12-3723-cv

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

CAYUGA INDIAN NATION OF NEW YORK,

Plaintiff-Appellee,

v.

SENECA COUNTY, NEW YORK,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of New York (Siragusa, J.)

BRIEF FOR PLAINTIFF-APPELLEE

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INTRODUCTION

Just three years ago, in *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 (2d Cir. 2010), this Court had little trouble concluding that, under a straightforward application of settled Supreme Court precedent, sovereign immunity from suit bars local government officials from foreclosing on lands owned by an Indian tribe. Although the Supreme Court vacated *Madison County* after the tribe there waived its sovereign immunity, none of the underlying precedent has changed. This case presents exactly the same issue as *Madison County*, with Seneca County ("the County") making many of the same arguments that this Court rejected in that case. Having assessed *ad valorem* property taxes on lands owned by the Cayuga Indian Nation of New York ("the Cayuga Nation" or "the Nation"), the County now seeks to foreclose upon those lands for nonpayment of taxes.

As the district court correctly held, the Nation's sovereign immunity prohibits the County's efforts to foreclose on Nation-owned land. Sovereign immunity from suit – a bedrock principle of federal Indian law – permits a suit against an Indian tribe only where Congress authorizes the suit or the tribe unequivocally waives its sovereign immunity. That is true even where a state or local government has the power to *impose* the tax or regulation that it seeks to enforce in court. And it is clear that this principle applies with equal force to

foreclosures on tribally owned land (as *Madison County* confirmed), even though the tribe's name may not actually appear in the case caption. Because Congress has not authorized the County's proposed foreclosures, nor has the Nation waived its sovereign immunity, the foreclosures are prohibited.

In an effort to avoid this result, the County's brief largely attempts to blend a tribe's immunity from *taxation* with its sovereign immunity from *suit*. But it is clear that, even if a state may permissibly *impose* a tax on an Indian tribe, sovereign immunity may prohibit the state from pursuing judicial remedies against the tribe. Alternatively, the County argues that sovereign immunity is irrelevant to foreclosure actions because they are *in rem* proceedings. Yet the Supreme Court has repeatedly recognized that regardless of how a suit against property is formally characterized, it is in substance a suit against the sovereign and thus within the compass of sovereign immunity. Finally, the County makes the extraordinary argument that, by *paying taxes* on parcels of land that are not even at issue here, the Nation has somehow waived its sovereign immunity *from suit* as to all other parcels owned by the Nation. Whatever the import of the Nation's payment of taxes, it certainly does not amount to the unequivocal waiver that courts repeatedly have found necessary to vitiate a tribe's sovereign immunity.

This Court should reach the same conclusion as the *Madison County* panel, and affirm the district court's grant of preliminary injunctive relief to the Nation.

JURISDICTION

The Nation agrees with the statement of jurisdiction provided by the County.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether tribal sovereign immunity from suit bars Seneca County from foreclosing on parcels of land owned by the Nation.

2. Whether the Nation has waived its sovereign immunity from suit by paying taxes on other parcels of land and acknowledging as much in separate litigation.[1]

STATEMENT OF FACTS

The Cayuga Nation is an Indian nation recognized under federal law. *See, e.g.*, Indian Entities Recognized and Eligible to Receive Services from the United States Bureau of Indian Affairs, 67 Fed. Reg. 46328 (July 12, 2002). In 1794, the United States recognized the Nation's 64,000-acre reservation – located within the boundaries of New York State – and pledged that the "reservation[ ] shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." Treaty of Canandaigua, Act of Nov. 11, 1794, 7 Stat. 44, 45, Art. II.

[1] The County lists five issues presented for review. County Br. 1–2. The Nation's first issue encompasses the County's first three issues, and the Nation's second issue corresponds to the County's fourth issue. The fifth issue listed by the County – whether the Nation has a "reservation" under federal law or otherwise maintains sovereignty over the parcels at issue here – need not be decided because in no event does sovereign immunity from suit depend on these considerations. *See infra* pp. 31–35 & n.12.

Congress has never taken action to disestablish the Nation's federal treaty reservation. Long ago, however, the State of New York purported to acquire all of the Nation's reservation land. *Compare* 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."). In recent years, the Nation has repurchased parcels of that land – including land within Seneca County – on the open market. Seneca County, in turn, has sought to collect *ad valorem* property taxes on Nation-owned parcels, including the five parcels at issue in this litigation. A52–54.

In late 2010, the County initiated proceedings to foreclose on those five Nation-owned properties for nonpayment of taxes, advising the Nation of those proceedings in a series of "Tax Enforcement Notifications." *See* A60–70. The Nation attempted to persuade Seneca County to withdraw these parcels from foreclosure. As part of that effort, the Nation pointed to this Court's decision in *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 (2d Cir. 2010), *subsequently vacated*, 131 S. Ct. 704 (2011), which had held – in materially identical circumstances – that the Oneida Indian Nation's sovereign immunity from suit barred two counties from foreclosing on its land for non-payment of taxes.

The County determined it would press forward with foreclosure, however, and in January 2011, the Nation commenced this action for permanent declaratory and injunctive relief. *See* A4–12. At the same time, the Nation sought a preliminary injunction on the ground that foreclosure upon Nation-owned properties would violate its sovereign immunity from suit. *See* A24–39.[2] The parties agreed to stay the foreclosure proceedings while the Nation's motion for a preliminary injunction remained pending. *See* A169.

Ultimately, the district court granted the Nation's motion for a preliminary injunction. A167–81. As the court explained, "[a] lengthy discussion [was] unnecessary," because "Supreme Court precedent clearly determine[d] the outcome" of the motion. A171. The district court continued:

> Even assuming that Seneca County has the right to impose property taxes on the subject parcels owned by the Cayuga Indian Nation, it does not have the right to collect those taxes by suing to foreclose on the properties, unless Congress authorizes it do so, or unless the Cayuga Indian Nation waives its sovereign immunity from suit. Congress has not authorized Seneca County to sue the Cayugas, and the Cayugas have not waived their sovereign immunity. Consequently, the Cayugas' motion

[2] The Nation's amended complaint added a count alleging that the assessment of taxes on Nation-owned lands violated New York State law. A57. That district court did not consider that count in granting the Nation preliminary injunctive relief, and it is not at issue here. Nor is the applicability of the Indian Trade and Intercourse Act (ITIA) at issue here: before the district court, the Nation disclaimed the ITIA as a basis for injunctive relief. A126 n.2, 170 n.3; *compare* County Br. 32–33.

> for an order enjoining the foreclosure actions must be granted.

Id. In reaching this conclusion, the district court relied on Supreme Court precedent holding that even if a state has authority to tax or regulate an Indian tribe's activities, it does not necessarily have the ability to sue the tribe to enforce the tax or regulation. *See* A171–72 (discussing *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998)).

