IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

CAYUGA INDIAN NATION OF NEW YORK, Plaintiff, v. SENECA COUNTY, NEW YORK, Defendant.	No. 11-cv-6004-CJS

PLAINTIFF CAYUGA INDIAN NATION'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER

INTRODUCTION

Just six days after the Cayuga Indian Nation ("the Nation") filed its opening brief in support of injunctive relief in this case, the Supreme Court vacated the Second Circuit's decision in *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 (2d Cir. 2010), without ruling on the case's merits. *See Madison County v. Oneida Indian Nation of New York*, 131 S. Ct. 704 (2011). The Nation's opening brief, of course, rested principally on the Second Circuit's *Madison County* decision. But even though that decision has now been vacated, the brief filed by Defendant Seneca County ("the County") fails to demonstrate that foreclosing on the Nation's real property for nonpayment of taxes would comply with federal law.[1]

The County's arguments largely conflate two distinct concepts: immunity from taxation, on the one hand, and sovereign immunity from suit, on the other hand. Both of these are grounded in concepts of Indian sovereignty – but the Nation asserts only the latter here. The Nation does not claim that the parcels at issue here are immune from taxation as a matter of federal law. Rather, the Nation claims – consistent with longstanding Supreme Court precedent – that, even assuming the Nation's liability for the taxes in question, the County may not enforce those taxes by resort to the judicial remedy of foreclosure. It is well-established that, even where there is no immunity from taxation, sovereign immunity from suit may bar a state from resorting to a judicial remedy to enforce its tax. And that is so even if the judicial remedy is the most effective or convenient one. *See, e.g., Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 514 (1991). Viewed in this light, the County's principal arguments – including its reliance on the Supreme Court's holding in *City of Sherrill v. Oneida Indian*

[1] The County's brief focuses entirely on whether the Nation is likely to prevail on the merits. It nowhere offers any argument that the Nation has failed to satisfy the other three prongs of the standard for granting injunctive relief.

Nation of New York, 544 U.S. 197 (2005), that an Indian tribe cannot reestablish immunity from taxation by repurchasing reservation land on the open market – are easily disposed of. Indeed, despite expressing some misgivings, the Second Circuit in *Madison County* recognized that it was bound by Supreme Court precedent to hold sovereign immunity applicable in circumstances materially identical to those here.

The County's other arguments are no more persuasive. For instance, the County's brief asserts that the Nation has waived its sovereign immunity from suit – but it nowhere explains how the Nation's payment of tax on other parcels amounts to unequivocal consent to be subjected to suit in connection with the parcels that actually are at issue in this litigation. Alternatively, the County goes to great lengths to demonstrate that the lands in question are not currently within a federal reservation. Yet even if this conclusion were relevant (which it is not), the County fails to grapple with the fact that, just last summer, the New York Court of Appeals held the opposite – and did so in a case where the County's own officials were parties. The County therefore is bound by collateral estoppel.

The motion for a preliminary injunction should be granted.[2]

ARGUMENT:
TRIBAL SOVEREIGN IMMUNITY FROM SUIT BARS FORECLOSURE ON LANDS HELD BY THE NATION.

Seneca County asserts that it may foreclose on lands held by the Nation, notwithstanding the Nation's sovereign immunity from suit. That is wrong. As the Second Circuit had no trouble

[2] As set forth in the Nation's complaint, the instant foreclosures are likewise barred by the Indian Trade and Intercourse Act (also known as the Non-Intercourse Act), which renders unlawful a ""conveyance of lands . . . from [an] Indian nation or tribe of Indians," absent congressional consent. 25 U.S.C. § 177. Tribal sovereign immunity from suit, however, provides a clear and sufficient basis for this Court to grant the requested preliminary injunctive relief. Should this action progress to the merits stage, the Nation plans to litigate its Non-Intercourse Act claim as well.

concluding in *Madison County*, whatever the authority of county and state authorities to impose a tax on land held by a tribe, tribal sovereign immunity from suit bars them from enforcing it through the judicial remedy of foreclosure. And this is true regardless of whether the tribe exercises sovereign control over the land in question.

