12-3723-cv

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

BRIEF FOR DEFENDANT-APPELLANT

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JURISDICTIONAL STATEMENT

Plaintiff-Appellee Cayuga Indian Nation of New York (the "Nation") commenced this action pursuant to the All Writs Act, 28 U.S.C. § 1651(a), seeking to enjoin Defendant-Appellant Seneca County, New York (the "County") from maintaining tax foreclosure proceedings against parcels owned by the Nation. That the Nation had failed to pay applicable real property taxes is undisputed.

The United States District Court for the Western District of New York had jurisdiction pursuant to 28 U.S.C. §§ 1331, 2283. Jurisdiction in this Court is based upon 28 U.S.C. § 1292(a)(1) because the District Court preliminarily enjoined the County from maintaining foreclosure proceedings.

Finding the Nation has sovereign immunity from suit, the District Court preliminarily enjoined the County's foreclosure proceedings. No further proceedings below are anticipated because absent reversal by this Court, the decision of the District Court in effect permanently enjoins any foreclosure proceedings against parcels owned by the Nation. The judgment below was entered on August 20, 2012, and the notice of appeal was filed on September 14, 2012. Accordingly, this appeal is timely.

ISSUES PRESENTED FOR REVIEW

1. Whether sovereign immunity from suit bars the County from maintaining tax foreclose proceedings against parcels that the Nation acquired by

open market purchases in recent years after two hundred years of non-Indian ownership and with respect to which the Nation has never paid real property taxes.

2. Whether the doctrine of sovereign immunity from suit is inapplicable given the *in rem* nature of a tax foreclosure proceeding.

3. Even if it somehow otherwise had immunity from suit, whether the Nation is nonetheless subject to New York foreclosure laws because here the subject parcels are not sovereign and the Nation is not acting within any sovereign territory.

4. Whether the Nation has waived its claim to sovereign immunity and therefore should be estopped from arguing that it need not pay real property taxes because in prior litigation the Nation conceded its obligation to pay the same, *see Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 643 n.11 (2010), and in fact paid those taxes with respect to other parcels it owns.

5. Whether, for purposes of the Indian Trade and Intercourse Act ("ITIA") and other issues, the Nation's parcels lie within an ancient New York State reservation that was long ago lawfully ceded to New York State or whether the parcels lie within a federal reservation that has been disestablished.

STANDARD OF REVIEW

The District Court found in favor of the Nation and preliminarily enjoined the County from pursuing foreclosure. No further proceedings below are

anticipated. The standard of review for the issues presented on this appeal is *de novo*. *See Disabled Am. Veterans v. United States Dep't of Veterans Affairs*, 962 F.2d 136, 140 (2d Cir. 1992) (holding that questions of law decided in connection with requests for preliminary injunctions receive the same *de novo* review that is appropriate for issues of law generally).

STATEMENT OF THE CASE

This is an appeal from the decision and order of the United States District Court for the Western District of New York, Judge Charles J. Siragusa, that was entered on August 20, 2012. *See* District Court Decision, R. at A-167. The decision and order enjoined the County from maintaining foreclosure proceedings against parcels of real property owned by the Nation for failure to pay real property taxes. This appeal followed.

STATEMENT OF FACTS

On February 25, 1789, one week before March 4, 1789, when the United States government began operating as such under the Constitution, and more than a year before Congress passed its first ITIA to regulate interactions with Indian tribes, New York treated with the original Cayuga tribe whereby the Cayugas ceded to the State all of their lands within New York ("1789 Treaty"). *See Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 268-69 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006) (dismissing the Nation's possessory land claim); *see also*

1789 Treaty. The State in return set aside a 64,015-acre state reservation in Central New York for the Cayugas' use. *See* 1789 Treaty. That historic tract of land sits at the north end of Cayuga Lake and extends down the lake's eastern and western shores into both Cayuga County and Seneca County. *Id.* In that same treaty, New York also reserved for itself the exclusive right to purchase back those same land use rights that it had reserved to the Cayugas. *See* 1789 Treaty. Under the Treaty of Canandaigua in 1794, the United States government sought peace with Indian tribes in Central and Western New York and, as part of that treaty, acknowledged the pre-existing state reservation created by New York for the Cayugas. *See Pataki*, 413 F.3d at 268-69. Beyond acknowledging the Treaty of 1789, the Treaty of Canandaigua did not create an independent federal reservation. *See* Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44.

The historical record confirms that when New York treated with them in 1789, the Cayugas resided primarily with the Senecas near Buffalo, New York and in Canada as well. The Cayugas had no interest in retaining the state-created reservation and the corresponding grant of rights to use that land. *See Cayuga Indian Nation v. Pataki*, 165 F. Supp. 2d 266, 309-10 (N.D.N.Y. 2001). After several illegal attempts to sell their land rights to third parties, the Cayugas sold to New York all of their remaining rights pursuant to sales between 1794 and 1807 and abandoned the land. *See Pataki*, 413 F.3d at 269; *see also* 1795 Treaty

between the Cayugas and New York State, July 27, 1795, *and* 1807 Treaty between the Cayugas and New York State, May 30, 1807. For the next two hundred years, the land was not only owned and governed by non-Indians but was also subject to local taxation. *See Pataki*, 413 F.3d at 277 ("[G]enerations have passed during which non-Indians have owned and developed the area that once composed the Tribe's historic reservation . . . ."). Indeed, the Second Circuit has found that the Nation's claims with respect to lands in Cayuga and Seneca Counties that the Cayugas had abandoned centuries ago present the same issues, namely, the disruption of long-standing local governance, that doomed the Oneida Indian Nation's claims in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) ("*Sherrill*"). *See Pataki*, 413 F.3d at 277 ("[W]e conclude that the present case must be dismissed because the same considerations that doomed the Oneidas' claim in *Sherrill* apply with equal force here."). In *Sherrill*, of course, the Supreme Court held that the Oneida Indian Nation's recently-purchased parcels are not sovereign and are subject to taxation. *Sherrill*, 544 U.S. at 214 ("'[S]tandards of federal Indian law and federal equity practice' preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.").

Over the past few years, the Nation, a purported successor entity to the historic Cayuga Indians that once resided in Central New York, began making open market purchases of parcels in Cayuga and Seneca Counties. *Gould*,

14 N.Y.3d at 630. On two such parcels, one in Cayuga County and one in Seneca County, the Cayugas thereafter began selling tax free cigarettes to the public at large. In November 2008, the sheriffs from those two counties seized cigarettes pursuant to a search warrant related to an investigation of ongoing violations of New York's Tax Law, and the district attorneys prosecuted individuals that were selling those cigarettes. *Id.* at 630-31. The Nation thereafter filed a lawsuit against the sheriffs and district attorneys challenging their efforts to enforce the Tax Law. *Id.* The New York Court of Appeals, in a 4-3 decision, ultimately held that the portion of the Tax Law upon which the seizures were based was not "in effect." *Id.* at 653-54. The Court noted, however, that *Sherrill* precluded the Nation from attempting to assert sovereign power over its properties for the purpose of avoiding real property taxes. *Id.* at 642-43. As part of its arguments to the New York Court of Appeals, the Nation acknowledged its obligation to pay real property taxes with respect to the parcels at issue there and further represented that it had complied with those obligations. *Id.* at 643 n.11.

Since acquiring the parcels in Seneca County that are at issue here, and notwithstanding the plain holding in *Sherrill*, the Nation has steadfastly refused to pay real property taxes. It is undisputed that all such taxes have been and remain in default. *See* The Nation's Amended Complaint, Exhibit A, R. at A-60-64. In accordance with its standard tax foreclosure procedures, in October 2010, the

County commenced "a proceeding to foreclose on real property . . . ." *Id.* The proceeding itself is captioned "In the matter of the Foreclosure of Tax Liens by Proceeding *In Rem* pursuant to Article Eleven of the Real Property Tax Law by the County of Seneca." *Id.* Further, the notification advises: "Nature of proceeding: Such proceeding is brought against the real property only and is only to foreclose the tax liens described in this petition. No personal judgment will be entered herein for such taxes or other legal charges or any part thereof." *Id.*

In January 2011, the Nation commenced this action to enjoin the County from foreclosing on Nation-owned properties. *See* The Nation's Initial Complaint, R. at A-4. The Nation moved for injunctive relief, contending that the foreclosure proceedings, although against the properties, nonetheless violates the Nation's sovereign immunity. In support, the Nation cited this Court's decision in *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 (2d Cir. 2010). There, this Court held that although the Oneida Indian Nation had concededly failed to pay real property taxes that were properly assessed and owing, sovereign immunity from suit barred the ensuing foreclosure proceedings. After the Supreme Court granted *certiorari* to review *Madison County*, however, the Oneida Indian Nation withdrew its claim to sovereign immunity, taking the issue away from the Supreme Court and causing that Court to vacate this Court's decision.