The Court explained that *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), was fully consistent with this distinction: Although the Supreme Court there held that certain land owned by the Oneida Nation was not exempt from property taxation, "it did not explicitly hold that the City of Sherrill could sue the Oneidas to collect unpaid taxes." A173. The district court recounted that following *City of Sherrill*, this Court confirmed the distinction between a tribe's immunity from taxation and its immunity from suit. Specifically, in *Madison County*, this Court held that even if New York counties could *tax* land owned by the Oneidas, "the long-standing doctrine of tribal sovereign immunity" prohibited them from *foreclosing on* that land based on nonpayment of taxes. *Id.* (quoting *Madison County*, 605 F.3d at 151). The district court acknowledged that, while the Nation's motion for a preliminary injunction in this case was pending, the Oneida Indian Nation had waived its sovereign immunity from foreclosure proceedings, causing the Supreme Court to vacate this Court's decision in *Madison County*. *See*

Madison Cnty. v. Oneida Indian Nation of N.Y., 131 S. Ct. 704 (2011) (*per curiam*). As the district court explained, however, the Supreme Court's decision to vacate did not depend "on the merits" of this Court's decision in *Madison County*. A175. And the district court could find "no reason to believe that the Second Circuit would reach a different decision" if presented with the same question today. *Id*. That is because the decision in *Madison County* "was necessitated by 'unambiguous guidance from the Supreme Court,' which has not changed." *Id.* (quoting *Madison County*, 605 F.3d at 164 (Cabranes, J., concurring)).

Finally, the district court rejected the County's other arguments, including (a) that the Nation had waived its sovereign immunity from suit by paying taxes on certain parcels of land other than the ones at issue here; and (b) that the Nation should be estopped from claiming sovereign immunity from suit because in an earlier and unrelated state court action, it had indicated that it paid property taxes on those other parcels. A180–81. The district court therefore granted the Nation's motion for preliminary injunctive relief. This appeal followed.

SUMMARY OF ARGUMENT

The district court correctly held that sovereign immunity from suit precludes the County from foreclosing on Nation-owned lands. Under a long line of Supreme Court precedent, tribal sovereign immunity bars any suit against an Indian tribe, unless the tribe consents or Congress authorizes the suit. That is true

even if the state has authority to *regulate* the activities giving rise to the suit. Indeed, the very premise of tribal sovereign immunity is that there are some regulations that a state may validly impose on a tribe, but that the state nonetheless may not enforce by means of a lawsuit against the tribe. It is well-settled, accordingly, that even where a tribe lacks immunity from taxation, sovereign immunity from suit may bar a state from suing to enforce the tax.

That principle applies with equal force to suits to foreclose on property owned by an Indian tribe: such suits are, in substance, suits against the tribe. This Court easily reached that conclusion in *Madison County* – a decision that, although subsequently vacated, recognized that its result was commanded by Supreme Court precedent. That precedent still has not been disturbed.

The County's contrary arguments largely conflate the distinct concepts of immunity *from taxation* and sovereign immunity *from suit*. Although both of these doctrines are grounded in concepts of Indian sovereignty, the Nation asserts only the latter here. The Nation does not claim that the lands at issue in this case are immune from taxation as a matter of federal law. Rather, the Nation claims, and the district court correctly held, that *even if* the County may impose the taxes in question, it may not enforce those taxes through the judicial remedy of foreclosure. Viewed in this light, the County's arguments – including its reliance on the Supreme Court's holding in *City of Sherrill v. Oneida Indian 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 beside the point. Indeed, in *Madison County*, this Court addressed the same decisions and arguments, concluding that tribal sovereign immunity prohibited foreclosure in circumstances just like those at issue here.

The County nonetheless contends that sovereign immunity from suit is inapplicable here because foreclosure proceedings are *in rem*, rather than *in personam*. But neither this Court nor the Supreme Court has adhered to that distinction where a sovereign's immunity from suit is at stake. In fact, although the county defendants in *Madison County* raised the same objection, this Court found that foreclosure actions were barred by the Oneidas' sovereign immunity from suit. Alternatively, the County maintains that sovereign immunity does not apply here because the lands themselves are not "sovereign" and purportedly do not lie within a federal reservation. But there is no basis to hold that tribal sovereign immunity bars foreclosure against only *some* tribally-owned lands. Indeed, the Supreme Court has made clear that a tribe's sovereign immunity from suit applies even where the underlying activities take place away from Indian lands.

Finally, the County asserts that the Nation has waived its sovereign immunity from suit by paying taxes on *other* parcels of land not at issue here, and

by making certain representations about those payments before the New York Court of Appeals. But a tribe's waiver of sovereign immunity must be unequivocally expressed. Far from unequivocally expressing such a waiver, the Nation's payments can scarcely be understood even to concede that these *other* lands are *subject to tax*. A fortiori, they say nothing at all about whether sovereign immunity *from suit* applies with respect to the lands at issue in *this* litigation.

This Court should affirm the district court's grant of injunctive relief.

ARGUMENT

I. Standard Of Review

This Court reviews a district court's decision to grant a preliminary injunction for an abuse of discretion. *See, e.g., Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011). "An abuse of discretion occurs if the district court '(1) based its ruling on an erroneous view of the law, (2) made a clearly erroneous assessment of the evidence, or (3) rendered a decision that cannot be located within the range of permissible decisions.'" *Id.* (quoting *Lynch v. City of N.Y.*, 589 F.3d 94, 99 (2d Cir. 2009)). Under this standard, this Court reviews *de novo* the legal conclusions underlying the district court's decision. *Id.*[3]

[3] On appeal, the County challenges the district court's determination that the Nation was indeed likely to prevail on the merits but does not contend that the preliminary injunction was otherwise inappropriate.

II. Tribal Sovereign Immunity From Suit Prohibits The County From Foreclosing On Nation-Owned Lands.

The district court properly held that tribal sovereign immunity from suit prohibits the County from foreclosing on Nation-owned lands. As a long line of Supreme Court precedent makes clear – and as this Court had little trouble concluding in *Madison County* – that is true even if the County has the power to impose *ad valorem* taxes on the lands in question. It is also true regardless of whether the lands in question are considered "sovereign" or part of a "reservation."

A. Long-Settled Precedent Dictates That Sovereign Immunity Bars Foreclosure On Nation-Owned Lands.

The doctrine of tribal sovereign immunity is a bedrock principle of federal Indian law. As the Supreme Court has explained, "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *see also, e.g.*, *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 356 (2d Cir. 2000). This means that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754 (1998). The doctrine of tribal sovereign immunity flows from the tribes' status "[a]s sovereigns or quasi sovereigns," *id.* at 757, and it "reflects the Constitution's treatment of Indian tribes as governments in the Indian commerce clause," Felix S.

Cohen, *Handbook of Federal Indian Law* § 7.05[1][a], at 636 (Nell Jessup Newton et al. eds., 2012). Thus, as opposed to other types of immunity – including the immunity from taxation that tribes enjoy on reservation land – "a tribe's immunity from suit is independent of its lands." *Madison County*, 605 F.3d at 157.

