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

REPLY BRIEF FOR DEFENDANT-APPELLANT

HARRIS BEACH PLLC
PHILIP G. SPELLANE
JAMES P. NONKES
Attorneys for Defendant-Appellant
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

PRELIMINARY STATEMENT 1

ARGUMENT 4

POINT I THE NATION RELIES ON THIS COURT'S VACATED DECISION IN *MADISON COUNTY* AND INAPPLICABLE CASES CITED THEREIN, BUT DISREGARDS BINDING LANGUAGE IN *SHERRILL* AND *YAKIMA* WHICH HOLDS WITH RESPECT TO AN INDIAN TRIBE'S NON-SOVEREIGN PROPERTIES THAT A TAXING AUTHORITY MAY BOTH IMPOSE *AND COLLECT* REAL PROPERTY TAXES 4

POINT II THE NATION WITHDRAWS ITS PREVIOUS ARGUMENT THAT IT MAY AVOID FORECLOSURE ONLY ON PURPORTEDLY ANCIENT RESERVATION LAND – AND NOW CLAIMS IT MAY AVOID FORECLOSURE ON LAND ANYWHERE IN THE UNITED STATES, REGARDLESS OF SOVEREIGNTY OR RESERVATION STATUS – YET DISREGARDS WELL-SETTLED RULES OF SOVEREIGNTY AND RELIES ON INAPT CASES WHEREIN THE UNITED STATES SEEKS TO PROTECT TITLE TO SOVEREIGN PROPERTY 14

POINT III THE NATION UNDERMINES ITS OWN ARGUMENT WHEN IT ATTEMPTS TO EXPLAIN ITS PRIOR REPRESENTATIONS TO THE NEW YORK COURT OF APPEALS EXPRESSLY ACKNOWLEDGING ITS OBLIGATION TO PAY REAL PROPERTY TAXES 24

CONCLUSION 26

TABLE OF AUTHORITIES

Page

Cases

Asociacion de Reclamantes v. United Mexican States, 735 F.2d 1517 (D.C. Cir. 1984) 20, 21

Bull v. United States, 295 U.S. 247 (1935) 16

C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla., 532 U.S. 411 (2001) 20

Cass County Joint Water Resource District v. 1.43 Acres of Land, 643 N.W.2d 685 (N.D. 2002) 13, 18

Cayuga Indian Nation v. Gould, 14 N.Y.3d 614 (2010) 24

Celauro v. U.S., 411 F. Supp. 2d 257 (E.D.N.Y. 2006) 7

City of Cincinnati v. Commonwealth ex rel. Reeves, 292 Ky. 597, 167 S.W.2d 709 (Ct. App. 1942) 19

City of New York v. Permanent Mission of India to the U.N., 446 F.3d 365 (CA2 2006), *aff'd*, 551 U.S. 193 (2007) 21

City of Sherrill v. Oneida Indian Nation, 544 U.S. 197 (2005) .... passim

Confederated Tribes & Bands of Yakima Nation v. County of Yakima, 903 F.2d 1207 (9th Cir. 1990) 10

County of Yakima v. Confederated Tribes & Bands of the Yakima Indians, 502 U.S. 251 (1992) .... passim

Georgia v. City of Chattanooga, 264 U.S. 472 (1924) 17, 19

Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751 (1998) .... passim

Kolstad v. American Dental Assoc., 527 U.S. 526 (1999) 8

Madison County, *Oneida Tribe of Indians v. Village of Hobart*, 542 F. Supp. 2d 908 (E.D. Wis. 2008) 12

Okla. Tax Comm'n v. Chickasaw Nation, 515 U.S. 450 (1995)..............................20

Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991) 5, 8, 10, 11

Oneida Indian Nation of New York v. Madison County, 605 F.3d 149 (2d Cir. 2010) .... passim

Oneida Tribe of Indians v. Vill. of Hobart, 542 F. Supp. 2d 908 (E.D. Wis. 2008) 9

People ex rel. Hoagland v. Streeper, 12 Ill. 2d 204, 145 N.E.2d 625 (1957) 17

Shaffer v. Carter, 252 U.S. 37 (1920)...16

State ex rel. Taggart v. Holcomb, 85 Kan. 178, 116 P. 251 (1911) 18

State v. City of Hudson, 231 Minn. 127, 42 N.W.2d 546 (1950) 17

The Schooner Exch. v. McFaddon, 11 U.S. (7 Cranch) 116 (1812)........................21

