20-1310-cv

United States Court of Appeals

for the

Second Circuit

CAYUGA NATION; CLINT HALFTOWN, TIMOTHY TWOGUNS, GARY WHEELER, DONALD JIMERSON, MICHAEL BARRINGER, RICHARD LYNCH, B.J. RADFORD, and JOHN DOES 8-20,

Plaintiffs-Counter-Defendants-Appellees,

– 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-Counter-Claimants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

PROOF BRIEF OF THE CAYUGA NATION

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INTRODUCTION

The principal issue in this appeal is whether a facility known as Lakeside Entertainment sits on "Indian lands" within the meaning of the Indian Gaming Regulatory Act ("IGRA"). IGRA provides that, "on Indian lands," "[a]ny class II gaming"—meaning bingo and equivalent games—is "within the jurisdiction of the Indian tribes, … subject to the provisions of" IGRA and the oversight of the National Indian Gaming Commission ("NIGC"). 25 U.S.C. § 2710(a)(2). Congress thereby "expressly preempt[ed] the field in the governance of gaming activities *on Indian lands*." *Mashantucket Pequot Tribe v. Town of Ledyard*, 722 F.3d 457, 469–70 (2d Cir. 2013) (emphasis added). So, if Lakeside Entertainment is on "Indian lands," IGRA preempts the Village of Union Springs ("Village") from regulating the Cayuga Nation's gaming at Lakeside Entertainment.

That dispositive issue is resolved by the "cardinal canon" of interpretation, which comes "before all others"—namely, that "[w]hen the words of a statute are unambiguous … judicial inquiry is complete." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992). IGRA defines "Indian lands" as "*all* lands within the limits of *any* Indian reservation." 25 U.S.C. § 2703(4) (emphasis added). And Lakeside Entertainment is, indisputably, within the Nation's reservation. The federal government recognized that reservation in the 1794 Treaty of Canandaigua, and it has never

been disestablished—as every court to consider the question has held, *Cayuga Indian Nation of New York v. Seneca County*, 260 F. Supp. 3d 290, 307–15 (W.D.N.Y. 2017), and as the parties stipulated, JA__ [Dkt.111 at 2].[1] That means Lakeside Entertainment is on "Indian lands," and the district court's judgment enjoining the Village from interfering with the Nation's gaming must be affirmed.

The Village disputes little of this. It does not dispute that IGRA preempts state regulation of gaming on "Indian lands." Br. 41. Neither does it walk back its stipulation that the "Nation today possesses a federal reservation that has not been disestablished." JA__ [Dkt.111 at 2]. Nor does it dispute that Lakeside Entertainment is a "Class II gaming facility." Br. 18.

The Village stakes its case on the argument that, even though Congress defined "Indian lands" to include "all lands" within "any Indian reservation," Congress did not really *mean* the words "all" or "any." Br. 41, 44, 46 n.17. The Village pleads that Congress "could not have … anticipated" *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), Br. 44, which held that "laches" barred the Oneida Nation from relying on its inherent sovereignty to assert "immunity from local taxation on parcels … purchased in the open market" within its reservation. *Id.* at 214; *see* Br. 44. Because Congress supposedly did not anticipate *Sherrill*, the

[1] Citations to documents filed below are to page numbers of the ECF files.

Village seeks to erase reservation lands subject to *Sherrill*—including Lakeside Entertainment—from the phrase "all lands within … any Indian reservation."

This anti-textual argument fails, first, for the reason all such arguments fail. This Court's "job [is] to apply faithfully the law Congress has written." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017). It is "never" the Court's "job to rewrite a constitutionally valid statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Id.* Just last Term, the Supreme Court rejected Oklahoma's similar argument that its longstanding assertion of jurisdiction over the Creek Nation's reservation rendered those lands no longer a "reservation" under 18 U.S.C. § 1151(a). *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2468 (2020). The Court explained that, "[w]hen interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us"—because "[t]hat is the only 'step' proper for a court of law." *Id.*

Even setting aside the statutory text, the Village is wrong. When Congress enacted IGRA in 1988, it well understood that, on some reservations, states exercise substantial authority. And while the Village repeatedly asserts that the Nation is "categorically barred from asserting jurisdiction" or "governmental power" under *Sherrill*, Br. 44, that is incorrect as well. *Sherrill* addressed a narrow question of tax immunity, and this Court has recently cautioned against over-reading that decision.

Consistent with *Sherrill*, the Nation today exercises jurisdiction and governmental power in myriad ways, including by—with the Department of the Interior's blessing—operating a police force and court system, participating in government-to-government programs like the Indian Roads Program, and managing housing for Nation citizens. Indeed, the NIGC regulates Lakeside Entertainment based on its conclusion that the facility sits on "Indian lands." JA__, __ [Dkt.123 ¶ 47; Dkt.123-21].

The district court also correctly granted the Nation judgment on its additional claims. First, IGRA preempts the Village's threatened criminal actions, instead conferring on the federal government "exclusive jurisdiction" to enforce any applicable criminal gaming laws. 18 U.S.C. § 1166. Second, the Nation's sovereign immunity from suit prohibits enforcement actions against the Nation or its officials. The Village's contrary argument, based on a supposed "immovable property exception" to the Nation's sovereign immunity, is foreclosed by this Court's rejection of the same argument in *Cayuga Indian Nation of New York v. Seneca County*, No. 19-0032, __ F.3d ___, 2020 WL 6253332, at *1 (2d Cir. Oct. 23, 2020).

With the merits so clear, the Village implores that the "Court need not reach" the merits because issue or claim preclusion bar this suit, in view of a 2003 action between the Nation and the Village. Br. 3. But as the district court explained, the Village's arguments "distort[] … the parties' litigation history." JA__ [Dkt.147 at

28]. And the court was well-placed to know, having presided over both suits. Issue preclusion cannot apply because, simply put, no court in the 2003 action ever *ruled against* the Nation on any IGRA issue. Claim preclusion cannot apply because this suit concerns new threats, arises from a fundamentally different dispute about a different Village ordinance, and centers on IGRA preemption issues the Nation could not have raised when it filed its 2003 suit.

This Court should affirm the district court's well-reasoned decision.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the district court erred in holding that Lakeside Entertainment sits on "Indian lands" under IGRA, thereby preempting the Village from prohibiting or regulating the Nation's Class II gaming;

2. Whether the district court erred in holding that IGRA preempts the Village from initiating criminal enforcement proceedings directed at the Nation's Class II gaming at Lakeside Entertainment;

3. Whether the district court erred in concluding that the Nation's sovereign immunity bars the Village's enforcement actions; and

4. Whether the district court erred in holding that the 2003 suit concerning property renovations does not preclude this suit concerning the Nation's gaming.

STATEMENT OF THE CASE

A. Regulatory Background.

To "promote tribal economic development [and] tribal self-sufficiency," Congress in 1988 enacted IGRA. 25 U.S.C. § 2701(4). IGRA provides a comprehensive scheme for regulating Indian gaming and "was 'intended to expressly preempt the field in the governance of gaming activities on Indian lands.'" *Mashantucket*, 722 F.3d at 469–70 (quoting *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544 (8th Cir. 1996)).

IGRA divides Indian gaming into three categories. Class I gaming, consisting of "social games solely for prizes of minimal value or traditional forms of Indian gaming," 25 U.S.C. § 2703(6), is "within the exclusive jurisdiction of the Indian tribes," *id.* § 2710(a)(1). Class III gaming consists of casino-type games and is subject to a scheme of joint tribal/state regulation based on "Tribal-State compact[s]." *Id.* § 2710(d)(1); *see id.* § 2703(8).

This case concerns Class II gaming, which includes "bingo" and electronic equivalents. *Id.* § 2703(7)(A)(i). IGRA provides that "[a]ny class II gaming on Indian lands" is "within the jurisdiction of the Indian tribes, but shall be subject to the provisions of this chapter." *Id.* § 2710(a)(2).

IGRA's "Indian lands" definition covers two types of land:

(A) all lands within the limits of any Indian reservation; and

> (B) any lands title to which is either held in trust by the United States for the benefit of any Indian tribe or individual or held by any Indian tribe or individual subject to restriction by the United States against alienation and over which an Indian tribe exercises governmental power.

25 U.S.C. § 2703(4). The first type of "Indian lands" thus consists of "all lands within the limits of any Indian reservation." *Id.* § 2703(4)(A). The second includes "trust" or "restrict[ed]" lands, but only "over which an Indian tribe exercises governmental power." *Id.* § 2703(4)(B).

