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September 30, 2013

Hon. Catherine O'Hagan Wolfe
Clerk of the Court
U.S. Court of Appeals for the Second Circuit
40 Foley Square
New York, New York 10007

Re: Cayuga Indian Nation of New York v. Seneca County, New York, Second Circuit No. 12-3723

Dear Ms. Wolfe:

The United States files this letter brief pursuant to Fed. R. App. P. 29(a) and the Court's letter of July 17, 2013, inviting the United States to file a brief as *amicus curiae*. In its letter of July 17, 2013, this Court invited the United States to address two questions:

1. Does tribal sovereign immunity from suit apply to *in rem* proceedings?

2. Does tribal sovereign immunity from suit apply to actions to enforce *ad valorem* property taxes on tribe-owned land over which the tribe concedes it may not exercise sovereign power pursuant to *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005)?

As explained below, it is well established that a sovereign's immunity from suit extends to land in the sovereign's possession. No exception to this principle has been carved out for Indian tribes, which are recognized as sovereign under federal law. Tribal sovereign immunity from suit is wholly independent of any issue regarding tribal regulatory authority over lands. The Supreme Court has long distinguished

between immunity from substantive law, including taxation or regulation, and immunity from enforcement actions or suits. It has held that an Indian tribe, like any other sovereign, may be subject to a state's substantive law, yet immune from suit to enforce that law. Accordingly, the answer to both of the Court's questions is that tribal sovereign immunity applies; and in the absence of an affirmative waiver, it bars this foreclosure action against lands possessed by a federally recognized Indian tribe.

Background

The Cayuga Indian Nation ("Cayuga") is a federally recognized Indian tribe. Through an agreement negotiated with the State in 1789, Cayuga ceded the majority of its vast territory to New York, retaining a 64,000-acre reservation. That reservation was recognized by the United States in the 1794 Treaty of Canandaigua, but later was acquired by the State of New York in violation of federal law. *See Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266, 268 (2d Cir. 2005). This litigation arose out of Cayuga's later purchase on the open market of lands located within its reservation boundary, including lands located in Seneca County, New York. In 2005, the United States Supreme Court held in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), that land located within a tribe's reservation boundary is not automatically restored to Indian country status – which generally prohibits the imposition of state taxes on reservation lands and reservation Indians – through tribal purchase of the lands in fee, and that the State retains regulatory and taxing jurisdiction on the lands at issue in *City of Sherrill* after the tribe for which they were reserved reacquires title to them.

The Tribe does not dispute in this litigation that, under *City of Sherrill*, the County has authority to impose and collect *ad valorem* property taxes on parcels of land purchased by Cayuga and located within the County. The only question presented here is whether the County may collect its tax through *in rem* foreclosure proceedings against those lands, a question which the Supreme Court has not previously addressed directly, but the answer to which is dictated by the Court's precedents.

In 2010, the County undertook foreclosure proceedings against five parcels of land owned by Cayuga. Cayuga sought to enjoin the foreclosure proceedings, and the district court granted the injunction on the ground that Cayuga, as a sovereign entity, is immune from suit in the state proceeding. In its since-vacated decision in *Madison County, New York v. Oneida Indian Nation*, 605 F.3d 149,156-59 (2d Cir. 2010), this Court discussed the doctrines of tribal sovereign immunity from suit, which is at issue here, and of state authority to tax tribal land, which was at issue in *City of Sherrill*. The two doctrines serve different purposes and have different implications, and consequently have evolved separately. As this Court has observed, *Madison County*, 605 F.3d at 150, the scope of tribal sovereign authority over land has undergone considerable evolution in response to changing circumstances, while the doctrine of tribal sovereign immunity from suit has not.

The County contends that tribal sovereign immunity is inapplicable where the County seeks to proceed in an *in rem* foreclosure action against "non-sovereign"

property possessed by Cayuga.[1] But, as we explain below, neither the status of the land nor the "*in rem*" nature of an action to foreclose on the property bears on Cayuga's immunity from suit.

I. Tribal sovereign immunity bars *in rem* actions to foreclose on lands possessed by federally recognized Indian tribes.