I. Tribal Sovereign Immunity From Suit Bars Foreclosure On Land Owned By An Indian Tribe.

It is a bedrock principle of federal Indian law that, absent congressional authorization, tribal sovereign immunity bars suit against an Indian tribe. *See, e.g.*, *Okla. Tax Comm'n*, 498 U.S. at 509; *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering*, 476 U.S. 877, 890-91 (1986); *Puyallup Tribe, Inc. v. Dep't of Game*, 433 U.S. 165, 172-73 (1977); *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-13 (1940). As the Supreme Court explained in *Santa Clara Pueblo*, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers," and "without congressional authorization, the Indian Nations are exempt from suit." 436 U.S. at 58 (internal quotation marks omitted).

Sovereign immunity from suit applies to an Indian tribe regardless of the location of the activities giving rise to the suit. That is true even if those activities take place on lands where the tribe does not exercise sovereign regulatory authority. In other words, although a state may generally *regulate* the activities of tribes outside reservation boundaries, sovereign immunity from suit may bar the state from *suing* the tribe for violating applicable laws. *See Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751, 755 (1998) (rejecting respondent's request "to confine immunity from suit to transactions on reservations and to governmental activities," and stressing that "[t]o say substantive state laws apply to off-reservation conduct . . . is not to say that a tribe no longer enjoys immunity from suit"); *see also id.* (explaining that "[t]here is a difference

between the right to demand compliance with state laws and the means available to enforce them").

The result of tribal sovereign immunity from suit may well be that a party is left without access to its preferred or most convenient remedy against an Indian tribe – but that is not a reason to refrain from applying the doctrine. *See id.*; *Okla. Tax Comm'n*, 498 U.S. at 512-14 (holding that states have a right to collect taxes on certain Indian cigarette sales, but the tribe is immune from suit seeking to enforce that right). Put differently, the fact that a state or county is authorized to regulate or tax a tribe does not mean that the entity has at its disposal the full array of remedies that might be available against a non-tribal entity. *See id.* at 514 (upholding tribal sovereign immunity from suit despite state's complaint that it has "a right without any remedy," and recognizing that "sovereign immunity bars the State from pursuing the most efficient remedy"). To the extent that tribal sovereign immunity from suit leaves the state unable to enforce its laws, the state's recourse is to "seek appropriate legislation from Congress." *Id.*

Critically for present purposes, tribal sovereign immunity from suit applies even when the lawsuit does not technically name the tribe in its caption but, rather, proceeds against the property itself.[3] In the analogous context of *state* sovereign immunity from suit, it is clear that a

[3] The cases that the County cites in support of an *in personam-in rem* distinction (County's Br. 11) do not counsel in favor of applying an *in rem* exception here. Two of those cases were decided by intermediate state appellate courts; a third is a state law case dating back more than half a century. The fourth, *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), rested principally on the unique history of the Bankruptcy Clause. *See id.* at 362-63, 369-78. Even in that setting, the decision nowhere suggested that sovereign immunity would not be implicated by the exercise of *in rem* jurisdiction over property *in a state's possession*. *See id.* at 373 ("Insofar as orders ancillary to the bankruptcy courts' *in rem* jurisdiction, like orders directing turnover of preferential transfers, implicate States' sovereign immunity from suit, the States agreed in the plan of the [Constitutional] Convention not to assert that immunity."); *see also id.* at 378 (stating not that *in rem* jurisdiction is categorically outside the compass of state sovereign immunity from suit, but that such jurisdiction "does not implicate state sovereignty *to nearly the same degree* as other kinds of jurisdiction" (emphasis added)).

libel action may not proceed in admiralty against a ship in the state's possession. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491, 502-07 (1998) (discussing cases, and distinguishing scenario where ship is *not* in state's possession). Likewise, for foreign nations, sovereign immunity from suit traditionally protected their ships from libel actions *in rem*. *See, e.g., The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926). When the property owner is the federal government, it is well-settled that sovereign immunity from suit bars a state from foreclosing for non-payment of taxes, regardless of whether tax immunity applies. *See, e.g., United States v. Lewis County*, 175 F.3d 671, 674 (9th Cir. 1999). In each of these circumstances, the *in rem* nature of a proceeding does not vitiate the applicability of sovereign immunity from suit. There is no basis for a different conclusion when the entity invoking sovereign immunity from suit is an Indian tribe.[4]

