8) and N.J.S.A. 52:16A-56, the law governing the Commission on American Indian Affairs, to argue that New Jersey did not recognize the Nation via the 1982 concurrent resolution (*Brief* at 8-9). Neither have any relevance to the Nation's claims: the Commission law was amended to require statutory tribal recognition in 2001, well after the concurrent resolution (*Compl.* ¶ 20), and the Nation's claims do not concern federal recognition (*e.g.*, *Compl.* ¶¶ 46, 50). *See infra*, Argument Section A.

have been debunked by actions of the state itself, including when then-Governor Corzine commissioned a 2006 study of New Jersey's tribes. *Compl.* ¶ 16(k), (l).

Similarly, a state employee assigned to work as the sole staffer for the New Jersey Commission on American Indian Affairs – without the knowledge or consent of the Commissioners charged with executing its mission (*Compl.* ¶¶ 22(b), 27, 30) – informed the U.S. General Accounting Office that New Jersey has no state-recognized tribes on the basis of the position assumed by Defendant (*Compl.* ¶ 30).

Damage to the Nation as a consequence of Defendant's actions (and inaction) has been and continues to be severe. *Compl.* ¶¶ 33-34, 36, 40. The Nation has already lost and is imminently and continuously threatened with the loss of grant funding for critical health and employment initiatives, student scholarships, jobs, the ability to do business through its certified tribal company, the authorization to sell crafts as Indian-made under federal law, and its status, standing, and reputation in various domestic and international American Indian organizations. *Compl.* ¶ 33. The Nation asks that the Court prevent Defendant from unilaterally terminating the Nation's status, and require him to honor New Jersey's long-standing position that the Nation is a state-recognized American Indian tribe (*Compl.* ¶¶ 1, 41-67), unless and until such status is withdrawn with due process.

III. STANDARD OF REVIEW

On a Rule 4:6-2 motion to dismiss, the Court applies an indulgent standard. "[T]he plaintiff is entitled to a liberal interpretation of [the] contents [of the complaint] and to the benefits of all its allegations and the most favorable inferences which may be reasonably drawn" therefrom. *Burg v. State*, 147 N.J. Super. 316, 319 (App. Div.), *quoting Rappaport v. Nichols*, 31 N.J. 188, 193 (1959), *certif. denied*, 75 N.J. 11 (1977). Every reasonable inference is accorded

the plaintiff (*Printing Mart-Morristown v. Sharp Electronics Corp.*, 116 N.J. 739, 746 (1989)), and the motion is "granted only in rare instances and ordinarily without prejudice." Pressler, *Current N.J. Court Rules*, comment 4.1.1 on R. 4:6-2(e) (2009). While the "inquiry is limited to examining the legal sufficiency of the facts alleged on the face of the complaint," *Printing Mart-Morristown*, 116 N.J. at 746, the reviewing court must "view the allegations with great liberality and without concern for the plaintiff's ability to prove the facts alleged in the complaint." *Sickles v. Cabot Corp.*, 379 N.J. Super. 100, 106 (App. Div.), *certif. denied*, 185 N.J. 297 (2005).

Accordingly, "the test for determining the adequacy of a pleading [is] whether a cause of action is 'suggested' by the facts." *Printing Mart-Morristown*, 116 N.J. at 746, *quoting Velantzas v. Colgate-Palmolive Co.*, 109 N.J. 189, 192 (1988). In applying this test, a court treats the plaintiff's version of the facts as set forth in his or her complaint as uncontradicted and accord it all legitimate inferences. *Banco Popular N. Am. v. Gandi*, 184 N.J. 161, 166 (2005).

Here, the Nation's allegations at minimum "suggest" viable state Constitutional claims and should survive Defendant's motion to dismiss for failure to state a claim. In addition, the Nation's allegations establish the justiciability of the questions before the court, overcoming Defendant's motion to dismiss.

IV. LEGAL ARGUMENT

A. DEFENDANT IMPROPERLY RELIES ON FEDERAL RECOGNITION STANDARDS TO MAKE ITS MOTION.

The Nation asks the Court to confirm its status as a *state-recognized* tribe. Defendant's Brief conflates the federal and state recognition processes, asking the Court to consider *federal* recognition standards and laws in this case.

Federal tribal recognition and state tribal recognition are dramatically different matters with different statutes, rules, case law, and history. Defendant's Brief wastes several pages explaining federal tribal recognition standards (*Brief* at 6-10), demonstrating a fundamental lack of understanding of the real issues underlying the Nation's claims. *See* 1- 3 Cohen's Handbook of Federal Indian Law § 3.02[9] (Nell Jessup Newton ed., 2012) ("state-recognized tribes are generally not the subject of federal legislation and concern. Hence, there would not appear to be any conflict with federal law when states administer their own programs of respect and protection."). Federal recognition is not at issue in this case, thus any basis Defendant asserts for dismissal based upon federal recognition must be disregarded.

Most notably, Defendant claims Congress has the sole authority to regulate relations with American Indians. *Brief* at 6. While Congress has the sole authority to confer federal recognition on American Indian tribes, it has authorized states to regulate state relations with tribes. In *Schaghticoke Tribal Nation v. Harrison*, 264 Conn. 829, 836-37 (2003), the court expressly rejected defendant's claim that "the federal government has preempted the field of determination of tribal status of Native American groups...." *See* Cohen's Handbook § 3.02[9] ("State recognition can take a variety of forms, and federal laws extending to state-recognized tribes defer to the states' characterizations."); Alexa Koenig & Jonathan Stein, *Federalism and the State Recognition of Native American Tribes: A Survey of State-Recognized Tribes and State Recognition Processes Across the United States*, 48 Santa Clara L. Rev. 79 (2008) ("Koenig & Stein").