The principles governing tribal sovereign immunity are deeply embedded in federal Indian law. Since European settlers first arrived in North America, the Indian tribes occupying the continent have been regarded as sovereigns. *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832). *See National Farmers Union Ins. Co. v. Crow Tribe*, 471 U.S. 845, 851 (1985) (The Indian Tribes are a direct continuation of "self-governing political communities that were formed long before Europeans first settled in North America."); *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). Although Tribes' original dominion over their land has been diminished, Tribes have retained a sovereign status as "domestic dependent nations" under the dominion and protection of the United States. *Id.*, 30 U.S. (5 Pet.) at 17. *See Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *United States v. Wheeler*, 435 U.S. 313, 322 (1978).

As an attribute of their inherent sovereignty, "Indian tribes have long been

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[1] The County incorrectly refers to the land at issue here as "non-sovereign" land. Because the land is located within the boundary of the Cayuga reservation (*see Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233, 245 (N.Y. 2010)) it is reservation land over which Cayuga may exercise tribal sovereign powers consistent with the County's concurrent authority to impose its *ad valorem* tax. Those powers are not challenged in this litigation. As we explain below, tribal sovereign immunity from suit is independent of sovereign power over land.

recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). *See Three Affiliated Tribes v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986); *see also Alden v. Maine*, 527 U.S. 706, 716 (1999) (quoting *The Federalist No. 81*, at 548-549 (A. Hamilton) (J. Cooke ed., 1961) ("It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its consent.")). Congressional abrogation of tribal immunity, like congressional abrogation of other forms of sovereign immunity, "cannot be implied but must be unequivocally expressed." *Martinez*, 436 U.S. at 58.

The County's position rests on the untenable premise that tribal immunity from suit exists only as to *in personam* suits. *See* Br. 10, 20, 25-26. To the contrary, tribal immunity, premised on inherent tribal sovereignty, continues to exist in the absence of waiver or Congressional abrogation. In *Kiowa Tribe v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754, 756 (1998), the Supreme Court laid to rest any doubt over the continuing vitality of the established rule of tribal sovereign immunity from suit, and reiterated that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."

A. Sovereign entities are immune from suits against their land

It is firmly established that a suit against the land of a sovereign is a suit against the sovereign itself. *See United States v. State of Alabama*, 313 U.S. 274, 282 (1941) (because "[a] proceeding against property in which the United States has an interest is a suit against the United States," valid tax liens may not be enforced *in rem*) (citing *The Siren*, 74 U.S. 152, 154 (1868) ("there is no distinction between suits against

the government directly, and suits against its property"); *State of Minnesota v. United States*, 305 U.S. 382, 386-87 (1939) (*in rem* condemnation action against land held by United States in trust for individual Indians barred by sovereign immunity).

Nothing in the Supreme Court's recent precedents has altered or undermined this fundamental tenet of sovereign immunity. *See, e.g., California v. Deep Sea Research, Inc.*, 523 U.S. 491, 506 (1998) (federal courts lack jurisdiction over *in rem* admiralty proceedings in which a state, the federal government, or a foreign government has asserted ownership of a *res* in its possession); *Florida Dept. of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 699 (1982) (observing principle that "an action – otherwise barred as an *in personam* action against the State – cannot be maintained through seizure of property owned by the State. Otherwise, the [State's immunity from suit] could easily be circumvented; an action for damages could be brought simply by first attaching property that belonged to the State and then proceeding *in rem*.").

In the absence of an affirmative waiver or congressional abrogation, these precedents are fully applicable to federally recognized Indian tribes. "It is by now well established that Indian tribes possess the common-law immunity from suit traditionally enjoyed by sovereign powers." *Bassett v. Mashantucket Pequot Tribe*, 204 F.3d 343, 356 (2d Cir. 2000); *see also C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 532 U.S. 411, 418 (2001); *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 754 (1998) ("As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."). And, "[a]lthough Congress has occasionally authorized limited

classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments." *Oklahoma Tax Comm'n v. Citizen Band Potowatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 510 (1991) ("*Potowatomi*") (Tribe is immune from suit to enforce state cigarette tax).[2]

To be sure, in *Kiowa*, the Supreme Court stated that "the immunity possessed by Indian tribes is not coextensive with that of the States." 523 U.S. at 756. Thus, tribal sovereign immunity, unlike state immunity, is "subject to the broad power of Congress." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143 (1980). The states, on the other hand, in the "plan of the convention," mutually surrendered their immunity from suit by other states, *Kiowa*, 523 U.S. at 756; *see also Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991), and agreed "not to assert any sovereign immunity defense they might have had in proceedings brought pursuant to 'Laws on the subject of Bankruptcies,'" *Central Virginia Community College v. Katz*, 546 U.S. 356, 377 (2006) (quoting U.S. Constitution, art. I, § 8, cl. 2 ("Bankruptcy Clause")).