The distinction between immunity *from suit* and immunity *from taxation* is critical. The Nation does not contend that federal law prohibits the County from imposing taxes on the lands in question. Instead, the Nation asserts that it is immune *from suit* for failure to pay taxes, regardless of whether those taxes are validly imposed. And as the Supreme Court has long held, sovereign immunity from suit applies even where a tribe is subject to state law, including state taxes. As the Court has explained, "[t]o say substantive state laws apply to [certain] conduct . . . is not to say that a tribe no longer enjoys immunity from suit." *Kiowa*, 523 U.S. at 755. Or, put differently, "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Id*. (citations omitted).

The Supreme Court's decisions in *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and *Kiowa* make this point clear. In *Potawatomi*, the Court held that Oklahoma could require an Indian tribe to collect certain taxes, but that tribal sovereign immunity prohibited the State from suing the tribe to compel the collection of those taxes.

498 U.S. at 510–14. The State complained that this decision "impermissibly burden[ed] the administration of state tax laws." *Id.* at 510; *see id.* at 514 (noting State's argument that holding sovereign immunity from suit applicable would "give [it] a right without any remedy"). Yet the Court refused to cut back on the tribe's sovereign immunity from suit, noting that "[a]lthough Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments." *Id.* at 510. The Court further noted that if the State ultimately remained unsatisfied with its alternatives, it could "seek appropriate legislation from Congress." *Id.* at 514.

Seven years after *Potawatomi*, the Court reaffirmed this reasoning in *Kiowa*. There, the Court held that a tribe was entitled to sovereign immunity from suit on a promissory note that it had signed, regardless of whether it had done so on or off the reservation, and even though the note allegedly related to the tribe's commercial activities. Relying on its decision in *Potawatomi*, the Court once again recognized that while a state may have authority to tax or regulate tribal activities, it does not necessarily follow that the state may sue to enforce those regulations or compel payment of those taxes. 523 U.S. at 755; *see also, e.g.*, *Santa Clara Pueblo*, 436 U.S. at 58, 59 (holding that the Indian Civil Rights Act (ICRA) "modifies the substantive law applicable to the tribe," but that "suits against the tribe under the ICRA are barred by its sovereign immunity from suit").

Although acknowledging that this distinction may be troublesome where tribes engage in extensive commercial activities, the Court reaffirmed that any changes to a tribe's sovereign immunity from suit must be made by Congress, rather than the judiciary. 523 U.S. at 758–59.

Sovereign immunity from suit precludes an action to foreclose on tribally owned lands for nonpayment of taxes. Indeed, a unanimous panel of this Court had no trouble reaching precisely this conclusion in *Madison County*. The *Madison County* panel held that "the remedy of foreclosure is not available to the Counties unless and until Congress authorizes such suits or the [Oneida Nation] consents to such suits," and that "[b]ecause neither of these events has occurred, the foreclosure actions are barred by the [Oneida Nation's] immunity from suit." *Madison County*, 605 F.3d at 159. And Judge Cabranes – who expressed discomfort with the result – explained, in a concurrence joined by Judge Hall, that "absent action by our highest Court, or by Congress, it is the law" 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." *Id.* at 163–64 (citing *Kiowa*, 523 U.S. at 755, *Potawatomi*, 498 U.S. at 514; and *City of Sherrill*, 544 U.S. 107).

This Court's holding in *Madison County* is consistent not only with Supreme Court precedent on tribal sovereign immunity from suit, but also with precedent on

the immunity of the United States.[4] Even if the United States is bound by a state's substantive law, it is nonetheless immune from a foreclosure suit to enforce it. Thus, in *United States v. Alabama*, the Supreme Court noted that even if a tax lien on federal property was valid, enforcement "proceedings could not be taken against the United States without its consent." 313 U.S. 274, 281 (1941). Accordingly, the Court invalidated tax sales of government property because "[a] proceeding against property in which the United States has an interest is a suit against the United States." *Id.* at 282. Along the same lines, in *United States v. Lewis County*, 175 F.3d 671, 674, 678 (9th Cir. 1999), the Ninth Circuit held that although a federal statute allowed a county to tax property owned by a federal agency, the United States' sovereign immunity from suit precluded the county from foreclosing on its property. *See id.* at 678 (recognizing that "the inability to foreclose impairs the County's ability to collect its tax," but observing that this circumstance is common "when a taxing authority deals with another sovereign").

The fact that the Supreme Court ultimately vacated this Court's *Madison County* decision is of no consequence for this case. As the County observes

[4] The immunities of federal, state, foreign and tribal sovereigns have common foundations, and precedent regarding other sovereigns may shed light on tribal sovereign immunity from suit. *See, e.g.*, *C&L Enters., Inc. v. Citizen Band of Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001); *Kiowa*, 523 U.S. at 759; *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512–13 (1940); *Garcia v. Akwesasne Hous. Auth.*, 268 F.3d 76, 86–87 (2d Cir. 2001).

(County Br. 15–16), after the Supreme Court granted certiorari in *Madison County*, the Oneida Indian Nation waived its sovereign immunity with respect to foreclosure against Oneida-owned property. In response, the Supreme Court vacated this Court's judgment and remanded the case to this Court. *Madison County v. Oneida Indian Nation of N.Y.*, 131 S. Ct. 704 (2011). But the Supreme Court expressed no view on the merits of this Court's analysis. It simply recognized that, due to this "new factual development," this Court should have the opportunity to "address, in the first instance, whether to revisit its ruling on sovereign immunity . . . and – if necessary – proceed to address other questions in the case." *Id.*; *cf. Levas & Levas v. Village of Antioch*, 684 F.2d 446, 451 (7th Cir. 1982) (noting that the Supreme Court's decision to vacate in light of a change in law expressed no view on the merits); Eugene Gressman et al., *Supreme Court Practice* 348–49 (9th ed. 2007) (noting that where the Supreme Court grants, vacates, and remands a case in light of new case law, "the lower court is being told merely to reconsider the entire case in light of the intervening precedent – which may or may not compel a different result").[5]

[5] On remand in *Madison County*, this Court "accept[ed] [the Tribe's] abandonment of its immunity-based claims" but refused to disturb its prior determination that the Oneidas' reservation had not been disestablished or diminished. *Oneida Indian Nation of N.Y. v. Madison Cnty.* ("*Madison County II*"), 665 F.3d 408, 425, 443–44 (2d Cir. 2011) (citing *Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 169 (2d Cir. 2009); *Madison County*, 605