Here, the court below, by decision and order entered August 20, 2012, followed the vacated decision in *Madison County* and enjoined the County from maintaining the tax foreclosure proceedings. *See* District Court Decision, R. at A-167. The District Court held that it might otherwise have allowed the proceedings based on *Sherrill* but felt compelled to issue the injunction based on this Court's prior ruling in *Madison County*, even though that decision has been vacated. *Id.* at A-177. This appeal followed.

SUMMARY OF ARGUMENT

The Nation, a purported successor entity to the historic Cayuga Indians that once resided in Central New York, commenced this action seeking injunctive relief to prevent Seneca County from foreclosing on parcels that the Nation purchased relatively recently on the open market for failure to pay real property taxes. The Nation cannot legitimately dispute that it owes those taxes with respect to the subject parcels given the unequivocal holding of the Supreme Court in *Sherrill*. *See, e.g.*, *Gould*, 14 N.Y.3d at 642 ("*City of Sherrill* certainly would preclude the Cayuga Nation from attempting to assert sovereign power over its convenience store properties for the purpose of avoiding real property taxes . . . ."). Instead, the Nation contends that it enjoys a sovereign immunity from suit that bars the County from foreclosing on the parcels despite the conceded default in payment.

The District Court followed this Court's vacated decision in *Madison County* and enjoined the foreclosure proceedings. The District Court held that it might otherwise allow the foreclosures under the Supreme Court's decision in *Sherrill* but nevertheless felt bound to grant the Nation an injunction based on *Madison County*:

> [I]f this Court were writing without the benefit of guidance from the Second Circuit, it might well have been inclined to agree that *Sherrill's* broad language bars the Cayugas from asserting any sovereign authority involving the recently-purchased parcels, including sovereign immunity from suit . . . . However, for the reasons stated above, the Court will follow the Second Circuit's ruling in [*Madison County*], which, although technically without effect after being vacated, clearly rejects Defendant's argument.

District Court Decision, R. at A-177-78.

The County is of course both mindful and respectful of this Court's prior ruling in *Madison County*. Since that decision has been vacated, however, the County respectfully submits that the reasoning in *Madison County* should be revisited and on this appeal no longer adopted, particularly in light of the facts presented.

First, *Madison County* has been vacated by the Supreme Court. The Supreme Court agreed to review *Madison County*, but, just before oral argument, the Oneida Indian Nation utilized an "eleventh-hour tactical move" to "avoid[] review by belatedly agreeing to waive sovereign immunity." District Court

Decision, R. at A-174-75. Secondary commentators, even by pro-Indian groups, believe that the Supreme Court would have reversed *Madison County* had the Oneida Indian Nation not withdrawn its claim. *See infra*, n.1.

In light of the vacatur, this Court is not bound by its Panel's earlier holding and certainly may and should exercise its judgment here to reverse the District Court and dismiss the Nation's challenge to the foreclosure proceedings. The Court should do so because the rationale underlying *Madison County* conflicts with, *inter alia*, the Supreme Court's holding in *Sherrill* that (i) Indian tribes are lawfully subject to real property taxes on recently purchased properties even if those properties lie within the borders of an ancient reservation, and (ii) tax immunity may not be used as a defense to eviction following foreclosure.

Second, the district court should not have enjoined the foreclosure proceedings because binding case law holds that a claim to sovereign immunity bars only *in personam* claims against the Nation. The County seeks no remedy against the Nation itself. Rather, this is an *in rem* proceeding against only the subject parcels. In *Madison County*, this Court remained silent on this issue, and the holding of the District Court Judge Hurd in that case relied on a decision that barred *in personam* actions to recoup money damages. Lost in all of this is the prior holding of the Supreme Court that a county's efforts to impose and collect real property taxes on tribe-owned properties does not infringe on tribal

self-government or sovereign immunity because such jurisdiction is *in rem* and not *in personam*. *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 264-65 (1992). Thus, an *in rem* proceeding against the properties should be allowed, notwithstanding the Nation's purported claim to sovereign immunity from suit.

Third, the district court's decision should be reversed because the Nation's properties are located outside any sovereign domain. It is well settled that a sovereign entity such as a state or tribe is not entitled to immunity from suit with respect to land or properties that it owns outside its sovereign territory. *See, e.g.*, *Georgia v. Chattanooga*, 264 U.S. 472, 479-80 (1924). Unlike the issue in *Madison County* where the Oneidas at least purportedly maintained a minimal presence and interest in land in Madison County, the Cayugas completely abandoned their lands in Seneca County centuries ago through valid conveyances to New York. The Nation has only recently begun to purchase properties in Seneca County on the open market. *Sherrill* undisputedly confirms that these properties are not sovereign Indian lands. As such, the Nation has acted outside of any sovereign territory, and it may not claim sovereign immunity from suit to bar the foreclosure proceedings.

Fourth, even if *Madison County* somehow still offers precedent, it does not bar foreclosure against the Nation's parcels because here the Nation has waived

any such immunity and should be estopped from further relying on it. Unlike the Oneida Indian Nation in *Madison County*, which argued that it owed no real property taxes whatsoever, here the Nation has expressly acknowledged its obligations to pay real property taxes and has even made payments on certain of its properties. *Gould*, 14 N.Y.3d at 643 n.11. *Gould* involved the Nation's attempts to avoid New York's cigarette sales and excise taxes. In that litigation, the Nation touted that it had satisfied its real property tax obligations with respect to its parcels in Seneca County and Cayuga County where it was selling the tax-free cigarettes. *Id.* The Nation's prior representation to the New York Court of Appeals in *Gould* and its acknowledgment of its real property tax obligations waive any potential claim of sovereign immunity from suit with respect to its current failure to meet those obligations. The Nation should not be permitted to tout in one court its payment of real property taxes on parcels that, under *Sherrill*, were plainly not sovereign, and later in a different court claim that a purported sovereign immunity from suit exempts it from any liability to pay taxes on similarly non-sovereign parcels. The Nation cannot so pick and choose. In short, as a result of its affirmative representations in *Gould*, the Nation has waived any claim to sovereign immunity and is therefore estopped from asserting any such claim here.

Finally, in its Amended Complaint and in its initial brief in support of its underlying motion, the Nation argued that the ITIA bars the foreclosure proceedings because any transfer of title to the parcels resulting from foreclosure would alienate Indian land in violation of that statute. In its reply brief below, however, the Nation disclaimed reliance on the ITIA as a basis for its motion. *See* The Nation's Reply Brief, at p. 2 n.2, R. at A-126. It said that tribal immunity from suit provides a sufficient basis for injunctive relief, without regard to the ITIA. To the extent the Nation nonetheless attempts to raise the ITIA on this appeal, this Court should reject it. The ITIA was designed to protect Indians from losing aboriginal title to sovereign lands through sales to non-Indians. The ITIA has no application to non-sovereign properties that an Indian tribe or group such as the Nation purchases on the open market from non-Indians. *Sherrill* confirms that the Nation's properties are not sovereign lands, rendering the ITIA inapplicable to the foreclosure proceedings. Further, the historical record is clear that the Nation's properties are not even within the borders of any purported ancient federal reservation but rather lie within an ancient New York State reservation that the Cayugas lawfully ceded back to New York State centuries ago. Thus, any reliance by the Nation on the ITIA fails as a matter of law.