As a general matter, however, and putting aside abrogation and waiver, the basic rules of immunity of federal, state, foreign, and tribal sovereigns from suit rest on the same foundations, and courts often look to precedents regarding other types of

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[2] "Congress has consistently reiterated its approval of the immunity doctrine," which is consistent with its "desire to promote the goal of Indian self-government, including its 'overriding goal' of encouraging tribal self-sufficiency and economic development." *Potowatomi*, 498 U.S. at 510 (citations omitted). Congress continues to acknowledge that Indian tribes are immune from suit. *See*, *e.g.*, Pub. L. No. 109-432, § 209 (Dec. 20, 2006), *codified at* 30 U.S.C. § 1300(j)(3) (requiring tribes to waive immunity from suit to assume regulatory authority under Surface Mining Control and Reclamation Act).

sovereigns to determine the contours of tribal immunity in appropriate circumstances. *See*, *e.g.*, *C & L Enterprises*, 532 U.S. at 421 n.3; *Kiowa*, 523 U.S. at 759; *Garcia v. Akwesasne Housing Authority*, 268 F.3d 76, 86-87 (2d Cir. 2001); *see also Krystal Energy Co. v. Navajo Nation*, 357 F.3d 1055, 1056 (9th Cir. 2004); *Osage Tribal Council v. U.S. Dept. of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999); *TTEA v. Ysleta del Sur Pueblo*, 181 F.3d 676, 680 (5th Cir. 1999) (tribal sovereign immunity is "a distinct but similar concept" to state sovereign immunity).

There is no support for the proposition that sovereign immunity is generally inapplicable to *in rem* actions. Indeed, the Supreme Court in *Alabama* expressly observed that sovereign immunity would bar enforcement of tax liens through a foreclosure action against property in the United States' possession. *Alabama*, 313 U.S. at 281 ("the fact that the United States had taken title and that proceedings could not be taken against the United States without its consent would protect it against such enforcement"). *See also*, *State of Minnesota v. United States*, 305 U.S. at 382 (*in rem* condemnation action barred by sovereign immunity); *Treasure Salvors, Inc.*, 458 U.S. at 670 (State in possession of *res* is immune from *in rem* admiralty proceeding). The County has offered no basis for a different result where the sovereign landowner is a tribe rather than the United States.

B. Authority to tax does not imply authority to sue

The distinction between immunity from regulation or taxation and immunity from suit is well established. The United States, a state, or a foreign nation may be bound to comply with another sovereign's substantive law and yet be immune from

suits to enforce that law. For example, in *Alabama*, the Supreme Court held that although the United States' land was subject to liens for non-payment of taxes, those liens could not be enforced due to the United States' immunity from suit. 313 U.S. at 281-82; *see also United States v. Davidson*, 139 F.2d 908, 911 (5th Cir. 1943) (same). The Ninth Circuit in *United States v. Lewis County*, 175 F.3d 671 (9th Cir. 1999), followed *Alabama* and held that certain federal property was taxable, but could not be foreclosed upon. The court there observed that "the inability to foreclose impairs the County's ability to collect its tax," but "[s]uch dislocations are not unknown when a taxing authority deals with another sovereign." *Id.* at 678 (citing *Potowatomi*, 498 U.S. at 514). This Court has recognized that "[t]his may leave some aggrieved parties without relief, but that is inherent in the doctrine of sovereign immunity." *Adeleke v. United States*, 355 F.3d 144, 150-151 (2d Cir. 2004) (holding Fed. R. Crim. P. 41(g) does not waive United States' immunity from actions for money damages).