Three Affiliated Tribes v. World Engineering, 476 U.S. 877 (1986) 19

United States v. Alabama, 313 U.S. 274 (1941) 16

United States v. Nat'l Bank of Commerce, 472 U.S. 713 (1985) 7

Statutes

§ 460(2)(e)...22

1 F. Wharton, Conflict of Laws § 278 (3d ed. 1905)..21

Foreign Sovereign Immunities Act of 1976 ["FSIA"], 28 U.S.C. § 1602 et seq. ...21

Restatement (Second) of Foreign Relations Law § 68(b) (1965)............................22

Restatement (Third) of Foreign Relations Law § 455(1)(c) (1987) 22

Other Authorities

Yakima Nation Brief, in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indians*, 1991 WL 521292 (1991)..10

Defendant-Appellant Seneca County, New York (the "County") submits this Reply Brief to the Opposition Brief of Plaintiff-Appellee Cayuga Indian Nation of New York (the "Nation") on the issue of whether the County may maintain real property tax foreclosure proceedings against non-sovereign parcels owned in fee by the Nation.

PRELIMINARY STATEMENT

From the first line of the Nation's brief, it is apparent that the Nation places its proverbial eggs in one basket, namely this Court's decision in *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 (2d Cir. 2010) ("*Madison County*"). The Nation relies on the same sovereign immunity cases that underlie this Court's vacated decision in *Madison County*, those that prevent civil suits against Indian tribes for payment of sales tax or amounts due on a promissory note, as well as cases that involve the United States seeking to protect its sovereign property. These cases do not support the relief the Nation seeks because when it comes to payment of real property taxes and foreclosure for failure to pay with respect to non-sovereign properties, the Supreme Court, in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indians*, 502 U.S. 251 (1992), and *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 (2005), has consistently ruled in favor of the taxing jurisdictions.

The Nation admits that the subject parcels are not sovereign. The Nation reverses the argument it advanced to the District Court, however, and asks this Court to allow it to avoid foreclosure with respect to properties it purchases anywhere in the United States, even outside its purportedly historic reservation, based not on any reservation or sovereignty status of the properties but on the tribe's sovereign immunity from suit. The Nation argues that *Yakima* and *Sherrill* support only a county's right to *impose* property taxes but leave a county powerless to *collect* those same taxes, regardless of the location of the property. That argument is belied by a plain reading of those cases. In language the Nation addresses only in a footnote, *Yakima*, for example, explicitly holds that that while lawsuits against a tribe might be disruptive of tribal self-government and implicate a tribe's sovereign immunity, a county's right with respect to a tribe's non-sovereign property to assess and *collect* property taxes, defined by the Supreme Court to include the remedy of foreclosure, does *not* implicate the tribe's sovereign immunity. The Nation's misguided argument that the *Yakima* court chose its language sloppily and did not intend to address collection fails; that issue is specifically addressed in that case by the District Court, the Ninth Circuit, in the briefs on appeal to the Supreme Court, and then ultimately by the Supreme Court.

Sherrill follows *Yakima* and similarly addresses equitable relief available to a taxing authority; rejects a tribe's right to avoid such relief based on sovereign

immunity from suit; and holds that the tribe may not rekindle any aspect of its sovereignty, "in whole or in part," with respect to such parcels. The Nation's attempt to limit these cases solely to the issue of tax imposition is not only illogical but defies a plain reading.

Accordingly, the County respectfully submits that the cases underlying *Madison County*, which are repeated in the Nation's brief on this appeal, are inapplicable to the County's effort to collect taxes owed by means of foreclosure against non-sovereign property. The Nation claims that this Court "had little trouble" finding in favor of the Oneida Indian Nation in *Madison County*. (Opp. Brief at 1.) That is not true. This Court found that the result was "reminiscent of words" in a nonsensical nursery rhyme. *Madison County*, 605 F.3d at 159. In addition, in their concurring opinion, two judges describe the decision as one that "defies common sense." *Id*. at 163. The County submits that, based on its prior decisions, the Supreme Court would have reversed *Madison County*, instead of just vacating it, but for the Oneidas' tactical eleventh-hour move to evade Supreme Court review. For these reasons, and the reasons set forth below, the County respectfully submits that the Supreme Court's *vacatur* of *Madison County* allows the opportunity to resolve the issues on this appeal in accordance with Supreme Court precedent.