In fact, Defendant's position that New Jersey cannot recognize tribes is directly belied by the state's 2001 amendments to the Commission law, which set forth *prospective* procedures for how New Jersey will recognize state tribes in the future. *Compl.* ¶ 20, *citing* N.J.S.A. 52:16A-

56(g).[2] The amended law confirms that the 1982 concurrent resolution granted state recognition to three tribes, including the Nation, by defining "Intertribal People" – members of the public eligible to sit on the Commission – as "American Indians who reside in New Jersey and are not members of the [three state-recognized tribes], but are enrolled members of another tribe recognized by another state or the federal government." N.J.S.A. 52:16A-53(1) (emphasis added). Moreover, Congress has repeatedly confirmed the states' authority to recognize tribes by granting certain federal benefits to state-recognized tribes, regardless of their federal recognition status. *See, e.g.*, Native American Programs Act of 1974, 42 U.S.C. §§ 2991-2992 (2012); Indian Health Care Improvement Act, 25 U.S.C. §§ 1601-1683 (2012); Cohen's Handbook § 3.02[9] (discussing federal programs that benefit state-recognized tribes).

Further demonstrating his fundamental misunderstanding of federal and state tribal recognition laws and procedures, the Defendant's Brief claims that "[the Legislature's 1982 Concurrent] Resolution cannot be plausibly read as a formal acknowledgement that the Nation is an authentic sovereign government as might be found by the [Bureau of Indian Affairs (BIA)]." *Brief* at 9. The BIA's process for federal recognition is wholly irrelevant to state recognition, and state recognition has no bearing on federal recognition. *Compl.* ¶ 25 ("State recognition of tribes plays no part in securing rights to conduct gaming under federal law."). State recognition can consist of an acknowledgement or designation of tribal status, such as the concurrent resolution. *Compl.* ¶¶ 19, 22(a). In other words, in the context of state recognition, Defendant's attempt to distinguish between types of recognition (*Brief* at 9) is meaningless.[3]

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[2] Defendant not only acknowledges this statute, but relies on it to make his political question argument. *Brief* at 13.
[3] Defendant also argues that the resolution did not formally "recognize" the Nation, but merely "designated" the Nation. *Brief* at 9. Defendant's distinction is a false one; as the Nation alleges, "no law, rule, or practice distinguishes between [recognize, acknowledge and designate] in the context of state recognition of American Indian tribes." *Compl.* ¶ 22(a); *see also Compl.* ¶ 23.

Similarly, Defendant characterizes the relief sought as "compelling the State of New Jersey from denying or repudiating claimed prior official recognition of the Plaintiff as an authentic American Indian tribe of the State." *Brief* at 1. To the contrary, the Nation asks the Court to prohibit the Acting Attorney General from rescinding its state recognition *without due process*. While it is within the State's authority to regulate State relations with tribes – a point the Defendant repeatedly ignores – no state government official has the authority unilaterally to deprive citizens of their state constitutional rights -- here, due process and equal protection.

B. THE NATION'S FEDERAL CLAIMS ARE JUSTICIABLE AND WITHIN THE COURT'S AUTHORITY TO ADJUDICATE

1. Precedent Establishes That Tribal Recognition Is Not A Political Question.

Defendant argues that the Nation's claims are non-justiciable because N.J.S.A. 52:16A-56(g) requires a "statutory enactment by the Legislature" to recognize tribes. *Brief* at 13, *citing* N.J.S.A. 52:16A-56(g). This provision, however, was not adopted until 2001 – twenty years after New Jersey recognized the Nation – via amendments to the law governing New Jersey's Commission on American Indian Affairs, on which the Nation's seat is explicitly reserved. *See Compl.* ¶ 16(c), 20. The law has no retroactive effect and no impact on the 1982 resolution. It is thus relevant only in two respects, both of which disfavor Defendant's position. First, it establishes that prior to 2001, New Jersey did not require legislation to recognize tribes. Second, it contradicts Defendant's contention that states are preempted from conveying state recognition of tribes (*Brief* at 6-8).

Moreover, the New Jersey legislature's 2001 decision to adopt a statute addressing future recognition of tribes does not, as Defendant argues, retroactively render the issue a political

question. *Brief* at 13-14. Many courts have decided issues of tribal status and state recognition, even where a political process was under way.[4] In *Amalgamated Ind. v. Historic E. Pequot*, the court maintained jurisdiction over an alleged breach of contract by the tribal defendants:

> In the context of a civil case, the courts of this state have not held that recognition of a group as an Indian tribe by the state is a non-justiciable political question.... In the absence of a final determination by the federal government, *recognition of Indian tribes ... is not a political question and may be determined by the court.*

2005 Ct. Sup. 8152, at 8160-61, NO. X03 CV 03 4000287 (Conn. Super. Ct. 2005) (emphasis added). That is, even though the BIA had issued a determination of the tribe's federal status that was pending appeal, the court nevertheless maintained jurisdiction over the recognition issue.