ARGUMENT

POINT I

THIS COURT SHOULD REVERSE THE DECISION AND ORDER BELOW AND ALLOW THE FORECLOSURE PROCEEDINGS BECAUSE THE DISTRICT COURT'S RELIANCE ON *MADISON COUNTY* IS MISPLACED. THAT DECISION HAS BEEN VACATED AND, IN ANY EVENT, ITS RATIONALE SHOULD BE REVISITED AND NO LONGER ACCEPTED.

The Supreme Court has already decided in *Sherrill* that an Indian tribe may *not* rely on immunity to prevent eviction following foreclosure. It is respectfully submitted that, on that point, this Court's now-vacated decision in *Madison County* incorrectly applies *Sherrill*. In *Sherrill*, the Oneida Indian Nation purchased land purportedly within an ancient Indian reservation and argued that it should be free from real property taxation. The Supreme Court unequivocally held that land purchased by an Indian tribe after centuries of non-Indian ownership is subject to real property taxation:

> In this action, [the Oneida Indian Nation] seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations. We now reject the unification theory of [the Oneida Indian Nation] and the United States and hold that "standards of federal Indian law and federal equity practice" preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.

Sherrill, 544 U.S. at 213-14.

Further, the *Sherrill* majority addresses the foreclosure question head-on and writes: "The dissent suggests that, compatibly with today's decision [that an Indian tribe's fee properties are subject to real property taxes], the Tribe may assert tax immunity defensively in the eviction proceeding initiated by *Sherrill*. *We disagree*." *Id.* at 214 n.7 (emphasis added).

In its decision below, the District Court found that *Sherrill* appeared to allow the foreclosure proceedings, but it nevertheless felt compelled to enjoin those proceedings based on the now-vacated decision in *Madison County*:

> [I]f this Court were writing without the benefit of guidance from the Second Circuit [in *Madison County*], it might well have been inclined to agree that *Sherrill's* broad language bars the Cayugas from asserting any sovereign authority involving the recently-purchased parcels, including sovereign immunity from suit . . . . However, for the reasons stated above, the Court will follow the Second Circuit's ruling in [*Madison County*], which, although technically without effect after being vacated, clearly rejects Defendant's argument.

District Court Decision, R. at A-177-78.

The Supreme Court vacated *Madison County* shortly before the scheduled oral argument after the Oneida Indian Nation waived its sovereign immunity as a defense to the underlying foreclosure proceedings. *Madison County v. Oneida Indian Nation*, 131 S. Ct. 704, 704 (2011). The Oneida Indian Nation's doing so prevented the Supreme Court from reviewing this Court's decision. Indeed, here

District Court Judge Siragusa described the Oneida Indian Nation's conduct as an "eleventh-hour tactical move" to "avoid[] review by belatedly agreeing to waive sovereign immunity." District Court Decision, R. at A-174-75.[1]

In any event, because the Supreme Court has vacated *Madison County*, that decision provides no binding precedent. *County of Los Angeles v. Davis*, 440 U.S. 625, 634 n.6 (1979) ("Of necessity our decision vacating the judgment of the [United States] Court of Appeals deprives that court's opinion of precedential

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[1] Secondary commentators, even by pro-Indian groups, overwhelmingly believe that if the Oneida Indian Nation did not effect the waiver and intentionally deprive the Supreme Court of the opportunity to rule, the Supreme Court would have reversed *Madison County* and found sovereign immunity inapplicable to foreclosure proceedings. *See, e.g., Precision Lawyering. For Tribes and Businesses*, available at http://galandabroadman.wordpress.com/2011/01/11/oneida-why-an-in-rem-exception-would-have-been-wrong/ (last visited December 31, 2012) ("The Oneida Indian Nation seems to have recognized what was at risk, and wisely mooted the dispute before the Roberts Court could rule on it."); *Native American Rights Fund*, available at http://narfnews.blogspot.com/2011_01_01_archive.html (last visited December 31, 2012) ("[T]his case was viewed as a prime opportunity for the Court to . . . carve out a significant exception to the doctrine of tribal sovereign immunity. At least for now, that result has been averted."); *Montana Wyoming Tribal Leaders Council*, available at http://www.mtwytlc.org/component/content/article/113-indian-organizations/763-supreme-court-vacates-and-remands-madison-county-v-oneida-nation.html (last visited December 31, 2012) ("The remand order is a victory for . . . all of Indian Country. From the time when the [Supreme] Court granted review, this case posed a significant risk that they would carve out a significant exception to the doctrine of tribal sovereign immunity. That result has been averted."); *Indianz.Com*, a product of the economic development corporation of the Winnebago Tribe of Nebraska and a Native American-owned media firm, available at http://64.38.12.138/News/2011/000090.asp (last visited December 31, 2012) ("[T]he tribe went out of its way to avoid coming before the justices in a closely watched case.").

effect . . . ."); *O'Connor v. Donaldson*, 422 U.S. 563, 577 n.12 (1975) (same); *Russman v. Bd. of Educ.*, 260 F.3d 114, 122 n.2 (2d Cir. 2001) ("When imposed by the Supreme Court, vacatur eliminates an appellate precedent that would otherwise control decision on a contested question throughout the circuit."); *see also Guardians Ass'n of The New York City Police Dep't, Inc. v. Civil Service Comm'n of the City of New York*, 633 F.2d 232, 265 n.63 (2d Cir. 1980) ("In discussing the frequently cited court of appeals opinion in *Davis* we express no view concerning its precedential weight, if any, within the Ninth Circuit, in view of the Supreme Court's subsequent vacatur of that decision on grounds of mootness . . . .").

This Court accordingly need not follow the rationale underlying its Panel's prior decision in *Madison County* and should revisit and reconsider the issues raised both there and here. Indeed, the District Court's opinion in *Madison County* has already been rejected by courts in sister states. It is respectfully submitted that those decisions correctly hold that *Madison County* misconstrues the doctrine of sovereign immunity to prevent foreclosure against properties on which an Indian tribe is lawfully required to pay real property taxes. In *Oneida Tribe of Indians v. Village of Hobart*, 542 F. Supp. 2d 908 (E.D. Wis. 2008), for example, the Eastern District of Wisconsin rejected the central holding in *Madison County* and held:

> I find the right of a local government to foreclose for nonpayment of taxes implicit in *Sherrill's* holding that the OIN's reacquired property is subject to *ad valorem*

> property taxes and therefore disagree with the [Northern District of New York in *Madison County*].

Id. at 934.

Based on the Supreme Court's decision in *Sherrill* and other courts' interpretation of that decision, it is respectfully submitted that this Court should reconsider the rationale in *Madison County* and find that Seneca County may foreclose on parcels owned by the Nation. The Supreme Court's decision to grant *certiorari* in *Madison County*, and its subsequent vacatur of that decision following the Oneida Indian Nation's waiver of sovereign immunity, *Madison County*, 131 S. Ct. at 704, offers this Court the opportunity to do so.

POINT II

THE DECISION AND ORDER OF THE DISTRICT COURT SHOULD BE REVERSED. SOVEREIGN IMMUNITY FROM SUIT DOES NOT BAR THE FORECLOSURE PROCEEDINGS BECAUSE THEY SEEK NO *IN PERSONAM* REMEDY AGAINST THE NATION BUT RATHER ONLY AN *IN REM* REMEDY AGAINST THE SUBJECT PARCELS.

The Supreme Court's holding in *Sherrill* that a tribe may not assert immunity as a defense to tax eviction comports with the Court's previous decision in *Yakima* – which involved foreclosure by a county after an Indian tribe failed to pay real property taxes – that real property tax issues do *not* implicate sovereign

immunity because they involve *in rem* rather than *in personam* jurisdiction. *Yakima*, 502 U.S. at 264-65.