ARGUMENT

POINT I

THE NATION RELIES ON THIS COURT'S VACATED DECISION IN *MADISON COUNTY* AND INAPPLICABLE CASES CITED THEREIN, BUT DISREGARDS BINDING LANGUAGE IN *SHERRILL* AND *YAKIMA* WHICH HOLDS WITH RESPECT TO AN INDIAN TRIBE'S NON-SOVEREIGN PROPERTIES THAT A TAXING AUTHORITY MAY BOTH IMPOSE *AND COLLECT* REAL PROPERTY TAXES.

The Nation admits that the parcels at issue here are not sovereign and are accordingly subject to real property tax. (*See* Opp. Brief at 31, n. 11, 32 n. 12, *passim*.) ("The Nation does not claim that the lands at issue in this case are immune from taxation . . . ."); ("The Nation does not contend that federal law prohibits the County from imposing taxes on lands in question."); (conceding that if the tribe's ability to exert sovereignty over the land is determinative, "the Nation concedes that foreclosure would be permissible on the lands at issue in this case"). To support its argument that sovereign immunity from lawsuits nevertheless prevents foreclosure with respect to non-sovereign property, the Nation relies almost exclusively on this Court's vacated decision in *Madison County*, and, in turn, the two cases cited there, *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) and *Oklahoma Tax Commission v.*

Citizen Band of Potawatomi Indian Tribe of Oklahoma, 498 U.S. 505 (1991) (Opp. Memo., *passim*.)

Potawatomi and *Kiowa* do not support the Nation's argument because they involve *in personam* actions against a sovereign Indian tribe for payment of a sales tax (*Potawatomi*) and payment under a promissory note (*Kiowa*). Neither is an *in rem* proceeding against non-sovereign property on which taxes are lawfully imposed and owed. Indeed, *Potawatomi* confirms that a tribe's sovereign immunity from suit bars the state from commencing an *in personam* action against the tribe to collect sales tax. The Court acknowledged, however, that the state could invoke other means to collect the sales tax: "There is no doubt that sovereign immunity bars the State from pursuing the most efficient remedy [*i.e.*, a lawsuit against the tribe], but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State." *Potawatomi*, 498 U.S. at 514. *Potawatomi* is thus correctly read to mean that tribal sovereign immunity from suit bars only a direct lawsuit against a tribe.

Kiowa likewise limits its holding to the principle that "[t]ribes enjoy immunity from suits on contracts . . . ." *Kiowa*, 523 U.S. at 760. It is incorrect and illogical to expand these *in personam* cases so broadly that they

encompass foreclosure proceedings against non-sovereign properties. They plainly do not so hold.

In addition to relying on inapt cases, the Nation urges this Court to limit relevant cases, *Yakima* and *Sherrill*, to the proposition that the County may impose real property taxes on tribal land but may not collect those same taxes. (*See, e.g.*, Opp. Brief at 19.) Indeed, the Nation argues that *Sherrill* rejects only "the Oneida Nation's claim of tax immunity, not sovereign immunity from suit." (Opp. Brief at 19.) Seeking to limit the scope of *Sherrill*, the Nation contends, "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." (Opp. Brief at 20.) The Nation's argument fails for several reasons, not the least of which is a plain reading of *Yakima* and *Sherrill*.

Yakima and *Sherrill* are both decided in the context of the applicable taxing authority's enforcement of an equitable remedy in response to a tribe's failure to pay real property taxes. Specifically, the remedy in *Yakima* is foreclosure; in *Sherrill* it is eviction. Both cases explicitly discuss the equitable relief available and find in favor of the taxing authority notwithstanding each tribe's sovereign immunity from suit.

Yakima discusses the difference between *in rem* and *in personam* actions and then confirms that a state has the power to "assess and collect" property tax with

respect to non-sovereign land owned by an Indian tribe: "While 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." *Yakima*, 502 U.S. at 265 (emphasis added). The Supreme Court, the Internal Revenue Service, and the courts of this Circuit all hold that the power to "collect" real property taxes *includes* foreclosure. *United States v. Nat'l Bank of Commerce*, 472 U.S. 713, 720 (1985) (discussing the "lien-foreclosure suit" as the first tool to "enforce the *collection* of unpaid taxes") (emphasis added); *Celauro v. U.S.*, 411 F. Supp. 2d 257, 264 (E.D.N.Y. 2006) ("The Internal Revenue Code provides two principal tools for the *collection* of delinquent taxes. The first is the lien-foreclosure suit.") (emphasis added).