Defendant's Brief cites *no* case in which a court declined jurisdiction over state tribal recognition as a non-justiciable political question.[5] In contrast, the Nation can cite many cases in which the court has maintained jurisdiction over a recognition-related dispute. *Amalgamated Ind.*, 2005 Ct. Sup. 8152, *supra*; *New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 488-90 (E.D.N.Y. 2005) (rejecting state's claim and concluding that Shinnecock Indians are state-recognized Indian Tribe); *Schaghticoke*, 264 Conn. at 836-37 (rejecting argument that federal recognition procedures "preclude the trial court from determining whether the plaintiff is in fact the tribe recognized by the state"). *See also Robinson v. Salazar*, 838 F. Supp. 2d 1006, 1029 (E.D. Cal. 2012) (evaluating complaint to determine whether it alleged sufficient facts to satisfy definition set forth in *U.S. v. Montoya de Hernandez*, 473 U.S. 531 (1985)); *Gristede's Foods, Inc. v. Unkechauge Nation*, 660 F. Supp. 2d 442, 469 (E.D.N.Y. 2009) (for purposes of sovereign immunity, court had jurisdiction to determine whether tribe meets federal common law

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[4] As Defendant admits, the Federally Recognized Indian Tribe List Act established three ways in which an American Indian tribe may obtain federal recognition: by Act of Congress, by BIA's administrative procedures, or *by a federal court decision.* Brief at 7 n.2.

[5] The only case Defendant cites, *Shinnecock Indian Nation v. Kempthorne*, No. 06-5013, 2008 U.S. Dist. LEXIS 75826 (E.D.N.Y. Sept. 30, 2008) (*Brief* at 13), concerns *federal* tribal recognition, an issue not relevant here.

definition of "tribe"); *Narragansett Tribe of Indians v. Southern Rhode Island Land*, 418 F. Supp. 798 (D.R.I. 1976) (court decided federal status of tribe under *Montoya* standard). The key to these decisions is that the relief sought was not for the court to *confer* recognition on the plaintiff-tribes, but rather to *confirm* existing state recognition. Defendant's political question argument thus relies on a mischaracterization of the Nation's claims – the Nation does not seek recognition from the Court. The Nation seeks to maintain state recognition benefits and privileges that it has enjoyed for over 30 years, unless and until due process for a rescission of such entitlements is given.

2. The Nation's Claims Are Well Within The Purview Of The Court To Decide.

Defendant relies on *Gilbert v. Gladden*, 87 N.J. 275 (1981), in arguing that tribal recognition is a non-justiciable political question. *Brief* at 11. As Defendant notes, the court in *Gilbert* adopted the factors used to determine the presence of a non-justiciable political question established by the Supreme Court in *Baker v. Carr*, 369 U.S. 186 (1962) (*Brief* at 12-13).

Defendant accurately summarizes these factors, but misapplies them. As the Supreme Court has cautioned, courts must be aware that "the 'political question' label" can "'obscure the need for case by case inquiry'" and "avoid 'resolution by any semantic cataloguing.'" *Gross v. German Found. Indus. Initiative*, 456 F.3d 363, 377 (3d Cir. 2006), *citing Baker*, 369 U.S. at 217.

In fact, the Court in *Baker* expressly cites tribal recognition as an area of law where "there is no blanket rule" requiring judicial abstention. 369 U.S. at 215. Indeed, *Baker* emphasizes that where tribal status is concerned, a court "will not stand impotent before an

obvious instance of a *manifestly unauthorized exercise of power.*" *Id.* at 217 (emphasis added). Defendant's actions in this case fit that description exactly.

Even if a political question were arguably related to the Nation's claims, "Unless one [of the political question criteria] is *inextricable* from the case at bar, there should be no dismissal for non-justiciability on the ground of a political question's presence." *Baker*, 369 U.S. at 217 (emphasis added). *See also Gilbert*, 87 N.J. at 282 (same); *Loigman v. Trombadore*, 228 N.J. Super. 437, 442 (1988) (same). "[S]imply because the case has a connection to the political sphere [is not] an independent basis for characterizing an issue as a political question ..." *Amalgamated Ind.*, 2005 Ct. Sup. 8152, *citing Office of Governor v. Select Committee of Inquiries*, 271 Conn. 540, 572-74, 858 A.2d 709 (2004). Here, none of the *Baker* factors are inextricable from the Nation's causes of action, thus *Baker* does not bar the Court from deciding the matter.

Defendant claims that four *Baker* factors bar the Court from adjudicating the Nation's claims:

- He first argues that the "lack of judicially discoverable and manageable standards for resolving the issue" takes the Nation's claims outside the Court's authority, contending that "the whole concept of 'recognition' is muddled when applied to the states." *Brief* at 14. As the Nation has repeatedly explained, there is nothing "muddled" about state recognition, despite Defendant's determination to muddle it. States have been recognizing tribes for many decades, and the federal government has respected those procedures. *Compl.* ¶ 19. *See* Cohen's Handbook § 3.02[9] ("State recognition can take a variety of forms, and federal laws extending to state-recognized tribes defer to the states' characterizations."). Indeed, the practice of states recognizing tribes predates the federal recognition process by decades. Koenig & Stein, at 9 ("State recognition has a long history, enjoying several centuries of precedent and evolution.").

Additionally, the Nation asks the Court to *confirm* its state recognition status and find that Defendant wrongfully attempts to repudiate that status, thus violating the Nation's due process and equal protection rights, *not* to determine or grant state recognition status. *See, e.g., Compl.* ¶¶ 1, 36. The Nation alleges that New Jersey has already recognized the Nation as an American Indian tribe and that multiple communications from and actions of the government over the past three decades confirmed that recognition. *Compl.* ¶¶ 11, 16, 21, 29. The Nation simply asks the Court to order the Acting Attorney General to honor that decision, absent action to rescind such recognition with due process.