In *Yakima*, the Yakima Indian Reservation covered approximately 1.3 million acres in southeastern Washington State. *Id.* at 256. Eighty percent of the reservation's land was held by the United States in trust for the benefit of the tribe or its individual members. The remaining twenty percent was owned in fee by Indians and non-Indians as a result of allotment-era land patents. *Id.* Some of the fee land was owned by the Yakima Indian Nation itself. *Id.*

The reservation was located almost entirely within the confines of Yakima County, which, pursuant to Washington law, imposed an *ad valorem* levy on taxable real property within its jurisdiction and an excise tax on sales of such land. *Id.* When Yakima County proceeded to foreclose on all properties for which *ad valorem* and excise taxes were past due, including a number of reservation parcels in which the tribe or its members had an ownership interest, the Yakima Nation commenced an action for declaratory and injunctive relief, contending that federal law prohibited taxes on fee-patented lands held by the tribe or its members. *Id.*

The Supreme Court held that a county may impose and collect real property taxes, as opposed to sales taxes, on properties owned by an Indian tribe within the county. *Id.* at 264-65. The Court specifically relied on the difference between *in rem* and *in personam* jurisdiction, and held that Washington's tax on real

property was entirely distinct from Montana's failed attempt to tax an Indian tribe's personal property in *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976). Thus, the Court held that *Moe* was inapplicable to the imposition of taxes on real property.

The *Yakima* Court stated: "The Yakima Nation and the United States deplore what they consider the impracticable, *Moe*-condemned 'checkerboard' effect produced by Yakima County's assertion of jurisdiction over reservation fee-patented land. But because the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned; and it is not impracticable either." *Id.* The Supreme Court further held that "[w]hile the *in personam* jurisdiction over reservation Indians at issue in *Moe* [*i.e.*, imposing a sales tax on personal property] would have been significantly disruptive of tribal self-government, the mere power to assess and collect a tax on certain real estate is not." *Id.* at 265. The case arose out of foreclosure proceedings and nowhere did the Supreme Court question the validity of those proceedings. Instead, the Supreme Court remanded the case to resolve a factual issue with respect to certain parcels and to conduct further proceedings consistent with its opinion. *Id.* at 270.

Even if the Nation were entitled to sovereign immunity from an *in personam* suit, that would not prohibit an *in rem* proceeding against the properties in question. While recoupment of money may implicate sovereign immunity, *United*

States v. Nordic Vill. Inc., 503 U.S. 30 (1992) (holding that sovereign immunity of the United States was not waived with respect to bankruptcy trustee's claim against the IRS for monetary relief), courts hold that sovereign immunity is not impacted by *in rem* proceedings. *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 371 (2006) (finding that a bankruptcy court's exercise of *in rem* jurisdiction "did not implicate state sovereign immunity"); *Smale v. Noretep*, 208 P.3d 1180, 1184 (Wash. Ct. App. 2009) (holding that the trial court correctly denied tribe's motion to dismiss action seeking to quiet title claim because "*exercising jurisdiction over in rem proceedings does not implicate sovereign[] immunity*") (emphasis added); *Coastland Corp. v. N.C. Wildlife Res. Comm'n*, 517 S.E.2d 661, 663 (N.C. Ct. App. 1999) (holding that because "[s]overeign immunity is a defense to a claim of personal jurisdiction," it does not apply to partition suit, which is an *in rem* proceeding); *People Ex Rel. Hoagland v. Streeper*, 145 N.E.2d 625 (Ill. 1957) (rejecting State of Missouri's claim of sovereign immunity in an *in rem* action concerning property located within Illinois).

Indeed, *in rem* proceedings are against property and proceed regardless of whether the property's current owner is subject to *in personam* jurisdiction. In *Shaffer v. Heitner*, 433 U.S. 186, 199 (1977), the Supreme Court summarized the difference:

> If jurisdiction is based on the court's power over property within its territory, the action is called "*in rem*" or "*quasi*

> *in rem*." The effect of a judgment in such a case is limited to the property that supports jurisdiction and does not impose a personal liability on the property owner, since he is not before the court.

See also Cass County Joint Water Res. Dist. v. 1.43 Acres of Land, 643 N.W.2d 685, 689 (N.D. 2002) ("A proceeding *in rem* is an action against the property itself, and *in personam* jurisdiction is not required."); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 929 P.2d 379, 386-87 (Wash. 1996) ("Because our decision is based upon *in rem* jurisdiction, we need not further consider *in personam* jurisdiction, immunity and waiver."); 20 Am. Jur. 2d *Courts* § 72 (2010) ("[A] decision *in rem* does not impose responsibility or liability on a person directly but operates directly against the property in question . . . irrespective of whether the owner is subject to the jurisdiction of the court *in personam*."); 1 Am. Jur. 2d *Actions* § 29 (2010) ("[An *in rem* proceeding] is against the thing or property itself directly, and has for its object the disposition of the property, without reference to the title of individual claimants.").

In his decision in *Madison County*, District Court Judge Hurd briefly discussed this issue, rejecting the *in rem* argument. Judge Hurd stated:

> It is of no moment that the state foreclosure suit at issue here is in rem. What is relevant is that the County is attempting to bring suit against the Nation. The 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 v. Madison County, 401 F. Supp. 2d 219, 229 (N.D.N.Y. 2005). Judge Hurd's analysis, however, overlooks that the foreclosure proceedings are by definition *in rem* and not a suit "against the Nation." *See JoAnn Homes at Bellmore, Inc. v. Dworetz*, 25 N.Y.2d 112, 122 (1969) ("[A]n action for foreclosure is in the nature of a proceeding in rem to appropriate the land."); *see also Ontario Land Co. v. Yordy*, 212 U.S. 152, 158 (1909) ("We have repeatedly held that these tax foreclosure proceedings are *in rem*, and not against the [ ] owner . . . .").

Moreover, Judge Hurd relied on *dicta* in *Nordic Village*, 503 U.S. 30. That case, however, involved an attempted *in personam* action against a branch of the United States government under a specific provision of the Bankruptcy Code for money damages, not an *in rem* action involving real property. The Supreme Court acknowledged that it could not apply an *in rem* exception in that case because the Bankruptcy Court below never purported to exercise *in rem* jurisdiction. *Id.* at 38 ("[T]he premise for that argument is missing here, since respondent did not invoke, and the Bankruptcy Court did not purport to exercise, *in rem* jurisdiction."). Indeed, because the case involved the attempted recoupment of money, "there was no *res* to which the court's *in rem* jurisdiction could have attached." *Id.* Following *Nordic Village*, Congress enacted legislation to overrule that decision and

abrogated any claim to sovereign immunity under the Bankruptcy Code provision at issue. *See In re Sacred Heart Hosp.*, 133 F.3d 237, 243 (3d Cir. 1998) (holding that an amendment to the Bankruptcy Code "was intended to overrule [*Nordic Village*]" and that "[t]here can be no doubt that Congress unequivocally expressed its intent to abrogate the states' [ ] immunity under the Bankruptcy Code"). Further, subsequent to *Nordic Village*, the Supreme Court has held that bankruptcy jurisdiction does not impact state sovereign immunity as an *in personam* lawsuit would do because bankruptcy proceedings are predominantly *in rem*. *Katz*, 546 U.S. at 362 ("Bankruptcy jurisdiction, at its core, is *in rem* . . . . [Thus,] it does not implicate States' sovereignty to nearly the same degree as other kinds of jurisdiction.").

Here, in the District Court, Judge Siragusa held that this Court had addressed the *in rem* versus *in personam* jurisdiction issue in *Madison County* by simply stating that this Court must have reviewed and rejected the claim. District Court Decision, R. at A-179-80 ("Although the Panel did not discuss Defendant's argument about *in rem* proceedings in the decision, it obviously considered and rejected it.") It is respectfully submitted that this Court's decision in *Madison County* does not address the *in rem* issue, *i.e.* whether a county may file a purely *in rem* foreclosure proceeding against Indian tribe-owned properties. Instead, it cites

Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991), to hold that sovereign immunity bars the most efficient remedy, *i.e.* a lawsuit directly against the tribe. *Potawatomi* of course involved an *in personam* action against a sovereign tribe to enforce sales taxes owed on cigarette sales at a convenience store. District Court Judge Hurd in *Madison County* also relied on *Potawatomi*, making an incorrect factual finding that "[w]hat is relevant [to this issue] is that the County is attempting to bring suit against the Nation." *Madison County*, 401 F. Supp. 2d at 229. No such suit against the Nation was brought in that case, and no such suit is brought here.