Class II gaming is subject to joint tribal/federal regulation, and lawful Class II gaming must satisfy several requirements. Indian nations may "engage in, or license and regulate" Class II gaming (1) on "Indian lands within such tribe's jurisdiction" if, among other things, (2) the "gaming is located within a State that permits such gaming for any purpose by any person," and (3) the nation's "governing body … adopts an ordinance or resolution" approved by the NIGC's Chairman. *Id.* § 2710(b).

Congress assigned enforcement responsibility to the NIGC, directing it to "monitor class II gaming conducted on Indian lands." *Id.* § 2706(b)(1). The NIGC may order the temporary or permanent "closure of an Indian game for substantial violation of [IGRA's] provisions" or the NIGC's regulations. *Id.* § 2713(b)(1)–(2).

IGRA also independently bars local officials from *criminally* prosecuting violations of local gambling laws in "Indian country." Instead, the United States has

"exclusive jurisdiction" over "criminal prosecutions" under "State gambling laws that are made applicable under this section to Indian country." 18 U.S.C. § 1166(d). Section 1166 makes "all State laws pertaining to the licensing, regulation, or prohibition of gambling" applicable in "Indian country," *id*. § 1166(a), but excludes from its definition of "gambling" "class II gaming regulated by" IGRA, *id.* § 1166(c). The net effect is that state laws do not apply to Class II gaming in "Indian country"—but even when state laws do apply in "Indian country," only the federal government may bring criminal prosecutions. "Indian country" includes "all land within the limits of any Indian reservation." *Id.* § 1151(a).

B. The Cayuga Nation And Lakeside Entertainment.

The Cayuga Nation is a sovereign Indian nation recognized by the federal government. *See Indian Entities Recognized by and Eligible To Receive Services from the United States Bureau of Indian Affairs*, 85 Fed. Reg. 5,462, 5,463 (Jan. 30, 2020). In 1794, the United States pledged that the Nation's 64,015-acre "reservation[ ] shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." Treaty of Canandaigua of 1794, art. II, 7 Stat. 44, 45. This reservation endures today, as the Village has stipulated and every court to consider the question has held. JA__ [Dkt.111 at 2]; *infra* at 22.

Nonetheless, New York in 1795 and 1807 unlawfully purchased all the Nation's reservation lands. JA__ [Dkt.123 ¶ 6]. The Nation has worked to correct

that historic injustice. Over the last two decades, the Nation has reacquired portions of its reservation via open-market purchases, including the Lakeside Entertainment site, and used the properties to foster self-sufficiency and economic development. JA__ [*Id.* ¶¶ 8–10]. Since 2003, the Nation has developed and operated two convenience stores and adjacent gas stations, a private label water bottling facility, a cigarette manufacturing facility licensed by the federal Alcohol and Tobacco Tax and Trade Bureau, a produce stand, and two working farms (a cattle farm and a produce farm), as well as Lakeside Entertainment. JA__, __ [Dkt.124-2 ¶ 6; Dkt.124-3 ¶ 15].

In 2003, a renovation dispute arose about the property, at 271 Cayuga Street, that would become Lakeside Entertainment. The Nation "began renovations" without obtaining permits required by Village building and zoning ordinances, based on the Nation's position that the Village could not apply local laws to reservation lands the Nation reacquired in fee. *Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 317 F. Supp. 2d 128, 132 (N.D.N.Y. 2004) ("*Union Springs I*"). The Nation sued in October 2003, and the district court ruled for the Nation. *Id*. at 151. But after *Sherrill* held that "laches" allowed municipalities to apply "property taxes" to similar lands within the Oneida Nation's reservation, 544 U.S. at 202, 221, the court reversed course. It held that the Nation could not rely on its inherent authority to assert "immunity from state and local zoning laws." *Cayuga Indian Nation of N.Y.*

v. Vill. of Union Springs, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005) ("*Union Springs II*"). The 2003 suit is detailed below. *Infra* Section IV.A.

With the 2003 suit already proceeding, the Nation entered the field of IGRA gaming. On November 12, 2003, the Nation's Council adopted a Class II gaming ordinance, and the NIGC approved the ordinance shortly thereafter. JA__, __ [Dkt.123 ¶¶ 16–17; Dkts.123-1–2]. Gaming commenced at Lakeside Entertainment in May 2004. JA__ [Dkt.123 ¶ 19].

C. The Present Dispute.

Although the Nation voluntarily closed Lakeside Entertainment in 2005, other Indian nations continued to game in New York during the following years, including at Oneida's Turning Stone Casino. JA__ [Dkt.123 ¶ 20]. In 2013, the Nation's Council authorized resumption of Class II gaming; the Nation also renewed its Class II gaming license in accordance with the NIGC's regulations. JA__, __, __ [Dkt.123 ¶¶ 24–27; Dkt.123-7; Dkt.124-4].

Today, the NIGC comprehensively regulates Lakeside Entertainment based on the NIGC's conclusion that it sits on "Indian lands." JA__, __, __, __, __ [Dkt.123 ¶¶ 47–52; Dkt.123-21; Dkt.124-2 ¶¶ 51–60; Dkt.124-21 ¶¶ 27–35; Dkts.124-33–35]. In 2018, the NIGC issued a letter memorializing its decision to "regulate the gaming facility of the Nation." JA__, __, __, __ [Dkt.123 ¶ 47; Dkt.123-21; Dkt.124-2 ¶ 54; Dkt.124-21 ¶ 29]. The NIGC cited as authority 25

U.S.C. § 2706(b), which empowers the NIGC to "monitor class II gaming conducted on Indian lands," and 25 C.F.R. § 571.5, which authorizes the NIGC to "enter the premises of an Indian gaming operation … on Indian lands," *id.* § 571.5(a)(1). JA__; *see* JA__ [Dkt.123-21; *see* Dkt.124-34 (NIGC's determination that the "Cayuga should be regulated as any other gaming tribe")].[2] Since then, the NIGC has approved the Nation's revised gaming ordinance and has routinely conducted site visits. JA__, __, __, __ [Dkt.123 ¶¶ 47-48; Dkt.123-21–22; Dkt.124-2 ¶¶ 54–55; Dkt.124-21 ¶¶ 29, 31]. It also has approved the Nation's request for access to its secure Tribal Access Portal, lists the Nation on its "Gaming Tribe Report," and accepts the Nation's quarterly fees and audited reports and financial statements. JA__, __, __, __ [Dkt.123 ¶¶ 49–52; Dkt.124-2 ¶¶ 56–60; Dkt.124-21 ¶¶ 30, 33–35; Dkt.124-35].

When the Nation reopened Lakeside Entertainment, it complied with *Union Springs II*. On August 8, 2013, the Nation submitted to the Village a completed application for a Certificate of Occupancy. JA__, __, __, __ [Dkt.123 ¶ 38; Dkt.123-14; Dkt.124-2 ¶ 67; Dkt.124-21 ¶ 40]. The Village's Code Enforcement Officer, Howard Tanner, requested additional information in an August 13, 2013 letter, and the Nation hired an architect to complete a full compliance review. JA__, __, __,

[2] For a time before 2018, the NIGC had not decided to fully regulate Lakeside Entertainment. JA__ [Dkt.124-21 ¶ 25].

__; *see also* JA__ [Dkt.123 ¶ 39; Dkt.123-15; Dkt.124-2 ¶ 70; Dkt.124-21 ¶ 43; *see also* Dkt.124-23]. The Nation submitted the architect's report and a revised application on December 19, 2013. JA__, __, __, __ [Dkt.123 ¶ 40, Dkt.123-16; Dkt.124-2 ¶ 71; Dkt.124-21 ¶ 44]. On February 21, 2014, Tanner inspected the facility and identified three minor building-code issues. JA__, __, __, __ [Dkt.123 ¶ 42; Dkt.124-2 ¶ 78; Dkt.124-3 ¶ 27; Dkt.124-21 ¶ 50]. The Nation addressed each, and on March 7, Tanner stated that he would issue a Certificate the next week. JA__, __, __, __ [Dkt.123 ¶ 43; Dkt.124-2 ¶¶ 79–80; Dkt.124-3 ¶ 27; Dkt.124-21 ¶ 51].