It is therefore unsurprising that, in *Madison County*, the Second Circuit had little trouble concluding that sovereign immunity from suit barred the county defendants from foreclosing on property owned by the Oneida Indian Nation. *See Oneida Indian Nation of N.Y. v. Madison*

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[4] In *Oklahoma Tax Commission*, the Supreme Court suggested that, even though sovereign immunity from suit barred the state from suing an Indian tribe for failing to comply with certain cigarette tax obligations, it would be consistent with tribal sovereign immunity from suit for the state to "collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores." 498 U.S. at 514 (citation omitted). As this language makes clear, the Court's reference to "seizing unstamped cigarettes off the reservation" was a reference to seizing property *from non-tribal wholesalers*, not from tribes. In contemplating such a seizure, the Court certainly was not sanctioning seizure of property *held by a tribe* as a remedy for nonpayment of taxes.

Likewise, *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), on which the County relies (County's Br. 10), is entirely off point. That decision distinguished between *in rem* and *in personam* jurisdiction not for purposes of sovereign immunity from suit, but for purposes of determining the scope of the county's authority to tax. *See County of Yakima*, 502 U.S. at 262-65. As noted above, the Nation is not here challenging the County's jurisdiction to regulate or tax the lands at issue.

County, 605 F.3d 149, 156-60 (2d Cir. 2010), *vacated on other grounds*, 131 S. Ct. 704 (2011). Even the two Second Circuit judges who urged the Supreme Court to revisit its own precedents recognized that "unambiguous guidance from the Supreme Court" compelled the conclusion that "although the Counties may tax the property at issue here, they may not foreclose on those properties because the tribe is immune from suit." 605 F.3d at 164 (Cabranes, J., concurring, joined by Hall, J.). The same is true here.

II. There Is No Geographic Limitation To Tribal Sovereign Immunity From Suit That Would Permit Foreclosure Here.

As shown above, sovereign immunity from suit bars the county from foreclosing on *any* land held by the Nation. Nonetheless, the County asserts that foreclosure is permitted here because of the *kind* of land that is at issue. First, the County suggests that foreclosure is lawful because this land is not reservation land. Yet this Court need not even address the hypothetical question whether tribal sovereign immunity from suit would bar foreclosure outside of a reservation, because the lands at issue here plainly *are* reservation land – and the County is collaterally stopped from maintaining the contrary in any event. Second, the County suggests that foreclosure is lawful because the land is not subject to the Nation's sovereign control – but there is no basis for limiting the foreclosure bar in this manner.

1. There is no need for this Court to determine whether tribal sovereign immunity from suit bars foreclosure on tribally-held land that is not reservation land.[5] That is because the parcels in dispute here *are* reservation land. They are located within the Nation's federal reservation, which was recognized in 1794 and has never ceased to exist. *See, e.g.*, *Cayuga Indian Nation v. Gould*, 930 N.E.2d 233, 244-52 (N.Y.), *cert. denied*, 131 S. Ct. 353 (2010).

[5] Notably, however, the Second Circuit ruled in *Madison County* that tribal sovereign immunity from suit prohibits foreclosure regardless of whether the land is reservation land. *See* 605 F.3d at 157-58 & n.6. This Court could easily reach the same conclusion.