Finally, even if the Court interprets the Nation's claims to ask for a determination of state recognition, the Court will need to decide whether the 1982 concurrent resolution and subsequent acts by the state legislature, as relied upon by the Nation (*Compl.* ¶ 16), are sufficient to have recognized the Nation as a New Jersey tribe. New Jersey courts routinely determine questions of the enforceability of statutory enactments and legislative actions; nothing prevents this Court from doing so here. *See Gross*, 456 F.3d at 388 ("a case does not present a political question under this factor so long as it involves...normal principles of statutory construction"); *Department of Children and Families, Div. of Child Protection and Permanency v. E.D.-O*, 223 N.J. 166, 186 (2015) ("In instances in which the Court must engage in the interpretation of a statute, our fundamental task 'is to discern and effectuate the intent of the Legislature.'").

- Defendant then contends that the Nation asks the Court to determine an issue that calls for an initial policy determination reserved for non-judicial discretion. *Brief* at 14-15. This third *Baker* factor, most often raised in disputes related to foreign relations (*see, e.g., Massachusetts v. Laird*, 400 U.S. 886, 893 (1970) (adjudication of constitutionality of U.S. participation in Indochina war); *Passaic County Bar Assn. v. Hughes*, 108 N.J. Super. 161, 168 (1969) ("certain of the [*Baker* factors] are almost certainly directed to questions of foreign affairs")), likewise does not render the Nation's claims non-justiciable. The Nation raises no questions of legislative judgment

or policy wisdom; the Nation has been injured by Defendant's violations of its state Constitutional rights. *See id.* ("This is not a case where we would have to determine the wisdom of any policy.").

- Defendant also argues that should the Court resolve the case, it will express a lack of respect for the coordinate branches of government. *Brief* at 15. While a judicial finding that a government law or decision is unconstitutional (or arbitrary) "might in some sense be said to entail a 'lack of respect'..., disrespect ... cannot be sufficient to create a political question. If it were, every judicial resolution of a constitutional challenge to a congressional enactment would be impermissible." *United States v. Munoz-Flores*, 495 U.S. 385, 391 (1990). *See also Powell v. McCormack*, 395 U.S. 486, 549 (1969). Indeed, as the court noted in *Asbury Park Press, Inc. v. Woolley*, it is the role of the courts to exercise action when an official has exceeded his authority:

> The judicial branch of the government has imposed upon it the obligation of interpreting the Constitution and of safeguarding the basic rights granted thereby to the people.... [W]hen legislative action exceeds the boundaries of the authority delegated by the Constitution, and transgresses a sacred right guaranteed to a citizen, final decision as to the invalidity of such action must rest exclusively with the courts. It cannot be forgotten that ours is a government of laws and not of men, and that the judicial department has imposed upon it the solemn duty to interpret the laws in the last resort. However delicate that duty may be, we are not at liberty to surrender, or to ignore, or to waive it.

33 N.J. 1, 12 (1960). The state legislature recognized the Nation as a New Jersey tribe three decades ago; asking the Court to confirm this status and to require the Attorney General to do the same, and thereby cease violating the Nation's Constitutional rights, does not express a lack of respect for the State or its legislature. Rather, it is the Defendant who has disrespected the clear intent of the legislature to confer state recognition to the Nation by rescinding such status without due process.

Defendant cites the concurring opinion in *DeVesa v. Dorsey*, 134 N.J. 420 (1993) to argue that the instant case calls for judicial restraint under the fourth *Baker* factor. *Brief* at 15.

The outcome in *DeVesa* relied upon the first *Baker* factor – whether a specific constitutional provision has been textually committed to one of the political branches – not the fourth (*id.* at 430).

- Finally, Defendant cites the sixth *Baker* factor: that there is potential for embarrassment from differing decisions by various departments. *Brief* at 15. There is no potential for differing results (or for embarrassment not already caused by the Acting Attorney General's violations of the Nation's rights). The Nation's status was established decades ago through the then-preferable and still accepted method of concurrent resolution. *Compl.* ¶ 19. Therefore, the New Jersey legislature has no need to take up the question. Accordingly, there is no possibility of differing outcomes between the Court and state legislature as the Nation seeks for the Court to enforce the legislature's action.

The Supreme Court requires courts to undertake a "discriminating inquiry into the precise facts and posture of the particular case." *Gross*, 456 F.3d at 377-78, *citing Baker*, 369 U.S. at 217. Under that standard and the case law discussed above, the Nation's claims are nonpolitical questions justiciable by this Court.

3. The Nation Asks the Court to Enforce State Recognition, Not to Determine it.

As noted above, the Nation is not asking the Court to *determine* its status; it is asking the Court to *enforce* state recognition previously provided through the 1982 resolution and subsequent actions (*Compl.* ¶¶ 11-16) in the absence of any due process effectively withdrawing that recognition (*Compl.* ¶¶ 18, 21; Counts I-II). Accordingly, it is being asked to interpret the state's and Attorney General's actions, beginning with the 1982 resolution and continuing routinely for three decades afterwards (*Compl.* ¶ 16), and apply New Jersey constitutional law to those facts. Again, that request raises no "political question" difficulties.

C. THE NATION PROPERLY SETS FORTH ITS DUE PROCESS AND EQUAL PROTECTION CLAIMS.

The Nation sets forth proper claims under the state Constitution. "The New Jersey Supreme Court has continued to consider interpretations of the state constitutional rights provisions that are broader, or more protective of citizens, than the decisions of the United States Supreme Court interpreting the federal Constitution." *Hernandez v. Don Bosco Preparatory High*, 322 N.J. Super. 1, 14 (1999), *quoting* Robert F. Williams, The New Jersey State Constitution: A Reference Guide xix (1997). Accordingly, special care should be taken to protect the Nation's rights under the state Constitution.