The Village, however, never issued a Certificate of Occupancy. Instead, it proclaimed that a 1958 Games of Chance Ordinance ("1958 Ordinance") precluded it from doing so. JA__, __, __, __ [Dkt.123 ¶ 44; Dkt.123-18; Dkt.124-2 ¶ 81; Dkt.124-21 ¶ 52]. That Ordinance makes it "lawful for any bona fide religious, charitable or non-profit organization of veterans, volunteer firemen and similar … to conduct the game of bingo," but does not permit Indian nations to game. JA__, __ [Dkt.123 ¶ 22; Dkt.123-4].

The 1958 Ordinance is why the Village has refused to issue a Certificate of Occupancy, and it has been the foundation for all the Orders to Remedy the Village issued targeting Lakeside Entertainment in the run-up to this lawsuit. A July 9, 2013 Order cited the Nation for violating the Village's "Zoning Ordinances" and "Other Applicable Laws" based on violations of the "Games of Chance Ordinance." JA__,

__, __, __ [Dkt.123 ¶ 36; Dkt.123-12; Dkt.124-2 ¶ 66; Dkt.124-21 ¶ 39]. In Tanner's August 13, 2013 letter, he asserted, "[a]s the Zoning Officer," that the Nation was in violation of "the Games of Chance Ordinance." JA__, __, __, __ [Dkt.123 ¶ 39; Dkt.123-15; Dkt.124-2 ¶ 68; Dkt.124-21 ¶ 41]. On December 20, 2013, the Village issued a near-identical Order to Remedy again citing the 1958 Ordinance, and another Order citing 19 N.Y.C.R.R. § 1202.3, which requires a Certificate of Occupancy for changes in use. JA__, __, __, __ [Dkt.123 ¶ 41; Dkt.123-17; Dkt.124-2 ¶¶ 73–75; Dkt.124-21 ¶ 47]. In a March 24, 2014 letter, Tanner again asserted that Nation was violating "the 1958 … ordinance" and hence, "I cannot grant a certificate of occupancy." JA__, __, __, __ [Dkt.123 ¶ 44; Dkt.123-18; Dkt.124-2 ¶ 81; Dkt.124-21 ¶ 52]. He also invoked, for the only time, a supposed requirement to "obtain a use variance from the zoning board of appeals." JA__, __, __, __ [Dkt.123 ¶ 44; Dkt.123-18; Dkt.124-2 ¶¶ 82–83; Dkt. 124-21 ¶ 52]. But Tanner identified no basis for requiring such a variance separate from the 1958 Ordinance, and the Nation on April 2, 2014 responded to explain why no variance was required, JA__, __, __, __ [Dkt.123 ¶ 45; Dkts.123-18–19; Dkt.124-2 ¶¶ 82–83, 85, 89; Dkt.124-21 ¶¶ 52-53].

The Village's Orders threatened both civil and criminal actions against the Nation and its officials. JA__, __, __, __ [Dkt.123-12; Dkt.123-17; Dkt.123-20; Dkt.124-2 ¶¶ 64–65]. On October 27, 2014, the Village's counsel informed the

Nation that the Village planned to initiate an enforcement action against Lakeside Entertainment, JA__ [Dkt.5-5 ¶ 9].

D. This Lawsuit.

The Nation and John Doe plaintiffs sued on October 28, 2014, seeking declaratory and injunctive relief. The next day, the district court entered a temporary restraining order, which was continued by consent. JA__ [Dkts.7–8].

That has been the status quo since. While the district court dismissed the suit for lack of standing on May 19, 2015, it granted an injunction pending appeal. JA__ [Dkt.51; Dkt.65]. This Court reversed the standing-based dismissal and reinstated the suit. *Cayuga Nation v. Tanner*, 824 F.3d 321, 324 (2d Cir. 2016). For several years, the parties agreed to preserve the status quo while exploring negotiated resolutions. When negotiations failed, litigation resumed.

On May 22, 2019, the plaintiffs filed a three-count Amended Complaint, which also identified several Does as Nation officials. JA__ [Dkt.100]. Count I asserts that IGRA preempts the Village's enforcement actions in full. JA__ [*Id.* ¶¶ 80–85]. Count II asserts that 18 U.S.C. § 1166 preempts the Village's criminal enforcement actions. JA__ [*Id.* ¶¶ 86–91]. Count III asserts that the Nation's sovereign immunity precludes enforcement actions. JA__ [*Id.* ¶¶ 92–96].

E. The Decision Below.

On cross-motions for summary judgment, the district court sided with the Nation.

On Count I, the court held that IGRA preempts the Village's attempts to regulate the Nation's Class II gaming. JA__ [Dkt.147 at 44]. It explained that reservation lands are, categorically, "Indian lands," which include "all lands within the limits of any Indian reservation." JA__ [*Id*. at 36–37 (quoting 25 U.S.C. § 2703(4))]. Since Lakeside Entertainment's reservation status is undisputed, JA__ [*id.* at 8], it qualifies as "Indian lands."

The district court also addressed a separate issue that was not necessary to find preemption and that the Village has not raised on appeal. As explained, IGRA broadly preempts state regulation of Class II gaming on "Indian lands." But to be *legal*, gaming must meet additional requirements, including that it occur on lands "within such tribe's jurisdiction." 25 U.S.C. § 2710(b). A violation may trigger NIGC enforcement. The Nation argued, and the district court held, that nothing in *Sherrill* prevented the Nation from satisfying this requirement. Agreeing with *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 701–02 (1st Cir. 1994), the court held that "this jurisdictional component is satisfied so long as a tribe may exercise some jurisdictional authority," and that "even concurrent jurisdiction with state and

local authorities" suffices. JA__ [Dkt.147 at 43]. The court found "no reasonable dispute that the Nation exercises some … concurrent jurisdiction." JA__ [*Id.*].

On Count II, the district court held that IGRA preempts the Village's criminal enforcement efforts. JA__ [*Id*. at 45].

On Count III, the district court held that even absent preemption, sovereign immunity bars enforcement actions against the Nation or its officials. JA__ [*Id*. at 46–48].

The district court also rejected the Village's arguments based on issue and claim preclusion, explaining that those arguments "distort[ed] … the parties' litigation history." JA__ [*Id*. at 28]. As to issue preclusion, the court explained that the Village was "wrong" that "preemption 'was actually litigated and actually decided' or even 'necessary to support a valid and final judgment on the merits' in" the 2003 suit. JA__ [*Id*. at 30]. As to claim preclusion, the court observed that the "scope of litigation is framed by the complaint at the time it is filed," JA__ [*id*. at 32 (quoting *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 369–70 (2d Cir. 1997)], and that when the Nation filed its 2003 complaint—which was about "whether the Village's zoning and land-use laws applied to renovation and construction"—the Nation was not even gaming, JA__ [*id*]. Because this suit is "based on new (and different) enforcement efforts" directed at gaming, claim preclusion was no bar. JA__ [*Id.*].

This appeal followed.

SUMMARY OF ARGUMENT

I. The Village's enforcement efforts against Lakeside Entertainment are preempted because the facility sits on "Indian lands." As this Court has held, IGRA "expressly preempt[s] the field in the governance of gaming activities on Indian lands." *Mashantucket*, 722 F.3d at 469–70. IGRA defines "Indian lands" to include "all lands within the limits of any Indian reservation." 25 U.S.C. § 2703(4)(A). Lakeside Entertainment satisfies this definition because, as the parties have stipulated, it sits within the Nation's federal reservation, which has never been disestablished. While the Village asks this Court to depart from IGRA's clear text on the ground that Congress did not anticipate *Sherrill*, courts will not "rewrite … statutory text" based on such "speculation." *Henson*, 137 S. Ct. at 1725.

Moreover, when Congress enacted IGRA, it understood that "Indian lands" differ in how much authority tribes and states can exercise. Yet nonetheless, Congress provided without qualification that IGRA preempts state regulation of Class II gaming on "all lands" within "any Indian reservation."

Alternatively, even if IGRA's "Indian lands" definition required a showing of "governmental power"—which, for reservation lands, IGRA does not—the Nation would satisfy that requirement. As the district court correctly held, the Nation exercises governmental power at Lakeside Entertainment in myriad ways.

II. IGRA also preempts the Village's criminal enforcement efforts by granting the federal government "exclusive jurisdiction over criminal prosecutions" of any non-preempted local gambling laws. 18 U.S.C. § 1166. The district court correctly held that § 1166 forecloses any criminal enforcement actions by the Village against the Nation or its officers.

