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

CAYUGA NATION, CLINT HALFTOWN, TIMOTHY TWOGUNS, GARY WHEELER, DONALD JIMERSON, MICHAEL BARRINGER, RICHARD LYNCH, B.J. RADFORD, AND JOHN DOES 8-20, Plaintiffs, v. HOWARD TANNER, VILLAGE OF UNION SPRINGS CODE ENFORCEMENT OFFICER, IN HIS OFFICIAL CAPACITY; BUD SHATTUCK, VILLAGE OF UNION SPRINGS MAYOR, IN HIS OFFICIAL CAPACITY; CHAD HAYDEN, VILLAGE OF UNION SPRINGS ATTORNEY, IN HIS OFFICIAL CAPACITY; BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK; AND THE VILLAGE OF UNION SPRINGS, NEW YORK, Defendants.	No. 5:14-cv-1317-DNH-ATB

PLAINTIFFS' RESPONSE MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

The Village's Memorandum helpfully narrows the questions this Court must decide. The Village focuses heavily on preclusion issues that fail as a matter of law, and on a single merits argument concerning the Indian Gaming Regulatory Act ("IGRA") that is foreclosed by the statute's plain text. Undisputed facts and clear law dictate judgment for the Nation.

Preclusion. Principally, the Village urges the Court to avoid the merits—invoking issue and claim preclusion based on the 2003 Nation/Village suit. But as to issue preclusion, the Village is missing the key ingredient: It applies only where a court has *resolved* an issue adversely to the preclusion target. This Court never ruled against the Nation on any IGRA issue.

As to claim preclusion, the Village distorts the facts of the 2003 action and ignores the governing law. On the facts, the Nation did not bring, and could not have brought, an IGRA preemption claim in its 2003 complaint. The Nation was not then gaming, did not even have a tribal gaming ordinance, and had not received any threat by the Village to enforce any anti-gaming regulation. The Nation was *renovating*, and the Village threatened enforcement actions based on failure to follow the Village's building codes—which the Nation claimed (pre-*Sherrill*) were categorically inapplicable. That is what the 2003 complaint was about.

To be sure, the Nation began gaming during the 2003 suit, and the Village—not the Nation, as the Village's papers misleadingly claim—ultimately raised certain gaming and IGRA arguments. But none of that matters. The blackletter rule is that claim preclusion turns on the state of the world "at the time [the original complaint] is filed"; when new facts that arise during litigation yield new potential claims, a "plaintiff may seek leave to file a supplemental pleading to assert a new claim based on" new facts, but it "is not required to do so." *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 370 (2d Cir. 1997). And if it does not, claim preclusion "does not bar litigation of claims arising from transactions which occurred after" the original complaint. *Id.*

Indeed, claim preclusion never applies when "the facts that have accumulated after the first action are enough on their own to sustain the second." *Storey v. Cello Holdings, LLC*, 347 F.3d 370, 384 (2d Cir. 2003) (Sotomayor, J.). Here, the Nation could not have raised any IGRA claim when it filed its 2003 complaint, and the 2013 and 2015 Orders to Remedy that spurred the present action are sufficient on their own to sustain this suit.

Count I. The Nation showed that IGRA preempts state regulation of Class II gaming on "Indian lands," defined to include "*all* lands within the limits of *any* Indian reservation." 25 U.S.C. § 2703(4)(A) (emphasis added); *see* Op. Mem. 13-14. The Village does not disagree. Its sole argument is that the Nation's reservation—which, for present purposes, it stipulated "has not been disestablished," ECF No. 111—is not a "reservation" under IGRA. Vill. Mem. 25. The Village says Congress "could not have anticipated" *Sherrill*, and so it asks this Court to interpret IGRA more narrowly than its text demands. Vill. Mem. 27. But the Supreme Court has repeatedly rejected such arguments. When a statute's text is clear, it governs. Courts may not rewrite the statute based on prognostications about what members of Congress might have said if quizzed about a particular situation. And here, the Village's arguments are especially poor. The Congress that passed IGRA knew that jurisdictional lines on reservations vary widely, and that, on some reservations, States exercised broad authority much like what *Sherrill* later approved. Yet Congress defined "Indian lands" to include "all" lands within "any" reservation.

Again seeking to avoid the merits, the Village says that the requirement to obtain a "use variance" is an independent, non-preempted basis for proceeding against Lakeside Entertainment. But the Village has not cited Lakeside Entertainment for violating this requirement in the six-plus years since it reopened. And for good reason. For one thing, IGRA preempts this requirement as well. The Village claims a use variance is required only because the Nation is *gaming*, and the

use-variance process imposes a slew of requirements that are inconsistent with IGRA—including requiring that the Nation show that its proposed use is in "the best interests of the Village" (as the Village sees it). Indeed, the Village admits that, because Village law "does not, under any circumstances, authorize … commercial … gaming," it will not grant a variance unless the Nation "petition[s] the Village Board of Trustees" to change the law. Shattuck Decl. ¶¶ 6, 9; Trufant Decl. ¶¶ 8, 11; Tanner Decl. ¶ 22. Hence, absent legislative action, any request for a variance is futile. A party challenging a preempted law need not first ask the legislature to *repeal* that law.

Counts II/III. Counts II and III are also readily resolved. On Count II, the Nation explained that even if IGRA did not preempt the Village's anti-gaming laws, 18 U.S.C. § 1166 gives the federal government exclusive jurisdiction over criminal prosecutions. The Village's only response is to point to the general criminal jurisdiction granted to New York under 25 U.S.C. § 232. But as the Ninth Circuit held, § 1166—a later, more specific statute—controls over such general grants.

As to Count III, the Village concedes that the Nation is generally immune from its enforcement actions, claiming only that its actions concerning Lakeside Entertainment may proceed based on an "immovable property" exception. This argument is wrong for two reasons. First, the Second Circuit has rejected the "immovable property" exception, as Judge Suddaby recently recognized. Second, even where this exception applies, it is limited to actions seeking to determine title to, or possession of, real property. Actions like the Village's—which concern *activities* on property—fall outside this exception. The Village's own sources recognize as much.

ARGUMENT

I. The Nation Is Entitled To Summary Judgment As To Preclusion.

The Village devotes most of its memorandum to non-merits arguments based on issue preclusion (collateral estoppel) or claim preclusion (res judicata). Neither doctrine, however,

applies.[1] The Village bases its contrary arguments on distortions of the record, whose true facts are apparent from this Court's four decisions in the 2003 case. *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 293 F. Supp. 2d 183 (N.D.N.Y. 2003) ("*Union Springs I*"); *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004) ("*Union Springs II*"); *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 317 F. Supp. 2d 152 (N.D.N.Y. 2004) ("*Union Springs III*"); *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005) ("*Union Springs IV*").[2]

A. Background.

What spurred the 2003 action was not gaming but renovations at 271 Cayuga Street. The Nation believed that its on-reservation properties were entirely immune from "local zoning or other land use laws, rules, or ordinances." 2003 Compl. ¶ 26, ECF No. 1 (Tennant Decl. Ex. CC). It thus renovated without obtaining construction permits. The Village disagreed—and in October 2003, issued Stop Work Orders and Orders to Remedy alleging violations such as "demolition without permit/asbestos survey," "need stamped plans," and "no building permit." *Id.* ¶ 28; Aff. of Clint Halftown, Ex. B, ECF No. 3 (Schauf Supp. Decl. Ex. M).

The Nation, in turn, filed suit on October 19, 2003. 2003 Compl. at 9. It sought declaratory and injunctive relief on the ground that the "Nation has sovereignty over the property," so that the Village "may not regulate it" at all. *Id.* ¶ 5. It thus urged this Court to declare that the Village's application "of local zoning or other land use laws, rules, or ordinances to the Nation and to the Property is without authority or jurisdiction and is pre-empted by federal law." *Id.* ¶ 31. The

[1] While Plaintiffs' opening memorandum did not address the Village's preclusion defense, the undisputed facts and clear law show that Plaintiffs are entitled to judgment on this defense.

[2] Because this response addresses all four of these opinions, while the Nation's opening memorandum discussed only two, the numbering conventions in this response differ.

Complaint was specific about the "federal law" it invoked: the "Treaty of Canandaigua; the Nation's sovereignty, which derives from Article I, Section 8 and Article Il, Section 2, Clause 2 of the [U.S.] Constitution and from federal common law, and the Nonintercourse Act (25 U.S.C. § 177); and 25 C.F.R. § 1.4." *Id.*; *see id.* ¶ 6. The Complaint raised no claim under IGRA. Indeed, when the Complaint was filed, the Nation did not even satisfy IGRA's most basic requirements for lawful Class II gaming: The Nation did not adopt a gaming ordinance until November 12, 2003; NIGC did not approve it until November 18; and the Nation did not start gaming until May 2004. JSF ¶¶ 16-17, ECF No. 123; Supp. Decl. of B.J. Radford ¶ 4 ("Radford Supp. Decl.").