Likewise, a state may be bound to comply with federal law, but be immune from private suits to enforce that law. In *Alden v. Maine*, 527 U.S. 706 (1999), the Supreme Court held that Congress did not have the authority under Article I of the U.S. Constitution to abrogate state sovereign immunity from suit in a state's own courts. *Id.* at 754. But the Court cautioned that "[t]he constitutional privilege of a State to assert its sovereign immunity in its own courts does not confer upon the State a concomitant right to disregard the Constitution or valid federal law." *Id.* at 754-55; *see also Board of Trustees of University of Alabama v. Garrett*, 531 U.S. 356, 374 n.9 (2001); *City of New York v. United States*, 179 F.3d 29, 35 (2d Cir. 1999) (system of dual

federal-state sovereignty depends on state compliance with federal law).

Similarly, a Tribe may be subject to a state's "substantive laws" – *i.e.*, "a State may have authority to tax or regulate tribal activities" – but still be immune from suit. *Kiowa*, 523 U.S. at 755. In *Kiowa*, the Supreme Court followed its earlier decision in *Potowatomi*, which had "reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes." *Kiowa*, 523 U.S. at 755. In short, "[t]here is a difference between the right to demand compliance with state laws and the means available to enforce them." *Kiowa*, 523 U.S. at 755; *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 59 (1978) (holding Indian Civil Rights Act "modifies the substantive law applicable to the tribe," but "suits against the tribe under the ICRA are barred by its sovereign immunity from suit").[3]

The district court's decision in this case followed *Kiowa* and this Court's holding in *Garcia* that, "[r]egardless of whether the substantive norms of [certain federal statutes] apply to tribes, none of the laws abrogates tribal sovereign immunity from suit." 268 F.3d at 85-86; *see also id.* at n.5 ("the fact that a statute applies to Indian tribes does not mean that Congress abrogated tribal immunity in adopting it" (quoting *Bassett*, 204 F.3d at 357)). *Garcia* followed *Florida Paraplegic, Ass'n, Inc. v. Miccosukee Tribe of Indians of Florida*, 166 F.3d 1126 (11th Cir. 1999), in which the Eleventh Circuit held that "Title III of the [Americans with Disabilities Act] governs the

[3] Although not at issue in this case, the courts have consistently recognized that "[t]ribal sovereign immunity does not bar suits by the United States." *Reich v. Mashantucket Sand & Gravel*, 95 F.3d 174, 182 (2d Cir. 1996).

Miccosukee Tribe in its operation of its gaming and restaurant facility," *id.* at 1130, but did not abrogate the Tribe's immunity from suit for violations of the law, *id.* at 1132. The court there explained that "whether an Indian tribe is *subject* to a statute and whether the tribe may be *sued* for violating the statute are two entirely different questions." *Id.* at 1130 (emphasis in original); *see also id.* at 1133 n.17 ("the conclusion . . . that Title III *applies* to Indian tribes . . . sheds no light upon the critical question of whether tribes also may be sued by private citizens for violating the law").

C. The decisions in Yakima and Sherrill did not address tribal sovereign immunity from suit

The County relies on *County of Yakima v. Confederated Tribes & Bands of the Yakima Indians*, 502 U.S. 251 (1992), and *City of Sherrill v. Oneida Indian Nation*, *supra*, 544 U.S. 197, as "binding case law hold[ing] that a claim to sovereign immunity bars only *in personam* claims." Neither of these cases presented the question whether a Tribe is immune from a suit to foreclose on lands in its possession, and the County's effort to extend their holdings to this matter flies in the face of well-established precedent making clear 1) that sovereign immunity bars any action either against Cayuga directly or against property in its possession, and 2) that tribal sovereign immunity from suit may be abrogated only by unmistakably clear Congressional action.

The County contends (Br. 20) that *County of Yakima* stands for the proposition that "[e]ven if the [Cayuga] Nation were entitled to sovereign immunity from an *in personam* suit, that would not prohibit an *in rem* proceeding against the properties in question." As support for this assertion, the County relies on language in *Yakima*

distinguishing the *in rem* nature of state taxes on property from the *in personam* nature of an excise tax on property sales. That discussion did not, as the County asserts, address "the difference between *in rem* and *in personam* actions," or otherwise address suits to enforce the taxes at issue.