III. The Nation's sovereign immunity from suit independently bars the Village's threatened enforcement actions. While the Village claims that a common-law "immovable property exception" from sovereign immunity allows these actions to proceed, this Court recently rejected that argument in *Seneca County*, 2020 WL 6253332, at *1. *Seneca County* compels the same result here.

The district court also correctly rejected the Village's argument that it can circumvent the Nation's immunity by suing Nation officials. The very case the Village invokes holds that states can seek *Ex parte Young*-style injunctive relief against Indian nations' officials only for actions taken "off of the reservation." *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 120 (2d Cir. 2019).

IV. The district court correctly rejected the Village's preclusion arguments. Issue preclusion cannot apply because no court in the 2003 action ever ruled against the Nation on any IGRA issue. Claim preclusion cannot apply because this suit concerns *new* threats (Orders to Remedy in 2013 and 2015), arises from a fundamentally *different* dispute (about gaming and the Village's anti-gaming

ordinance, not renovations), and centers on IGRA preemption issues the Nation *could not have* raised when it filed the 2003 suit.

ARGUMENT

I. IGRA Preempts The Village's Regulation Of Gaming At Lakeside Entertainment.

One undisputed legal principle and one undisputed fact resolve this appeal. The legal principle is that IGRA preempts state regulation of gaming on "Indian lands." The fact is that Lakeside Entertainment sits within the Nation's federally recognized reservation, which has never been disestablished. The Village's attempt to resist the conclusion that inevitably follows from these two points—by arguing that the Nation's reservation is not a "reservation" under IGRA—fails. This Court should join the district court and the NIGC in so holding.

A. IGRA Preempts State Regulation Of Gaming On "Indian Lands."

It is undisputed in this appeal that, if Lakeside Entertainment sits on "Indian lands," IGRA preempts the Village's regulation of the Nation's gaming. The Village exclusively argues that "IGRA does not preempt the [1958] Ordinance because the gaming parcel does not constitute 'Indian lands,'" and that the "district court erred in its analysis of 'Indian lands.'" Br. 19, 41, 46; *see id.* at iii, iv.

The Village put all its eggs in that basket because it had no choice. IGRA provides that "[*a*]*ny* class II gaming *on Indian lands* shall … be within the jurisdiction of the Indian tribes, but shall be subject to [IGRA's] provisions." 25

U.S.C. § 2710(a)(2) (emphasis added); *see id.* § 2701(3) (finding that "clear [Federal] standards" were needed "for the conduct of gaming *on Indian lands*" (emphasis added)). Hence, this Court has held that IGRA "expressly preempt[s] the field in the governance of gaming activities *on Indian lands*." *Mashantucket*, 722 F.3d at 469–70 (emphasis added). Under this rule, so long as an Indian nation is conducting Class II gaming on "Indian lands," IGRA's "extraordinary preemptive power" ousts state law. *Gaming Corp. of Am. v. Dorsey & Whitney*, 88 F.3d 536, 544–47 (8th Cir. 1996). That rule accords with not just IGRA's text, but also its legislative history. *See* S. Rep. No. 100-446, at 6 (1988) (IGRA "is intended to expressly preempt the field in the governance of gaming activities on Indian lands"), *as reprinted in* 1988 U.S.C.C.A.N. 3071, 3076; *accord id.* at 36, 1988 U.S.C.C.A.N. at 3105 (Senator Evans' views emphasizing that "this bill should be construed as an explicit preemption of the field of gaming in Indian Country").

Sister circuits agree. The Eighth Circuit has held that IGRA's "preemptive force" extends to Indian gaming "conducted 'on Indian lands.'" *State ex rel. Nixon v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1109 (8th Cir. 1999). The Tenth Circuit has recognized that IGRA "expressly preempt[s] state regulation of gaming activity that occurs on Indian lands." *Pueblo of Pojoaque v. New Mexico*, 863 F.3d 1226, 1235 (10th Cir. 2017). The Eleventh Circuit, too, has affirmed that, "in the governance of gaming activities on Indian lands," IGRA "occup[ies] th[e] field." *Tamiami*

Partners, Ltd. ex rel. Tamiami Dev. Corp. v. Miccosukee Tribe of Indians of Fla., 63 F.3d 1030, 1033 (11th Cir. 1995) (internal quotation marks omitted).

True, to be *legal* under federal law, Class II gaming must meet additional requirements. An Indian nation's "governing body," for example, must "adopt[] an ordinance … which is approved by the [NIGC's] Chairman." 25 U.S.C. § 2710(b)(1)(B); *supra* at 7. But those requirements have nothing to do with whether *state-law* actions are preempted. Instead, as the Eleventh Circuit explained, "the broad reach of [IGRA's] regulatory and enforcement provisions" further "evidence[s]" the "occupation of th[e] field by federal law." *Tamiami*, 63 F.3d at 1033. IGRA created the NIGC and empowered it to "monitor class II gaming conducted on Indian lands on a continuing basis." 25 U.S.C. § 2706(b)(1). The NIGC may "order temporary" or permanent "closure of an Indian game for substantial violation of the provisions of" IGRA or the NIGC's regulations. *Id.* § 2713(b)(1)–(2). Localities that believe an Indian nation is illegally conducting Class II gaming on Indian lands may thus ask the NIGC to initiate an enforcement action, and they may seek review in federal court if the NIGC declines. *See id.* § 2714. Localities may not, however, apply their own laws to regulate Class II gaming on "Indian lands."

B. Lakeside Entertainment Sits On "Indian Lands."

So the dispositive question is: Does Lakeside Entertainment sit on "Indian lands"?

The answer is yes. IGRA defines "Indian lands" to include "*all lands* within the limits of *any* Indian reservation." 25 U.S.C. § 2703(4)(A) (emphasis added). And here, Lakeside Entertainment is on an Indian reservation: As the parties have stipulated, the facility is within the federal reservation established by the 1794 Treaty of Canandaigua, and this reservation "has not been disestablished." JA__ [Dkt.123 ¶ 3 (quoting Dkt.111)].

Again, the Village stipulated to that fact because it had no choice. "[E]very federal court" to consider the question, and the New York Court of Appeals, agrees that the Nation's reservation has not been disestablished. *Cayuga Indian Nation of N.Y. v. Gould*, 930 N.E.2d 233, 247 (N.Y. 2010); *see Cayuga Indian Nation*, 260 F. Supp. 3d at 307–15. This Court has also held that the Oneida Nation's similarly situated reservation remains intact. *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 605 F.3d 149, 157 n.6 (2d Cir. 2010), *vacated on other grounds*, 562 U.S. 42 (2011).

All that, moreover, came before *McGirt* powerfully reaffirmed that "only Congress can alter the terms of an Indian treaty by diminishing a reservation, and its intent to do so must be clear." *McGirt*, 140 S. Ct. at 2469. Even though Oklahoma for more than 100 years had exercised jurisdiction over the Creek Nation's

reservation, *McGirt* explained that "[u]nlawful acts, performed long enough and with sufficient vigor, are never enough to amend the law"; rather, if "Congress wishes to withdraw its promises, it must say so"—because to "hold otherwise would be to elevate the most brazen and longstanding injustices over the law, both rewarding wrong and failing those in the right." *Id.* at 2482. For just the same reasons, Nation's federal reservation endures.

That undisputed—and indisputable—point should end this appeal. Because Lakeside Entertainment sits within the Nation's "reservation," and thus is on "Indian lands," 25 U.S.C. § 2703(4)(A), IGRA "expressly preempt[s] the field," *Mashantucket*, 722 F.3d at 469–70.

C. The Village's Arguments Lack Merit.

Although Congress defined "Indian lands" to include "all lands within the limits of any Indian reservation," 25 U.S.C. § 2703(4)(A), the Village invites this Court to blue-pencil the statute so that it means "some lands" within "some Indian reservations." The Village contends that Congress did not "anticipate[]" *Sherrill* and "was focused on" other reservations where the jurisdictional balance differs. Br. 42, 44. The Village thus argues that, even though Congress established the Cayuga Nation's reservation and never disestablished it, that reservation can be a "'reservation' within the meaning of IGRA" only if the Nation exercises a certain

amount of "governmental power"—which, the Village says, the Nation cannot do given *Sherrill*. Br. 41. This argument comprehensively fails.