The Village's Answer also did not address IGRA or cite its Games of Chance Ordinance. Answer & Counterclaim, ECF No. 9 (Tennant Decl. Ex. FF). In opposition to the Nation's motion for summary judgment, however, the Village raised gaming and IGRA in two limited respects. First, even on reservation land (and separately from the authority later conferred in *Sherrill*), States and municipalities "may assert jurisdiction over the on-reservation activities of tribal members" in "exceptional circumstances." *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 331-32 (1983); *accord Union Springs II*, 317 F. Supp. 2d at 144-45. The Village argued that "exceptional circumstances" were present because the Nation "planned to open a Class II gaming facility," which it claimed would "impact … the local community." Village Mem. of L. at 15-16, 17, ECF No. 38-9 (Schauf Supp. Decl. Ex. O). The Village urged that its "interest in ensuring its residents' health and safety" dictated requiring the Nation to comply with "fire and other safety codes." *Id.* at 17. Second, the Village sought "in the alternative, a preliminary injunction precluding the Nation from … gaming … until … the Nation complies with" IGRA. *Id.* at 17.

What the Village today calls "the Tribe's lawyers … arguing IGRA preemption," Vill. Mem. 12, was simply the response to these arguments.[3] First, the Nation argued that "exceptional circumstances" were absent. Pltf.'s Reply/Opp. Mem. at 8-16, ECF No. 40 (Tennant Decl. Ex. AA). The Nation argued, among other things, that the Village could not rely on its gaming-related concerns when IGRA "preempts … local attempts to … prohibit gaming activities on Indian lands." *Id.* at 15. Second, the Nation argued that the Village did "not allege anywhere in [its] pleadings" an IGRA claim; that the Village "lack[ed] standing to enjoin gaming purportedly not in compliance with IGRA"; and that the "Nation [h]as [c]omplied [w]ith IGRA." *Id.* at 16, 18.

On May 20, 2004, the Court granted the Nation summary judgment. As to the Village's request for an injunction, the Court deemed it "questionable" whether even "a liberal reading" of the Village's pleadings "provide[d] … notice of [an IGRA] claim," *Union Springs II*, 317 F. Supp. 2d at 149 n.21, and "whether the alleged harm is sufficiently imminent to warrant injunctive relief"—because "the Nation has not yet commenced any gaming," *id.* at 150. In the end, the Court found these issues "need [not] be addressed because defendants have not made the requisite showing of irreparable harm." *Id.* As to "exceptional circumstances," the Court found that the "planned use" for gaming could not provide such circumstances because "the Nation correctly points out that it is governed by IGRA, which preempts state and local attempts to regulate gaming on Indian lands, and thus, such a consideration is irrelevant." *Id.* at 148. This Court then granted summary judgment to the Nation based on the Nation's broad argument that the Village's zoning

[3] The Village also misleads on the timing. It depicts the Nation as opening Lakeside Entertainment "in early 2004" and, "[a]s soon as" it did so, raising IGRA preemption as part of some premeditated plan—quoting from a memorandum the Nation filed on February 10, 2004. Vill. Mem. 12. But at that point, the Nation was not gaming. That is clear from this Court's April 23, 2004 opinion, which notes that the Nation "ha[d] not yet commenced any gaming." *Union Springs II*, 317 F. Supp. 2d at 150. Lakeside Entertainment did not open until May 2004. Radford Supp. Decl. ¶ 4.

and land use ordinances were categorically inapplicable because 271 Cayuga Street was "Indian Country." *Id.* at 144. The Nation began gaming in late May 2004. Radford Supp. Decl. ¶ 4.

When the case returned to this Court after the Second Circuit's post-*Sherrill* remand, the Village did not reassert its "exceptional circumstances" argument—understandably, given its view that *Sherrill* gave it broader authority to apply its laws. Mem. of L. in Support of Mot. for Summ. J. at 7-11, ECF No. 112-8 (Schauf Supp. Decl. Ex. T); *see* Defts.' Mem. of L. in Support of Vacatur, ECF No. 87 (Schauf Supp. Decl. Ex. P). It also did not renew its request for an injunction requiring the Nation to comply with IGRA. For its part, the Nation also did not raise any IGRA claim. Again, that is exactly what one would expect: The Nation had discussed IGRA before only in response to the Village's arguments. In fact, the Nation's post-*Sherrill* briefs mentioned IGRA only in underscoring that "IGRA issues are not presently before the Court" and that the Village "neither cite[s] IGRA nor make any express argument calling for a cessation of the Nation's gaming." *Amicus* Br. on Behalf of Clint Halftown at 19-20, ECF No. 100 (Schauf Supp. Decl. Ex. R); *accord* Mem. of L. of *Amici Curiae* Clint Halftown at 7 n.3, ECF No. 114 (similar) (Schauf Supp. Decl. Ex. U). The Village, in response, did not dispute the Nation's position or even cite IGRA. *See* Mem. of L. in Opp. to Pltf.'s Cross-Mot., ECF No. 122 (Schauf Supp. Decl. Ex. V).

When this Court ruled, it agreed with the Village's *Sherrill*-based argument and held that the Nation could not rely on its inherent sovereignty to "assert[] immunity from state and local zoning laws." *Union Springs IV*, 390 F. Supp. 2d at 206. The Court nowhere discussed IGRA.

Hence, the Village gets it badly wrong with accusations that the "Cayugas' lawyers" have made "false denials of their reliance on IGRA preemption," Vill. Mem. 14, 16—serious charges to level against officers of this Court. When Mr. French agreed with Judge McCurn that the "Nation didn't interpose this IGRA argument before Judge Hurd," Vill. Mem. 15 (quoting Tennant

Decl. Ex. KK at 36-37), he was right. *The Village* raised gaming and IGRA issues in the prior litigation; the Nation's claims were not based on IGRA. Likewise, when Mr. DeBruin said that the Nation did not "invoke[] IGRA" as "a defense," he accurately conveyed that the Nation did not base its claims on IGRA. Vill. Mem. 15-16 (quoting Tennant Ex. MM at 11, 13). As for Mr. DeBruin's statement that this Court, "never cited IGRA," he was discussing the 2005 opinion issued "after *Sherrill*," Tennant Ex. MM at 13—which, indeed, did not cite IGRA. While the Nation might have appended the caveat that this Court's 2004 opinion did cite IGRA as described above, *supra* at 6, that does not render the substance of the Nation's arguments inaccurate.

B. The Village's Issue Preclusion Argument Is Meritless.

With that backdrop, it takes little to see why the Village's preclusion arguments are meritless. Issue preclusion "bars the relitigation of an issue that was raised, litigated, and actually decided by a [prior] judgment." *Postlewaite v. McGraw-Hill*, 333 F.3d 42, 48 (2d Cir. 2003). Hence, "for a judgment to be preclusive, the issue in question must have been actually decided." *Id.* "If an issue was not actually decided in the prior proceeding, or if its resolution was not necessary to the judgment," issue preclusion is no bar. *Id.* This doctrine therefore asks a simple question: Did this Court decide an IGRA issue adversely to the Nation? If the answer were yes, it would be clear for all to see. But the answer is no. A quick review of this Court's 2005 opinion—the only opinion adverse to the Nation—makes that clear. *See Union Springs IV*, 390 F. Supp. 2d at 205-06. The Village's issue preclusion argument is thus baseless.[4]

[4] Nor was resolving any IGRA issue *necessary* to this Court's 2005 judgment. That, again, is clear from the history: The Village did not invoke IGRA during the post-*Sherrill* remand, and when the Nation observed in its response papers that "no issues related to [IGRA] are currently before the court," the Village did not disagree. *Supra* at 7. The Village's present counsel has spun, from whole cloth, the claim that the post-*Sherrill* remand necessarily implicated IGRA issues.

C. The Village's Claim Preclusion Argument Is Meritless.

The Village fares no better with its argument based on claim preclusion, or res judicata.

Claim preclusion's main concern "is to bring litigation to an end after the parties have had a fair opportunity to litigate." *Oneida Indian Nation of N.Y. v. New York*, 194 F. Supp. 2d 104, 125 (N.D.N.Y. 2012) (Kahn, J.). It is an affirmative defense that requires the Village to show that "the claims asserted in the subsequent action were, or could have been, raised in the prior action." *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 499 (2d Cir. 2014) (quotation marks omitted). The "could have been" language, however, "is … a misnomer." *Pike v. Freeman*, 266 F.3d 78, 91 (2d Cir. 2001) (Sotomayor, J.). The question is whether a later claim is so "related to the claims that were asserted in the first proceeding that it *should have been* asserted." *Id.*; *see TechnoMarine*, 758 F.3d at 499 (considering "whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first" (quotation marks omitted)). Moreover, the Second Circuit "has narrowly read the scope of a 'claim.'" *HCC, Inc. v. R H & M Mach. Co.*, 39 F. Supp. 2d 317, 323 (S.D.N.Y. 1999). The "fact that both suits involved essentially the same course of wrongful conduct," or "the same parties, similar or overlapping facts, and similar legal issues," is "not decisive." *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d 86, 91 (2d Cir. 1997).

Particularly important is the rule that, for "purposes of res judicata, '[t]he scope of litigation is framed by the complaint at the time it is filed.'" *Computer Assocs.*, 126 F.3d at 369-70. After a complaint, sometimes facts change and new claims arise. When that occurs, a "plaintiff may seek leave to file a supplemental pleading to assert a new claim based on" new facts. But it "is not required to do so." *Id.* And absent an amended complaint, claim preclusion "does not bar litigation of claims arising from transactions which occurred after" the original complaint. *Id.*; *see SEC v.*

First Jersey Sec., Inc., 101 F.3d 1450, 1464 (2d Cir. 1996) ("election not to [amend] is not penalized by application of *res judicata* to bar a later suit on … subsequent conduct"); *accord Bey v. City of N.Y.*, No. 01 CIV. 8906, 2010 WL 3910231, at *14 (S.D.N.Y. Sept. 21, 2010), *aff'd*, 454 F. App'x 1 (2d Cir. 2011); *Guarneri v. Hazzard*, No. 9:06-CV-985NAM/DRH, 2010 WL 1064330, at *9 (N.D.N.Y. Mar. 22, 2010); *Humbles v. Reuters Am., Inc.*, No. 02-CV-60 TCP MLO, 2006 WL 2547069, at *9 (E.D.N.Y. Aug. 31, 2006) (all rejecting attempts to apply claim preclusion to claims arising during the pendency of the first lawsuit). If a "claim could not have been asserted" in the first action, moreover, it "is not barred in the second." *Pike*, 266 F.3d at 91 & n.15.