Here, moreover, the Supreme Court's vacatur in *Madison County* does nothing to detract from the persuasive power of this Court's decision. As Judge Cabranes explained in concurrence, the decision in *Madison County* was compelled by "unambiguous guidance from the Supreme Court," including its decisions in *Potawatomi* and *Kiowa*. *Madison County*, 605 F.3d at 164 (Cabranes, J., concurring). In the three years since this Court's decision, nothing of relevance has changed. As a result, this Court is identically situated to the panel that decided *Madison County*, and it should reach the same conclusion: the Nation's sovereign immunity bars a foreclosure action for nonpayment of taxes on Nation-owned lands. *See* A175 (district court statement that "[a]lthough the Supreme Court vacated the Second Circuit's ruling, it did not do so on the merits, and there is no reason to believe that the Second Circuit would reach a different decision today," and that "Judge Cabranes' concurring opinion, which Judge Hall joined, indicated

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F.3d at 157 n.6)), *petition for cert. filed*, 81 U.S.L.W. 3277 (U.S. Nov. 12, 2012). Madison and Oneida Counties petitioned for a writ of certiorari on that question, and on February 13, 2013, the Supreme Court called for the views of the Solicitor General. *See Madison Cnty. v. Oneida Indian Nation of N.Y.*, 133 S. Ct. 1310 (2013). Of course, the Supreme Court's decision to seek the United States' views as to whether certiorari should be granted says nothing about the merits of the underlying dispute. And the question whether the Oneidas retain a reservation is irrelevant to the question presented here: whether, regardless of the reservation status of Nation-owned lands, the Cayugas' sovereign immunity from suit prohibits the County from foreclosing on those lands for nonpayment of taxes.

that the Panel's ruling was necessitated by 'unambiguous guidance from the Supreme Court,' which has not changed").

B. *City of Sherrill* Does Not Command A Result For The County.

The County makes much of the Supreme Court's decision in *City of Sherrill*, which it contends bars a claim like the one the Nation makes here. But *City of Sherrill* has no relevance here, because it was a case about immunity *from taxation* – not immunity *from suit*.

City of Sherrill involved the Oneida Indian Nation's open-market purchase of land that was within the Oneidas' historical reservation, but that had been governed by the State of New York and its counties since 1805. The Oneidas sought "declaratory and injunctive relief recognizing [their] present and future sovereign immunity from local taxation" with respect to the land. 544 U.S. at 214; *see Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 764–65 (1985) (explaining that states may not impose real property taxes on certain Indian lands). The Supreme Court denied this relief. It explained that "the distance from 1805 to the present day, the Oneidas' long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke[d] the doctrines of laches, acquiescence, and impossibility, and render[ed] inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." 544 U.S. at 221.

The Supreme Court's decision in *City of Sherrill* made clear what it was rejecting: the Oneida Nation's claim of *tax* immunity, not sovereign immunity *from suit*. As noted above, the Court observed that the Oneidas sought to establish their "present and future sovereign immunity *from local taxation*." *Id.* at 214 (emphasis added); *see id.* at 215 n.9 (describing "[t]he relief" that the Oneidas sought as "recognition of present and future sovereign authority to remove the land from local taxation"). The Supreme Court had no occasion to consider any aspect of tribal sovereign immunity from suit – including whether the city could invoke the remedy of foreclosure for nonpayment of validly imposed taxes. That is why, in *Madison County*, this Court readily reached the conclusion that sovereign immunity barred foreclosure on Oneida-owned land despite the *City of Sherrill* decision. *See Madison County*, 605 F.3d at 159 ("*Sherrill* dealt with 'the right to demand compliance with state laws.' It did not address 'the means available to enforce' those laws." (quoting *Kiowa*, 523 U.S. at 755)).

The County grounds its contrary argument in *City of Sherrill*'s rejection – in a footnote – of the notion that "the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill." County Br. 15 (quoting *City of Sherrill*, 544 U.S. at 214 n.7) (emphasis deleted); *see also* County Br. 29. But that statement, too, concerned only immunity from taxation. As previously noted, the majority in *City of Sherrill* grounded its holding in the equitable nature of the relief

the Oneida Nation sought. *See* 544 U.S. at 214, 217, 221. In dissent, Justice Stevens argued that the majority's "distinction between law and equity [wa]s unpersuasive" because the "narrow legal issue" before the Court – the question of the tribe's "tax immunity" – also could have been raised "by a tribe as a *defense* against a state collection proceeding," *i.e.*, in an action at law. *Id.* at 225–26 (Stevens, J., dissenting). The majority responded that the Oneida Nation could not assert tax immunity defensively because "[t]he equitable cast of the relief sought remains the same." *Id.* at 214 n.7. In other words, the majority said that the Oneida Nation could not avoid tax enforcement suits by claiming immunity *from taxation*. It said nothing about the tribe's ability to claim immunity *from suit.*

Nor could the majority's back-and-forth with Justice Stevens possibly bear the weight that the County assigns to it. As discussed previously, *see supra* pp. 11–15, the Supreme Court has long recognized that a tribe may be subject to taxation but immune from a suit to collect taxes. It would have been quite odd for the Supreme Court to set aside this distinction and overrule cases like *Kiowa* and *Potawatomi* without so much as mentioning them. *See Peck ex rel. Peck v. Baldwinsville Cent. Sch. Dist.*, 426 F.3d 617, 633 (2d Cir. 2005) ("[W]e are reluctant to conclude that the Supreme Court would, without discussion and indeed totally *sub silientio*, overrule" its precedent.). So too, it is unlikely that, without any discussion, *City of Sherrill* overturned the Court's longstanding recognition

that an Indian tribe's immunity from suit persists unless and until Congress abrogates that immunity or the tribe waives it. *See, e.g.*, *C&L Enters.*, 532 U.S. at 418; *Kiowa*, 523 U.S. at 759. *City of Sherrill* should be interpreted at face value to address only the question of immunity from taxation.[6]

C. The County Cannot Avoid Sovereign Immunity From Suit By Invoking An *In Rem*/*In Personam* Distinction.

Alternatively, the County argues that even if the Nation generally enjoys sovereign immunity from suit, that immunity is irrelevant here because foreclosure proceedings are *in rem*, not *in personam*. County Br. 18–19. But both the Supreme Court and this Court (in *Madison County*) have rejected the argument that foreclosure on land owned by a sovereign can proceed in the face of the sovereign's immunity from suit. The County offers no reason for this Court to break with precedent and deem the *in rem*/*in personam* distinction dispositive.

1. Supreme Court Precedent Rejects The Notion That A Tribe's Sovereign Immunity From Suit Is Irrelevant To An *In Rem* Foreclosure Action.