1. Count I: Procedural Due Process.

Article I, paragraph 1 of the New Jersey Constitution "protects against injustice and, to that extent, protects 'values like those encompassed by the principle[] of due process.'" *Doe v. Poritz*, 142 N.J. 1, 99 (1995). In examining a procedural due process claim under the New Jersey Constitution, courts "first assess whether a liberty or property interest has been interfered with by the State, and second, whether the procedures attendant upon that deprivation are constitutionally sufficient." *Id.* The New Jersey Supreme Court has found that whether there is a "legitimate claim of entitlement" is the key concept at play when deciding what process is due in a particular situation. *Nicoletta v. N. Jersey Dist. Water Supply Comm'n*, 77 N.J. 145, 155 (1978). On this issue, the Supreme Court instructs:

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- *rules or understandings that secure certain benefits and that support claims of entitlement to those benefits.*

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972) (emphasis added). "[T]he question of whether somebody has a property interest is whether there is a reasonable

expectation to continued receipt of a benefit." Erwin Chemerinsky, *Procedural Due Process Claims*, 16 Touro L. Rev. 871, 881 (2000), *citing Roth*, 408 U.S. at 577 ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined").

Defendant argues – somewhat tautologically – that the Nation has not alleged a protected liberty or property interest because the Nation is not entitled to any process with respect to the loss of its 30-year status. *Brief* at 20. The claim is without merit.

a. The Nation's Liberty and Property Interests.

Defendant argues that the Nation has not alleged a state-protected liberty or property interest by ignoring and misstating the Nation's straightforward allegations in its Complaint, and by contending that the Nation's allegations of its liberty and property interests rest solely upon the 1982 resolution. *Brief* at 20, 22-23.

In fact, the Nation alleges its property interests have been created, maintained and reinforced by New Jersey during the last three decades. *Compl.* ¶¶ 13-16, 18. The Nation alleges that it "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." *Compl.* ¶¶ 13-16, 18, 43. The Nation also alleges that it has rights in its identity as an American Indian tribe recognized by New Jersey, and is thereby entitled to certain privileges and benefits accompanying that status. *Compl.* ¶ 17. To the Nation, these rights are critical to its identity, standing in the American Indian community, and very survival. *Compl.* ¶ 33. These interests rise to the level of state-protected interests or entitlements worthy of procedural due process protection. *See, e.g., Poritz*, 142 N.J. at 104 (one's reputation

is a liberty interest triggering procedural due process protection under the New Jersey Constitution).

The Nation has protected property and liberty interests in its tribal identity, created by the 1982 resolution and 30 succeeding years of conforming and substantiating state conduct. *Compl.* ¶¶ 14-16. The Nation has enjoyed these rights for many years, after maltreatment for centuries, only to have Defendant unilaterally withdraw them without notice, opportunity to be heard, or any other procedure. *Compl.* ¶ 23. The Nation sufficiently alleges property rights protected under state law, violations of which have been committed by Defendant. *Compl.* ¶¶ 41-46.

b. What Process is Due.

Defendant similarly contends that the Nation "necessarily fails to allege what process might be due" (*Brief* at 23), at the same time dismissing the Complaint allegations as "threadbare" (*Brief* at 24). Defendant declares that because New Jersey does not have established procedures for recognizing tribes – a contention the Nation disputes (*Compl.* ¶¶ 11-12) – the Nation is "necessarily" unable to allege what process is due and that the Nation is not entitled to any process with respect to the loss of its 30-year status (*Brief* at 1, 24).

Defendant's statement of the law is facially incorrect: the Nation need not allege what process is due – that is, the law does not require the claimant to tell the Court what the proper procedures should have been – but only that "the procedures available to him" (to the Nation, none) "did not provide due process of law." *Biliski v. Red Clay Consol. Sch. Dist. Bd. Of Educ. 574 F.3d 214*, 219(3d Cir. 2009) (citation omitted). This the Nation plainly does. *Compl.* ¶¶ 21, 30, 42-46.

Removal of the Nation's protected interests in maintaining its identity and state status require some form of pre-termination process, at least equivalent to the process that created the

interests in the first place. At a minimum, the Nation has the right to a parallel legislative action terminating the concurrent resolution or a hearing before a neutral decision-maker, with notice and an opportunity to contest the proposed rescission. *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (citations omitted) ("The 'right to be heard before being condemned to suffer grievous loss of any kind, even though it may not involve the stigma and hardships of a criminal conviction, is a principle basic to our society.").

Moreover, the Nation alleges that before adopting the concurrent resolution procedure, the New Jersey legislature required and received evidence of the Nation's genealogy and self-governance, a process that the State has described to the federal government. *Compl.* ¶¶ 12, 14, 16(b), 22(b). In purporting to withdraw the state's recognition, Defendant followed neither the evidentiary procedure nor the concurrent resolution procedure. *Compl.* ¶¶ 11, 26(b), 22(b). At minimum, the same process that recognized the Nation in 1982 should be followed to withdraw that status.

Finally, Defendant once again misleadingly cites and relies on procedures not adopted until 2001 to argue that the Nation fails to make a sufficient procedural due process claim. *Brief* at 8-9. While the State now has a formal requirement that tribes be recognized via statute, that requirement has no retroactive effect on the recognition given to the Nation through legislative action in 1982. As alleged in the Complaint (*Compl.* ¶¶ 15, 19), states change the processes through which they convey recognition to tribes, including moving toward or away from the use of concurrent resolutions, but the Nation found no instances – and Defendant cites none – in which a state changed its recognition procedures with retroactive effect, thereby removing a tribe's status (*Compl.* ¶ 35).