It is respectfully submitted that *Potawatomi* offers no support for the proposition that tribal sovereign immunity from personal liability bars *in rem* foreclosure proceedings against real property. A lawsuit against the tribe itself may be the most efficient remedy, but the County does not seek that. Rather, the County seeks to foreclose against real property. As such, a landowner's theoretical sovereign immunity from suit does not apply to foreclosure proceedings because those proceedings are against the land (which, as *Sherrill* confirms, is not sovereign land).

Again, the County has no intention to file an *in personam* action against the Nation. Rather, its tax foreclosure proceedings are unquestionably *in rem* proceedings against the properties at issue. As the County advised the Nation by virtue of a tax enforcement notification, it had commenced "a proceeding to foreclose on real property . . . ." *See* The Nation's Amended Complaint, Exhibit A, R. at A-60-64. The proceeding itself is captioned "In the matter of the Foreclosure of Tax Liens by Proceeding *In Rem* pursuant to Article Eleven of the Real Property Tax Law by the County of Seneca." *See id.* Further, the notification advises the recipient: "Nature of proceeding: Such proceeding is brought against the real property only and is only to foreclose the tax liens described in this petition. No personal judgment will be entered herein for such taxes or other legal charges or any part thereof." *See id.* This *in rem* proceeding against the subject properties does not implicate or offend the Nation's purported claim to sovereign immunity from suit. Accordingly, this Court should reverse the District Court's decision and order and allow the County to maintain the foreclosure proceedings.

POINT III

THE DECISION AND ORDER OF THE DISTRICT COURT SHOULD BE REVERSED. SOVEREIGN IMMUNITY FROM SUIT DOES NOT BAR THE FORECLOSURE PROCEEDINGS BECAUSE THE NATION HAS ACTED OUTSIDE OF ANY SOVEREIGN TERRITORY.

Case law holds that a sovereign entity does not have immunity from suit with respect to properties it owns outside its sovereign jurisdiction. *See, e.g.*, *Chattanooga*, 264 U.S. at 479-80. In *Chattanooga*, Georgia purchased land in Tennessee. *Id.* When Tennessee commenced a condemnation action and asserted eminent domain over Georgia-owned properties, Georgia asserted a defense of sovereign immunity with respect to its properties. The Supreme Court rejected Georgia's claim, holding that when it purchased land within Tennessee it acted outside of its sovereign territory and "consented to be sued" in the courts of Tennessee with respect to the properties it purchased there. *Id.* at 482.

Chattanooga makes clear that a sovereign entity may not assert its sovereignty as a defense when it acts with respect to properties located outside of its sovereign territory. As summarized by the Illinois Supreme Court in *People ex rel. Hoagland v. Streeper*:

> The sovereignty of one State does not extend into the territory of another so as to create immunity from suit or freedom from judicial interference. Land acquired by one State in another is held subject to the laws of the

> latter and to all the incidents of private ownership . . . . As to such property, the [sovereign entity] cannot maintain its sovereign privileges or immunities.

145 N.E.2d at 629.

Here, *Sherrill* confirms that the Nation's recently purchased parcels are not sovereign and the Nation has accordingly acted outside of any sovereign territory when it has purchased the same.[2] It is respectfully submitted that *Madison County* regrettably undermines *Sherrill* by allowing an Indian group to revive aspects of sovereignty through land purchases, thereby disrupting local governance. *Sherrill* certainly recognized that potential adverse outcome and plainly allowed local municipalities to prohibit it. Specifically, *Sherrill* holds that the Oneida Indian Nation could not invoke sovereign immunity from suit to avoid the local municipality's collection of disputed property taxes. On this point, the Supreme Court stated:

> [G]iven the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneidas' long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe cannot unilaterally revive its

[2] Moreover, as discussed in Point V, the parcels are not even located within any ancient federal reservation. This inquiry is not relevant to whether the properties constitute a sovereign territory, however, because *Sherrill* plainly confirms that they do not.

> ancient sovereignty, in whole or in part, over the parcels at issue.

Sherrill, 544 U.S. at 214 (emphasis added).

Given this clear instruction from the Supreme Court, it is respectfully submitted that the Nation is properly prevented from invoking a defense of sovereign immunity where equitable doctrines preclude the tribe from asserting sovereignty over a particular parcel of land. Indeed, when Justice Stevens argued in his dissent in *Sherrill* that tribal immunity could be raised "as a *defense* against a state collection proceeding," *id.* at 225 (emphasis in original), the majority opinion specifically rejected that possibility. *See id*. at 214 n.7 ("The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding against Sherrill. We disagree."); *see also id.* at 221 (Souter, J., concurring) (rejecting claim of territorial sovereign status whether affirmative or defensive).

It is further respectfully submitted that by overlooking this plain instruction by the Supreme Court, *Madison County* leaves local governments powerless to seek judicial remedies to avoid the very disruptive impacts that *Sherrill* confirms they have the right to prevent.

POINT IV

THE DECISION AND ORDER OF THE DISTRICT COURT SHOULD BE REVERSED. SOVEREIGN IMMUNITY FROM SUIT DOES NOT BAR THE FORECLOSURE PROCEEDINGS AT ISSUE BECAUSE THE NATION HAS WAIVED ANY CLAIM TO SOVEREIGN IMMUNITY OR SHOULD BE ESTOPPED FROM INVOKING ANY SUCH CLAIM.

Madison County reiterates the long-standing principle that a sovereign entity may waive its immunity from suit. *Madison County*, 605 F.3d at 159 (holding that foreclosure would be allowed if the tribe waived immunity). While courts have held that a waiver should be clear, they recognize that there are no magic words or talismanic phrases required in order to find such a waiver. *See C & L Enterprises, Inc. v. Citizen Band of Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001) (finding waiver of tribal immunity based on contract language to which Indian tribe agreed); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 25 (1st Cir. 2006) ("[A]n effective limitation on tribal sovereign immunity need not use magic words."). Indeed, courts hold that a sovereign entity may waive its claim to immunity from suit by virtue of the sovereign's conduct. *See Narragansett*, 449 F.3d at 25 ("An Indian tribe's sovereign immunity may be limited by either tribal *conduct* (*i.e.*, waiver or consent) or congressional enactment (*i.e.*, abrogation)." (emphasis added)).

Putting an issue in play through litigation constitutes conduct by which a sovereign entity may waive its immunity. *See Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 500 F. Supp. 2d 1143, 1150 (E.D. Wis. 2007) (finding that "the Tribe has expressly waived its immunity from the Village's claim for a determination in its favor on the same issue [raised by the Tribe]. To hold otherwise would be anomalous and contrary to the court's broad equitable powers."); *Wyandotte Nation v. City of Kansas*, 200 F. Supp. 2d 1279, 1285 (D. Kan. 2002) (finding waiver where "the tribe's action in filing a quiet title suit necessarily places before the court the issue of whether plaintiff or defendants hold title to the land.").

Here, the Nation has waived its claim to sovereign immunity with respect to its real property tax obligations by making real property tax payments on certain other properties it owns within Seneca County (*i.e.*, the parcels where the cigarette sales at issue in *Gould* occurred). It did so by acknowledging its real property tax obligations to the New York Court of Appeals and by representing to that court its compliance with those obligations. *See Gould*, 14 N.Y.3d at 656 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."). Having made those concessions with respect to its non-sovereign parcels at issue in *Gould*, the Nation

may not now claim that a category of sovereign immunity, specifically sovereign immunity from suit, provides an exemption from real property taxes owed on similarly non-sovereign land. The subject parcels are not sovereign; that is undisputed. Sovereign immunity from suit is not applicable to these lands that have been distinctly non-Indian for over two hundred years. *See Sherrill*, 544 U.S. at 202-03 ("Given . . . the regulatory authority over the area constantly exercised by the State and its counties and towns for 200 years . . . we hold that the Tribe cannot unilaterally revive its ancient sovereignty, *in whole or in part*, over the parcels at issue." (emphasis added)).

POINT V

THE INDIAN TRADE AND INTERCOURSE ACT DOES NOT BAR THE FORECLOSURE PROCEEDINGS BECAUSE THAT STATUTE DOES NOT APPLY TO RECENT OPEN MARKET PURCHASES BY AN INDIAN TRIBE. THIS IS PARTICULARLY TRUE SINCE THE NATION'S PARCELS DO NOT EVEN LIE WITHIN AN ANCIENT FEDERAL RESERVATION.