With limited exceptions not applicable here (*see infra* pp. 27–28), the Supreme Court has rejected the notion that there is a meaningful difference

[6] For these reasons, the Nation respectfully submits that the district court in *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F. Supp. 2d 908, 934 (E.D. Wis. 2008) (cited at County Br. 17–18), misread *City of Sherrill* when it concluded that "the right of a local government to foreclose for nonpayment of taxes implicit in *Sherrill*'s holding that the [tribe's] reacquired property is subject to *ad valorem* property taxes." *Id*.

between *in personam* and *in rem* jurisdiction for purposes of sovereign immunity. *See United States v. Nordic Village, Inc.*, 503 U.S. 30, 38 (1992). The Supreme Court has repeatedly recognized that a suit against the land of a sovereign is a suit against the sovereign itself.[7] In *United States v. Alabama*, 313 U.S. 274 (1941), discussed above, the Court ruled that sovereign immunity would prohibit the State from suing the United States to enforce liens on federally owned lands, and it invalidated state court proceedings for sale of those lands. As the Court explained, "[a] proceeding against property in which the United States has an interest is a suit against the United States," and thus is barred by federal sovereign immunity. *Id.* at 282; *see also, e.g.*, *The Siren*, 74 U.S. (7 Wall) 152, 154 (1868) ("[T]here is no distinction between suits against the government directly, and suits against its property."); *Minnesota v. United States*, 305 U.S. 382, 386 (1939) (collecting authority for the proposition that proceedings against federally owned property are suits against the United States). Thus, it is clear that the *in rem* status of a suit to foreclose on federally owned property does not defeat sovereign immunity. There

[7] Courts apply a similar rule in admiralty. While the Supreme Court has held that a libel action may proceed against a ship that is *not* in the state's possession, it has strongly suggested that sovereign immunity would bar the same action where the state has actual possession of the res. *See California v. Deep Sea Research, Inc.*, 523 U.S. 491, 501–08 (1998). And at least prior to the passage of the Foreign Sovereign Immunities Act, sovereign immunity also protected the ships of foreign nations from *in rem* libel actions. *See Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562, 574–76 (1926); *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 143–45 (1812).

is no reason to reach a different conclusion with respect to property owned by an Indian tribe. *See, e.g.*, *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512–13 (1940) (suggesting that similar policies underlie federal and tribal sovereign immunity).

Indeed, the County's proposed *in rem*/*in personam* distinction makes little practical sense. Although foreclosure actions against a sovereign's land technically are *in rem*, they clearly affect the sovereign's interests and involve it in litigation. As the Supreme Court has recognized, "[t]he phrase 'judicial jurisdiction over a thing' is a customary elliptical way of referring to jurisdiction *over the interests of persons* in a thing." *Shaffer v. Heitner*, 433 U.S. 186, 207 (1977) (quoting *Restatement (Second) of Conflict of Laws* § 56, Introductory Note (1971) (emphasis added)); *see id.* at 207 n.22 ("All proceedings, like all rights, are really against persons. Whether they are proceedings or rights *in rem* depends on the number of persons affected." (quoting *Tyler v. Court of Registration*, 55 N.E. 812, 814 (Holmes, C. J.)), *appeal dismissed*, 179 U.S. 405 (1900)). Consistent with this understanding of *in rem* proceedings, both the federal Constitution and New York law require that an Indian nation, like any owner, be notified of an *in rem* suit against its property. *See Shaffer*, 433 U.S. at 206 (collecting cases); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 312–13 (1950) (due process notice requirements do not depend on whether litigation is *in personam* or

in rem); N.Y. Real Prop. Tax Law § 1125 (requiring notice to all with interest in the property). When sovereign land is subject to foreclosure, in short, the sovereign is necessarily involved in the litigation. That the litigation is labeled "*in rem*" makes no difference.

Contrary to the County's contentions, *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), did not create a foreclosure exception to tribal sovereign immunity. Like *City of Sherrill*, *Yakima* involved immunity from taxation, not sovereign immunity from suit. There, the question presented was whether "the County of Yakima may *impose* an *ad valorem* tax on so-called 'fee-patented' land located within the Yakima Indian Reservation, and an excise tax on sales of such land." *Id.* at 253 (emphasis added). The Court held that the Act permitted the county to impose the *ad valorem* tax but not the excise tax. *Id.* at 268–70.

The County nonetheless reads *Yakima* to embrace its contention that because real property tax issues "involve *in rem* rather than *in personam* jurisdiction," they "do *not* implicate sovereign immunity." County Br. 18–19. That is a misreading of *Yakima*. The County relies on a section of the opinion that distinguished *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976). *Moe* had held that certain *in personam* taxes on Indian residents of a reservation would yield an impermissible "checkerboard" of jurisdiction dependent

on whether the regulated individual was a tribal member. *See id.* at 478–79. In upholding the taxes at issue in *Yakima*, the Court distinguished *Moe* by explaining that the challenged taxes were on the land (*in rem*) rather than on the tribal member's activities (*in personam*). Thus, in the Court's view, the *Yakima* taxes would not yield an impermissible "checkerboard" of regulation, for the tax assessor's "parcel-by-parcel determinations" on the reservation would "not differ significantly from those he must make off the reservation, to take account of immunities or exemptions enjoyed, for example, by federally owned, state-owned, and church-owned lands." *Yakima*, 502 U.S. at 265. This statement – addressing whether the taxes could be lawfully imposed – says nothing at all about the separate question whether the tribe's sovereign immunity from suit would prohibit Yakima County from enforcing the taxes through foreclosure.

Finally, the County observes that *Yakima* "arose out of foreclosure proceedings and nowhere did the Supreme Court question the validity of those proceedings." County Br. 20. But again, the question whether foreclosure proceedings are barred by tribal sovereign immunity was not before the Court. The Court gave no indication that it was reaching beyond the question presented to address whether sovereign immunity barred a foreclosure remedy for nonpayment of taxes. Indeed, the Court never once mentioned sovereign immunity from suit – and, after a passing reference in its statement of factual background, never

mentioned foreclosure. *Yakima* therefore provides no support for the County's assertion that it may foreclose on tribally owned land without trenching on sovereign immunity.[8]

2. This Court Has Rejected The Argument That Tribal Sovereign Immunity Permits *In Rem* Foreclosure Actions.

Consistent with the weight of Supreme Court precedent, this Court has already considered and rejected the precise argument that the County makes here. In *Madison County*, the county defendants argued that the Oneidas' sovereign immunity from suit did not apply in an *in rem* tax foreclosure proceeding. The district court rejected this argument, explaining that "[t]he County cannot circumvent Tribal sovereign immunity by characterizing the suit as *in rem*, when it is, in actuality, a suit to take the tribe's property." *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 401 F. Supp. 2d 219, 229 (N.D.N.Y. 2005) (citing *Kiowa* and *Nordic Village*), *aff'd*, 605 F.3d 149 (2d Cir. 2010), *vacated*, 131 S. Ct. 704 (2011). On appeal, the county defendants renewed their argument that the *in rem* nature of a New York foreclosure proceeding made the tribe's sovereign immunity from suit

[8] The County also highlights (County Br. 20) the *Yakima* Court's statement that "[w]hile the *in personam* jurisdiction over reservation Indians at issue in *Moe* would have been significantly disruptive of tribal self-government, the mere power to assess *and collect* a tax on certain real estate is not." 502 U.S. at 265 (emphasis added). Because the Court repeatedly indicated that it was addressing only whether a tax could be *imposed*, the Court's statement about the "power to assess and collect" the tax cannot sensibly be read as an implicit embrace of the power to foreclose on tribally owned land in the face of tribal sovereign immunity.

irrelevant. *See* Brief and Special Appx. For Defendants-Counterclaimants-Appellants at 57–61, *Oneida Nation of N.Y. v. Madison Cnty.*, 605 F.3d 149 (2d Cir. 2010) (No. 05-6308), 2007 WL 6432637.