Specifically, in *Sherrill*, the underlying equitable remedy at issue was an eviction proceeding in the context of a tax foreclosure proceeding. Like *Yakima*, *Sherrill* also addresses and upholds a taxing jurisdiction's right not only to impose but also to *collect* the real property tax on a tribe's non-sovereign property, the tribe's sovereign immunity from suit notwithstanding. In his dissent, Justice Stevens suggested that tribal sovereign immunity may be raised as a defense against "a state *collection* proceeding." *Sherrill*, 544 U.S. at 225 (emphasis added). 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 initiated by Sherrill. We disagree.").

Plainly, both *Yakima* and *Sherrill* contemplate an enforcement proceeding in the event of default in payment of real property taxes. Despite this, the Nation's brief urges that the scope of each holding must be narrowly limited to the exact issues identified in the questions presented. (Opp. Brief at 24.) Clearly, the Supreme Court's review is not so limited. The Nation's argument that *Yakima* and *Sherrill* would have been constrained to address only discrete issues formally raised in the briefs' questions presented disregards well-settled Supreme Court precedent, including *Potowatomi*, a case on which the Nation specifically relies.

In *Potowatomi*, for example, the Supreme Court rejected a similar argument by the tribe that an issue (tax on sales to nonmembers of the tribe) was not properly before the Court because it had not been explicitly referenced in the questions presented: "[Although not explicitly presented], [t]he question is fairly subsumed in the 'questions presented' in the petition for *certiorari*, and both parties have briefed it. We have the authority to decide it and proceed to do so." *Potawatomi*, 498 U.S. at 512; *see also Kolstad v. American Dental Assoc.*, 527 U.S. 526, 540 (1999) (discussing that the Court reaches issues "intimately bound up" with questions on review). Indeed, the holding in *Sherrill* itself is based on the Court's

consideration and resolution of issues wholly independent of those raised in the parties' briefs. *Sherrill*, 544 U.S. at 214, n.8 ("We resolve this case on considerations not discretely identified in the parties' briefs. But the question of equitable considerations limiting the relief available to OIN, which we reserved in *Oneida II*, is inextricably linked to, and is thus 'fairly included' within, the questions presented.")

The Nation's proposed narrow reading of *Yakima* and *Sherrill* would render those decisions meaningless. It contends that the Supreme Court would have barred the respective taxing authorities from pursuing eviction or foreclosure due to sovereign immunity. That argument is pure speculation; neither decision discusses that outcome. To suggest that the two cases discuss and provide rights, but all the while silently and implicitly contemplate the denial of corresponding remedies – such as the remedies actually presented to the Court in those cases – would reduce those decisions, as one court has observed, to "nothing more than an elaborate academic parlor game." *See Oneida Tribe of Indians v. Vill. of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008).

Accordingly, it is respectfully submitted that this Court should hold that *Sherrill* and *Yakima* mean just what they say, that a state may not only impose but also may *collect* a property tax on non-sovereign land. To be sure, both the District Court's decision and the Ninth Circuit's decision in *Yakima* hold that the

power to impose *and collect* the tax is at issue. Indeed, as noted by the Supreme Court, "the District Court [in *Yakima*] awarded summary judgment to the Tribe and entered an injunction prohibiting the imposition or *collection* of the taxes on such lands." *Yakima*, 502 U.S. at 256 (emphasis added). On review, the Ninth Circuit said: "This case concerns the power of the State of Washington to levy and *collect* ad valorem and excise sales taxes upon such land." *Confederated Tribes & Bands of Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1208 (9th Cir. 1990) (emphasis added). On that appeal, the Yakima Nation raised the issue of tribal sovereign immunity. Citing *Potowatomi*, the Yakima Nation argued that a relevant tax statute "did not provide a waiver of the Yakima Nation's traditional sovereign immunity from suit. A confrontation over non-payment of property taxes would have left the State in the embarrassing position of being unable to judicially enforce property taxes which may have been assessed." *Yakima Nation Brief*, in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indians*, 1991 WL 521292, at *35 (1991). The Supreme Court nevertheless ruled against the tribe, holding that the county may not only assess but also "collect" the tax on the tribe's properties. *Yakima*, 502 U.S. at 265. It is quite simply absurd to argue that the Supreme Court did not actually mean to provide this right to collect.

The issues of imposition and collection of the tax are inextricably intertwined. The Nation nevertheless contends that it would have been "quite odd"

for the Supreme Court to allow enforcement and overrule cases like *Kiowa* and *Potawatomi* without discussing them. (Opp. Brief at 20.) That argument misses the point. *Sherrill* does not cite *Potawatomi* and *Kiowa* because they are not relevant to the issue of foreclosure against non-sovereign property; they concern only a tribe's immunity from *in personam* lawsuits.