1. The Village Cannot Rewrite "Any Reservation" To Mean "Some Reservations."

The first and dispositive point is that the Village's reading contradicts IGRA's text. Courts must "always turn first" to the rule that when "the words of a statute are unambiguous, … 'judicial inquiry is complete.'" *Germain*, 503 U.S. at 253–54. And it is "never [the Court's] job" to do what the Village asks and "rewrite … statutory text under the banner of speculation about what Congress might have done had it faced a question that, on everyone's account, it never faced." *Henson*, 137 S. Ct. at 1725; *accord Brogan v. United States*, 522 U.S. 398, 403 (1998) (similar).

The word "all" "conveys breadth," *Peter v. Nantkwest, Inc.*, 140 S. Ct. 365, 372 (2019), "indicat[ing] no limitation," *Norfolk & Western Railway Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117, 129 (1991). Likewise, "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))). So when IGRA defines "Indian lands" to mean "all" lands within "any" reservation, courts cannot rewrite that definition to exclude lands within some reservations. *Accord New York v. Salazar*, No. 6:08–CV–644, 2009 WL 3165591, at *9 (N.D.N.Y. Sept. 29, 2009) (rejecting argument

that *Sherrill* rendered the Oneida Nation's reservation no longer a "reservation" under IGRA).

The Village's argument is really a relabeling of the position *McGirt* rejected. While the Village dismisses *McGirt* as a disestablishment case, Br. 44 n.16, *McGirt* implicated a nearly identical statutory issue. The Major Crimes Act preempts state prosecutions of certain crimes in "Indian country," defined to include "all lands within the limits of any Indian reservation." 18 U.S.C. § 1151(a); *see McGirt*, 140 S. Ct. at 2459. If there was ever a case to embrace the Village's coined term of a "not disestablished" reservation that is not a "reservation" for statutory purposes, it was *McGirt*. Oklahoma had exercised jurisdiction for a century, warned that following the statutory text could upset "[t]housands" of convictions and "burden[] federal courts," and urged the Court to "acknowledge[] that *de facto*" the Creek Nation's lands were no longer a reservation. 140 S. Ct. at 2468, 2479–80. But instead the Court held that "[w]hen interpreting Congress's work in this arena, no less than any other, our charge is usually to ascertain and follow the original meaning of the law before us"—which is "the only step proper for a court of law." *Id.* at 2468. The Village's claim that the Nation's concededly intact reservation is a "de facto *former* reservation[]," Br. 44, must meet the same fate.

The Village's invitation to append a "governmental power" requirement also cannot be squared with IGRA's structure. Under the *second* prong of IGRA's

"Indian lands" definition—concerning "trust" and restricted lands—Congress included only lands "over which an Indian tribe exercises governmental power." 25 U.S.C. § 2703(4)(B). But Congress omitted that qualifier from the first prong, covering reservations. 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).

With the text so set against the Village, it is gilding the lily to invoke the canon that "[s]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Connecticut ex rel. Blumenthal v. U.S. Dep't of Interior*, 228 F.3d 82, 92 (2d Cir. 2000). But the Indian canon provides another reason the Village must lose. IGRA certainly does not *unambiguously* endorse the Village's view that Lakeside Entertainment, though on the Nation's reservation, is not on a "reservation" under IGRA.

2. The Village's "Indian Lands" Arguments Fail Even On Their Own Terms.

The Village's position fails even on its own terms.

First, the Village's supposition that Congress "focused" on a particular type of Indian lands—where Indian nations exercise plenary jurisdiction to the exclusion of states, Br. 42—cannot be squared with the backdrop against which Congress *actually* legislated. Long before IGRA's 1988 enactment, "Public Law 280" and similar laws had conferred on many states 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). These states included Alaska, California, Minnesota, Nebraska, Oregon, and Wisconsin ("mandatory" Public Law 280 states); Florida, Idaho, Iowa, and Washington ("optional" states); and Colorado, Connecticut, and Utah (with bespoke jurisdictional grants).[3]

Especially telling are laws concerning Rhode Island and Massachusetts—both enacted before IGRA—in which Congress provided that the Indian lands were "subject to the [state's] civil and criminal laws and jurisdiction," *Narragansett Indian Tribe*, 19 F.3d at 694, and that the Indian nations "shall not have any jurisdiction 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 despite all this variation, Congress provided categorically that "Indian lands" include "all" lands within "any"

[3] *Doe v. Mann*, 415 F.3d 1038, 1050 n.16 (9th Cir. 2005); 18 U.S.C. § 1162(a); 28 U.S.C. § 1360; Act of May 21, 1984, Pub. L. No. 98-290, §§ 1–5, 98 Stat. 201, 201–02 (1984); 25 U.S.C. § 1755 (1983); Mohegan Nation of Connecticut Land Claims Settlement Act of 1994, Pub. L. No. 103–377, § 2, 108 Stat. 3501, 3501–02; Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96–227, § 7, 94 Stat. 317, 320–21 (1980).

reservation—and the First Circuit squarely held that the *Narragansett* and *Aquinnah* lands are "Indian lands."

The variation extends to taxation issues like those *Sherrill* considered. While the Village suggests that reservation lands are "immune to state and local taxation," Br. 42 n.13, that is not always true. In *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), the Supreme Court held "that the [1887] General Allotment Act permits Yakima County to impose an ad valorem tax on *reservation* land patented in fee." *Id.* at 270 (emphasis added). This holding did not make the Yakimas' reservation any less of a reservation.

Indeed, that point spotlights the flaw at the heart of the Village's argument: The sources it cites as evidence of "common understandings" of what "reservation" meant in 1988 are actually *descriptions* of characteristics some reservations have, incorrectly recast as *requirements* every reservation must satisfy. Br. 42 & n.13. In reality, the rule governing what constitutes a "reservation" in 1988 was the same rule governing today: Once "a block of land is set aside for an Indian reservation," the "entire block retains its reservation status until Congress explicitly indicates otherwise." *McGirt*, 140 S. Ct. at 2468 (quoting *Solem v. Bartlett*, 465 U.S. 463, 470 (1984)).

Second, the Village's repeated assertion that the Nation exercises no "governmental power," Br. 19, 41–48, is false. The First Circuit has twice

considered whether Indian nations that sought to game on trust land exercised sufficient "governmental power" to qualify under the "Indian lands" definition's second prong. The First Circuit explained that "[m]eeting this requirement does not depend upon the Tribe's theoretical authority, but upon the presence of concrete manifestations of that authority." *Narragansett*, 19 F.3d at 703. And the First Circuit found that this "inquiry … need not detain us" because it was clear that the tribes had "taken many strides in the direction of self-government," citing as examples establishing "public safety" programs and court systems, "pass[ing] numerous ordinances," and participating in federal government-to-government programs under the "Indian Self-Determination … Act" ("ISDA") and in housing programs of the "Department of Housing and Urban Development" ("HUD"). *Aquinnah*, 853 F.3d at 626; *Narragansett*, 19 F.3d at 703.

The Nation has done all this and more. The Cayuga Nation Police Force patrols Nation-owned properties within the Nation's reservation and responded to at least 390 calls for service between August 2018 and the submission of summary-judgment briefing below. JA__, __, __, __, __ [Dkt.124-2 ¶¶ 27–42; Dkt.124-3 ¶¶ 43–44; Dkt.124-27 ¶¶ 4, 6–7 10–12, 14–20; Dkt.137-3 ¶¶ 5–11; Dkt.137-4]. The Nation's court system has jurisdiction under Nation law over offenses defined in the Nation's penal code, including a trial court, appellate court, prosecutor, and public defender; the Nation has also contracted with a prison to incarcerate those convicted

in those courts. JA__, __, __, __ [Dkt.124-2 ¶¶ 43–48; Dkt.124-3 ¶¶ 44–50; Dkt.124-18 at 2-22; Dkt.124-19 at 2-6]. The Nation has passed many ordinances covering zoning, land use, health and safety, agriculture, markets, sanitation, and alcoholic beverage control on Nation-owned properties within the Nation's reservation—enforced by Nation-appointed officers. JA__, __, __ [Dkt.124-2 ¶¶ 12–13; Dkt.124-3 ¶¶ 32–33, 35; Dkts.124-5–12]. And the Nation participates in government-to-government programs under the ISDA and the Indian Roads Program, and it owns and manages 42 units of housing for Nation citizens on the Nation's reservation, constructed or acquired with HUD funds. JA__, __, __ [Dkt.124-2 ¶¶ 18–19; Dkt.124-3 ¶¶ 36, 38; Dkts.124-13–15].