Here, claim preclusion does not apply for multiple independent reasons.

IGRA claims unavailable. First, when the Nation filed its October 19, 2003 Complaint, it could not have raised its IGRA claims. *See Marvel Characters, Inc. v. Simon*, 310 F.3d 280, 286-87 (2d Cir. 2002) ("prior judgment 'cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon" (quoting *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328 (1955))). The "case or controversy … between … the parties" that entitled the Nation to seek this Court's intervention, *see Union Springs I*, 293 F. Supp. 2d at 193, did not concern gaming. Rather, the Nation had commenced renovations without complying with local zoning and land-use laws, based on its position that those laws did not apply to the Nation. 2003 Compl. ¶ 26. The Village therefore cited the Nation for not providing (for example) "an asbestos survey or filed architect plans." *Id.* ¶ 28. The Village did not cite the Nation based on the violation of any anti-gaming law; indeed, the Village itself says that its "enforcement action against the renovation activity took place without the Village knowing that" the property might be used "for gaming." Vill. Mem. 10. Given the building and land-use violations that the Village's 2003 Stop Work Orders and Orders to Remedy alleged, it would have been a nonsequitur

for the Nation to assert, as a defense, that "IGRA preempts … State and local laws that prohibit … gaming." Am. Compl. ¶ 82. Because IGRA preemption was not a defense to the actions that spurred the 2003 suit, the Nation was not required to (and could not have) raised an IGRA defense.

Moreover, when the Nation filed its October 19, 2003 Complaint, key facts supporting its IGRA preemption claim did not yet exist. *Williams v. Perry*, 229 F.3d 1136, 2000 WL 1506086, at *4 (2d Cir. 2000) (unpublished table decision) (claim preclusion inapplicable when "an essential fact giving rise to the claim" had "not transpired at the time [plaintiff] filed" the first suit). IGRA preempts state regulation of "the governance of gaming activities." *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 469-70 (2d Cir. 2013). But when the Nation filed its prior action, it had not yet entered that field. The Nation was not gaming *at all* (and would not begin doing so until May 2004), and it did not even have an NIGC-approved gaming ordinance. *Supra* at 5. Had the Nation's Complaint raised an IGRA claim, it would have been asking this Court to hypothesize that (1) the Nation would enact a gaming ordinance; (2) NIGC would approve it; (3) the Nation would begin gaming; and (4) the Village would invoke anti-gaming laws against that gaming. Such a claim would have properly been dismissed as unripe.

Indeed, as late as *April 2004*, this Court indicated (without deciding) that, because "the Nation has not yet commenced any gaming," the Village's request for a preliminary injunction requiring the Nation to comply with IGRA was based on "speculat[ion]" and lacked a "sufficiently imminent" threat "to warrant … relief." *Union Springs II*, 317 F. Supp. 2d at 150. In October 2003, IGRA claims would have been even more premature. Claim preclusion does not apply to claims that were not ripe when the first action was filed. *Hillary v. St. Lawrence Cty.*, No. 817CV659GLSDEP, 2019 WL 977876, at *7 (N.D.N.Y. Feb. 28, 2019); *Thyroff v. Nationwide Mut. Ins. Co.*, No. 05-CV-6607T, 2006 WL 2827082, at *3 (W.D.N.Y. Sept. 29, 2006).

New threats. Second, the present action rests entirely on new threats. Claim preclusion is inapplicable where "the facts that have accumulated after the first action are enough on their own to sustain the second." *Storey*, 347 F.3d at 384 (Sotomayor, J.); *see TechnoMarine*, 758 F.3d at 502-03 (preclusion inapplicable because plaintiffs' "present claim, to the extent based on the new acts of infringement" committed after the prior suit, "was not and could not have been litigated in the earlier proceeding"); *Computer Assoc.*, 126 F.3d at 369 ("Without a demonstration that the conduct complained of in the [second] action occurred prior to the initiation of the [first] action, *res judicata* is simply inapplicable."). For example, even if a plaintiff does not succeed in its first attempt to enjoin a violation of the antitrust laws, preclusion does not bar a second action if the conduct continues. *See Storey*, 347 F.3d at 384 (discussing *Lawlor*, 349 U.S. at 327-28); *Harkins Amusement Enters., Inc. v. Harry Nace Co.*, 890 F.2d 181, 183 (9th Cir. 1989) (Kennedy, J.). Likewise, if "a person trespasses … every day," a suit for trespass "precludes a subsequent action for trespass as to all the instances of trespass preceding … the original suit"—but permits a second suit for later trespasses. *Waldman v. Vill. of Kiryas Joel*, 207 F.3d 105, 111 (2d Cir. 2000) (discussing *Restatement (Second) of Judgments* § 24 cmt. d & illus. 7 (1982)). That remains true even if (as in the trespass example) the later acts "were part of [the] same pattern."[5]

Here, Plaintiffs' request for declaratory and injunctive relief in no way depends on the 2003 threats. Instead, the Amended Complaint rests on Orders to Remedy issued in 2013 and 2015—

[5] *Williams*, 2000 WL 1506086, at *4 (citing *First Jersey*, 101 F.3d at 1464); *accord HCC*, 39 F. Supp. 2d at 323 (explaining that the Second Circuit in *Interoceanica* held that claim preclusion did "not bar a shipping line from seeking to invalidate a New York state piloting ordinance on grounds that it violated the Commerce Clause, even though the shipper could have raised the defense in previous litigation"; while "the underlying facts … were similar and the shipper's alleged wrongful conduct was premised upon the same statutory provision," the "crucial" fact was that the "separate … voyages" gave "'rise to separate statutory wrongs—just as a party who breaches a contract twice in the same way has committed two separate breaches'" (quoting 107 F.3d at 90-92)).

threats that not only post-date the prior action but are about gaming, not construction. These new threats stand on their own to create a "new claim." *Storey*, 347 F.3d at 384.[6]

The Village's arguments. The Village's contrary arguments lack merit. First, it stresses that—as noted—the Nation promulgated a gaming ordinance and "opened Lakeside Entertainment" while the prior action was pending. Vill. Mem. 12. But that does not matter. Again, even if the Nation could have amended its complaint to add an IGRA claim, its "election not do so is not penalized by … *res judicata*." *First Jersey*, 101 F.3d at 1464.

Next, the Village suggests that the Nation's 2003 Complaint raised an IGRA claim by stating that the Village's "enforcement of … local land use regulations and ordinances … is preempted by the federal and tribal regulatory scheme established by Congress." Vill. Mem. 11 (quoting 2003 Compl. ¶ 5). Via this vague verbiage, the Village says, the Nation "execut[ed] on [a] plan to invoke [IGRA] statutory preemption when the facts supported it." Vill. Mem. 12. But this is pure revisionism. The 2003 Complaint was not coy about the federal laws it invoked, describing them in paragraphs 6 and 32. This Court easily identified those laws, recognizing that the Nation based its claims on "the Indian Commerce Clause, Treaty Clause, the Nonintercourse Act, the Treaty of Canandaigua, and federal common law"—not IGRA. 293 F. Supp. 2d at 196.

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[6] *Waldman*, on which the Village relies, reaffirms that claim preclusion "will not bar a suit based upon legally significant acts occurring after the filing of a prior suit that was itself based upon earlier acts," even if "such acts were part of the same pattern." 207 F.3d at 113. That rule, however, did not help the *Waldman* plaintiff because of the nature of his claim. In his second suit against a municipality, he brought what might be called a "hostile religious environment" claim—contending that the "pervasive entanglement" between a municipality and a church required the municipality's dissolution. *Id.* at 112. Yet he could not make out that claim without relying on facts about the municipality's conduct that pre-dated his first suit. *Id.* at 109-10, 113 (identifying "overlapping" and "new" facts). The Second Circuit thus concluded that the first suit was preclusive. Here, Plaintiffs challenge the Village's discrete acts of sending Orders to Remedy in 2013 and 2015. Those threats suffice to entitle the Nation to declaratory and injunctive relief, without reference to the 2003 threats. This case is like the repeated trespasses, not *Waldman*.

The Village also makes much of the fact that the injunctive relief this Court initially issued in the 2003 suit could be read broadly enough to encompass anti-gaming laws. *See* Vill. Mem. 4. But that broad relief reflected the breadth of the theory the Nation pressed in 2003, when it contended that its inherent sovereignty rendered all State and local ordinances categorically inapplicable. 2003 Compl. ¶ 26. The Supreme Court has squarely rejected the argument that claim preclusion bars a subsequent suit simply because a prior action sought "injunctive relief which, if granted, would have prevented the illegal acts now complained of." *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 328-29 (1955); *see Stewart v. Transp. Workers Union of Greater N.Y., Local 100*, 561 F. Supp. 2d 429, 443-44 (S.D.N.Y. 2008); *Bey*, 2010 WL 3910231, at *14 n.10 (both finding *Lawlor* "squarely rejected" similar arguments).