2. Count II: Substantive Due Due Process.

New Jersey case law dictates that "[t]o establish a substantive due process claim, a plaintiff must prove the particular interest at issue is protected by the substantive due process clause and the government's deprivation of that protected interest shocks the conscience." *Filgueiras v. Newark Pub. Sch.*, 426 N.J. Super. 449, 469 (App. Div.), *certif. denied*, 212 N.J. 460 (2012). Defendant argues that the Nation "does not attempt to identify the fundamental interest at stake," passing over the relevant allegations as "vague[]." *Brief* at 20. To the contrary, the Nation specifically pleads that it has a fundamental right to exist as a tribe. Defendant's interference with that right, motivated by unfounded and pernicious racial stereotypes, and in light of the state's long record of abuse of American Indian peoples and their identity, is indeed arbitrary and shocks the conscience. *Compl.* ¶¶ 18, 24, 36-38, 45-47.

Defendant argues that the Nation's asserted rights fail to pass muster because "substantive due process is reserved for the most egregious governmental abuses against liberty or property rights, abuses that 'shock the conscience or otherwise offend ... judicial notions of fairness ... [and that are] offensive to human dignity.'" *Brief* at 17-18, *quoting Rivkin v. Dover Township Rent Leveling Bd.*, 143 N.J. 352, 366 (1996). The Nation has been forced to scratch out a meager existence under the thumb of government actors whose actions are impelled by racist ideas about American Indians (*Compl.* ¶¶ 5-10; 23-24). To have secured, enjoyed and relied upon state and federal benefits for the past three and a half decades, only to have them suddenly withdrawn, certainly violates the Nation's substantive due process rights under this standard.

a. The Nation Alleges That It Was Deprived Of Fundamental Rights.

The Nation has a fundamental right, based on the Constitution, to exist as a distinct racial or ethnic group, free of discrimination and oppression. *See Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997) (citations omitted) ("the Due Process Clause specially protects those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition'"). For centuries, New Jersey ignored that right. Only in the last several decades has the state made any effort to ameliorate its history of discrimination against American Indians.

The Nation's Complaint asserts this right in detail and in historical context. It sets forth the long and ugly history of racism and oppression faced by American Indian tribes (*Compl.* ¶¶ 4-10), as well as the efforts by the federal government and many state governments to try to rectify the detrimental effects of that history in some small part, and to provide benefits and privileges exclusively to tribes (*Compl.* ¶¶ 17, 33).

Moreover, the Nation plainly alleges that after centuries of oppression and as a result of over 30 years of treatment as a state-recognized tribe, it recovered and secured some portion of its fundamental property and liberty rights in that identity, and concomitant benefits and privileges. *Compl.* ¶¶ 18, 46. The 1982 concurrent resolution, and subsequent statutes recognizing and affirming the Nation's status, secured those benefits to the Nation for thirty-four years. *Compl.* ¶¶ 14-16. The Nation had a reasonable expectation that the benefits would continue, based on this history and the absence of legislative action rescinding the Nation's status. *Compl.* ¶ 18. The Nation has thus set forth a cognizable claim that Defendant has impaired a key aspect of its fundamental right to existence.

b. The Nation Alleges That Defendant's Conduct Shocks the Conscience.

Defendant asserts that the Nation "has not plausibly alleged government conduct that 'shocks the conscience.'" *Brief* at 20. Again, Defendant disregards or minimizes the Nation's well-founded allegations. The Nation alleges that Defendant acted unilaterally, without any real authority, in derogation of the legislature's prerogative and from an invidious motive. *Compl.* ¶¶ 27-28, 49. By adopting a policy that allows the Gaming Division to respond to the Arts & Crafts Board inquiry, despite the Division's lack of expertise and lack of authority on Indian affairs, Defendant demonstrated an arbitrary disregard for the responsibilities of New Jersey's Commission on Indian Affairs and for the legislative process. *Compl.* ¶¶ 27-28, 49-50. Defendant's actions also evince racist beliefs that all American Indians want to open casinos. *Compl.* ¶¶ 24, 27-28, 49.

When a state official has time to deliberate but nevertheless consciously disregards the fact that his conduct poses a substantial risk of serious harm, his actions violate the substantive due process clause. *See Gormley v. Wood-El*, 218 N.J. 72, 102 (2014), *citing County of Sacramento v. Lewis*, 523 U.S. 833, 849 (1998) (intentionally causing an unjustifiable injury harm satisfies the "shock conscience" standard for a substantive due process claim). Defendant has had plenty of time to deliberate, as the Nation's status was questioned in 2012 and Defendant investigated the matter upon the Nation's request. *Compl.* ¶¶ 30-32. His actions here, as alleged by the Nation – deliberate, unauthorized, unilateral, invidiously motivated and contrary to legislative determination – constitute "egregious official conduct" that "shocks the conscience."

Defendant contends – similarly to its procedural due process argument (*see* Argument Section C.1, *supra*) – that because New Jersey only recently codified its procedures for tribal

recognition, the Nation fails to state a cognizable substantive due process claim. *Brief* at 20.[6] That New Jersey neglected to codify a state recognition process until 2001 does not vindicate its infringements of the Nation's substantive due process rights. The Nation's claim is based on decades of treatment as a state-recognized tribe and the entitlements attached thereto, not the New Jersey Annotated Statutes. *Compl.* ¶ 16. The Nation has set forth a cognizable claim for substantive due process violations, and Defendant's Motion to dismiss Count II should be denied.