The Village has no adequate response. It gets nowhere by observing that *Narragansett* involved "trust lands." Br. 47. That is the only reason the Narragansett *had to* establish "governmental power," which on a "reservation" is unnecessary. The Village's real argument is that the Nation's exercises of governmental power are "unlawful" under *Sherrill*. Br. 48. But *Sherrill* does not remotely establish as much; instead, it addressed a narrow question of tax immunity. *Sherrill* held that the Oneida Nation could not invoke its inherent sovereignty to oust local governments' taxing power, and it rested on a doctrine—"laches"—that is fact-intensive and "necessarily requires that the resolution be based on the circumstances peculiar to each case." *Tri-Star Pictures, Inc. v. Leisure Time Prods., B.V.*, 17 F.3d 38, 44 (2d

Cir. 1994); *see Sherrill* 544 U.S. at 217, 221. *Sherrill* did not address the Nation's authority to exercise *its own* inherent governmental power, much less hold that all the varied exercises of governmental power described above are unlawful.

Myriad authorities testify to that conclusion. This Court has repeatedly "considered and discarded" similarly unmoored readings of *Sherrill*, holding that the Nation may assert "sovereign immunity from suit" despite similar arguments. *Seneca Cnty.*, 2020 WL 6253332, at *9–11; *accord Cayuga Indian Nation of N.Y. v. Seneca Cnty.*, 761 F.3d 218, 221 (2d Cir. 2014). In 2018, the Director of the BIA likewise affirmed that the "Department [of the Interior's] position is that the Cayuga Indian Nation may enforce its own criminal laws against Indians within the boundaries of the Reservation" via its police force, rejecting localities' arguments that *Sherrill* rendered the Nation's police force unlawful. JA__, __, __ [Dkt.124-2 ¶ 42; Dkt.124-3 ¶ 51; Dkt.124-20]. And in an amicus brief submitted to this Court and approved by the Solicitor General, the Department of Justice chided Seneca County for referring to the Nation's land as "non-sovereign," 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." JA__ [Dkt.124-40 at 5 n.1]. Indeed, the *Narragansett* and *Aquinnah* lands were subject to similar state authority, yet the First

Circuit easily found IGRA's "governmental power" requirement satisfied. *Supra* at 29.

Also no help to the Village is *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556, 566 (2d Cir. 2016). *See* Br. 45. As the district court recognized, the discussion the Village invokes, concerning *Sherrill* and "jurisdiction," "might well be dicta" anyway, JA__ [Dkt.147 at 42], having arisen in the context of a standing challenge and without briefing. But what matters here is that this dicta did not even address the "Indian lands" question on which preemption turns. Instead, it addressed one of the requirements for Class III gaming to be lawful under federal law—namely, that Class III gaming may be conducted only as "authorized by the governing body of the Indian tribe *having jurisdiction over such lands*." 25 U.S.C. § 2710(d)(1)(A)(i) (emphasis added). An Indian tribe violating that requirement might find itself a target for the federal government—and significantly, the *Upstate Citizens* plaintiffs sought as relief "an injunction requiring the [federal] government to 'take enforcement action' against unlawfully operating casinos." 841 F.3d at 566. This requirement, however, is irrelevant to preemption.

3. Although Irrelevant To Preemption, The Nation Satisfied IGRA's "Jurisdiction" Requirement.

The district court also concluded that Lakeside Entertainment complied with IGRA's federal-law requirements for lawful Class II gaming, including 25 U.S.C. § 2710(b)(1)'s requirement that Lakeside Entertainment sit "on Indian lands *within*

such tribe's jurisdiction." JA__ [Dkt.147 at 38–44 (emphasis added)]. The Village on appeal does not cite or quote § 2710(b)(1), or challenge whether Lakeside Entertainment fulfills this requirement. That is no surprise, given its recognition that preemption turns on the "Indian lands" issue.[4] Regardless, the district court's conclusion is correct. If someday the Village seeks relief from the NIGC, that request will fail for the reasons the district court gave.

The "jurisdiction" argument the Village would make is that, because of the power New York's localities may exercise under *Sherrill*, the Nation lacks "jurisdiction" over Lakeside Entertainment. But as the First Circuit has held, the Class II "jurisdiction" requirement asks only whether some tribal "jurisdiction" is *present*, not whether that jurisdiction is *plenary* or whether state jurisdiction is *absent*. *See* 25 U.S.C. § 2710(b)(1) (authorizing gaming on any "Indian lands within such tribe's jurisdiction"). So long as Indian nations have some "concurrent

[4] The Village of course cannot raise such an argument for the first time in reply. *See McCarthy v. SEC*, 406 F.3d 179, 186 (2d Cir. 2005). Nor is there doubt that the Village deliberately chose to forego this argument. The Village's opening brief below did not argue that the Nation failed to satisfy § 2710(b)(1), pressing only its "Indian Lands" argument. JA__, __ [Dkt.135 at 3–4, 33–38]. The *Nation*'s brief—filed simultaneously—stressed that preemption turns solely on the "Indian lands" issue but argued, alternatively, that the Nation satisfied § 2710(b)(1). JA__, __ [Dkt.124-1 at 19, 22–31]. The Village's response again raised only the "Indian lands" issue. JA__ [Dkt.138 at 23–29]. The district court's decision agreed with the Nation on § 2710(b)(1), JA__ [Dkt.147 at 38–44]—yet still, the Village's opening appellate brief did not address that provision.

jurisdiction," they have "jurisdiction" under IGRA. *Narragansett*, 19 F.3d at 701–02. Indeed, the First Circuit held that Indian tribes may satisfy this requirement via "that portion of jurisdiction they possess by virtue of their sovereign existence as a people." *Id.*; *see Aquinnah*, 853 F.3d at 624. Here, the district court correctly recognized that "[b]ecause there is no reasonable dispute that the Nation exercises some degree of concurrent jurisdiction over the Property"—based on all the exercises of jurisdiction detailed above, *supra* at 29–30— IGRA's "jurisdiction" requirement "is satisfied." JA__ [Dkt.147 at 43].

The "jurisdiction" requirement's modest purpose is to provide that an Indian nation can game only on its *own* reservation. Without it, one nation could game on *another*'s "Indian lands." As the NIGC has explained, "Congress intended that gaming on any specific parcel of Indian lands not be conducted by any Indian tribe, but only by the specific tribe or tribes with jurisdiction over that land." JA__ [Dkt.124-36 at 11]. And the NIGC has found that, because an Indian nation was "the only tribe that exercises jurisdiction over" particular lands, it necessarily met "IGRA's [jurisdiction] requirements." JA__ [Dkt.124-38 at 5]. That approach accords with the statutory text: Paired with the word "within," the relevant definition of "jurisdiction" is a "geographic area within which political or judicial authority may be exercised." *Black's Law Dictionary* 1017 (11th ed. 2019); *accord Merriam-Webster Dictionary*, M-W.com, https://bit.ly/33QuQn2 (last visited Oct. 26, 2020)

("the limits or territory within which authority may be exercised"). IGRA's "jurisdiction" requirement thus asks a *where* question about geography, not a *how much* question about what powers a nation exercises.[5]

D. IGRA Preempts The Village's Use-Variance Requirement.

The Village makes a one-paragraph argument that, at least, its Zoning Law's requirement to obtain a "use variance" escapes preemption because it is "neutral." Br. 49. This conclusory argument fails. For one, the Village has never cited the Nation for violating this requirement, raising it only once in an informal letter. JA__ [Dkt.123-18].[6]

Moreover, this requirement is not genuinely *independent* of the Village's attempt to regulate the Nation's gaming; rather, as the district court held, it "amounts to an indirect regulation of" that gaming. JA__; *see* JA__, __, __, __ [Dkt.147 at 48; *see* Dkt.123 ¶¶ 44–45; Dkts.123-18–19; Dkt.124-2 ¶¶ 85, 89; Dkt.124-21 ¶ 53]. Lakeside Entertainment sits in a "Commercial" district for parcels "where the

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[5] Again, *Upstate Citizens* is no barrier. Its discussion concerned Class III gaming subject to a different "jurisdiction" provision and regulatory scheme. Moreover, *Upstate Citizens* stated only that, if Interior's decision taking land into trust for the Oneida Nation were reversed, the Oneida's "operation of the [Turning Stone] casino *may* become unlawful"—and it did so in resolving a standing challenge to one party where others indisputably had standing. 841 F.3d at 566 (emphasis added). This dicta cannot be read as requiring this Court to part company with the First Circuit and the NIGC.