Even more strained is the Village's suggestion that preclusion should apply because the Nation supposedly "initially disguised [its] plans to open a gaming facility." Vill. Mem. 9. To begin, this allegation is no more than a smear. The Village's only support for its claim that the Nation never intended to use the parcel for "tribal offices" is that the Nation was simultaneously "trying to block the Seneca-Cayuga Tribe (of Oklahoma)'s efforts to establish a gaming facility in the … Reservation." *Id.* But preventing an Oklahoma tribe from gaming on the Nation's reservation is hardly evidence that the Nation always intended to game *at this parcel*. More important, the Nation's subjective intentions are irrelevant. Whatever the Nation initially intended, the fact remains that the Nation did not have an IGRA defense—as of October 19, 2003—to the Stop Work Orders and Orders to Remedy that the Village had issued. *Supra* at 10-11.[7]

[7] For the same reasons, the Village is wrong that claim preclusion bars Count II's reliance on 18 U.S.C. § 1166. Vill. Mem. 20. Again, the Nation has invoked that section here in response to new threats that post-date the 2003 action. And again, the Nation could not have invoked that section when it filed its 2003 Complaint: § 1166 gives the federal government exclusive jurisdiction "over

D. Claim Preclusion Also Does Not Apply To The Nation's Sovereign Immunity Claim.

The Village's argument that claim preclusion bars the Nation's invocation of its sovereign immunity, *see* Vill. Mem. 20-21, is wrong for the same reasons: This suit concerns new threats, resting on new grounds. Hence, the Nation's decision not to invoke sovereign immunity in response to the Village's 2003 orders alleging (for example) "demolition without permit/asbestos survey," *supra* at 4, does not preclude the Nation from raising immunity to block the Village's 2013 and 2015 attempts to enforce its Games of Chance Ordinance and related laws.

Indeed, as to sovereign immunity, the Village's arguments are even more untenable. Via "claim preclusion," the Village asks this Court to hold that the Nation's 2003 suit waived its sovereign immunity as to any later action by the Village to enforce any local law. But to "relinquish its immunity, a tribe's waiver must be 'clear,' and thus it 'cannot be implied but must be unequivocally expressed.'" *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 761 F.3d 218, 221 n.1 (2d Cir. 2014). The Nation's 2003 suit certainly did not "unequivocally" waive immunity as to any later attempt by the Village to enforce its anti-gaming laws. In fact, precisely because waiver must be "clear," courts have recognized that a waiver in one suit "generally does *not* extend to a separate or re-filed suit." *Biomedical Patent Mgmt. Corp. v. Cal. Dep't of Health Servs.*, 505 F.3d 1328, 1339-40 (Fed. Cir. 2007) (emphasis in original); *see Wagoner Cty. Rural Water Dist. No. 2 v. Grand River Dam Auth.*, 577 F.3d 1255, 1260 (10th Cir. 2009) (Tacha, J., joined by Gorsuch, J.) (similar); *Shieldalloy Metallurgical Corp. v. N.J. Dep't of Envtl. Prot.*, 743 F. Supp. 2d 429, 436-37 (D.N.J. 2010) (similar); *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 890 F. Supp. 2d 240,

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criminal prosecutions of violations of State gambling laws." 18 U.S.C. § 1166(d). But when the Nation filed suit in 2003, the Village had not threatened to invoke any "gambling laws."

248 (W.D.N.Y. 2012) (Nation's payment of taxes on some properties did not waive sovereign immunity as to attempts to enforce taxes at others), *aff'd*, 761 F.3d 218 (2d Cir. 2014).

More than that: In a series of suits that the federal government brought and defended "on behalf of … Indian Nations," the Supreme Court has rejected *entirely* the argument that "a failure to object" on sovereign-immunity grounds in a first suit carried "res judicata" effect in a second. *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512-14, 60 (1940). The Court found that, in "a collision between the desirable principle that rights may be adequately vindicated through a single trial of an issue and the sovereign right of immunity from suit," "immunity should prevail." *Id.* at 514-15. Lower courts have extended that principle to state sovereign immunity. *Jordon v. Gilligan*, 500 F.2d 701, 710 (6th Cir. 1974). And like state and federal immunity, tribal sovereign immunity is a question of "subject matter jurisdiction." *Laake v. Turning Stone Resort Casino*, 740 F. App'x 744, 745 (2d Cir. 2018); *accord U.S. Fid.*, 309 U.S. at 514-15.

II. Count I: IGRA Preempts The Village's Actions Against Lakeside Entertainment.

A. IGRA Protects The Indian Gaming That Occurs At Lakeside Entertainment.

On the merits, the Village rests its case on the proposition that, when IGRA uses the phrase "any Indian reservation," IGRA does not mean "any Indian reservation." The Village does not dispute that IGRA's preemptive sweep extends to all Class II gaming by Indian tribes on "Indian lands." 25 U.S.C. § 2710(b)(2). Nor can the Village gainsay that IGRA defines "Indian lands" to include "*all* lands within the limits of *any* Indian reservation," 25 U.S.C. § 2703(4) (emphasis added)—though it buries this text in a footnote—or that Lakeside Entertainment sits within the Nation's "'not disestablished' … reservation." Vill. Mem. 24 n.8, 28. Instead, the Village argues only that the Nation's reservation is not a "reservation" "within the meaning of IGRA." *Id.* at 2.

This argument fails because it violates the "cardinal canon" in interpreting statutes, to which courts must "always turn first … before all others." *Conn. Nat'l Bank v. Germain*, 503 U.S.

249, 253 (1992). That rule provides that "courts must presume that a legislature says in a statute what it means and means in a statute what it says there," as the Supreme Court "ha[s] stated time and again." *Id.* at 253-54 (citing, *e.g.*, *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241-42 (1989)). Meanwhile, when "the words of a statute are unambiguous, … this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

That is the case here. IGRA could not have been clearer in defining "Indian lands" to include "*all* lands within the limits of *any* Indian reservation." 25 U.S.C. § 2703(4) (emphasis added). As the Supreme Court has "previously noted," "'[r]ead naturally, the word 'any' has an expansive meaning"—"'one or some indiscriminately of whatever kind.'" *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 218-19 (2008) (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997) (in turn quoting *Webster's Third New International Dictionary* 97 (1976))). That forecloses the Village's claim that, when IGRA uses the phrase "any reservation," it means "some reservations."

The Village's contrary arguments are wrong. First, the Village says that a reservation is not an IGRA "reservation" unless a nation can exercise a particular quantum of "governmental power." Vill. Mem. 25. But to begin, Plaintiffs have already shown that the Nation *does* exercise governmental power, and that the federal government has recognized its sovereign authority to do so. Op. Mem. 18-19, 21-22; *infra* at 23. More important, IGRA's text does not call for a weighing of precisely *how much* power an Indian nation may exercise on a reservation. The second branch of IGRA's "Indian lands" definition, for "trust" and restricted fee lands, covers only lands "over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4)(B). But for the first branch, concerning reservations, this qualifier is absent. The Village's argument writes that careful distinction out of the statute. It thereby violates the rule that, when "Congress includes particular

language in one section of a statute but omits it in another," it is "presumed that Congress acts intentionally and purposely in" doing so. *Jaen v. Sessions*, 899 F.3d 182, 189 (2d Cir. 2018).

Second, the Village argues that the word "reservation" has a "common law definition" that *means* the exercise of a certain quantum of "governmental authority"—quoting the Supreme Court's description of "Indian reservations as separate, although dependent nations," in which "state law could have no role to play." Vill. Mem. 25-26 (quoting *McClanahan v. State Tax Comm'n of Ariz.*, 411 U.S. 164, 168 (1973)). The Village is wrong again. Its sleight of hand is to take *descriptions* of characteristics that some reservations have and to recast them—incorrectly—as *requirements* every reservation must satisfy.

Instead, the dispositive rule concerning reservations is this: "Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." *Solem v. Bartlett*, 465 U.S. 463, 470 (1984). Applying that principle, Judge Kahn held that, despite *Sherrill*, the Oneida Nation's reservation lands remain a "reservation" under IGRA—explaining that "[i]n *Sherrill*, the Supreme Court not only expressly declined to address the Second Circuit's determination that the [Oneida] reservation had not been disestablished, but also noted that 'only Congress can divest a reservation of its land.'" *New York v. Salazar*, No. 6:08–CV–644, 2009 WL 3165591, at *9 (N.D.N.Y. Sept. 29, 2009) (quoting *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 216 n.9 (2005)). Here, the same rule governs. Because Congress set aside the Nation's reservation in the Treaty of Canandaigua and never disestablished it, it remains a reservation under federal law.