3. Count III: Equal Protection.

The New Jersey Supreme Court has recognized that the equal protection analysis under the State Constitution and the Federal Constitution are "substantially the same." *Brief* at 24, *citing Drew Assocs. of NJ, LP v. Travisano*, 122 N.J. 249, 258-59 (1991). Importantly, however, "[a]lthough conceptually similar, the right under the State Constitution can in some situations be broader than the right conferred by the Equal Protection Clause." *State v. Chun,* 194 N.J. 54, 101-02 (2008), *quoting Doe v. Poritz,* 142 N.J. 1, 94 (1995). Indeed, "where an important personal right is affected by governmental action, this Court often requires the public authority to demonstrate a greater 'public need' than is traditionally required in construing the federal constitution." *Id., quoting Taxpayers Ass'n of Weymouth Twp. V. Weymouth Twp.*, 80 N.J. 6, 43 (1976).

Defendant contends that the Nation must show "differential treatment" in order to make a proper equal protection claim, arguing that the Nation "has not alleged that the tribe was treated differently than members of a similarly situated class." *Brief* at 25. That is, Defendant argues that

[6] More specifically, Defendant claims that "New Jersey does not have established procedures, standards or requirements for the 'recognition' or continued recognition of American Indian tribes." *Brief* at 20. But this is untrue. A state may have "procedures, standards or requirements" for state recognition without codifying them. *See* Argument Section A, *supra.*

because he treats all American Indians with equal disrespect and disdain, he has not violated *any* tribes' Equal Protection rights under the New Jersey Constitution.

Defendant's contention misses a critical distinction applicable to American Indians, who "are not necessarily similarly situated to either non-Indian state citizens or citizens of other states, and it is unclear to whom courts are intended to compare them." Shira Kieval, *Note: Discerning Discrimination in State Treatment of American Indians Going Beyond Reservation Boundaries*, 109 Columbia L. Rev. 1 (2009). In *Pyke v. Cuomo*, 258 F.3d 107, 108-09 (2d Cir. 2001), the Second Circuit illustrated and applied this point, holding that "it is not necessary to allege the existence of a similarly situated non-minority group when challenging a law or policy that contains an express, racial classification." The court explained:

> A plaintiff alleging an equal protection claim under a theory of discriminatory application of the law, or under a theory of discriminatory motivation underlying a facially neutral policy or statute, generally need not plead or show the disparate treatment of other similarly situated individuals ... So long as they allege and establish that the defendants discriminatorily refused to provide police protection because the plaintiffs are Native American, plaintiffs need not allege or establish the disparate treatment of otherwise similarly situated non-Native American individuals.
>
> It would be difficult, if not impossible, to find other individuals whose situation is similar to Native Americans living on a reservation and exercising a substantial measure of self-government independent of New York State. Plaintiffs would probably be incapable of showing similarly situated individuals who were treated differently.

258 F.3d at 108-09, *citing Brown v. Oneonta*, 221 F.3d 329, 337 (2d Cir. 2000). That is to say, the Nation need not allege that it was treated differently than other similarly situated groups because there are none, and because a discriminatory motivation underlies Defendant's policy. *Compl.* ¶¶ 24, 38, 53-54.

Defendant attempts to press the argument further, stating that the Nation "does not allege that the State's 'recognition' of American Indian tribes can be compared to the State's treatment of other racial groups." *Brief* at 26. Such a criticism is illogical; only American Indians are required to obtain recognition from a state or the federal government in order to claim a legitimate existence. No other racial group in New Jersey – or, for that matter, in the United States – bears this burden, or enjoys the benefits that flow from recognition once obtained. *See* Kieval, *supra*; *Brown*, 221 F.3d at 337, *supra*.

Finally, while Defendant again attempts to minimize the Nation's allegations, his characterization is manifestly erroneous. The Nation makes sufficient allegations of discriminatory conduct, alleging that Defendant's actions against it were arbitrary, invidiously motivated, and entirely unnecessary given the state interests involved. *Compl.* ¶ 53. The Nation also alleges that Defendant is "motivated by a racial-stereotype-driven and irrational fear that any American Indian tribe, if recognized as such, will seek to conduct gaming." *Compl.* ¶ 24. The Defendant's actions are improperly discriminatory and based on the race of the Nation's members. *Compl.* ¶ 53. Such allegations are sufficient to defeat Defendant's Motion to Dismiss the Nation's Equal Protection claim

4. Count IV: Estoppel.

Equitable estoppel applies to "conduct, either express or implied, which reasonably misleads another to his prejudice so that a repudiation of such conduct would be unjust in the eyes of the law." *McDade v. Siazon,* 208 N.J. 463, 480 (2011), *quoting Dambro v. Union Cnty. Park Comm'n,* 130 N.J. Super. 450, 457 (Law Div. 1974). The elements of estoppel are "a knowing and intentional misrepresentation by the party sought to be estopped under circumstances in which the misrepresentation would probably induce reliance, and reliance by

the party seeking estoppel to his or her detriment." *D'Agostino v. Maldonado*, 216 N.J. 168, 200 (2013), *quoting O'Malley v. Dep't of Energy,* 109 N.J. 309, 317 (1987).

The 1982 Concurrent Resolution of the New Jersey legislature and continued acts of the New Jersey government (*Compl.* ¶¶ 13-16) conferred status as a state-recognized tribe on the Nation (*Compl.* ¶ 14). By attempting to rescind this status (*Compl.* ¶¶ 27-28, 30), Defendant has transmuted the State's prior actions into a "knowing and intentional misrepresentation." *O'Malley*, *supra*, 109 N.J. at 317. Defendant knowingly disregarded the status conferred on the Nation by the legislature in 1982 and undermined the connection between this status and the federal government without notice to the Nation. *Compl.* ¶¶ 29-30. The Nation and its members expended money, time, and effort in reliance on the state's representation that the state officially recognized the Nation as an American Indian tribe, and to a significant degree predicated its tribal identity on what it reasonably believed was the state's binding recognition of it has an American Indian Tribe. *Compl.* ¶¶ 59, 61.