As discussed above, this Court affirmed in *Madison County*, holding that the Oneida Nation's sovereign immunity from suit barred foreclosure on tribally owned land. Although the panel did not expressly address the *in rem*/*in personam* distinction, it necessarily must have rejected the County's argument and determined that the *in rem* status of a foreclosure action does not render tribal sovereign immunity inapplicable. Otherwise, this Court would have had to reverse, rather than affirm, the district court's judgment. *Cf., e.g., Todd & Co. v. SEC*, 637 F.2d 154, 155–56 (3d Cir. 1980) (determining that, in affirming the Securities and Exchange Commission's finding of a violation, a prior panel of the same court must have rejected each of petitioners' arguments); *United States v. Minicone*, 994 F.2d 86, 89 (2d Cir. 1993) (explaining that under the law of the case doctrine, "where issues have been explicitly *or implicitly* decided on appeal, the district court is obliged, on remand, to follow the decision of the appellate court" (emphasis added)).

3. The County's Other Authorities Do Not Counsel A Different Conclusion.

Left without support for its proposed *in rem*/*in personam* distinction, the County points to a series of cases that are distinguishable, not authoritative, or

both. The County first cites Supreme Court cases arising in bankruptcy. *See* County Br. 20–24. But one of those cases, *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992), actually *rejects* an "*in rem* exception to the sovereign-immunity bar against monetary recovery." *Id.* at 38. And while subsequent cases decline to apply state sovereign immunity from suit to particular bankruptcy proceedings, they rest expressly on the unique history of the Bankruptcy Clause. As the Supreme Court explained in *Central Virginia Community College v. Katz*, 546 U.S. 356 (2006), when the states accepted the Clause and ratified the Constitution, they "agreed . . . not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies.'" *Id.* at 377; *see also id.* at 363, 369–70. The facts of this case, of course, do not implicate the Bankruptcy Clause. Nor has the Nation otherwise ceded its sovereign immunity. The bankruptcy cases thus provide no support for the County's position here.[9]

[9] Moreover, the Court in *Katz* did not categorically deem state sovereign immunity inapplicable to *in rem* bankruptcy proceedings; rather, it explained that *in rem* bankruptcy jurisdiction "does not implicate state sovereignty to *nearly the same degree* as other kinds of jurisdiction." *Cent. Va. Cmty. College*, 546 U.S. at 378 (emphasis added). Thus, even in bankruptcy, the Court has declined to hold that "every exercise of a bankruptcy court's *in rem* jurisdiction will not offend the sovereignty of the State." *Tenn. Student Assistance Corp. v. Hood*, 541 U.S. 440, 450 n.5 (2004).

The County next relies on several cases involving tribal lands. But none of those cases is binding, none addressed a foreclosure action, and several involved post-litigation transfers of land to tribes in apparent attempts to thwart a court's jurisdiction. In *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379 (Wash. 1996), the plaintiff sued to partition and quiet title to a parcel of land; thereafter, certain individual owners transferred their interests to the Quinault Indian Nation. 929 P.2d at 380; *see id.* at 381. The Washington Supreme Court held that this litigation tactic did not eliminate the trial court's *in rem* jurisdiction, in part because the action did not have the potential to divest the tribe of property. *See id.* at 384–85. Instead, the plaintiff "merely [sought] a judicial determination of the cotenants' relative interests in real property and a division of that property according to those interests." *Id.* at 385. Thus, sovereign immunity did not bar the suit because "[t]he Quinault Nation would lose no property or interest for which it holds legal title." *Id.* Obviously, the same cannot be said of Seneca County's efforts to foreclose on property owned by the Cayuga Nation.

Smale v. Noretep, 208 P.3d 1180, 1184 (Wash. Ct. App. 2009), is distinguishable on similar grounds. In *Smale*, plaintiffs sought to quiet title to property they claimed to have acquired through adverse possession. After suit was filed, the original owner transferred title to a tribe, but *Smale* held that the transfer did not divest the court of jurisdiction. *Id.* at 1180. Again, the court emphasized

that the action "would not deprive the Tribe of its land." *Id.* at 1182. Instead, "[i]f the Smales adversely possessed the portion of the disputed property" at the time they claimed, then the original defendant had no title to convey and "the Tribe never had any property to lose." *Id.* at 1182, *see also id.* at 1183–84. Indeed, the *Smale* court distinguished the district court's decision in *Madison County* on this very basis: "[U]nlike the foreclosure action in *Oneida*," the court explained, "a successful adverse possession action here would not deprive the Tribe of its land." *Id*. At 1182.[10]

Finally, the County relies on *Coastland Corp. v. North Carolina Wildlife Resources Commission*, 517 S.E.2d 661 (N.C. Ct. App. 1999). But there, the court expressly stated that its discussion of sovereign immunity (in the context of a petition for partition) was dicta "not necessary to [its] decision in this case." *Id.* at 662. In any event, *Coastland Corp.* involved state rather than tribal sovereign immunity. And once again, the court relied on the fact that the petition did not

[10] Another of the County's cited cases, *Cass County Joint Water Resource District v. 1.43 Acres of Land*, 643 N.W.2d 685 (N.D. 2002), also appears to have involved a transfer of land to an Indian tribe in an effort to thwart jurisdiction. There, the local government sought to condemn a parcel of land owned by an individual. In the days leading up the suit, however, the individual conveyed the land to a tribe for a nominal sum. *Id*. at 688. In addition to holding that the tribe's sovereign immunity did not bar the condemnation suit, the court held that the individual could not be dismissed as a defendant because he remained a record owner at the time the action was commenced. *Id*. at 698–99. In view of its unique factual circumstances, *Cass County* provides no reason to conclude that the Cayuga Nation's sovereign immunity does not apply here.

"seek[] to affirmatively change ownership, but rather to rearrange ownership" that had already been determined. *Id*. Indeed, the court suggested that if the petition did "seek[] a change in ownership of state-owned lands," then "sovereign immunity might bar [it]." *Id.* at 664. That is precisely the case here: A foreclosure action would seek to change ownership of Nation-owned lands, and is thus precluded by the Nation's sovereign immunity from suit.