In *Yakima*, the Tribe challenged the County's authority to impose an *ad valorem* property tax on land located within the boundaries of the Tribe's reservation that had been allotted to individual Indians under the General Allotment Act, 25 U.S.C. § 349. The General Allotment Act expressly removed the restrictions on alienation of Indian reservation lands[4] that were allotted to individual Indians in trust and then patented to them in fee. The land at issue in *Yakima* was owned in fee by individual Indians and by the Tribe, which had purchased some of these patented lands. The Court held that the General Allotment Act permitted state taxation of the former Indian allotments.

At issue in *Yakima* was the established principle that "absent cession of jurisdiction or other federal statutes permitting it, a state is without power to tax reservation lands and reservation Indians," *Yakima*, 502 U.S. at 258. The question presented was whether the County could impose an *ad valorem* tax on fee-patented land located within the Yakima Indian Reservation, and an excise tax on sales of such land. The Tribe and its members sought to enjoin foreclosure proceedings brought to enforce the taxes on the ground that the state lacked authority to impose them in the first instance. They did not raise the separate question of the Tribe's immunity from

[4] Under the Trade and Intercourse Acts, a conveyance of Indian land is void in the absence of Congressional authorization. *See, e.g., County of Oneida, New York, et al., v. Oneida Indian Nation of New York*, 470 U.S. 226, 245-46 (1991).

suit. The Court therefore did not reach the question whether the Tribe was amenable to *in rem* enforcement proceedings, as the County contends. Instead, the Court considered only the state's authority *vel non* to impose taxes on Indian landowners within the boundaries of a Tribe's reservation.

In determining whether the General Allotment Act permitted the imposition of the state taxes, the Court characterized an *ad valorem* tax *itself* as essentially *in rem* (502 U.S. at 265), and held that the Act, by removing restrictions on alienation of the land, permitted the exercise of state jurisdiction to impose and enforce such a tax and to collect it through forced sale. The Court reasoned that taxation of lands owned in fee – whether by individual Indians or the Tribe itself – would not significantly disrupt tribal self-government, noting, however, that the Act did not subject even those lands to plenary State jurisdiction. 502 U.S. at 264. And it held that the State had no authority to impose an excise tax on sales of land owned by the Tribe or its members. *Yakima*, 502 U.S. at 258. At most, therefore, *Yakima* held that the *lands* at issue, including those held by the Tribe, were subject to state taxation authority. Nothing in *Yakima* addressed the separate issue of the *Tribe's* immunity from foreclosure proceedings undertaken to implement that authority. *Yakima* thus held only that Congress by statute had affirmatively authorized state taxation of certain Indian-owned lands by first rendering them alienable (502 U.S. at 263), and then expressly freeing them from all restrictions as to sale, incumbrance, or taxation. *Id.* at 264. It did not specifically address the sovereign immunity of the Tribe from suit. In any event, even if the relevant provisions of the General Allotment Act were held to constitute an

express abrogation of sovereign immunity to a state-court foreclosure action of a tribe that purchased previously-allotted land that passed into fee status, *Yakima* sheds no light on the question of sovereign immunity in this case, which does not involve the General Allotment Act or any other statute that could be the basis for an abrogation of tribal sovereign immunity.

Nor is the County correct (Br. 15) that *Sherrill* held the Tribe subject not only to state tax laws, but also to suit in state court to enforce those laws. To the contrary, *Sherrill* addressed only the State's authority to tax, and did not reach the question of the Tribe's sovereign immunity from suit. In *Sherrill*, this Court expressly stated that it need not decide whether the City's eviction suit was barred by tribal immunity, in light of its holding that the land at issue was not taxable. 337 F.3d at 146, 167. Consequently, in the Supreme Court, neither the parties nor the Court addressed the Tribe's immunity from suit; and in reversing this Court's judgment, the Supreme Court held only that the land at issue was taxable.