[6] While the Village asserts that a December 20, 2013 Order to Remedy invoked the use-variance requirement, Br. 14, that is incorrect. JA__ [Dkt.100-6].

primary land use involved the sale and/or manufacture of goods and services … for profit." JA__; *accord* JA__ [Dkt.124-26 at 36 (Zoning Law of the Village of Union Springs Dated Nov. 2013 § 6.6(A)); *accord* Dkt.124-23 at 4]. The Nation could conduct many similar activities, like running a restaurant or bar, or selling retail goods, with no variance. A variance is required because the Nation is *gaming*. That triggers IGRA's preemption of "the field in the governance of gaming activities on Indian lands." *Mashantucket*, 722 F.3d at 469–70. Indeed, the Village *told* the Nation it could satisfy this requirement only by "petition[ing] the Village Board of Trustees to … allow commercial gaming." JA__ [Dkt.125 ¶ 22]. The Village cannot avoid preemption of its anti-gaming laws by pointing to a "use variance" process those laws render futile.

II. IGRA Independently Bars Criminal Enforcement Actions.

Independently, "a straightforward application of [18 U.S.C.] § 1166 precludes Union Springs from undertaking any criminal enforcement proceedings with respect to the Tribe's Class II gaming." JA__ [Dkt.147 at 45]. Section 1166 provides that "[t]he 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 (emphasis added); *accord Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 793 n.5 (2014) (describing Section 1166). Reservation lands are "Indian country." 18 U.S.C. § 1151(a); *see McGirt*, 140 S. Ct. at 2464, 2474.

The Village concedes that Section 1166 generally provides for exclusive federal jurisdiction. Br. 50. It claims, however, that 25 U.S.C. § 232 confers "concurrent jurisdiction" on New York and that *United States v. Cook*, 922 F.2d 1026 (2d Cir. 1991), recognized as much. Both arguments fail.

Section 232 is irrelevant because Section 1166 superseded it. Section 232, enacted in 1948, generally gives New York "jurisdiction over offenses committed by or against Indians on Indian reservations." 25 U.S.C. § 232. But a "later-enacted, more specific, comprehensive statute that targets … specific subject matter … 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). Section 1166, enacted with IGRA in 1988, specifically addresses *gaming* prosecutions. The Ninth Circuit has thus held that Section 1166 displaced the concurrent criminal jurisdiction that Public Law 280—which is nearly identical to Section 232—confers on states. *Sycuan Band of Mission Indians v. Roache*, 54 F.3d 535, 540 (9th Cir. 1994). As the Ninth Circuit explained, "[i]f th[e] exclusivity" of Section 1166 "is incompatible with any provision of Public Law 280, then the Public Law 280 provision has been impliedly repealed." *Id.* The district court properly applied the same principle here.

Nor does *Cook* say otherwise. *Cook* held that Section 232 does not abrogate *federal* criminal jurisdiction that otherwise exists. 922 F.2d at 1032–33. To suggest that *Cook* also blessed state gaming prosecutions, the Village lifts from context a

parenthetical observing that New York law allows "local legislatures [to] license the operation of games of chance by authorized charitable organizations," *id.* at 1035, and uses that parenthetical to assert that *Cook* recognized New York's "right to enforce" state gaming laws, Br. 50. *Cook*, however, says no such thing.

III. Sovereign Immunity Bars The Village's Threatened Actions.

A. The Nation Is Entitled To Sovereign Immunity.

The district court also correctly held that "tribal sovereign immunity bars the Village from proceeding against the" Nation. JA__ [Dkt.147 at 47]. The Village contends that because this case supposedly concerns real property, the "common law immovable property exception" allows it to proceed against gaming at Lakeside Entertainment. *Seneca County*, however, rejected a similar invocation of the "immovable property exception," and compels the same result here.

Seneca County addressed a county's argument that the "common law" "immovable property" exception permitted it to foreclose on Nation-owned properties for alleged nonpayment of taxes. 2020 WL 6253332, at *5. This Court found that it "need not rule on the existence of [an immovable-property] exception to tribal immunity"—because regardless, foreclosure actions "fall outside the … common law … exception." *Id.* As *Seneca County* explained, the exception applies only to claims that "'contest[]' … rights or interests in real property," like quiet-title actions

determining who owns a disputed tract. *Id.* at *6; *accord id.* at *7 (actions "to *determine* rights in immovable property"). By contrast, foreclosure actions do not qualify because, though they "certainly *involve*[] real property," they do not dispute present property ownership or property rights. *Id.* at *7.

Seneca County's holding is dispositive here. The Village likewise does not "contest[]" ownership of or rights in 271 Cayuga Street. It targets the Nation's *activities* there (namely, gaming). Indeed, to illustrate when the immovable-property exception does not apply, *Seneca County*—following the *Restatement (Second) of Foreign Relations Law* (1965)—pointed to a suit that "arise[s] out of a slip-and-fall" on the sovereign's property. 2020 WL 6253332, at *7; *accord Restatement (Second)* § 68 ill. 7; *Seneca Cnty.*, 2020 WL 6253332, at *7 (noting courts "have regularly consulted" this edition of the *Restatement* to ascertain the common law). A slip-and-fall is outside the exception because it concerns not ownership but the owner's actions (*i.e.*, whether the owner negligently maintained the premises). For just the same reason, the exception does not apply here.[7]

Seneca County easily resolves this case. But the Village's arguments also fail for two more reasons, which *Seneca County* did not reach.

[7] To the extent the Village argues that *Sherrill* abrogated the Nation's sovereign immunity, Br. 54, *Seneca County* squarely rejects that argument too. 2020 WL 6253332, at *9–11.

First, the Village correctly describes the common-law immovable-property exception as applying only "outside of [the sovereign's] jurisdiction." Br. 51. This case, however, concerns reservation lands. None of the Village's sources support applying the exception on an Indian nation's reservation.

Second, the district court correctly held that "immunity doctrines lifted from other contexts do not always neatly apply to Indian tribes." JA__ [Dkt.147 at 47 (quoting *Upper Skagit Indian Tribe*, 138 S. Ct. at 1654)]. Hence, this Court has held that tribal sovereignty immunity is an "[avowedly] broad principle" and that "settled law" requires courts to "dismiss[] any suit against a tribe absent congressional authorization (or a waiver)." *Seneca Cnty.*, 761 F.3d at 220. In other words, the "power to restrict the scope of a tribe's immunity from suit lies, instead, with Congress." *Seneca Cnty.*, 2020 WL 6253332, at *5. It is not for courts to restrict that immunity via strained analogies to foreign sovereigns and U.S. states.

B. The Village Cannot Circumvent The Nation's Immunity By Naming Nation Officials.

The Village claims that even if the Nation has immunity, the Village may "enforce its laws against … tribal officials." Br. 54. But plaintiffs "cannot circumvent tribal immunity by merely naming [tribal] officers or employees." *Chayoon v. Chao*, 355 F.3d 141, 143 (2d Cir. 2004).

Gingras v. Think Finance, Inc., 922 F.3d 112 (2d Cir. 2019), does not hold otherwise. *Gingras* held that "under a theory analogous to *Ex parte Young*, tribal

sovereign immunity does not bar state … 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). This case, by contrast, concerns conduct *on the reservation*.

The Village's characterization of the on/off reservation distinction as "novel," Br. 55, is bizarre. *Gingras* repeatedly limited its holding to "off-reservation" conduct, and it relied on rules that apply to "Indians going beyond reservation boundaries"—plus *Bay Mills*, which concerned activity "occur[ing] off the reservation," 572 U.S. at 795. *Gingras*, 922 F.3d at 120–22. The Village's claim that applying *Gingras* according to its terms "renders *Sherrill* … meaningless," Br. 55, is identical to arguments this Court has long rejected. *Seneca Cnty.*, 2020 WL 6253332, at *9–11.

IV. The Village's Preclusion Arguments Fail.

To avoid the merits, the Village makes two preclusion arguments. It says issue preclusion applies because the "question of whether IGRA preempts Village laws was … decided … favorably to the Village" in the 2003 lawsuit. Br. 18. Alternatively, it says claim preclusion applies because both the 2003 lawsuit and this one "started with the Cayugas' unilateral decision to operate a Class II gaming facility on fee lands." *Id.* As the district court explained, however, the Village "distorts … the parties' litigation history." JA__ [Dkt.147 at 28]. And the court

would know, having presided over both suits. Neither issue nor claim preclusion applies.