The Nation admits that *Madison County* does not "expressly address" the distinction between an *in rem* foreclosure action against property and an *in personam* action against a tribe. (Opp. Brief at 27.) It nevertheless argues that the distinction should be overlooked, blithely arguing that "such suits [foreclosures against property] are, in substance, suits against the tribe." (Opp. Brief at 8.) The Nation then sums up its argument with the wholly inapplicable proposition that "[w]hen sovereign land is subject to foreclosure, in short, the sovereign is necessarily involved in the litigation." (Opp. Brief at 24.)

The Nation has already conceded that the subject parcels are not sovereign, rendering its argument about "sovereign land" irrelevant. Accordingly, the cases cited by the Nation involving the United States seeking to protect real property *within* its sovereignty, (Opp. Brief at 22), do not support the Nation's position here. *See* Point II, *infra*. Moreover, the Nation's argument that a foreclosure against its non-sovereign property is indistinguishable from a lawsuit against the tribe itself fails. *Yakima* and *Sherrill* each provide the County with the authority to collect

real property taxes through foreclosure. Leaving aside the plain holdings in *Yakima* and *Sherrill*, it is a fundamentally illogical that the Nation should urge this Court to disregard the distinction between an *in rem* foreclosure action against property and an *in personam* lawsuit against a tribe, and at the same demand that this Court apply a rigid distinction between a state's power to impose versus collect a real property tax.

Although the Nation's proffered arguments fail, perhaps most telling is their silence with respect to certain issues. When presented with comments by various Indian groups that the Supreme Court would have reversed *Madison County* had the Oneida Indian Nation not waived immunity – in what the District Court here recognized was an "11th-hour tactical move" to evade review (District Court Decision, R. at A-174-75) – the Nation has no response.

When presented with the plain fact that the District Court here indicated that, but for *Madison County*, it would have ruled in the County's favor based on its reading of Supreme Court precedent, (District Court Decision, R. at A-177-78), the Nation has no response.

When presented with a case that, based on Supreme Court precedent, explicitly rejects the District Court's decision in *Madison County*, *Oneida Tribe of Indians v. Village of Hobart*, 542 F. Supp. 2d 908 (E.D. Wis. 2008), the Nation is

left to offer in a footnote only the meek statement that the court must have "misread" applicable precedent. (Opp. Brief at 21, n. 6.)

In response to a case that cannot be reconciled with *Madison County*, namely, *Cass County Joint Water Resource District v. 1.43 Acres of Land*, 643 N.W.2d 685, 694 (N.D. 2002) (relying on *Yakima* and rejecting an Indian tribe's sovereign immunity claim because "[a] condemnation action is purely *in rem*, and does not require acquisition of *in personam* jurisdiction over the owners of the land"), the Nation offers, again in a footnote, only the view that "unique factual circumstances" should cause this Court to disregard that case. (Opp. Brief at 30, n. 10.)

Based on the plain language and clear holdings in *Sherrill* and *Yakima*, as well as other courts' interpretation of those decisions, it is respectfully submitted that this Court should reconsider the rationale in *Madison County* and find that the County may maintain foreclosure proceedings against the Nation's non-sovereign parcels.

POINT II

THE NATION WITHDRAWS ITS PREVIOUS ARGUMENT THAT IT MAY AVOID FORECLOSURE ONLY ON PURPORTEDLY ANCIENT RESERVATION LAND – AND NOW CLAIMS IT MAY AVOID FORECLOSURE ON LAND ANYWHERE IN THE UNITED STATES, REGARDLESS OF SOVEREIGNTY OR RESERVATION STATUS – YET DISREGARDS WELL-SETTLED RULES OF SOVEREIGNTY AND RELIES ON INAPT CASES WHEREIN THE UNITED STATES SEEKS TO PROTECT TITLE TO SOVEREIGN PROPERTY.

A separate but related line of cases allows foreclosure against the Nation's non-sovereign properties, those that hold that a sovereign entity may not claim any aspect of sovereignty – such as the right to avoid foreclosure – with respect to properties it owns that are not within its sovereign territory. These cases take on increased importance given the Nation's newfound argument that the right to avoid foreclosure purportedly exists regardless whether the Nation's properties are sovereign or lie within its claimed historic reservation.