Even though the Nation stated that it does not rely on the ITIA, *see* The Nation's Reply Brief, at p. 2 n.2, R. at A-126, and accordingly the District Court decision does not depend on that statute, *see* District Court Decision, R. at A-170 n.3, the Nation in its Amended Complaint and in its initial brief below argued that the ITIA bars the County's proceedings because foreclosure would effect a purportedly prohibited transfer of Indian land. *See* District Court Decision, R. at

A-170 n.3 ("Plaintiff had argued, in its moving papers, that the foreclosure actions violated the Non-Intercourse Act . . . . However, Plaintiff's reply brief disclaims reliance on the Non-Intercourse Act as a basis for the subject motion . . . . Accordingly, the Court need not address the Non-Intercourse Act at this time."). To the extent the Nation nevertheless relies on the ITIA on this appeal, this Court should reject any such reliance based on the Supreme Court's decision in *Sherrill*.

A) The ITIA Bars Only Alienation of Indian Country Lands.

The ITIA was meant to regulate conveyances of land originally possessed by Indian tribes and to protect them from overreaching in voluntary but one-sided land sales that would diminish aboriginal holdings. *See Lummi Indian Tribe v. Whatcom County*, 5 F.3d 1355, 1358 (9th Cir. 1993) ("Congress sought to protect Indian tribes by ensuring that in the transfer of Indian lands, the Indians were treated fairly and protected from 'the greed of other races' and 'artful scoundrels inclined to make a sharp bargain.'"). Thus, a violation of the ITIA may be found only when an Indian tribe sells aboriginal title to land. *See Oneida Indian Nation v. County of Oneida*, 617 F.3d 114, 136 (2d Cir. 2010) ("The [ITIA] merely codified the principle that a sovereign act was required to extinguish *aboriginal title* and thus that a conveyance without the sovereign's consent was void *ab initio*." (emphasis added)).

The ITIA was never intended to apply to unrestricted fee land that a tribe purchased on the open market from a non-Indian. *See Bates v. Clark*, 95 U.S. 204, 209 (1877) ("It follows from this that all the country described by the [ITIA] as Indian country remains Indian country so long as the Indians retain their original title to the soil, and ceases to be Indian country whenever they lose that title . . . .").

In *Lummi Indian Tribe*, 5 F.3d at 1359, the Indian tribe purchased on the open market in the 1970s and 1980s parcels that formerly were within that tribe's reservation. The court rejected the tribe's claim that the tribe's repurchased lands would fall under the ITIA and specifically held that such lands were alienable. *Id.*; *see also Mashpee Tribe v. Watt*, 542 F. Supp. 797, 803 (D. Mass. 1982), *aff'd*, 707 F.2d 23 (1st Cir. 1983) (the ITIA does not restrict "the alienation of property acquired by Indians from non-Indians in settled sections of the country"); *Cass County Joint Water Res. Dist.*, 643 N.W.2d at 697 ("[L]and does not become inalienable under the [ITIA] merely because it is acquired by an Indian tribe."); *Anderson & Middleton Lumber Co.*, 929 P.2d at 387 ("The Nation argues that when it purchased its interest in the property, that interest became subject to the [ITIA's] restriction against alienation . . . . We do not agree."). Indeed, the Michigan Court of Appeals has ruled that "the [ITIA] applies only to voluntary conveyances by the tribes themselves and *not* to involuntary conveyances by the

state for nonpayment of taxes." *Bay Mills Indian Cmty. v. State of Michigan*, 626 N.W.2d 169, 173 (Mich. Ct. App. 2001) (emphasis added).

A ruling to the contrary would yield the absurd result that an Indian tribe could purchase property on the open market from a non-Indian and subsequently pay no real property taxes without risk of foreclosure – but that a non-Indian would have to confirm a purchase of that same property from an Indian tribe through an Act of Congress or other federal channels.

In sum, when an Indian tribe purchases land on the open market, the ITIA has no bearing on subsequent transfers of title.

B) As Confirmed by Both Sherrill and Gould, the Nation's Recently Purchased Properties Are Not Sovereign Lands.

In *Sherrill*, the Supreme Court drew a distinction between sovereign "Indian Country" and lands that an Indian tribe purchases on the open market after centuries of non-Indian ownership. The Supreme Court flatly rejected the Oneida Indian Nation's claim to a sovereign, tax exempt reservation on the latter. The Court held that the right to be free from local taxation – *i.e.*, the right to exert sovereign dominion – was reserved only for actual and long-standing Indian reservations. Thus, the Oneida Indian Nation's parcels were subject to local taxation. The Supreme Court confirmed that under under federal law, any

remnants of sovereignty or power arising from reservation status had long ago dissipated with the abandonment of the land. The Court held:

> In this action, [the Oneida Indian Nation] seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations. We now reject the unification theory of [the Oneida Indian Nation] and the United States and hold that "standards of federal Indian law and federal equity practice" preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.

Sherrill, 544 U.S. at 213-14.

Sherrill was further supported by public policy concerns against creating a haphazard "checkerboard" of reservations throughout a state that could otherwise be created at the behest of an Indian tribe though open market purchases of ancient land from non-Indians. The Court held that allowing the Oneida Indian Nation to purchase ancient lands at will and thereafter claim tax free status on those lands would overburden state and local governments and neighboring landowners:

> The city of Sherrill and Oneida County are today overwhelmingly populated by non-Indians. A checkerboard of alternating state and tribal jurisdiction in New York State – created unilaterally at [the Oneida Indian Nation's] behest – would seriously burde[n] the administration of state and local governments and would adversely affect landowners neighboring the tribal patches.

Id. at 219-20. Thus, "[t]he relief [the Oneida Indian Nation] seeks – recognition of present and future sovereign authority to remove the land from local taxation – is unavailable because of the long lapse of time, during which New York's governance remained undisturbed, and the present-day and future disruption such relief would engender." *Id.* at 216 n.9.

Sherrill recognized the concerns associated with checkerboard reservations and found that those matters are properly addressed in the land into trust process under 25 U.S.C. § 465. The Court said:

> Recognizing these practical concerns, Congress has provided, in U.S.C. § 465, a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being. Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land "shall be exempt from State and local taxation."

Id. at 220.

Only if a tribe successfully completes the land into trust process – which requires the tribe to pay all due real property taxes – may recently-purchased properties be exempt from local taxation and other regulations. Short of completing the land into trust process, *Sherrill* and its progeny made clear that Indian tribes may not revive any sovereignty rights on repurchased lands. Indeed, the New York Court of Appeals found that *Sherrill* bars the Nation from relying on sovereignty to avoid its real property taxes. *See Gould*, 14 N.Y.3d at 642-43

("[*Sherrill*] certainly would preclude the Cayuga Nation from attempting to assert sovereign power over its convenience store properties for the purpose of avoiding real property taxes.").

Sherrill renders academic any discussion of the applicability of the ITIA to the issues at bar. In rejecting the Oneida Indian Nation's unification-of-fee-and-aboriginal-title theory, *Sherrill*, 544 U.S. at 213-14, the Supreme Court eliminated the legal basis upon which the Nation arguably would have standing – *i.e.*, as possessors of aboriginal title – to invoke the ITIA. With no ability to revive its ancient sovereignty, and lacking federal government trust status for the subject parcels, the Nation is left with unrestricted fee title. The restrictions against alienation that apply to a tribe's "original title to the soil," *Dick v. United States*, 208 U.S. 340, 359 (1908), do not exist with respect to the Nation's recently-purchased properties.

Sherrill cannot be read to mean the ITIA prevents the alienation of title through foreclosure where (1) the recently purchased land is fully taxable and (2) the Nation exercises no sovereign authority over it. Those two conditions of the land – which inhere in *Sherrill's* holding – are incompatible with recognizing the land as "Indian Country" and therefore within the protection of the ITIA. It is inconceivable that *Sherrill* would cite the ITIA four times in analyzing tribal sovereign immunity from state and local taxation, 544 U.S. at 204, 205, 207, and

declare the City of Sherrill as the exclusive lawful sovereign, specifically affirming its right to impose and collect taxes as a core incident of its sovereignty, yet *sub silentio* mean the city could not foreclose because of the ITIA.