Indeed, when Congress passed IGRA, it well understood that reservations nationwide vary widely in how much authority states and Indian nations may exercise—and that on many, Indian

nations do not exercise the "exclusive" authority that the Village incorrectly contends defines a "reservation." Vill. Mem. 25. Under "Public Law 280," Congress conferred on six states—Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin—substantial criminal and civil jurisdiction over reservations, providing that designated state laws would have "the same force and effect within such Indian country as they have elsewhere." 18 U.S.C. § 1162(a) (criminal jurisdiction); *accord* 28 U.S.C. § 1360(a) (civil).[8] Congress also offered other states the chance to assume jurisdiction, and several states—including Florida, Idaho, Iowa, and Washington—did so. *Doe v. Mann*, 415 F.3d 1038, 1050 n.16 (9th Cir. 2005). Additional states have received their own jurisdictional grants, including Colorado,[9] Connecticut,[10] and Utah.[11] Especially relevant are laws concerning Rhode Island and Massachusetts, in which Congress provided that tribal lands were "'subject to the [state's] civil and criminal laws and jurisdiction,'" *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994), and that the nations "'shall not have any jurisdiction

[8] In full, the criminal jurisdictional grant provides that these states "shall have jurisdiction over offenses committed by or against Indians in the areas of Indian country listed opposite the name of the State or Territory to the same extent that such State or Territory has jurisdiction over offenses committed elsewhere within the State or Territory, and the criminal laws of such State or Territory shall have the same force and effect within such Indian country as they have elsewhere within the State or Territory." 18 U.S.C. § 1162(a). The civil jurisdictional grant provides that these states "shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the State to the same extent that such State has jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State." 28 U.S.C. § 1360(a).

[9] Act of May 21, 1984, Pub. L. No. 98-290, §§ 1-5, 98 Stat. 201, 201-02 (1984) (authorizing Town of Ignacio to exercise jurisdiction within the Southern Ute Indian Reservation and limiting tribal jurisdiction outside trust lands).

[10] 25 U.S.C. § 1755 (1983) (The "reservation of the [Mashantucket Pequot] Tribe is declared to be Indian country subject to State jurisdiction to the maximum extent provided in" Public Law 280); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103–377, § 2, 108 Stat. 3501, 3501-02 (similar regarding lands of Mohegan Nation).

[11] Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96–227, § 7, 94 Stat. 317, 320-21 (1980).

over nontribal members and shall not exercise any jurisdiction over any part of [lands] in contravention of … the [state's] civil regulatory and criminal laws.'" *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 624-25 (1st Cir. 2017), *cert. denied*, 138 S. Ct. 639 (2018). Yet the First Circuit held those lands were "Indian lands."

This variation, notably, extends to taxation issues like those considered in *Sherrill*. While the Village implies that reservation lands are categorically "immune to state and local taxation," Mem. 26, that is not always true. The Supreme Court considered one exception to the default rule in *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), where it held "that the General Allotment Act permits Yakima County to impose an ad valorem tax on reservation land patented in fee." *Id.* at 270. This holding did not make the Yakimas' reservation any less of a reservation. The same is true of *Sherrill.*

Third, the Village invites this Court to narrow the plain meaning of "reservation" on the theory that Congress did not have *Sherrill* in mind when it passed IGRA. Vill. Mem. 27. But the Supreme Court has rejected this approach, explaining that it "is not, and cannot be, our practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy—even assuming that it is possible to identify that evil from something other than the text of the statute itself." *Brogan v. United States*, 522 U.S. 398, 403 (1998). There, the Court declined to create an exception to 18 U.S.C. § 1001's broad criminal prohibition on "'any false, fictitious, or fraudulent statement" to government agencies based on the defendant's assertion that Congress only foresaw that this provision would impose liability where a false statement threatened a "perversion of government[] functions." *Id.* at 400, 405. Likewise here, this Court is not free to rewrite the words "any reservation" based on claims that Congress did not anticipate *Sherrill*. And again, while *Sherrill* of course lay in the future when Congress passed IGRA, Congress was well

aware of all the variants on tribal and state jurisdiction outlined above. Yet it defined "Indian lands" to cover "*all* lands within the limits of *any* Indian reservation." 25 U.S.C. § 2703(4).

Fourth, the Village incorrectly claims that the Nation's position is inconsistent with "how the NIGC has interpreted the statute" and "how the Secretary of Interior and courts have interpreted IGRA." Vill. Br. 28. But as to NIGC, its position is manifest in its March 2018 decision to "once again regulate the gaming facility of the Nation," relying on regulatory authorities—25 U.S.C. § 2706(b) and 25 C.F.R. § 571.5—that apply only on "Indian lands." JSF ¶ 47 & Ex. U thereto; SAMF ¶ 54; Op. Mem. 7-8. True, as Plaintiffs forthrightly acknowledged, this has not always been NIGC's position. Op. Mem. 7. But the Village cannot gain by relying on NIGC's old position when NIGC has now recognized that its precedents compel recognizing the Nation's right to game.

As to the "Secretary of the Interior," the Village relies on a letter concerning *non-reservation* land that Secretary found qualified as "Indian lands" under the second branch of IGRA's definition—because "title is 'held by an Indian tribe ... subject to restriction … against alienation and over which an Indian tribe exercises governmental power.'" *Citizens Against Casino Gambling in Erie Cty. v. Hogen*, No. 07-CV-0451S, 2008 WL 2746566, at *28 (W.D.N.Y. July 8, 2008) (quoting 25 U.S.C. § 2703(4)(B)). Given that this branch of the definition requires "governmental power," it is no wonder that the "Secretary's letter state[d], in relevant part" that the nation could game "only if the tribe … exercise[s] governmental power." *Id.* at *28 n.34. The same goes for the one court decision the Village cites, which merely held that, because lands were "not within the limits of an Indian reservation," they qualified as Indian lands only if the nation

"exercise[d] … governmental power." *Miami Tribe of Okla. v. United States*, 5 F. Supp. 2d 1213, 1218 (D. Kan. 1998).[12]

Moreover, the Village also cannot avoid the Nation's alternative argument—that even if some quantum of "governmental authority" were required, the Nation satisfies any such requirement under the standards the First Circuit set forth in *Narragansett* and *Wampanoag*. And here, again, there is no doubt about the federal government's position. NIGC's regulation of Lakeside Entertainment confirms that it regards the Nation as satisfying any applicable "governmental power" requirement. Likewise, the Department of the Interior's Bureau of Indian Affairs recently reaffirmed that the Nation retained its "inherent sovereign authority to enforce its own laws inside the Cayuga Indian Nation Reservation boundaries," and that "the Department [of the Interior's] position is that the … Nation may enforce its own criminal laws against Indians within the boundaries of the Reservation." SAMF ¶ 42. That is consistent with the 2013 brief, approved by the Solicitor General, that disagreed with Seneca County for "incorrectly refer[ing]

[12] The Nation's position concerning the "efforts of the Seneca-Cayuga Tribe of Oklahoma to establish a gaming facility within the limits of the Cayuga Historic Reservation," Vill. Mem. 28, was the same as *NIGC*'s position: The Seneca-Cayuga Tribe may game only on *its own* "Indian lands," not on the lands of other Indian nations, including the Cayuga Nation. *Seneca-Cayuga Tribe of Okla. v. Town of Aurelius*, 233 F.R.D. 278, 280 (N.D.N.Y. 2006) ("According to the Nation, IGRA prohibits an Indian tribe from conducting gaming in more than one state. Because the Tribe already operates a gaming facility in … Oklahoma, the Nation argues, it may not also operate a gaming facility in … New York."); *see* Op. Mem. 16-17.

Regardless, the Village's assertion that the Nation "should be judicially estopped," Vill. Mem 29, is clearly wrong. This doctrine "prevents a party from asserting a factual position in one legal proceeding that is contrary to a position that it successfully advanced in another." *Clark v. AII Acquisition, LLC*, 886 F.3d 261, 264 (2d Cir. 2018). The Village does not claim that the Nation *successfully* advanced any inconsistent position; rather, the Seneca-Cayuga lost on *Sherrill* grounds. 233 F.R.D. at 281. Moreover, this doctrine is limited to inconsistent *factual* positions, not "legal positions." *Seneca Nation of Indians v. New York*, 26 F. Supp. 2d 555, 565 (W.D.N.Y. 1998), *aff'd*, 178 F.3d 95 (2d Cir. 1999); *accord O'Dette v. Fisher*, No. 12 CIV. 2680 ILG SMG, 2014 WL 6632470, at *7 (E.D.N.Y. Nov. 21, 2014); *Carson Optical, Inc. v. Prym Consumer USA, Inc.*, No. CV 11-3677 ARL, 2013 WL 1209041, at *10 (E.D.N.Y. Mar. 25, 2013).

to the land at issue … as 'non-sovereign' land," explaining that "[b]ecause the land is located within the boundary of the Cayuga reservation, it is reservation land over which Cayuga may exercise tribal sovereign powers consistent with the County's concurrent authority." Letter Br. for the United States as Amicus Curiae at 4 n.1, *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 761 F.3d 218 (2d Cir. Sept. 30, 2013) (No. 12-3723), ECF No. 104-3 (Schauf Decl. Ex. L).

As the federal government recognizes, the Nation exercises governmental authority and jurisdiction in spades. This includes, as set forth in Plaintiffs' opening memorandum:

- The Nation's Police Force patrols Nation-owned properties within the Nation's reservation. While the Village notes that the Nation may still sometimes make calls to the "9-1-1 call center," Schenck Decl. ¶ 9, the Village ignores that the Police Force now undertakes many tasks that, before, would have been undertaken by the State or local police—including 81 incidents in just the past year. Supp. Decl. of Mark L. Lincoln ¶¶ 5-7. So yes: the Nation may still seek assistance from other governments. But this does not diminish the governmental power that the Nation exercises—just as the Village does not relinquish its governmental power by asking for help from the State Police. *Id.* ¶ 9. Indeed, both State Police troopers and the Auburn City Police Department have contacted the Nation's Police Force for help, making clear that requests for assistance run in both directions. *Id.* ¶ 11.