Neither the fact that the state-court proceeding the Tribe sought to enjoin in *Sherrill* was an eviction proceeding undertaken to enforce a tax assessment (*see* Reply at 11-12) nor speculation that the Court would have reversed this Court's later decision in *Madison County* interpreting *Sherrill* (*id.* at 3,12), assists the County's case. The Court in *Sherrill* relied on practical implications resulting from the passage of time in concluding that the tribe at issue did not unilaterally restore its former reservation lands to their prior status as Indian country by purchasing them on the open market. It did not reverse its earlier conclusion that the lands had left tribal control in violation

of federal-law restrictions on alienation of Indian lands. 544 U.S. at 221. Its holding that the State could impose its *ad valorem* tax on the land therefore was based only on equitable considerations. Those considerations were entirely unrelated to any diminution of tribal sovereign immunity from suit. The County therefore is incorrect in asserting (Br. 14-15) that under *Sherrill*, tribes are subject to *in rem* actions to enforce State tax laws.[5]

II. Jurisdiction to tax under *Sherrill* does not include jurisdiction to foreclose on the lands of an Indian tribe

The County contends (Br. 14; Reply at 5-10) that because *Sherrill* and *Yakima* were triggered by tax enforcement proceedings in state court, the Supreme Court impliedly held in each case that the Tribe at issue was not immune from *in rem* proceedings to enforce the challenged state taxes. It asserts (Reply at 13) that the district court's "narrow" interpretation of *Yakima* and *Sherrill* renders their holdings

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[5] The County conflates immunity from taxation with immunity from suit in arguing (Br. 17-18) that *Sherrill* is controlling here. In his dissent, Justice Stevens said that the majority's "distinction between law and equity is unpersuasive" because the "narrow legal issue" before the Court could just as well have been raised "by a tribe as a defense against a state collection proceeding," *i.e.*, in an action at law. *Sherrill*, 544 U.S. at 225. The dissent made clear that the "narrow legal issue" before the Court was tax immunity. *Id.* at 224 ("a tribe enjoys immunity from state and local taxation"), 225 ("tax immunity"), 226 ("defensive use of tax immunity should still be available to the Tribe on remand"). The majority, also speaking explicitly about "tax immunity," responded that the Tribe could not assert tax immunity in the City's suit to evict the Tribe for nonpayment of taxes because "the equitable cast of the relief sought remains the same." *Id.* at 214 n.7. In other words, the majority said that the Tribe could not avoid tax enforcement suits by claiming *immunity from taxation*. The Court said nothing about claiming *immunity from suit* to avoid tax enforcement. *See Armijo v. Pueblo of Laguna*, 149 N.M. 234, 239; 247 P.3d 1119, 1124 (N.M. App. 2010) (*Sherrill* does not address sovereign immunity from suit, which is governed by rule in *Kiowa*).

"meaningless." The authority to tax, in the County's view, must include the authority to sue to collect unpaid taxes. But the County's assumption is not supportable. Regardless whether a tribe's sovereign authority over land has been diminished, the tribe's status as a sovereign dictates that it is immune from suit unless Congress has abrogated that immunity. *Kiowa*, 521 U.S. at 759-60.

Jurisdiction to impose an *in rem tax* on the Tribe's land does not include jurisdiction over *in rem suits* involving that land. *Kiowa*, 523 U.S. at 755 ("There is a difference between the right to demand compliance with state laws and the means available to enforce them."). *See also Alabama*, 313 U.S. at 281-82 (tax liens against property were valid, but sovereign immunity prevented enforcement); *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 196 n.1 (2007) (Question whether exception to Foreign Sovereign Immunities Act, 28 U.S.C. 1602 *et seq.*, allows suit to establish *validity* of tax lien on real property owned by foreign sovereign is independent of undisputed sovereign immunity to forclosure). As the Supreme Court made clear in *Yakima*, 502 U.S. at 265, 268-70, jurisdiction to tax Indian land does not include other, related intrusions into tribal sovereignty.

Sherrill did not turn on any diminution in the Tribe's inherent sovereignty. Instead, despite the Court's recognition that the Tribe retained aboriginal title to the lands at issue when the State asserted control over them in the eighteenth century, it relied on "the lapse of time, during which the Oneidas did not seek to revive their sovereign control," 544 U.S. at 216, in concluding that the land was subject to taxation by the State. There is accordingly no basis in *Sherrill* for a conclusion that Cayuga's

sovereign immunity does not bar a suit to deprive it of its lands. Unlike state sovereign immunity, tribal immunity "is not subject to diminution by the states," because the states' mutual surrender of immunity from suit in other states did not include Indians, who were unrepresented at the Constitutional Convention. *Kiowa*, 523 U.S. at 756; *see also Blatchford v. Native Village of Noatak*, 501 U.S. 775, 782 (1991). Accordingly, the rule in *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), that land located in Tennessee but owned by Georgia for railroad use was subject to condemnation by Tennessee has no application here. *See also Three Affiliated Tribes v. Wold Engineering*, 476 U.S. 877, 890-91 (1986) ("because of the peculiar "quasi-sovereign" status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy. * * * Nonetheless, in the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States.").