While the District Court in *Madison County* addressed the ITIA and found it applicable, on appeal this Court remained silent on the issue. The District Court's decision has been rejected by other courts. In *Hobart*, for example, the court held:

> It is true that in the two cases remanded to the United States District Court for the Northern District of New York after the Supreme Court's decision in *Sherrill*, the lower court has now held that recently purchased tribal lands are subject to the [ITIA]. On remand, the district court concluded that the local governments, whose authority to tax the OIN's property was upheld by the Supreme Court, are nevertheless barred by the [ITIA] from foreclosing on the property for nonpayment of taxes. As already noted, *I find the right of a local government to foreclose for nonpayment of taxes implicit in Sherrill's holding that the OIN's reacquired property is subject to* ad valorem *property taxes and therefore disagree with the district court's decision in those cases.*

542 F. Supp. 2d at 933-34 (emphasis added).

The logical conclusion of the Nation's argument is that the ITIA would allow it to purchase fee land anywhere in the United States, owe real property taxes on such land, but refuse to pay taxes without risk of foreclosure. This has no basis in law or logic. *See Hobart*, 542 F. Supp. 2d at 921 ("The suggestion that only federal protection against property tax assessments was withdrawn, but not protection from other, similar assessments, or from forced alienation by way of

condemnation or foreclosure for nonpayment of taxes, has no basis in logic or law."). Since "there is no canon against using common sense in construing laws as saying what they obviously mean," *Roschen v. Ward*, 279 U.S. 337, 339 (1929), this Court should prevent the absurd result that a tribe may purchase land anywhere in the United States on the open market and avoid foreclosure by virtue of the ITIA.

C) While it is Clear that the Nation's Properties Are Not Sovereign Lands, They Are Also Outside Any Purported Federal Reservation.

The Nation contends that the ITIA applies because its reacquired parcels lie within an ancient federal reservation. *See* The Nation's Amended Complaint, ¶ 2, at A-52. The Nation accordingly claims that when it purchases any land within the historic 64,015-acre tract in Central New York, it thereby revives rights on federal reservation land. That claim is false. In addition to confirming that purchasing such real property does not revive sovereignty, the New York Court of Appeals in *Gould* noted that the acquired tracts were technically located within an ancient federal reservation that had not been disestablished for purposes of New York's cigarette sales and excise tax. *Gould*, 14 N.Y.3d at 640. The *Gould* court, however, appeared to concede some doubt about the status of the land as a federal reservation. It said: "To be sure, the Supreme Court has not yet determined whether parcels of aboriginal lands that were later reacquired by the Nation

constitute reservation property in accordance with federal law. Its answer to that question would settle the issue." *Id.*

The County submits that the Court of Appeals' uncertainty on this issue is well-founded. None of the land that the Nation ever owned or possessed in Central New York was ever a federal reservation. While the inquiry is academic because the ITIA only applies to sovereign lands that plainly are not at issue here, the issue warrants review because the Nation's claim to an ancient reservation of 64,015 acres, which encompasses several municipal governments, compounds the disruption to state and local government and private citizens that concerned the Supreme Court in *Sherrill*. Since this is a federal issue, the County seeks a ruling from this Court that the Nation's properties have never been located within a federal reservation, or that any such federal reservation has been disestablished.

Gould begins its analysis of the history relevant to the purported existence of a federal reservation by discussing the 1794 Treaty of Canandaigua. 14 N.Y.3d at 642. The facts relevant to the issue, however, pre-date 1794. Specifically, on February 25, 1789, the Cayugas and New York State signed a Treaty, the first paragraph of which states: "First: the Cayugas do cede and grant all their lands to the people of the State of New York, forever." The only interest the Cayugas held in any portion of the ceded lands after 1789 was a limited land use right as granted by the State in the second article of the treaty. By the Treaty, the Cayugas agreed

that they would not sell the land use rights to anyone other than the State of New York. In relevant part, the treaty reads: "Secondly: the Cayugas shall, of the said ceded lands, hold to themselves and to their posterity forever, for their own use and cultivation, but not to be sold, leased, or in any other manner aliened or disposed of to others . . . ."

The 1789 Treaty was signed on February 25, 1789. One week later, on March 4, 1789, the United States Constitution took effect and the United States government began functioning as such. Congress approved the first ITIA over a year later, on July 22, 1790. The Articles of Confederation in effect when the 1789 Treaty was signed did not prohibit or require the assent of Congress for the transfer of Indian land. *See Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1167 (2d Cir. 1988). As a result, at the time of the 1789 Treaty, New York could – and did – lawfully exercise its right to extinguish whatever interests the Cayugas had in the subject land. *See id.*

The United States itself advanced this very argument before the American and British Claims Arbitration Tribunal in 1926. That Tribunal concluded that the 1789 Treaty "was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown," and that "[t]he title of New York . . . was *independent of and anterior to the Federal*

Constitution." Cayuga Indian Claims, 20 AM. J. INT'L L. 574, 590-91 (Am. & Br. Claims Arb. Trib. 1926) (emphasis added).

In the 1794 Treaty of Canandaigua, the United States acknowledged that the Cayugas possessed a state reservation. The Treaty of Canandaigua did not establish any new rights, much less a federal reservation. Article II of the Treaty of Canandaigua provides in full:

> The United States *acknowledge* the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

7 Stat. 44, Art. II (emphasis added).

This language confirms that the United States did not purport to reserve any land by virtue of the Treaty of Canandaigua in 1794. It merely "acknowledged" that New York had reserved to the Cayugas certain rights to the land after the Cayugas ceded whatever Indian title they may have held. Similarly, the United States did not purport to create a reservation by virtue of the Treaty of Canandaigua, but merely acknowledged that the lands constituted a state reservation under the 1789 Treaty between the Cayugas and New York. The

federal government simply promised not to disturb the Cayugas' use of the land pursuant to the 1789 Treaty.

The Treaty of Canandaigua did not convey an interest in land to the Cayugas and did not divest New York of its rights. *See Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917, 922 n.5 (1965) (explaining that the purpose of the Treaty of Canandaigua was to "reconfirm peace and friendship between the United States and the Six Nations . . . . [T]here was no purpose to divest New York and Massachusetts of their rights, nor was there any purpose to prevent or to supervise sales or transfers of [subject] territory."). A reading of the Treaty of Canandaigua as creating a federal reservation is erroneous because the United States did not have the power to grant or confirm a title to land when the sovereignty and dominion over it had become vested in New York State. *See Goodtitle v. Kibbe*, 50 U.S. 471, 478 (1850) (holding that Congress could not grant an interest in land that belonged to Alabama). After 1789, New York held the land in fee subject only to limited use rights granted to the Cayugas pursuant to state law. The federal government had no property rights in the lands and could not confer title without illegally depriving New York of its property rights. *See id.*

Although the Supreme Court has not held that the treaty making power of the United States extends to the divestment of a state's interest in land, it has observed that if such authority were to exist, it must be shown unmistakably in the

language of the treaty. *United States v. Minnesota*, 270 U.S. 181, 209 (1926) ("[N]o treaty should be construed as intended to divest rights of property – such as the state possessed in respect of these lands – unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question."). The Treaty of Canandaigua makes no mention of an intent to divest New York of its property rights, and there is no historical evidence that the federal government intended the Treaty to divest New York of its interest. On the contrary, the language of the Treaty of Canandaigua only confirms that the United States explicitly acknowledged New York State's treaty with the Cayugas.

If, as the Nation alleges, the Treaty of Canandaigua established a federal Cayuga reservation, then in so doing the United States violated the Fifth Amendment to the Constitution. The United States' power of eminent domain extends to the taking of state-owned property without the state's consent, but the United States must pay just compensation to the property owner for the property it takes. U.S. Const. amend. V; *see also Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 291 (1983). A compensable taking occurs "[i]f a government has committed or authorized a permanent physical occupation of [the] property." *Southview Assocs. v. Bongartz*, 980 F.2d 84, 92-93 (2d Cir. 1992). Under this standard, if by the Treaty of Canandaigua the United States took New York's property rights in the subject lands, then New York State would have been

entitled to compensation for that taking. No such compensation was ever given. Because compensation was never paid to New York, even if the United States attempted to effect a taking by the Treaty of Canandaigua, it was incomplete and no property interest passed to the Cayugas. *See United States v. Dow*, 357 U.S. 17, 21 (1958) (holding that title does not pass until the owner receives compensation).