- The Nation has established a court system with jurisdiction under Nation law over offenses defined in the Nation's penal code, including a trial court, appellate court, prosecutor, and public defender, and the Nation has contracted with a prison to incarcerate those found guilty of violating the Nation's laws within the Nation's reservation. SAMF ¶¶ 43-48.

- The Nation has passed many ordinances, including covering land use, health and safety, agriculture, markets, sanitation, and alcoholic beverage control on Nation-owned properties on the reservation—enforced by Nation-appointed officers. SAMF ¶¶ 12-13.

- To support the governmental powers the Nation exercises, the Nation participates in federal government-to-government programs under the Indian Self-Determination Act ("ISDA") and the Indian Roads Program. SAMF ¶ 25.

- The Nation owns and manages 42 homes or other units of housing for Nation citizens on the Nation's reservation, which the Nation constructed or acquired with funds provided by grants to the Nation from the United States Department of Housing and Urban Development. SAMF ¶¶ 18-19.

The Village is thus dead wrong that the Nation is no different from "any other resident[]," and is not a "self-governing body except on paper." Vill. Mem. 29 n.11. Private residents do not

oversee federally recognized police forces; create court systems and prisons to enforce sovereign laws; promulgate ordinances governing properties within their domains; or deal with the federal government on a government-to-government basis. None of these exercises of governmental power, moreover, are inconsistent with *Sherrill* or *Union Springs IV*. Those decisions prohibit the Nation from relying on its inherent sovereignty to avoid the application of certain state and local laws. *Union Springs IV*, 390 F. Supp. 2d at 206. They do not prohibit the Nation from exercising its own concurrent authority. IGRA requires no more.

B. The Village's Claims Concerning The Requirement To Obtain A "Use Variance" Are Irrelevant And Wrong.

With its IGRA arguments foreclosed, the Village argues that it may avoid IGRA entirely. It contends that the requirement to obtain a "use variance" is an independent, non-preempted basis for its threats that prevents the Nation from getting an injunction. Vill. Mem. 22. But the Village cannot so easily escape IGRA's "extraordinary preemptive power." *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 545 (8th Cir. 1996). This requirement is not an independent basis for its threats and is preempted for the same reasons as the Games of Chance Ordinance. And even if (counterfactually) the Village had a non-preempted ground to proceed against the Nation, the Nation would still be entitled to relief against the Village's anti-gaming laws.

1. Background.

To this day, the Village has never cited the Nation for violating the "use variance" requirement it invokes. What brought this controversy before the Court, and entitled the Nation to seek preemptive injunctive and declaratory relief, were three Orders to Remedy that the Village issued in July and December 2013 (supplemented by four orders served in May 2015). On each occasion, the Village threatened to proceed against the Nation based on the "Games of Chance

Ordinance." JSF ¶¶ 36, 41, 46 & Exs. L, Q, T; SAMF ¶¶ 66, 73-76, 90-95. Not one of those Orders invoked the supposed requirement to obtain a use variance. SAMF ¶ 83.

Only once, in informal correspondence, has the Village invoked this requirement in its discussions with the Nation—and when it did, the Nation fully addressed it. In a March 24, 2014 letter, Code Enforcement Officer Howard Tanner reiterated the Village's position based on the "1958 games of chance ordinance" and also asserted that the Nation had not obtained a "use variance." JSF Ex. R. On April 2, 2014, the Nation responded (contrary to the Village's claim that the Nation "did not engage with the Village on zoning," Vill. Mem. 21). The Nation observed that the Village had not identified any independent basis for requiring a use variance besides its preempted Games of Chance Ordinance; explained why no use variance was required; and set forth the Nation's position that the use variance requirement was, in any event, preempted. JSF ¶ 45 & Ex. S; SAMF ¶¶ 85, 89. The Village did not respond. In no correspondence to the Nation did the Village ever reiterate its claim that a use variance was required or dispute the Nation's position that the Village's zoning law was just another way of enforcing the Village's anti-gaming laws. Nor did the Village, when it served additional Orders to Remedy in May 2015, cite the Nation for violating this requirement. JSF ¶ 46 & Ex. T; SAMF ¶¶ 90-95. Nor, even, did the Village identify the supposed use variance requirement as an affirmative defense in its answer. *See* ECF No. 103.

2. The Use Variance Requirement Is Preempted.

The Village was right before, and is wrong now. As the Village accepted during this case's first six years, if IGRA preempts the Village's Games of Chance Ordinance—and it does—it also preempts the use variance requirement the Village seeks to impose. That is so for two reasons.

First, as the Nation's 2014 letter explained, the use variance requirement is not genuinely independent of the Games of Chance Ordinance; it is simply another means of enforcing this ordinance. The Village's moving papers confirm as much, showing the Village will never grant a

use variance because it regards the Nation's IGRA-authorized gaming as categorically unlawful. Mr. Tanner's declaration stresses that Lakeside Entertainment is "a commercial gaming facility, a use that [is] not permitted anywhere in the Village." Tanner Decl. ¶ 20. The Village's present and past mayors say the same thing, reiterating that "[g]aming is not permitted within the Village," aside from by non-profit charitable organizations, and that the Village "does not, under any circumstances, authorize the operation of a commercial … gaming operation." Shattuck Decl. ¶ 6; *see* Trufant Decl. ¶ 8 (identical).[13] The only way around this ban, Mr. Tanner makes clear, is for the Nation to "petition[] the Village Board of Trustees to … allow commercial gaming." Tanner Decl. ¶ 22. Hence, as the Village's memorandum summarizes, the only way for the Nation to obtain relief is to both "apply for a use variance *and* petition the Village to allow commercial gaming." Vill. Mem. 24. Absent change in law, an application for a variance is dead on arrival.

Given these clear facts, the Village cannot rely on the use variance requirement to avoid preemption. While the Village avers that the Nation should have sought legislative action before suing, it acknowledges that there is "no legal requirement that the Cayugas" do so. Vill. Mem. 24. A party challenging a preempted law is not required to ask the legislature to *repeal* that law before bringing suit. Likewise, the Village cannot avoid preemption of its anti-gaming laws by pointing to a "use variance" process that is futile *precisely because* of those laws.[14]

Second, the use variance requirement is preempted because—separately from the Games of Chance Ordinance—it seeks to regulate the Nation's gaming in a manner that IGRA forbids.

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[13] The characterization of the Nation's gaming as "commercial" and "for profit" is false. The Nation uses its gaming revenue to support its government functions. Halftown Decl. ¶ 22.

[14] Indeed, even where, unlike here, exhaustion is generally required, exhaustion is excused when doing so would be futile. *Zahran ex rel. Zahran v. Bd. of Educ.*, No. 1:03-CV-615, 2004 WL 1242962, at *5 (N.D.N.Y. June 4, 2004) (Hurd, J.).

IGRA's preemption is sweeping. It "expressly preempt[s] the field in the *governance of gaming* activities on Indian lands." *Mashantucket Pequot*, 722 F.3d at 469-70 (emphasis added) (quoting *Gaming Corp.*, 88 F.3d at 544 (in turn quoting S. Rep. No. 100-446, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076)). It derived this standard from the Eighth Circuit's *Gaming Corp.* decision, which elaborated—based on its review of IGRA's text and legislative history—what this preemption covers. Congress, the Eight Circuit explained, "left states with no regulatory role over gaming except as expressly authorized by IGRA." 88 F.3d at 546. In particular, IGRA does not permit states "to make particularized decisions regarding a specific class II gaming operation," and it forbids "'balance[ing] competing Federal, State, and tribal interests to determine the extent to which various activities are allowed.'" *Id.* at 544 (quoting S. Rep. No. 100-446, at 6 (1988), *reprinted in* 1988 U.S.C.C.A.N. 3071, 3076). Hence, if a state law turns on the fact that an Indian nation is *gaming* (as opposed to conducting some other activity), or would involve a particularized balancing of an Indian nation's interests in gaming against other interests in forbidding that gaming, or "would interfere with the nation's ability to govern gaming," the law "fall[s] within the scope of IGRA's preemption." *Id.* at 550.

Here, the Village's "use variance" requirement is preempted because it turns on the fact that the Nation is gaming and seeks to make "particularized decisions" about that gaming. The *only* reason the Village claims the Nation must obtain a use variance is that the Nation is gaming, rather than conducting some other commercial activity. Lakeside Entertainment sits in a "Commercial Zoning District," which the Village designated for parcels "where the primary land use involved the sale and/or manufacture of goods and services carried out for profit." Zoning Law of the Village of Union Springs Dated Nov. 2013 § 6.6(A) (Radford Decl. Ex. E) ("2013 Zoning Law"). The Zoning Law then permits 21 different commercial uses with no need for a

variance, including "Banks and/or Financial Institutions"; "Business and Professional Office"; "Eating or Drinking Establishment"; "Health Care Facility"; "Home Occupation"; "Inn"; "Keeping or raising Domestic Animals"; "Library"; "Personal Service Use"; "Retail Uses"; "Undertaking and Funeral Parlors"; and "Veterinary Services." *Id.* § 6.6(B). The Zoning Law also grandfathers existing uses, including permitting any "recreational facility owned and operated … by another government." *See* Village of Union Springs Zoning Ordinance Dated Oct. 1987 at 15 (Tanner Decl. Ex. A); *see* 2013 Zoning Law § 9-1.