D. The Location of the Land in Question Does Not Alter the Analysis.[11]

The County next argues that the Nation's sovereign immunity from suit does not bar foreclosure proceedings because, in light of *City of Sherrill*, the Nation-

[11] The opinion below stated that at oral argument, the Nation claimed sovereign immunity from suit only "as to foreclosure actions against properties within the Reservation . . . , but not as to properties outside the Reservation." A178. According to the district court, "[t]his argument seems to admit that the Cayugas' ability to claim sovereign immunity from suit is inherently tied to its ability to exercise at least some amount of sovereign authority over the land." *Id*. Given its briefing in the district court, however, the Nation does not believe that it conceded that sovereign immunity from suit is dependent upon reservation status or sovereign authority over the land. *See, e.g.*, A127 (argument in Nation's brief that "[s]overeign immunity from suit applies to an Indian tribe regardless of the location of the activities giving rise to the suit"); *id*. at A130 & n.5 (argument that tribal sovereign immunity "bars the county from foreclosing on *any* land held by the Nation," regardless of reservation status). And in any event, the district court did not rely on any concession, but instead held – as the Nation argues here – that sovereign immunity bars a foreclosure action regardless of whether the tribe has sovereign authority over the land. *See* A171.

owned lands are "outside of any sovereign territory." County Br. 27. But that argument fails under precedent of the Supreme Court and this Court alike.[12]

Kiowa makes clear that tribal sovereign immunity applies regardless of the location of the activities giving rise to a suit. There, the Court held that a tribe was immune from suit based on a promissory note "executed and delivered . . . beyond the Tribe's lands," which obligated the Tribe to make payments off the reservation. *Kiowa*, 523 U.S. at 754. In reaching this conclusion, *Kiowa* explained that tribal sovereign immunity from suit is not "confine[d] . . . to transactions on reservations." *Id.* at 755. Instead, the Court explained, its cases often "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred." *Id.* at 754. Thus, even if a state has "authority to tax or

[12] Should this Court determine that tribal sovereign immunity bars foreclosure only on lands over which a tribe exercises sovereign authority within the meaning of *City of Sherrill*, the Nation concedes that foreclosure would be permissible on the lands at issue in this case.

In no event would this Court need to address the question whether the Nation's reservation exists today. That is because, assuming that there is some territorial limitation on the extent to which sovereign immunity bars foreclosure on tribally owned lands, the touchstone would have to be sovereign authority over the land, not mere reservation status – which, under *City of Sherrill* and its progeny, is insufficient to confer sovereign authority over tribally owned land. The County, for its part, raises the status of the Nation's reservation only in the context of its ITIA argument. County Br. 40–52. But the applicability of the ITIA, which the Nation disclaimed below as a basis for injunctive relief, is not before this Court. *See supra* note 2. Thus, there is no need for this Court to take up the County's invitation (County Br. 41) to address whether the Cayuga Nation today possesses a reservation as a matter of federal law.

regulate tribal activities occurring within the State but outside Indian country" – *i.e.*, even if the activities take place on land over which the tribe lacks sovereignty – the Tribe still enjoys sovereign immunity from suit. *Id.* at 755; *see also id.* at 764 (Stevens, J., dissenting) (characterizing majority as holding that a tribe is "immune from a suit that has no meaningful nexus to the tribe's land or its sovereign functions").

Consistent with Supreme Court precedent, this Court in *Madison County* rejected the notion that, because the Oneida-owned land in question was not sovereign tribal land, foreclosure was permissible. *Madison County* explained that "this argument improperly conflates two distinct doctrines: tribal sovereign authority over reservation lands and tribal sovereign immunity from suit." 605 F.3d at 156. "While the tax exemption of reservation land arises from a tribe's exercise of sovereignty over such land," the Court reasoned, "and is therefore closely tied to the question of whether the specific parcel at issue is 'Indian reservation land,' *a tribe's immunity from suit is independent of its lands*." *Id.* at 157 (quoting *Cass Cnty. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110 (1998) (emphasis added)).

The County's contrary argument rests on *Georgia v. City of Chattanooga*, 264 U.S. 472, 478–80 (1924), and *People ex rel. Hoagland v. Streeper*, 145 N.E.2d 625, 629 (Ill. 1957). *See* County Br. 27–28. In *Chattanooga*, Georgia purchased

land in the city of Chattanooga for a railroad yard, which in turn was operated by a private company. 264 U.S. at 478. When Chattanooga sought to condemn the property, Georgia argued that it had not consented to be sued in Tennessee. The Court rejected this argument, holding that "[h]aving acquired the land in another state for the purpose of using it in a private capacity, Georgia can claim no sovereign immunity or privilege in respect of its expropriation" via condemnation. *Id.* at 479–80. Instead, "[t]he terms on which Tennessee gave Georgia permission to acquire and use the land and Georgia's acceptance amount to consent that Georgia may be made a party to condemnation proceedings." *Id.* at 480.[13] Similarly, in *Streeper*, the Illinois Supreme Court rejected Missouri's claim of sovereign immunity from a suit concerning property located in Illinois, because "[t]he sovereignty of one State does not extend into the territory of another so as to create immunity from suit or freedom from judicial interference." *Streeper*, 145 N.E.2d at 629.

Chattanooga and *Streeper* are of no help to the County here. Those cases addressed *state* sovereign immunity from suit. The Supreme Court has "often

[13] The Court's holding in *Chattanooga* was limited to the condemnation proceedings at issue there. Contrary to the County's claim, *see* County Br. 27, the Court specifically held that it "need not decide the broad question whether Georgia has consented generally to be sued in the courts of Tennessee in respect of all matters arising out of the ownership and operation of its railroad property in that state." 264 U.S. at 482.

noted," however, "that the immunity possessed by Indian tribes is not coextensive with that of the States." *Kiowa*, 523 U.S. at 755–56. In particular, "tribes were not at the Constitutional Convention," so they "were . . . not parties to the 'mutuality of . . . concession' that 'makes the States' surrender of immunity from suit by sister States plausible.'" *Id.* at 756 (quoting *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991); ellipsis in original). While states are free to make their own policy judgments regarding the immunity of other states in their courts, *see Nevada v. Hall*, 440 U.S. 410, 425–26 & n.29 (1979), the same is not true with respect to the immunity of Indian tribes. Instead, "tribal immunity is a matter of federal law and is not subject to diminution by the States." *Kiowa*, 523 U.S. at 756. As a result, the holdings in *Chattanooga* and *Steeper* – that a state sometimes lacks sovereign immunity from suit with respect to land it owns in another state – say nothing about whether tribal sovereign immunity bars the County from foreclosing upon lands owned by a sovereign Indian nation.

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

The County contends that even if sovereign immunity would otherwise bar foreclosure on property owned by the Cayuga Nation, the doctrine of waiver prevents the Nation from asserting sovereign immunity here. Contrary to the County's arguments, waiver has no bearing on this case.