D) Even if the Nation at One Point Possessed a Federal Reservation (Which it Did Not) that Reservation Has Been Formally and Legally Disestablished.

Even if the United States created a federal reservation by the Treaty of Canandaigua, that reservation has been disestablished because (i) the ITIAs in place at the time of the Cayugas treaties with New York did not require federal ratification of those treaties and (ii) in any event, the federal government ratified those transfers.

The July 27, 1795 Treaty between the Cayugas and New York State provides:

> [I]t is Covenanted, stipulated and agreed by the said Cayuga Nation that they will sell . . . to the People of the State of New York all and singular the Lands reserved to the use of the said Cayuga Nation . . . to have and to hold the same to the People of the State of New York and to their Successors forever.

The May 30, 1807 Treaty between the Cayugas and New York State further provides:

> [T]he said Cayuga Nation for and in consideration of the sum of Four thousand eight hundred dollars . . . Do sell and release to the people of the State aforesaid all their right title Interest possession property claim and demand whatsoever of in and to the said . . . Land . . . commonly called the Cayuga Reservations . . . which two reservations contain all the land the said Cayuga Nation claim or have any interest in in this State To have and to hold the said Two tracts of Land as above described unto the People of the State of New York and their Successors forever.

While the New York Court of Appeals in *Gould* held that these conveyances violated the federal restriction on the alienability of Indian lands, 14 N.Y.3d at 642, it is respectfully submitted that such a holding is not correct. The ITIA applied by the courts whose decisions the Court of Appeals cited was not the law in effect at the time of the alleged violations and did not include a key provision that the relevant statutes included. Specifically, the Court of Appeals cited *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004) and *Cayuga Indian Nation of N.Y. v. Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990), which held that the 1795 and 1807 conveyances of land to New York were invalid under the current version of the ITIA, 25 U.S.C. § 177. In fact, the ITIAs of 1793 and 1802 are the applicable Acts under which the use rights were purchased by New York in 1795 and 1807, respectively. Each of these ITIAs has a provision

indicating that the statute was meant to govern interstate commerce but *not* intrastate sales:

> That nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States, and being within the [ordinary] jurisdiction of any of the individual states.

See 1793 ITIA, sec. 13; 1802 ITIA, sec. 19. Thus, under applicable law, the 1795 and 1807 conveyances did not violate any restriction because they were not barred by the then-applicable ITIAs.

No federal Cayuga reservation was ever created, and there was, therefore, no restriction at all on the alienability of the lands transferred in 1795 and 1807. Those two transfers nonetheless complied even with the later version of the ITIA because they were approved by the federal government. The ITIA prohibits the purchase or grant of aboriginal lands from any Indian Nation "unless the same shall be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. The plain language of the Act indicates that ratification by the federal government through formalities of the Treaty Clause is not the sole source of federal approval for agreements between states and Indian tribes. Indeed, the Supreme Court's decision in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 248 (1985), holds only that federal approval must be "plain and unambiguous." It says nothing about what form such "plain and

unambiguous" consent must take. *See Cayuga Indian Nation v. Cuomo*, 667 F. Supp. 938, 944 (N.D.N.Y. 1987) (noting that the Supreme Court could have, but "did not set down an unequivocal rule that any conveyance of Indian land must be by express federal treaty in order to comply with the [ITIA]").

Under the applicable "plain and unambiguous" standard, the federal government's involvement in the negotiation, consummation and subsequent implementation of the 1795 and 1807 conveyances constituted federal ratification of those treaties. Not only did federal officials actively participate in the treaty process and attend the negotiations and signing of the 1795 and 1807 Treaties, but the federal government distributed New York's payments to the Cayugas. *See Cayuga Indian Nation of New York v. Cuomo*, 730 F. Supp. 485, 487 (N.D.N.Y. 1990) (discussing involvement of federal officials Jasper Parrish and Israel Chapin Jr. in the negotiation and signing of the 1795 and 1807 Treaties and Parrish's transmittal of consideration paid by New York State to the Cayugas for the acquisition of the Cayuga land); *Cayuga Indian Nation v. United States*, 36 Ind. Cl. Comm. 75, 92, 96 (1975) (noting that Parrish and Chapin signed the 1795 Treaty and that Parrish attended the signing of the 1807 Treaty as the United States Superintendent of Indian Affairs). The conduct of the federal government throughout the negotiation and implementation of both treaties demonstrates federal acquiescence to the conveyances. Those transfers were therefore valid and

did not violate the ITIA. The failure of the United States to take any action to attack or undo such transfers for over two hundred years is telling and prevents it from doing so now. *See Pataki*, *supra*, 413 F.3d at 279 (denying relief to the Nation based on laches despite effort of United States to intervene and assert claims on the Nation's behalf because "given the relative youth of this country, a suit based on events that occurred two hundred years ago is about as egregious an instance of laches on the part of the United States as can be imagined").

Further, in 1910, the United States and Great Britain entered into an agreement to establish an arbitral tribunal to resolve certain claims between the two governments. Among these was a claim by Great Britain, on behalf of the Cayuga Indians of Canada, related to New York State's refusal to pay to the Canadian Cayugas some part of the annuity provided under the 1795 Treaty. *See* Cayuga Indian Claims, 20 AM. J. INT'L L. 574, 576 (Am. & Br. Claims Arb. Trib. 1926). The agreement and the list of claims to be resolved were approved by the Senate. By this agreement, the United States recognized that the obligations under the 1795 Treaty were enforceable and could be adjudicated in an international forum. In 1926, the American and British Claims Arbitration Tribunal published its decision requiring the United States to pay on behalf of New York $100,000 to Great Britain as trustee for the Canadian Cayugas. *See id.* at 594. Thereafter, President Coolidge, with the approval of both houses of Congress, included in the

federal government's budget the funds required to pay the award. *See Cuomo*, 730 F. Supp. at 492. By payment of the Tribunal's award, the federal government plainly and unambiguously recognized the 1795 Treaty between the Cayugas and New York as a valid conveyance.

In deciding whether the Cayugas or the Nation has ever possessed a federal reservation which remains in place, the New York Court of Appeals, citing the Second Circuit's decision in *Pataki*, 413 F.3d at 269 n.2, noted that that "the Treaty of Buffalo Creek neither mentions Cayuga land or Cayuga title in New York, nor refers to the 1795 or 1807 treaties [between New York and the Cayugas]." *Gould*, 14 N.Y.3d at 639. However, the Court of Appeals' conclusion that there is a federal Cayuga reservation that has not been disestablished does not follow. The Treaty of Buffalo Creek confirms the Counties' assertion that the Cayuga reservation was either never established as a federal reservation or had long been disestablished by the time of the Treaty of Buffalo Creek, Jan. 15, 1838, 7 Stat. 550. Had there been a federal Cayuga reservation in existence at the time of the Treaty of Buffalo Creek, that treaty would have specifically mentioned any such reservation either as land to which rights were being relinquished or land to which Indians reserved rights. Instead, the Treaty of Buffalo Creek provides for compensation to the Cayugas upon their removal from New York State to the west, and refers to the Cayugas as "friends" of the Senecas. With no Cayuga reservation

for the Treaty to address specifically, it simply recognizes Cayugas and Onondagas "residing among [the Senecas]." The Treaty of Buffalo Creek is compelling evidence that, at least as of 1838, the federal government did not believe a federal Cayuga reservation existed.

CONCLUSION

For the reasons set forth above, the County respectfully requests that the Court reverse the District Court's decision and order enjoining the County from pursuing tax foreclosure proceedings against parcels of real property owned by the Nation for failure to pay real property taxes.

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Pittsford, New York

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

I hereby certify that this brief contains 12,410 words, in compliance with the type-volume limitations of Rule 32(a)(7)(B). 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).

Dated: Pittsford, New York
January 2, 2013

/s/Philip G. Spellane
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