In a change of course, the Nation now claims that it may purchase land anywhere in the United States, refuse to pay applicable and lawfully imposed taxes, and, essentially, thumb its nose at the taxing authority. (*See* Opp. Brief at 31, n. 11, 32 n. 12, *passim*.) On this point, the Nation has reversed course

because at the District Court it argued that it could only assert sovereign immunity to prevent foreclosure on properties within its purported historic reservation:

> [T]he Court finds one of Plaintiff's statements at oral argument to be particularly interesting. Specifically, Plaintiff's counsel indicated that *the Tribe does not claim to have sovereign immunity against tax foreclosure proceedings on all real property that it owns, regardless of location, but instead, only claims such immunity with regard to its property within the geographic boundary of the Cayuga Reservation as established by the Treaty of Canandaigua*. In other words, Plaintiff maintains that it has sovereign immunity from suit as to foreclosure actions against properties within the Reservation, which it maintains has never been disestablished, *but not as to properties outside the Reservation*.

(District Court Decision, R. at A-174-75 (emphasis added).)

The Nation argues that "a suit against the land of a sovereign is a suit against the sovereign itself" and that "there is no basis to hold that tribal sovereign immunity bars foreclosure against only *some* tribally-owned lands." (Opp. Brief at 9.) The Nation, however, points to cases where the United States sought to protect property *within* its sovereignty. (Opp. Brief at 22.) The difference here is that the Nation's properties are not sovereign and do not lie within any sovereign domain. To provide the Nation with any rights of a sovereign – such as the right to avoid foreclosure with respect to the subject parcels – would contradict the clear

holding in *Sherrill* that the Nation may not revive "in whole or in part" any aspect of its ancient sovereignty with respect to this land: "[W]e hold that the Tribe cannot unilaterally revive its ancient sovereignty, *in whole or in part*, over the parcels at issue." *Sherrill*, 544 U.S. at 202-03 (emphasis added).

Given the federal government's supremacy over all other sovereigns within its borders, it is hardly surprising that state, local, and tribal sovereigns may not foreclose on federally owned property of any kind without the federal government's permission. *See, e.g.*, *United States v. Alabama*, 313 U.S. 274, 281 (1941). That the federal government's immunity prevents suit against its property located within its "sovereign dominion" says nothing about a tribe's immunity with respect to admittedly non-sovereign property it may own.

Because "taxes are the lifeblood of government, and their prompt and certain availability an imperious need," sovereigns have been permitted to seize and execute upon property for the nonpayment of taxes. *Bull v. United States*, 295 U.S. 247, 259-60 (1935); *see also Shaffer v. Carter*, 252 U.S. 37, 52 (1920) (sovereign power includes not only levying taxes, but "enforcing payment . . . by the exercise of a just control over persons and property within its borders").

Well-settled case law holds that a sovereign entity does not have immunity from suit with respect to properties it owns outside its sovereign jurisdiction. The

Supreme Court held in *Georgia v. City of Chattanooga*, 264 U.S. 472, 480-82 (1924):

> Land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership. . . . The sovereignty of Georgia was not extended into Tennessee. . . . [Georgia] cannot claim sovereign privilege or immunity. . . . [Georgia's] property [in Tennessee] is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee. The power of the city to condemn does not depend upon the consent or suability of the owner.

264 U.S. at 480.

The rule of *Georgia v. Chattanooga* has been invoked in many *in rem* enforcement contexts. It is "elementary" that "a state acquiring ownership of property in another state does not thereby project its sovereignty into the state where the property is situated. The public and sovereign character of the state owning property in another state ceases at the state line . . . ." *State v. City of Hudson*, 231 Minn. 127, 130, 42 N.W.2d 546, 548 (1950) (regarding proceedings to enforce property taxes on portion of bridge owned by Wisconsin but located in Minnesota). "If it were otherwise, the acquisition of land in [one state] by another State would effect a separate island of sovereignty within [the home state's] boundaries. Such possibility can find no support in the law or reason." *People ex rel. Hoagland v. Streeper*, 12 Ill. 2d 204, 213, 145 N.E.2d 625, 630 (1957).