The County argues the contrary. But it is collaterally estopped from doing so by the New York Court of Appeals' decision just last summer in *Gould*. In *Gould*, two of the defendants were the Sheriff and District Attorney of Seneca County, both sued in their official capacity. The Nation claimed that, as a matter of state law, it had no obligation to collect and remit taxes on the sale of cigarettes because its stores were located on "[l]ands held by an Indian nation or tribe that is [sic] located within the reservation of that nation or tribe in the state." N.Y. Tax Law § 470(16)(a). The New York Court of Appeals agreed, concluding that (a) the term "reservation" in the above-quoted phrase referred to the settled federal-law meaning of "reservation"; and (b) the Nation's reservation remained intact as a matter of federal law. *See Gould*, 930 N.E.2d at 245; *id.* at 247. The counties' petition for certiorari, in turn, sought Supreme Court review of the Court of Appeals' holding that "the Cayuga Indian Nation possessed a federal reservation pursuant to the 1794 Treaty of Canandaigua" and that "the United States did not subsequently disestablish any purported federal reservation." Petition for Certiorari at i, *Gould v. Cayuga Indian Nation*, 131 S. Ct. 353 (2010) (No. 10-206) ("*Gould* Petition for Certiorari"), 2010 WL 3256353, at *i (questions presented); *see, e.g.*, *id.* at *27 (challenging "the Court of Appeals' conclusion that there is a federal Cayuga reservation which has not been disestablished").

While the County may believe that *Gould* was "incorrect" (County's Br. 25) to hold that the Nation's reservation remains in existence, it is not now free to dispute that holding. Seneca County is in privity with the Seneca County defendants in *Gould*. Those defendants vigorously litigated whether the Nation still has a reservation under federal law, and the Court of Appeals

resolved that question against them.[6] *See Gould*, 930 N.E.2d at 244-52. Seneca County therefore is precluded from relitigating it. *See, e.g., Buechel v. Bain*, 766 N.E.2d 914, 920-21 (N.Y. 2001).

In any event, even if collateral estoppel does not apply here, the Nation plainly does still have a reservation under federal law. As the Supreme Court has made clear, "only Congress can alter the terms of an Indian treaty by diminishing a reservation." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); *see also, e.g., Solem v. Bartlett*, 465 U.S. 463, 470 (1984) ("[O]nly Congress can divest a reservation of its land and diminish its boundaries."). Under that rule, a tribe's sale of land within its reservation to non-Indians does not by itself terminate the reservation status of that land. "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Id.* (emphasis added).[7] Accordingly, the Supreme Court has never found a reservation to be disestablished or diminished without an explicit expression of congressional purpose to that effect.[8] That bedrock principle of

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[6] Indeed, as to the question whether the Nation's reservation remains in existence, the County's brief – filed by the same counsel who represented the county officials in *Gould* – largely repeats verbatim the very same arguments advanced in the failed *Gould* petition for certiorari. *Compare* County's Br. at 26-33, *with Gould* Petition for Certiorari at *18-*28.

[7] *See also DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 444 (1975) ("[W]e have stressed that reservation status may survive the mere opening of a reservation to settlement."); *Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 356-59 (1962) (reservation is not diminished by "actual purchase of land within it by non-Indians"); *Mattz v. Arnett*, 412 U.S. 481, 504 (1973) (opening reservation land to non-Indian settlement does not "mean that the reservation was to be terminated").

[8] *See, e.g., Yankton Sioux Tribe*, 522 U.S. at 351 ("explicit language" of statute indicates intent to diminish reservation); *Hagen v. Utah*, 510 U.S. 399, 420 (1994) ("textual and contemporaneous evidence of diminishment is clear"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 597 (1977) (statutory language "precisely suited" to disestablishment); *DeCoteau*, 420 U.S. at 445 (statute "point[s] unmistakably" to termination).

federal Indian law was expressly reaffirmed in *City of Sherrill*. *See* 544 U.S. at 215 n.9 ("The Court has recognized that 'only Congress can divest a reservation of its land and diminish its boundaries.'" (quoting *Solem*, 465 U.S. at 470)).