Defendant argues that "the Complaint mischaracterizes the State's communications about the status of the Nation." *Brief* at 28. To the contrary, the Nation's Complaint alleges that the concurrent resolution employed by the state legislature to confer state recognition status on the Nation was a commonly accepted practice, and the Nation was entirely justified in relying upon it. *Compl.* ¶ 19. Further, Defendant's assertion that the Resolution "is not an act of legislation and is not binding outside of the Legislature" (*Brief* at 29) ignores that certain federal benefits are tied to state recognition of tribes, and that concurrent resolutions have been a viable means for conferring state recognition status for decades. *Compl.* ¶¶ 17-19. Finally, whether the concurrent resolution is legally binding is not determinative; the Nation also reasonably relied on

decades of treatment by the state and federal governments to establish its status. *Compl.* ¶ 16. The Nation's allegations are therefore sufficient to defeat the Defendant's Motion.

Similarly, Defendant's assertion that the Nation has "slept on its alleged rights for 14 years" is mistaken. *Brief* at 32. While the earliest attempts by state officials to undermine the Nation's status began as early as 2001, the Nation alleges that "[a]gencies of the federal government continued to treat the Nation and other tribes as state-recognized because of the clear history of state-recognition in New Jersey" (*Compl.* ¶ 29). The Nation's status was not fundamentally undermined until 2012, when a state employee of the Commission of Indian Affairs informed the federal Government Accounting Office that New Jersey had no state-recognized tribes. *Compl.* ¶ 30. From that time until the present, the Nation has sought answers from state officials regarding its status, and engaged in active settlement discussions with Defendant. *Compl.* ¶¶ 31-32. In addition, the Nation has suffered and continues to suffer significant financial and non-financial losses as a consequence of Defendant's position regarding state recognition. *Compl.* ¶ 33. It is therefore in the interest of fairness and justice that Defendant be estopped from continuing to undermine the state-recognition status of the Nation.

5. Count V: Arbitrary and Capricious Action.

Count V of the complaint alleges that Defendant's repudiation of the Nation's status is arbitrary, capricious and contrary to law. Defendant says New Jersey does not recognize this cause of action. Defendant is wrong.

New Jersey has long recognized a litigant's ability to challenge agency action on the basis that it is arbitrary or illegal. At common law, that challenge would have been by the prerogative writ of certiorari. *In re LiVolsi*, 85 N.J. 576, 594 (1981) ("It has always been one of the primary functions of the writ of certiorari to give the courts the power to review the actions

of legislatively created administrative agencies"). *See also McKenna v. N.J. Hwy. Auth.*, 19 N.J. 270, 274-75 (1955).

New Jersey's 1947 Constitution superseded common law prerogative writs, but preserved them "in Superior Court, on terms and in the manner provided by the rules of the Supreme Court, as of right." N.J. Const. (1947), Art. VI, Sec. 5, para. 4. "When our 1947 Constitution was prepared, pains were taken to insure not only that the court's prerogative writ jurisdiction would remain intact, but that the manner of its exercise would be greatly simplified." *Caporusso v. N.J. Dep't of Health and Senior Servs.*, 434 N.J. Super. 88, 101 (App. Div. 2014), *quoting Hosp. Ctr. at Orange v. Guhl*, 331 N.J. Super. 322, 333 (App. Div. 2000). Accordingly, common law prerogative writ actions are now cognizable under R. 4:69-1 as "actions in lieu of prerogative writ." *Selobyt v. Keogh-Dwyer Correctional Facility of Sussex Cty.*, 375 N.J. 91, 96 (App. Div. 2005). This includes the writ of certiorari, which empowers a court to invalidate agency action when that action is arbitrary, capricious or contrary to law. *See Caporusso, supra*; *Gilliland v. Bd. of Rev., Dep't of Labor & Indus.*, 298 N.J. Super. 349, 354-55 (App. Div. 1997).

Count V exactly fits this paradigm. The Nation alleges that Defendant's unilateral repudiation of the Nation's status was undertaken without explanation or basis, and in contravention of legislative endorsement and 30 years of state practice. That is, almost by definition, arbitrary and capricious action. Accordingly, the Nation lays out a proper claim in Count V of the Complaint.[7]

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[7] Defendant may be expected to make two further objections to this claim. First, he may assert that because a state agency is the subject of the challenge, the prerogative writ action should have been brought in the Appellate Division pursuant to R. 2:2-3(a). Second, he may argue that the Nation's action is untimely under R. 4:69-6.

Neither claim has merit. First, because the Nation's challenge requires the development of a factual record, it must be brought in the Law Division pursuant to R. 4:69-1 rather than the

V. CONCLUSION

Defendant's Brief demonstrates his fundamental lack of understanding of the processes by which states recognize tribes, the prior actions of his State, and the rights and protections afforded to the Nation for the past 30 years. For these and the foregoing reasons, Defendant's Motion to Dismiss should be denied in its entirety.

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Dated: January 21, 2016

Appellate Division under R. 2:2-3. *See Selobyt, supra,* 375 N.J. Super. at 96, *citing Pfleger v. N.J. Hwy. Dep't,* 104 N.J. Super. 289, 291-93 (App. Div. 1968). Second, as discussed above, the Nation's challenge is not untimely. But even if it were, this Court can, and should, enlarge the filing period pursuant to R. 4:69-6(c), since the Nation challenges "informal or *ex parte* determinations of legal questions by administrative officials." *Bor. of Princeton v. Mercer Cty.,* 169 N.J. 135, 152 (2001); *Shack v. Trimble,* 28 N.J. 40, 48 (1958).