Hence, if the Nation were conducting a variety of other similar commercial activities, like running a restaurant or bar, or selling goods at retail, no variance would be required. As well, if another government were engaged in a grandfathered gaming use, the "use variance" requirement would be no obstacle. Only because the Nation is *gaming*, and only because it decided to resume gaming after a hiatus, does the Village claim a variance is necessary. So, when the Village enforces this requirement, no less than when it enforces its Games of Chance Ordinance, it regulates and interferes with the Nation's "governance of gaming." *Mashantucket Pequot*, 722 F.3d at 469-70.

A closer look at the use variance process underscores that its requirements are irreconcilable with IGRA. The application requires the Nation to show that, absent a variance, it "cannot realize a reasonable return … demonstrated by competent financial evidence"; that the "alleged hardship … is unique"; that the variance "will not alter the essential character of the neighborhood"; and that the "hardship has not been self created." Tanner Decl. Ex. F ¶ 4(a). It then empowers the Village to "weigh[]" "the benefit to the applicant if the variance is granted … against the detriment to the … neighborhood," considering whether the "benefit … can be achieved by some [other] method," whether the "variance is substantial," and whether the "difficulty was self-created." *Id.* ¶ 4(b). Finally, the Village decides whether, in its view, the use is in "the best

interests of the Village, the convenience of the community, the public welfare and that it result[s] in a substantial improvement to the property in the … vicinity." 2013 Zoning Law § 8-1(A)(3)(a).

IGRA, however, reserves to Indian nations themselves the power to decide whether gaming is appropriate or advisable, and it does not condition that power on a showing—to a local government's satisfaction—that an Indian nation has no alternative. 25 U.S.C. § 2710(b). IGRA does not permit state and local governments to make such "particularized decisions" about whether an Indian nation may exercise its statutory right to game, nor to "balance[]" this statutory right against the local interests that (in the Village's view) militate against gaming. *Gaming Corp.*, 88 F.3d at 544. Here, the Village is attempting to use the use variance process to exercise exactly the "regulatory role over gaming," *id.* at 546, that Congress denied to it in IGRA.

3. Even If The Village Had Non-Preempted Grounds To Move Against Lakeside Entertainment, The Nation Would Be Entitled To Declaratory And Injunctive Relief.

Even if the "use variance" requirement provided an independent and non-preempted basis for action against Lakeside Entertainment (and it does not), that would not diminish the Nation's entitlement to injunctive and declaratory relief against the Village's anti-gaming laws. It is hornbook law that if an "individual claims federal law immunizes him from state regulation, the court may issue an injunction upon finding the state regulatory actions preempted." *Armstrong v. Exceptional Child Ctr., Inc.*, 135 S. Ct. 1378, 1384 (2015). "To obtain a permanent injunction, a plaintiff must succeed on the merits and show the absence of an adequate remedy at law and irreparable harm if the relief is not granted." *Roach v. Morse*, 440 F.3d 53, 56 (2d Cir. 2006).

The Nation meets these requirements for injunctive relief against the Village's Orders to Remedy based on the Village's anti-gaming laws—and that remains true even if someday the Village might identify some new basis for proceeding against Lakeside Entertainment. The Nation faces irreparable harm: If this Court declines to enter a permanent injunction, the Village could

proceed to enforce its existing order Orders tomorrow, which in turn could force the Nation to stop its IGRA-authorized gaming and deprive the Nation of revenues on which its government depends. By contrast, if the Court enjoins the existing Orders, the Nation will be free of action based on the Village's anti-gaming laws. Meanwhile, if the Village someday identifies a non-preempted, non-gaming law the Nation has violated, that will be a dispute for another day.[15] In the meantime, declaratory and injunctive relief against the Village's anti-gaming laws will align the playing field between the Nation and the Village with the boundaries Congress set.[16]

III. Count II: Even If IGRA Did Not Preempt The Village's Anti-Gaming Laws, 18 U.S.C. § 1166(d) Bars The Village From Bringing Criminal Prosecutions.

The Nation explained that, even if IGRA did not preempt the Village's anti-gaming laws, 18 U.S.C. § 1166(d) would prevent the Village from bringing any criminal prosecutions. Op.

[15] The Village suggests that the "use variance" requirement renders any harm from the Village's anti-gaming laws "speculative" and not "imminent." Mem. 24. This is plainly untrue: As just explained, absent injunctive relief, the Village could proceed to enforce its existing Orders to Remedy tomorrow. But the Village also gets the law wrong. "Although a showing of 'irreparable harm' is required for the imposition of any injunctive relief, preliminary or permanent, the 'imminent' aspect of the harm is not crucial to granting a permanent injunction." *Rodriguez ex rel. Rodriguez v. DeBuono*, 175 F.3d 227, 235 n.9 (2d Cir. 1999) (per curiam). The Village cites only cases concerning *preliminary* injunctions. Vill. Mem. 23 (discussing *Summers v. Earth Island Inst.*, 555 U.S. 488, 494 (2009); *New York v. Nuclear Regulatory Comm'n*, 550 F.2d 745, 755 (2d Cir. 1977), *superseded by rules as stated in Zervos v. Verizon New York, Inc.*, 252 F.3d 163 (2d Cir. 2001); *KMW Int'l v. Chase Manhattan Bank, N.A.*, 606 F.2d 10, 12 (2d Cir. 1979)).

[16] Independently, the Nation also meets the requirements for declaratory relief under the Declaratory Judgment Act. "To bring an action under the Declaratory Judgment Act, 28 U.S.C. § 2201(a), 'the facts alleged, under all the circumstances, [must] show that there is a substantial controversy, between [the] parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Chery v. Conduent Educ. Servs., LLC*, No. 1:18-CV-75, 2019 WL 1427140, at *8 (N.D.N.Y. Mar. 29, 2019) (Hurd, J.) (quoting *Chelsea Grand, LLC v. N.Y. Hotel & Motel Trades Council, AFL-CIO*, 729 F. App'x 33, 40 (2d Cir. 2018)). Here, the Village's issuance of Orders to Remedy based on its anti-gaming laws, and its threats to proceed immediately against the Nation and its officials via civil or criminal actions, yield an immediate and substantial controversy between the parties. And again, that remains true even if another controversy between the parties might someday arise concerning non-preempted laws.

Mem. 24-25. The Village's only response is to point to Congress's grant to New York, in 1948, of "jurisdiction over offenses committed by or against Indians on Indian reservations." 25 U.S.C. § 232. But by its express terms, § 1166(d)—enacted in 1988—supersedes this authority, providing that the "United States shall have exclusive jurisdiction over criminal prosecutions of violations of [non-preempted] State gambling laws" in "Indian country." 18 U.S.C. § 1166(d).[17] A "later-enacted, more specific, comprehensive statute that targets the specific subject matter at issue in the case controls the construction of a more general statute when there is a potential conflict." *Nutritional Health All. v. FDA*, 318 F.3d 92, 102 (2d Cir. 2003). The Ninth Circuit has reached that same conclusion as to Public Law 280, which—in near identical language—conferred on California "jurisdiction over offenses committed by or against Indians in … Indian country." 18 U.S.C. § 1162(a). It explained that "[i]f th[e] exclusivity" of § 1166 "is incompatible with any provision of Public Law 280, then the Public Law 280 provision has been impliedly repealed." *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1994).

United States v. Cook, 922 F.2d 1026 (2d Cir. 1991), is not to the contrary—despite the Village's distortion of it. Vill. Mem. 30. *Cook* held merely that in enacting § 232, Congress did not abrogate federal criminal jurisdiction that otherwise existed. 922 F.2d at 1032-33. *Cook* nowhere suggested that § 232 trumps § 1166's federal exclusivity. Certainly, it did not say that, even after § 1166, New York's jurisdiction "extends to enforcing local laws that 'license the operation of games of chance by authorized charitable organizations.'" Vill. Mem. 30 (quoting *Cook*, 922 F.2d at 1035). The Village has merely lifted from context a parenthetical in which the

[17] The Village does not dispute that Lakeside Entertainment is within "Indian country." Nor could it, given that Congress defined this term to include "*all land* within the limits of *any Indian reservation* under the jurisdiction of the United States Government, notwithstanding the issuance of any patent." 18 U.S.C. § 1151 (emphasis added).

Second Circuit describes that, in general, New York has laws licensing charitable organizations to game. Plaintiffs provide the full context in a footnote, so the Court may judge for itself.[18]

IV. Count III: Sovereign Immunity Bars The Village's Threatened Actions.

A. The Nation Is Entitled To Sovereign Immunity.

The Village raises only one defense to the Nation's showing that sovereign immunity bars any enforcement action against the Nation or its properties. It claims that the law governing the immunity of "foreign and state sovereign[s]" recognizes an "immovable property" exception. Vill. Mem. 31. The Village asks this Court to deem that exception applicable to Indian nations as well—and claims that this exception allows its enforcement actions because they concern real property at "271 Cayuga Street in the Village." For two independent reasons, this argument fails.