In light of the well-established distinction between immunity from regulation and immunity from suit, it cannot be presumed that the Supreme Court in *Sherrill* overruled its conclusion in *Kiowa* that a tribe may be subject to taxation, but immune from suit to collect taxes, without any reference to *Kiowa* whatsoever. *See Peck v. Baldwinsville Central School Dist.*, 426 F.3d 617, 633 (2d Cir. 2005) ("we are reluctant to conclude that the Supreme Court would, without discussion and indeed totally *sub silentio*, overrule" its precedent). Moreover, the Supreme Court has long held that Tribes retain sovereign immunity in the absence of waiver or unequivocal Congressional abrogation. *See*, *e.g.*, *Martinez*, 436 U.S. at 58; *C & L Enterprises*, 532 U.S. at 418;

Potowatomi, 498 U.S. at 510 (observing that Congress has never authorized suits to enforce tax assessments). To interpret *Sherrill* as the County suggests, this Court would have to find that the Court overruled these precedents *sub silentio*. The Supreme Court gave no indication that it intended to overrule the long lines of precedent distinguishing taxation from enforcement, *e.g.*, *Alabama*, 313 U.S. at 281-82, and subjecting sovereigns to substantive law without compromising their immunity from suit, *e.g.*, *Alden*, 527 U.S. 754-55. Nor did the Court overrule or even discuss its precedents holding that, absent waiver or congressional abrogation, Indian tribes are immune from suit, and that immunity from suit extends to property in the sovereign's possession, *e.g.*, *Deep Sea Research*, 523 U.S. at 506.

The County's interpretation of *Sherrill* assumes all of these *sub silentio* reversals. Yet, the Supreme Court has traditionally taken a cautious approach to these issues, in part because of potential separation of powers implications. *See Santa Clara Pueblo*, 436 U.S. at 60 ("a proper respect both for tribal sovereignty itself and for the plenary authority of Congress in this area cautions that we tread lightly in the absence of clear indications of legislative intent"). *Sherrill* gave no indication that the Court intended to overrule multiple lines of precedent and usurp Congress' authority, and it does not give this Court any basis for bypassing binding precedent. *See NYSA-ILA Vacation and Holiday Fund v. Waterfront Comm'n of New York Harbor*, 732 F.2d 292, 298 (2d Cir. 1984) ("Accepting the [party's] argument would require considerable speculation by this court to conclude that the Supreme Court intended *sub silentio* . . . to overrule a well-established rule . . . . We find such a conclusion unjustified.").

Accordingly, the Supreme Court's holding in *Sherrill* does not affect the Tribe's immunity from suits related to its land. The distinction between immunity from regulation or taxation and immunity from suit or enforcement arises from the different foundations of the two immunities. A tribe's immunity from regulation or taxation "centers on" its sovereignty over the land. *See Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2718 (2008). Tribal immunity from suit, in contrast, arises directly from the tribes' status as independent "sovereigns or quasi sovereigns." *See Kiowa*, 523 U.S. at 757. *Sherrill* held only that tribal lands are subject to state taxing authority where equitable considerations bar the assertion of the tribe's *tax* immunity with respect to reacquired reservation lands that had been lost to the State for centuries. It had nothing to do with whether the tribe continued to exist as an independent sovereign. *Kiowa* makes clear that Indian tribes do not forfeit their immunity from suit when they engage in activities outside of Indian country (*see id.* at 754-756, 758-759). The extent of the State's authority to exert taxing authority over Cayuga's lands accordingly is irrelevant to Cayuga's immunity from suit; and *Sherrill* accordingly provides no basis for reversal.

For the foregoing reasons, the district court correctly enjoined the County's foreclosure action. No federal statute or constitutional provision has authorized such actions against tribes. In the absence of an affirmative waiver, therefore, Cayuga's immunity bars the County's action.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2013, a copies of the foregoing were served on counsel using this Court's CM/ECF system.

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