The parcels at issue here, located within the Nation's historic reservation, satisfy that long-settled test for reservation status. As Judge Hurd of the Northern District concluded, after thoroughly discussing both the 1794 treaty that recognized the Cayuga reservation and the reservation's subsequent history, Congress has never disestablished or diminished the Cayuga reservation, and therefore "it stands to reason that the reservation status of that land remains in place to this day." *Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d 128, 137 (N.D.N.Y. 2004) (*Union Springs I*), *vacated on other grounds*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005); *see id.* at 136-43; *see also Cayuga Indian Nation v. Village of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005) (*Union Springs II*) (leaving undisturbed *Union Springs I*'s finding that the Nation's federal reservation remains intact, even while barring the Nation from asserting immunity from state and local zoning laws); *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 269 & n.2, 277 (2d Cir. 2005) (barring the Nation from asserting possessory land claims, without questioning the continued existence of the Nation's federal reservation).

The United States has consistently reaffirmed that the Nation was granted a reservation under federal law, and that the Nation's reservation remains intact. Most recently, the United States did so in an amicus brief filed in the New York Court of Appeals. *See* U.S. Amicus Br. at 1-8, *Cayuga Indian Nation v. Gould*, No. 74 (N.Y. filed Jan. 29, 2010). And the Bureau of Indian Affairs, the federal agency with jurisdiction over Indian affairs, currently is processing the Nation's application to have land taken into trust pursuant to 25 U.S.C. § 177 under the special track dedicated to "on-reservation acquisitions." *See* 25 C.F.R. § 151.10; *Gould*, 14 N.Y.3d at

247. In light of all of this, it is untenable to claim that the Nation lacks a reservation under federal law.[9]

2. Alternatively, the County suggests that tribal sovereign immunity from suit applies to foreclosure only if the tribe exercises sovereign authority over the land in question. Relatedly, the County suggests that sovereign immunity from suit is barred here by the Supreme Court's decision in *City of Sherrill*. That decision held that laches and other equitable principles barred the Oneida Indian Nation from "unilaterally reviv[ing] its ancient sovereignty" over certain reservation lands by reacquiring them on the open market and asserting immunity from taxation. 544 U.S. at 203.

The County's contentions miss the mark. The County fails to recognize that sovereignty over land (or, equivalently, immunity from state jurisdiction to tax and regulate) is different from sovereign immunity from suit. The Nation does not here claim that federal law bars the County from taxing its land or from regulating activity on that land. Rather, the Nation's claim is that,

[9] The County does not appear to argue that *City of Sherrill* (or the Second Circuit's subsequent decision in *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d. Cir. 2005)) stands for the proposition that the Cayuga reservation no longer exists. Such an argument would be unsustainable in any event: even as it held that the "long history of state sovereign control" over the Oneidas' land barred the tribe from claiming property tax immunity under federal law, the Supreme Court in *City of Sherrill* expressly *reaffirmed* that "only Congress can divest a reservation of its land and diminish its boundaries," 544 U.S. at 215 n.9 (quoting *Solem*, 465 U.S. at 470), and it did not question the Second Circuit's holding that the Oneida reservation continued to exist. *See Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 156 (2d Cir. 2003) ("the Sherrill Properties are located on reservation land, a status which Congress has never changed"), *rev'd on other grounds*, 544 U.S. 197 (2005); *City of Sherrill*, 544 U.S. at 215 n.9 (recognizing that only Congress can disestablish a reservation, and reserving the question whether Congress had in fact done so); *id.* at 223 (Stevens, J., dissenting) (noting that both the Court and the dissent "accept [the Second Circuit's] conclusions . . . that in 1794 the Treaty of Canandaigua established . . . a federally protected reservation; and that the reservation was not disestablished or diminished by the Treaty of Buffalo Creek"); *Gould*, 930 N.E.2d at 248-49.

even assuming that the County has jurisdiction to tax the land, it may not enforce that tax through the judicial remedy of foreclosure.[10]

That conclusion is hardly anomalous: it is well-settled, for instance, that Indian tribes possess sovereign immunity from suit even in connection with their off-reservation activities – which are most assuredly taxable, and which a state can regulate without interfering with sovereignty over land. *See Kiowa Tribe*, 523 U.S. at 755 (emphasizing that "[t]o say substantive state laws apply to off-reservation conduct . . . is not to say that a tribe no longer enjoys immunity from suit").