Just as states are not allowed to create "separate island[s] of sovereignty" by purchasing land within another sovereign's jurisdiction, *id.*, Indian tribes owning non-sovereign land within a state similarly have no "separate island of sovereignty." *See Cass County*, 643 N.W.2d at 688, 691, 694. At issue in *Cass County* was a parcel of land that would be flooded by a proposed dam. An opponent of the project sold the parcel to the Turtle Mountain Band of Chippewa Indians. The land was claimed to have been aboriginally occupied by the Band's ancestors and "contain[ed] a culturally significant village site and burial site." *Cass County*, 643 N.W.2d at 688. The Band claimed that its newly acquired parcel could not be condemned because, among other reasons, the tribe's purported "tribal sovereign immunity" under *Kiowa*. The court rejected this claim. In language equally applicable to the case at bar, the court said:

> The land at issue in this case is essentially private land which has been purchased in fee by an Indian tribe. It is not located on a reservation, is not allotted land, is not part of the Tribe's aboriginal land, is not trust land, and the federal government exercises no superintendence over the land. Under these circumstances, the State may exercise territorial jurisdiction over the land, including an *in rem* condemnation action, and the Tribe's sovereign immunity is not implicated.

Cass County, 643 N.W.2d 694; *see also State ex rel. Taggart v. Holcomb*, 85 Kan. 178, 184-85, 116 P. 251, 253 (1911) (Missouri city's waterworks plant in Kansas

"has no other or greater rights than a private corporation engaged in the same business. It is part of a sovereignty, it is true; but its powers cannot be exercised in Kansas. . . . [A] state of the Union is only sovereign in its own territory."); *City of Cincinnati v. Commonwealth ex rel. Reeves*, 292 Ky. 597, 167 S.W.2d 709, 714 (Ct. App. 1942) ("A municipality operating beyond the boundaries of the sovereignty creating it, is universally regarded as a private corporation with respect to such operations.").

The Nation seeks to distinguish *Georgia v. Chattanooga* and similar cases by claiming that an Indian tribe has greater sovereign status than that of a state because tribes did not attend or participate at the Constitutional Convention. The Nation accordingly contends that the issue of state sovereign immunity is somehow not applicable and irrelevant to Indian tribe sovereign immunity. (Opp. Brief at 34-35.) In so arguing, however, the Nation completely contradicts itself. Specifically, earlier in its brief the Nation claims that "[t]he immunities of federal, state, foreign and tribal sovereigns have common foundations, and precedent regarding other sovereigns may shed light on sovereign immunity from suit." (Opp. Brief at 15, n.4.) These two arguments are inconsistent. Moreover, the Supreme Court has emphasized that tribal sovereign immunity "[o]f course" is narrower than, "not congruent with," state sovereign immunity. *Three Affiliated Tribes v. World Engineering*, 476 U.S. 877, 890 (1986).

Moreover, as outlined in briefing to the Supreme Court in the foreclosure case involving the Oneida Indian Nation, *see, e.g.*, *Amicus Brief of the Town of Lenox*, in addition to cases involving the states, the Supreme Court repeatedly has looked to the limits on foreign sovereign immunity as "instructive" in defining the limits on tribal sovereign immunity. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001); *Kiowa*, *supra*, 523 U.S. at 759. Far from being "supersovereign[s]" with greater immunity than foreign nations, tribes enjoy *less* sovereignty and fewer immunities given their "dependent," domestic status. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995).

A foreign sovereign could not purchase property in Seneca County, put it to commercial use, refuse to pay its property taxes, disregard zoning and other local regulatory controls, and then defeat the County's *in rem* enforcement actions against the property by invoking sovereign immunity. *See Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984) ("A sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each state has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated with its institutions, suitable to its soil.").

The federal common law of foreign sovereign immunity, which long predated the enactment of the Foreign Sovereign Immunities Act of 1976 ["FSIA"], 28 U.S.C. § 1602 et seq., holds as a general matter that "when owning property here, a foreign state must follow the same rules as everyone else . . . ." *City of New York v. Permanent Mission of India to the U.N.*, 446 F.3d 365, 374 (CA2 2006), *aff'd*, 551 U.S. 193 (2007). The Supreme Court first embraced that rule two hundred years ago, observing that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction [of the foreign country]; he may be considered as so far laying down the prince, and assuming the character of a private individual . . . ." *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 145 (1812). The reason for exempting immovable property within U.S. jurisdiction from the scope of foreign sovereign immunity is self evident:

> A territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain. As romantically expressed in an early treatise: A sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each state has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated with its institutions, suitable to its soil.

Asociacion de Reclamantes, *supra*, 735 F.2d at 1521 (quoting 1 F. Wharton, Conflict of Laws § 278, at 636 [3d ed. 1905]).