It is hornbook law 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). Thus, "to relinquish its immunity, a tribe's waiver must be clear." *C&L Enters.*, 532 U.S. at 418 (internal quotation marks omitted). For example, as this Court held, the Oneidas effectively waived sovereign immunity from suit when their tribal council issued a declaration "'waiv[ing], irrevocably and perpetually, its sovereign immunity to enforcement of real property taxation through foreclosure by state, county and local governments within and throughout the United States.'" *Madison County II*, 665 F.3d at 422 n.11 (quoting tribal declaration); *see id.* at 425 (ruling that this waiver was "complete, unequivocal, and irrevocable"). By contrast, courts have found that statements that merely "imply a willingness to submit to federal lawsuits" – such as an employment contract's statement that the tribe would comply with Title VII – are insufficiently clear to waive tribal sovereign immunity. *Allen v. Gold Country Casino*, 464 F.3d 1044, 1047 (9th Cir. 2006); *see also, e.g.*, *Sanderlin v. Seminole Tribe of Fla.*, 243 F.3d 1282, 1286–88 (11th Cir. 2001) (tribe did not waive sovereign immunity from suits under the Rehabilitation Act by entering into contracts with the government and accepting federal funds).

Against that background, the County argues for waiver based on *Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233 (N.Y. 2010). That case

concerned the Nation's state tax obligations with respect to cigarettes sold on parcels of Nation-owned land that are not at issue here. The New York Court of Appeals held that (a) the land was located on an extant reservation as a matter of federal law; and (b) state tax law, by its own terms, therefore permitted the Nation to sell cigarettes without tax stamps. *Gould*, 930 N.E.2d at 244–52. In support of its waiver argument, the County fixes on the court's statement that "[t]he 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." *Gould*, 930 N.E.2d at 249 n.11; *see* Brief of Plaintiff-Respondent at 56, *Cayuga Indian Nation of N.Y. v. Gould*, 930 N.E.2d 233 (N.Y. 2010) (No. 74) ("[I]t is irrelevant that the Nation pays its property taxes, or that it has applied to have land taken into trust.").[14]

The County's waiver argument fails for three distinct reasons. *First*, as noted above, a tribe's "waiver of sovereign immunity cannot be implied but must

[14] The Nation pays taxes on certain parcels because they are the subject of a pending application for the Secretary of the Interior to take these parcels into trust pursuant to 25 U.S.C. § 465. Regulations implementing that 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 trust application. 25 C.F.R. § 151.13. The Secretary "shall require elimination prior to such approval if the liens, encumbrances, or infirmities make title to the land unmarketable." *Id.*; *see also Madison County*, 605 F.3d at 163 n.1 (Cabranes, J., concurring).

be unequivocally expressed." *Santa Clara Pueblo*, 436 U.S. at 58 (internal quotation marks omitted). Whatever the import of the "acknowledg[ment]" to which the Court of Appeals referred, it certainly does not amount to an "unequivocally expressed" waiver of sovereign immunity.

Second, even putting that problem aside, the County's argument again confuses the doctrines of tax immunity and sovereign immunity from suit. The Nation's actions in *Gould* relate only to the former: By acknowledging its payment of taxes on certain parcels, the Nation conceded at most that the County possessed the power to *impose* a tax on those parcels (and even that concession is questionable). The County's power to impose that tax says nothing about whether it has the separate power to foreclose on Nation-owned lands in violation of the Nation's sovereign immunity from suit.

Third, as the County itself recognizes, *Gould* involved different parcels of land than those at issue here. *See* County Br. 2 (stating that in *Gould*, the Nation had "paid … taxes with respect to other parcels it owns"). The County fails to explain how the Nation's actions and statements regarding those *other* parcels could unequivocally express a waiver of sovereign immunity with respect to the lands involved in this case. Indeed, acceptance of the County's argument would give tribes an incentive to fight each and every assertion of state regulatory jurisdiction, lest they be held to have effectuated a broad waiver. Here, the Nation

might be dissuaded from paying taxes on *any* of its lands for fear of inadvertently waiving its sovereign immunity from suit with respect to *all* of its lands.

The County cannot overcome all of this by relying on cases holding that a tribe waives its immunity with respect to a particular issue by "[p]utting [it] in play through litigation." County Br. 31. In each of the cases cited by the County, a district court held only that by invoking federal court jurisdiction to seek particular relief, a tribe waived its sovereign immunity with respect to a counterclaim for the "mirror image" of that relief. *Oneida Tribe of Indians of Wis. v. Village of Hobart*, 500 F. Supp. 2d 1143, 1149 (E.D. Wis. 2007) (in seeking declaration that land was not subject to municipal assessments, tribe waived immunity with respect to counterclaim for declaration that the land *was* subject to such assessments); *see Wyandotte Nation v. City of Kan.*, 200 F. Supp. 2d 1279, 1284–85 (D. Kan. 2002) (in filing quiet title suit, tribe waived immunity with respect to quiet title counterclaim). In *Gould*, by contrast, the Nation "put into play" only its obligation to collect and remit taxes on the sale of cigarettes at certain convenience stores. The Nation's real property tax payments and obligations were relevant, if at all, only as part of the background for the suit.[15] Under the reasoning of *Village of*

[15] In fact, the *Gould* court noted that under *City of Sherrill*, payment of real property taxes was an entirely separate question from the one before it – whether the convenience stores were located on a reservation recognized by the United States government. *See Gould*, 930 N.E.2d at 248.

Hobart and *Wyandotte Nation*, the Nation could potentially have waived sovereign immunity – if at all – only with respect to a counterclaim on its cigarette tax obligations.[16]

CONCLUSION

For the foregoing reasons, this Court should affirm the judgment of the district court. Should this Court determine that the injunction was wrongly entered, it should remand for further proceedings, including potential adjudication of the Nation's claim that the taxes imposed on the parcels here were invalid under state law.

[16] Although the County occasionally states that the Nation should be "estopped" from relying on its sovereign immunity from suit, *see* County Br. 2, 12, 30, the County's argument on this point focuses on waiver, not estoppel. *See id*. at 30–32. Moreover, the County does not invoke any case applying the doctrine of judicial estoppel, and it could not succeed on a judicial estoppel claim. As this Court has explained, judicial estoppel will apply only if (1) "a party's later position is 'clearly inconsistent' with its earlier position;" (2) "the party's former position has been adopted in some way by the court in the earlier proceeding;" and (3) "the party asserting the two positions would derive an unfair advantage against the party seeking estoppel." *DeRosa v. Nat'l Envelope Corp.*, 595 F.3d 99, 103 (2d Cir. 2010). As explained above, the Nation's position in this case – that sovereign immunity bars foreclosure on Nation-owned land – is in no way inconsistent with its position in *Gould*, where the Nation said nothing at all about sovereign immunity from suit.

Respectfully submitted,

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April 3, 2013

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(a)(7)(B), I hereby certify that this brief contains 10,455 words, as counted by Microsoft Word, excluding the items that may be excluded under Federal Rule 32(a)(7)(B)(iii). This brief uses a proportionally spaced typeface, Times New Roman, and the size of the typeface is 14 points, in compliance with Rules 32(a)(5)(A) and (a)(6).

/s/ David W. DeBruin

April 3, 2013

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of April, 2013, a true and correct copy of the foregoing brief of Appellee was served on all counsel of record in this appeal via CM/ECF pursuant to Local Rule 25.1(h)(1) and (2).

/s/ David W. DeBruin