As for *City of Sherrill*, that decision has nothing to do with sovereign immunity from suit. As noted above, *City of Sherrill* held only that an Indian tribe may not establish immunity from taxation by reacquiring reservation land on the open market. The Court did state, as the County notes, that the tribe may not "assert *tax* immunity defensively in the eviction proceeding initiated by Sherrill." 544 U.S. at 214 n.7 (emphasis added). Yet it nowhere so much as mentioned sovereign immunity *from suit*. It is therefore unsurprising that, in deciding *Madison County*, the Second Circuit panel did not view *City of Sherrill* as undermining the Supreme Court's "unambiguous guidance," 605 F.3d at 164 (Cabranes, J. concurring), that sovereign immunity from suit barred foreclosure on tribally held land for nonpayment of taxes. *See Madison County*, 605 F.3d at 158-60 (rejecting counties' reliance on *City of Sherrill*, and explaining that "*Sherrill* dealt with the right to demand compliance with state laws" but "did not address the means

[10] Thus, *Gould*'s statement that *City of Sherrill* "would preclude the Cayuga Nation from attempting to assert sovereign power over [its] convenience store properties for the purpose of avoiding real property taxes," 930 N.E.2d at 249 (cited in County's Br. 22) is beside the point, for the Nation is not challenging the County's authority to tax the parcels at issue.

available to enforce those laws" (internal quotation marks omitted)).[11] The district court decisions in *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185 (E.D.N.Y. 2007), and *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F. Supp. 2d 908 (E.D. Wis. 2008), on which the County heavily relies, simply reflect a misreading of *City of Sherrill*.

III. The Nation Has Not Waived Its Sovereign Immunity From Suit.

Finally, the County maintains that the Nation has waived its sovereign immunity from suit. Yet the County fails to grapple with the long-settled principle that an Indian tribe's "waiver of sovereign immunity cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted).

To begin with, the County's argument that the Nation has waived its sovereign immunity from suit is difficult to square with the County's argument that the Nation never had any sovereign immunity from suit in the first instance. But even setting aside that contradiction, the County's waiver arguments cannot succeed.

First, the County maintains that the Nation has waived its sovereign immunity from suit by paying taxes on certain *other* parcels it holds. *See* County's Br. 17. That argument is flawed at every turn. Most fundamentally, the County never explains how it is that, by paying taxes on parcels not at issue in this litigation, the Nation has waived *anything* with respect to the land that

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[11] In support of its more general assertion that "a sovereign entity does not have immunity from suit with respect to properties it owns outside its sovereign jurisdiction" (County's Br. 14), the County cites two cases, both of which are distinguishable. *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), involved the unique setting of eminent domain proceedings, not foreclosure proceedings. In addition, it involved one state's sovereign immunity from suit in the courts of another state, not the federal courts. The Supreme Court has explained that states are free to make their own policy judgments regarding the extent to which their own courts recognize the sovereign immunity of another state. *See Nevada v. Hall*, 440 U.S. 410, 425-26 & n.29 (1979) (discussing *Georgia*). The second case cited, *People ex rel. Hoagland v. Streeper*, 145 N.E.2d 625 (Ill. 1957), likewise is one in which a *state* court rejected another state's claim to sovereign immunity.

is actually involved here. And even if that hurdle could be overcome, the County's waiver argument still suffers from the same flaw that permeates much of its brief: At the absolute most, the Nation has conceded the County's power to impose a tax. Yet the County's possession of that power says nothing about whether it has the *further* power to invoke an enforcement remedy implicating the Nation's sovereign immunity from suit.[12] Certainly, any concession as to the County's authority to tax the Nation's land does not amount to an "unequivocally expressed" waiver of the Nation's sovereign immunity from suit in connection with that land.