These same considerations underlie the Supreme Court's holding in *Sherrill* regarding the Oneidas' purported sovereignty. *See* 544 U.S. at 202, 211, 215-16, 219-20 ("character of the area," history of "regulatory authority" and "jurisdiction," current demographics, "justifiable expectations" of current residents, and potentially "disruptive practical consequences" of accentuating "checkerboard" allocation of sovereignty).

"Under international law, a [foreign] state is not immune from the jurisdiction of the courts of another state with respect to claims . . . to immovable property in the state of the forum." Restatement (Third) of Foreign Relations Law § 455(1)(c) (1987). This lack of immunity extends to the enforcement, not simply the rendition, of judgments. "Immovable property" owned by foreign states is "subject to execution" if "the judgment relates to that property" and the property is "used for commercial activity" rather than "a diplomatic or consular mission or for the residence of the chief of such mission." *Id.* § 460(2)(e). *See also* Restatement (Second) of Foreign Relations Law § 68(b) (1965) ("The immunity of a foreign state . . . does not extend to . . . an action to obtain possession of or establish a property interest in immovable property located in the territory of the State exercising jurisdiction.").

The Nation readily concedes that the land at issue here is not sovereign, disclaims any reliance on the purported reservation status of such land, and does not, because it cannot, argue that such parcels are in any way affiliated with its tribal government or in any official capacity analogous to a diplomatic or consular mission. This Court should not bestow on the Nation the "supersovereign" status it seeks, *i.e.*, the right to assert sovereign status with respect to any and all admittedly non-sovereign land it may own. In keeping with Supreme Court precedent, the County should be permitted to maintain the challenged foreclosure proceedings.

POINT III

THE NATION UNDERMINES ITS OWN ARGUMENT WHEN IT ATTEMPTS TO EXPLAIN ITS PRIOR REPRESENTATIONS TO THE NEW YORK COURT OF APPEALS EXPRESSLY ACKNOWLEDGING ITS OBLIGATION TO PAY REAL PROPERTY TAXES.

The Nation argues that its prior representations to the New York Court of Appeals in *Cayuga Indian Nation v. Gould*, 14 N.Y.3d 614, 643 n.11 (2010), specifically that "[t]he Cayuga Indian Nation acknowledges its obligation to pay real property taxes, . . ." does not amount to a waiver. (Opp. Brief at 35.) In its brief, the Nation portrays this statement as, at most, a concession that "the County possessed the power to *impose* a tax on those parcels . . . ." (Opp. Brief at 38.) In doing so, however, the Nation only underscores that its attempt to distinguish the imposition of real property taxes from their collection is artificial and illogical.

If it were consistent with its artificial, rigid separation of these concepts, the Nation presumably would have said that the Cayuga Indian Nation acknowledges that the County may impose real property taxes on its properties or that it acknowledges that the properties are subject to real property taxes. Instead, the Nation acknowledged its obligation to *pay* those real property taxes.

The County submits that the Nation's previous representations to the New York State Court of Appeals amount to a waiver and that it should be estopped from asserting a contrary position to this Court. At a minimum, the Nation's

concession to the New York State Court of Appeals, and its current attempt to argue otherwise here, raises the disturbing prospect that it will advance inconsistent positions depending on what remedy it seeks from a court. Such shifting of positions smacks of the "checkerboarding" and the resulting disruption to local governance that *Sherrill* prohibits. It is respectfully submitted this Court should not condone that practice.

CONCLUSION

For the reasons set forth herein, together with those in its initial brief, the County respectfully requests that the Court reverse the District Court's order and allow the County to maintain the tax foreclosure proceedings against the Nation's non-sovereign parcels.

Dated: April 17, 2013
Pittsford, New York

HARRIS BEACH PLLC

By: /s/Philip G. Spellane______________

Philip G. Spellane
James P. Nonkes
Attorneys for Defendant-Appellant
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800

251332 2009762v3

CERTIFICATE OF COMPLIANCE WITH FRAP 32(a)

James P. Nonkes, one of the attorneys for Defendant-Appellant Seneca County, New York, hereby certifies that the foregoing brief is in compliance with Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 5,589 words, not including those portions of the brief excluded by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii); and in compliance with Federal Rules of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in a proportionally spaced type using Microsoft Office 2010 in 14-point Times New Roman.

Dated: April 17, 2013
Pittsford, New York

/s/James P. Nonkes
James P. Nonkes
Attorneys for Defendant-Appellant
Seneca County, New York