First, even if the immovable property exception applied to Indian tribes—and the Second Circuit has held the opposite, as explained below—it would not permit the Village's actions. That is because the exception applies to disputes about *ownership* of property, not to claims concerning *activities* on property. Thus, the Court in *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), considered (without deciding) whether this exception might apply to a quiet-title action about who owned a tract. *Id.* at 1652. But the *Restatement (Second) of Foreign Relations Law*—the compendium of the common law—is express that the exception reaches no farther. It provides

[18] The opinion provides, in relevant part (italicizing the Village's excerpt):

> Appellants maintain that New York law is civil/regulatory because New York allows some gambling activity and possession of some gambling devices under certain circumstances, *see* N.Y. Gen. Mun. Law § 185 *et seq.* (McKinney 1986 & Supp.1990) (local legislatures may *license the operation of games of chance by authorized charitable organizations*); N.Y. Penal Law § 225.32 (McKinney 1989) (antique slot machines not used for gambling purposes or machines assembled for purposes of being transported to a jurisdiction where such devices are lawfully operated are permitted) …

that the exception is inapplicable when an action does not seek "to obtain possession of or establish a property interest in immovable property." *Restatement (Second) of Foreign Relations Law* § 68(b) (1968). Its commentary elaborates that the exception "does not preclude immunity with respect to a claim arising out of a foreign state's ownership or possession of immovable property but not contesting such ownership or the right to possession." *Id.* § 68 cmt. d. And the *Restatement* then illustrates this principle with an example that shows beyond doubt that the exception does not apply to claims based on activities on immovable property. *Id.* § 68 ill. 7 ("X brings suit in a court of state A against state B because of an injury suffered in a fall on the stairway of a building owned by B. B is entitled to immunity."); *accord Restatement (Third) of Foreign Relations Law* § 455 cmt. b (1987) (exception applies to "[t]itle to land and to buildings on land").

The Supreme Court endorsed the *Restatement* as reflective of the common law on this point in *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 200-01 (2007) (accepting that exception extends no farther than "an action to obtain possession of or establish a property interest in immovable property" (quoting *Restatement (Second)* § 68(b)). So did Justice Thomas in his dissenting opinion in *Upper Skagit*, on which the Village relies—deeming the immovable property exception to cover "suit[s] concerning the ownership of real property," and to permit actions to "'obtain possession of or establish an ownership interest in immovable property.'" 138 S. Ct. at 1659-60 (quoting *Restatement of Foreign Relations Law of the United States (Proposed Official Draft)* § 71(b) (1962)).

This rule is fatal to the Village's sovereign immunity argument: Its threatened enforcement actions do not "contest[] … ownership or the right to possession" of real property. *Restatement (Second)* § 68 cmt. d. Instead, like the stairway fall described in the *Restatement* and *Permanent Mission*, the Village's actions arise out of activity—gaming—conducted on the property.

Second, the Second Circuit rejected arguments for applying the immovable property exception to Indian tribes in *Cayuga Indian Nation of New York v. Seneca County*, 761 F.3d 218 (2d Cir. 2014). That case asked whether sovereign immunity barred Seneca County's attempt to foreclose on the Nation's properties for alleged nonpayment of taxes. The County claimed the answer was no, arguing that "[c]ase law holds that a sovereign entity does not have immunity from suit with respect to properties it owns outside its sovereign jurisdiction," and that this "'immovable property'" "exempt[ion]" should apply to Indian nations. Br. for Def.-Appellant Seneca Cty. at 27, *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 761 F.3d 218, 220 (2d Cir. Jan. 2, 2013) (No. 12-3723), ECF No. 51 (Schauf Supp. Decl. Ex. W); Reply Br. for Def.-Appellant Seneca Cty. at 21-22, *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 761 F.3d 218 (2d Cir. Apr. 17, 2013) (No. 12-3723), ECF No. 67 (Schauf Supp. Decl. Ex. X). The Second Circuit, however, held sovereign immunity applied, and it "decline[d] to draw the novel distinctions—such as a distinction between *in rem* and *in personam* proceedings—that Seneca County has urged." 761 F.3d at 221.

This result followed from bedrock principles of Indian law. The court explained that Indian nations' sovereign immunity is an "avowedly 'broad principle'" that is a "'necessary corollary to Indian sovereignty and self-governance.'" *Id.* at 220 (quoting *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 788, 790 (2014)). Hence, the court continued, the "Supreme Court (like this Court) has 'thought it improper suddenly to start carving out exceptions' to that immunity." *Id.* at 220 (quoting *Bay Mills*, 572 U.S. at 790). Instead, courts must "'defer' to the plenary power of Congress to define and otherwise abrogate tribal sovereign immunity from suit." *Id.* (quoting *Bay Mills*, 572 U.S. at 790). That deference foreclosed Seneca County's invocation of the immovable property exception in *Cayuga Indian Nation*. It is likewise dispositive here.

The Village cannot sneak around this on-point precedent by invoking *Upper Skagit*. As the Village admits, the Supreme Court's "decision refrain[ed] from addressing the immovable property exception due to preservation issues." Vill. Mem. 31 (citing *Upper Skagit*, 138 S. Ct. at 1654). And the Village cannot dislodge controlling Second Circuit precedent with speculation that "the Supreme Court would have applied the immovable property exception if the argument had been properly preserved," *id.* at 34—especially because, as explained, the immovable property exception would not apply here even if it applied in *Upper Skagit*. "When the Court of Appeals announces a principle of law for this circuit, it remains the law until the case is overruled or reversed." *Bass v. Coughlin*, 800 F. Supp. 1066, 1071 (N.D.N.Y. 1991), *aff'd*, 976 F.2d 98 (2d Cir. 1992). Judge Suddaby recently rejected a request to apply the immovable property exception after *Upper Skagit*, explaining that the "settled precedent" of *Cayuga Indian Nation* foreclosed that claim. *Oneida Indian Nation v. Phillips*, 360 F. Supp. 3d 122, 133 (N.D.N.Y. 2018).[19]

Given this precedent, the Village's parade of horribles, *see* Vill. Mem. 34-35, is irrelevant. In every sovereign immunity case, the Second Circuit and the Supreme Court have likewise heard that recognizing immunity "will embolden … tribes" to violate the law. *Id.* Yet the Supreme Court has declined to narrow the "broad principle" of sovereign immunity; indeed, it has applied that principle "even when a suit arises from off-reservation commercial activity." *Bay Mills*, 572 U.S. at 785, 790. Today, that precedent—in addition to binding this Court—belies the Village's sky-is-falling claims. For decades, tribal sovereign immunity has been the law of the land, yet the Village is unable to point to any genuine examples of the problems it hypothesizes. To be sure,

[19] This issue is again before the Second Circuit. The 2014 opinion in *Cayuga Indian Nation* arose at the preliminary injunction stage. After the district court relied on *Cayuga Indian Nation* to grant final judgment to the Nation and issue a permanent injunction, the County again appealed to the Second Circuit. That appeal has been fully briefed, but no argument date has been set. *See Cayuga Indian Nation of N.Y. v. Seneca Cty.*, No. 19-0032-cv (2d Cir.).

meaningful disputes (like this case) do arise between Indian nations and local governments. But the Village presents no evidence to support its claim that Indian nations have leveraged their sovereign immunity to violate the law with impunity.

B. The Village Cannot Avoid The Nation's Immunity Via Suits Against Officials.

Alternatively, the Village claims that even if sovereign immunity bars its threatened enforcement actions against the Nation, it "is nonetheless authorized to enforce its laws against the … tribal officials." Vill. Mem. 35-36. But there is no general exception to sovereign immunity for suits against an Indian nation's officials. Quite the opposite: Plaintiffs "cannot circumvent tribal immunity by merely naming officers or employees of the Tribe when the complaint concerns actions taken in defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority." *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004). True, as the Village notes, the Second Circuit recognized a limited exception to that broad rule in *Gingras v. Think Finance, Inc.*, 922 F.3d 112 (2d Cir. 2019). But that exception, by its terms, does not apply here. The Second Circuit held that "under a theory analogous to *Ex parte Young*, tribal sovereign immunity does not bar state and substantive federal law claims for prospective, injunctive relief against tribal officials in their official capacities for conduct occurring *off of the reservation*." *Id.* at 120 (emphasis added). The Second Circuit repeated the same limit again at the end of its analysis, emphasizing that an *Ex Parte Young* suit was available where "Indian tribes [are] acting off-reservation." *Id.* at 124. And the Second Circuit grounded this conclusion in large part on *Bay Mills*, which likewise concerned "activity [that] occurs off the reservation." 572 U.S. at 795. This case, however, involves conduct *on* the Nation's reservation. JSF ¶ 10. The exception recognized in *Gingras* thus does not apply here.

The Nation understands the Village's position to be that, even though this case involves on-reservation conduct, the Court should ignore this status because of *Sherrill*. But the Second

Circuit rejected this argument in *Cayuga Indian Nation*. It held that "[n]otwithstanding Seneca County and the State of New York's vigorous argument, we read no implied abrogation of tribal sovereign immunity from suit into *City of Sherrill*." 761 F.3d at 221. "Such implied abrogation," the Second Circuit explained, "would be clearly at odds with the Supreme Court's solicitous treatment of the common-law tribal immunity from suit—as opposed to immunity from other, largely prescriptive, powers of the states such as the levying of taxes." *Id.* And such "implied abrogation," the Second Circuit concluded, "would also run counter to the principle that we must 'defer' to Congress about whether to abrogate tribal [sovereign] immunity.'" *Id.* (quoting *Bay Mills*, 572 U.S. at 790). That principle disposes of the Village's argument here.[20]

CONCLUSION

For the foregoing reasons and those in their opening memorandum, Plaintiffs respectfully request that the Court grant their motion for summary judgment, deny Defendants' motion, and enter the declaratory and injunctive relief requested in their Amended Complaint.

Respectfully submitted,

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[20] The Village's *Gingras* argument, in any event, at most goes to the scope of an injunction. By its terms, *Gingras* authorizes only "suits for prospective, injunctive relief" against Indian nations' officials. 922 F.3d at 125. It thus continues to bar other actions that the Village might bring.