Second, the County argues that, because the Nation represented to the New York Court of Appeals in *Gould* that it was in compliance with certain tax obligations, it cannot now assert sovereign immunity from suit in connection with property taxes. Once again, that is a non sequitur. The *Gould* opinion makes clear that the Nation represented it was in compliance with its property tax obligations for the parcels at issue in that litigation – not for the ones involved here. *See Gould*, 930 N.E.2d at 249 n.11 ("The Cayuga Indian Nation acknowledges its obligation to pay real property taxes and comply with local zoning and land use laws *on these parcels* and it is undisputed that the Nation has, to date, fulfilled those obligations" (emphasis added)). And even apart from that, the County offers no reason why a representation of compliance with a law should have the extraordinary consequence of stripping the Nation of its sovereign immunity from suit, or how such a representation could possibly constitute an

[12] The Nation pays taxes on certain other parcels because those parcels are subject of a pending land-into-trust application pursuant to 25 U.S.C. § 465. Regulations implementing that statutory provision require a tribal applicant to furnish "title evidence meeting the Standards For The Preparation of Title Evidence In Land Acquisitions by the United States, issued by the U.S. Department of Justice," and they authorize the Secretary of the Interior to "require the elimination of any . . . liens, encumbrances, or infirmities prior to taking final approval action on the [land-into-trust application] and he shall require elimination prior to such approval if the liens, encumbrances, or infirmities make title to the land unmarketable." 25 C.F.R. § 151.13; *see Madison County*, 605 F.3d at 163 n.1 (Cabranes, J., concurring).

"unequivocally expressed" waiver of sovereign immunity from suit. In any event, the only issue that the Nation "put[] in play through litigation" (County's Br. 17) in *Gould* was that of the Nation's obligation to collect and remit cigarette taxes – not its real property tax obligations, which merely formed part of the background for the suit. *Compare Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 500 F. Supp. 2d 1143, 1150 (E.D. Wisc. 2007) (cited in County's Br. 17) (concluding that, by filing a suit seeking a particular determination, the tribe had waived sovereign immunity from suit as to the defendant's counterclaim for "a determination in its favor on the same issue"); *Wyandotte Nation v. City of Kansas*, 200 F. Supp. 2d 1279, 1284-85 (D. Kan. 2002) (cited in County's Br. 17) (concluding that, by filing a quiet title claim, the tribe had waived sovereign immunity from suit as to the defendant's quiet title counterclaim regarding the same property).[13]

CONCLUSION

The motion for a preliminary injunction should be granted.

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[13] There is a further reason why foreclosure for nonpayment of property taxes would be improper: *solely as a matter of state law*, the parcels at issue are not subject to tax at all, because they fall within the state law exemption for tribally held reservation property. *See* N.Y. Real Property Tax Law § 454 ("The real property in any Indian reservation owned by the Indian nation, tribe or band occupying them [sic] shall be exempt from taxation and exempt from special ad valorem levies and special assessments to the extent provided in section four hundred ninety of this chapter."); N.Y. Indian Law § 6 ("No taxes shall be assessed, for any purpose whatever, upon any Indian reservation in this state, so long as the land of such reservation shall remain the property of the nation, tribe or band occupying the same."); *supra* Part II (discussing continuing existence of the Nation's reservation). This is not an argument that the Nation's parcels are immune from tax as a matter of federal law; rather, it is an argument that *state law by its own terms* exempts them from tax. The relevant state law exemption does not require that the lands in question be subject to tribal sovereign control, nor does it require that they be immune from taxation as a matter of federal law. All that is required is reservation status, which the parcels at issue here possess. *See Oneida Indian Nation of New York v. Madison County*, 401 F. Supp. 2d 219, 231 (N.D.N.Y. 2005), *aff'd on other grounds*, 605 F.3d 149 (2d Cir. 2010), *vacated on other grounds*, 131 S. Ct. 704 (2011); *cf. Gould*, 930 N.E.2d at 244-52 (reaching similar conclusion with respect to tax on cigarette sales).

Dated: March 14, 2011

Respectfully submitted,

/s/ Lee Alcott

David W. DeBruin
Joshua M. Segal
JENNER & BLOCK LLP
1099 New York Avenue, NW
Washington, DC 20001
(202) 639-6000

Daniel French
Lee Alcott
FRENCH-ALCOTT, PLLC
One Park Place
300 South State Street
Syracuse, NY 13202
(315) 413-4050