A. The Village Misstates The Parties' Litigation History.

As summarized above, the 2003 suit arose out of renovations at 271 Cayuga Street, where Lakeside Entertainment now sits. The Nation believed its on-reservation properties were entirely immune from "local zoning or other land use laws, rules, or ordinances." JA__ [Dkt.126-29 ¶ 26]. It thus renovated without obtaining 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." JA__, __ [*Id.* ¶ 28; Dkt.137-6 ¶ 9].

The Nation sued on October 19, 2003. JA__ [Dkt.126-29 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." JA__ [*Id.* ¶ 5]. It thus asked the court to declare that the Village's application "of local zoning or other land use laws, rules, or ordinances … is without authority or jurisdiction and is pre-empted by federal law." JA__ [*Id.* ¶ 31]. The 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 II, Section 2, Clause 2 of the

Constitution and from federal common law, and the Nonintercourse Act (25 U.S.C. § 177); and 25 C.F.R. § 1.4." JA__; *see* JA__ [Dkt.126-29 ¶¶ 31–32; *see id.* ¶ 6].

The Complaint raised no IGRA claim. Indeed, in October 2003, the Nation did not satisfy IGRA's most basic requirements for lawful Class II gaming: The Nation had not adopted a gaming ordinance; the NIGC had not yet approved any such ordinance; and the Nation was not gaming. *Supra* at 9–10. The Village's Answer also did not address IGRA or cite the 1958 Ordinance. JA__ [Dkt.126-32].

In opposition to the Nation's motion for summary judgment, however, the Village did raise gaming and IGRA in two respects. First, even on reservation lands (and separately from the authority *Sherrill* later conferred), localities "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). The Village argued that "exceptional circumstances" existed because the Nation "planned to open a Class II gaming facility," which the Village claimed would "impact … the local community." JA__ [Dkt.137-8 at 21–22, 23]. Second, the Village sought "in the alternative, a preliminary injunction precluding the Nation from … gaming … until … the Nation complies with" IGRA. JA__ [*Id.* at 23].

When the Village proclaims that "the Cayugas relied on IGRA preemption starting no later than February 2004," Br. 27 n.10, it fails to mention that the Nation was just responding to these Village arguments. First, the Nation argued that the

Village could not rely on its gaming-related concerns as "exceptional circumstances" given that IGRA "preempts … local attempts to … prohibit gaming activities on Indian lands." JA__ [Dkt.126-27 at 11-19]. Second, the Nation argued that the Village could not seek a preliminary injunction based on compliance with IGRA because it 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." JA__ [*Id.* at 19, 21].[8]

On May 20, 2004, the district court agreed with the Nation. As to the Village's injunction request, the court deemed it "questionable" whether even "a liberal reading" of the Village's pleadings "provide[d] … notice of [an IGRA] claim," *Union Springs I*, 317 F. Supp. 2d at 149 n.21, and "whether the alleged harm is sufficiently imminent to warrant injunctive relief"—because "[t]he Nation has not yet commenced any gaming," *id.* at 150. Ultimately, the Court found these issues "need [not] be addressed because defendants have not made the requisite showing

[8] For similar reasons, there is nothing to the Village's claim that Nation counsel in 2005 and 2015 "false[ly]" "denied … rel[ying] on IGRA preemption in *Union Springs I*." Br. 27 n.10. In 2005, Nation counsel agreed with Judge McCurn that the "Nation didn't interpose this IGRA argument before Judge Hurd." JA__ [Dkt.126-37 at 5–6]. That statement correctly reflects that it was the Village that raised gaming and IGRA issues in the 2003 litigation, and that the Nation's claims were not based on IGRA. In 2015, Nation counsel said that the Nation did not "invoke[] IGRA" as "a defense." JA__ [Dkt.126-39 at 5]. That statement also correctly reflected that the Nation did not base its claims on IGRA.

of irreparable harm." *Id.* As to "exceptional circumstances," the Court deemed the "planned use" for gaming "irrelevant" because "the Nation correctly points out that it is governed by IGRA, which preempts state and local attempts to regulate gaming on Indian lands." *Id.* at 148. This Court then granted judgment to the Nation based on the Nation's broad argument that the Village's ordinances were categorically inapplicable because 271 Cayuga Street was "Indian Country." *Id.* at 144. Gaming began in May 2004. JA__ [Dkt.137-2 ¶ 4].

When the case returned to district court after this Court's post-*Sherrill* remand, the Village did not reassert its "exceptional circumstances" argument—understandably, given its view that *Sherrill* gave it authority to apply its laws regardless. JA__; *see* JA__ [Dkt.137-13 at 11-16; *see* Dkt.137-9]. The Village also did not renew its request for an injunction requiring compliance with IGRA.

As before, the Nation raised no IGRA claim. Its post-*Sherrill* briefs mentioned IGRA only to underscore 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." JA__; *accord* JA__ [Dkt.137-11 at 25-26; *accord* Dkt.137-14 at 8 n.3]. The Village, in response, did not dispute the point or cite IGRA. *See* JA__ [Dkt.137-15].

The court agreed with the Village's *Sherrill* argument and held that the Nation could not rely on inherent sovereignty to "assert[] immunity from state and local zoning laws." *Union Springs II*, 390 F. Supp. 2d at 206. It did not discuss IGRA.

B. Issue Preclusion Does Not Apply.

With the Village's distortions corrected, little more is needed to show that the Village's issue-preclusion argument fails. 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 …," issue preclusion is no bar. *Id.* Here, a quick review of the post-*Sherrill* remand decision in 2005—the only decision adverse to the Nation—shows that no court ever decided an IGRA issue against the Nation. *Union Springs II*, 390 F. Supp. 2d at 205–06.

The Village's argument relies on a nonsequitur. It observes that the 2004 decision stated that IGRA "preempts … attempts to regulate gaming on Indian lands," and ruled for the Nation. Br. 28 (quoting *Union Springs I*, 317 F. Supp. 2d at 148). Then, the Village notes, the 2005 decision ruled against the Nation. *Id.* So, the Village implies, the 2005 decision *must have* decided IGRA preemption against the Nation. *Id.* The facts recounted above, however, show why that is wrong: The 2004 decision discussed IGRA in addressing the Village's argument that

"exceptional circumstances" allowed it to regulate the Nation's activities even in "Indian country." *Union Springs I*, 317 F. Supp. 2d at 148. After *Sherrill* provided some regulatory authority separate from the "exceptional circumstances" doctrine, the Village dropped the argument. The 2005 decision thus had no need to—and did not—address this argument or IGRA.

C. Claim Preclusion Does Not Bar The IGRA Claims.

The Village's claim-preclusion argument also fails. A "prior judgment is res judicata only as to suits involving the *same cause of action*." *Proctor v. LeClaire*, 715 F.3d 402, 412 (2d Cir. 2013). Whether two suits concern the same cause of action "depends in part on 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." *TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 499 (2d Cir. 2014). Here, for three reasons, the district court correctly held that the 2003 suit and this suit are not the same. This suit concerns *new* threats, arises from a *different* dispute about a different Village ordinance, and centers on IGRA preemption issues the Nation *could not have* raised when it filed its 2003 suit.

1. This Suit Is Based On New Threats.

The Village ignores the settled principle that if "the second litigation involve[s] different … and especially subsequent transactions, there generally is no

claim preclusion." *Proctor*, 715 F.3d at 412 (quoting *SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1464 (2d Cir. 1996)). That is because claim preclusion "has very little applicability to a fact situation involving a continuing series of acts, for generally each act gives rise to a new cause of action." *Id.* (quoting *Crowe v. Leeke*, 550 F.2d 184, 187 (4th Cir. 1977)). Instead, parties must look to *issue* preclusion, where applicable, to prevent repetitive "litigat[ion of] the same issues." *Crowe v. Leeke*, 550 F.2d 184, 187 (4th Cir. 1977) (cited in *Proctor*).

That principle suffices to foreclose the Village's argument. The 2003 suit arose from threats the Village made in 2003, while this suit arises from Orders to Remedy issued in 2013 and 2015—which, indeed, had an entirely different basis than the 2003 threats, *infra* Section IV.C.2. This case thus falls squarely within *Proctor*'s rule that when a second suit is based on "different … and … subsequent transactions, there generally is no claim preclusion." 715 F.3d at 412. As then-Judge Sotomayor explained, so long as the "facts that have accumulated after the first action are enough on their own to sustain the second," preclusion is inapplicable. *Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 384 (2d Cir. 2003). "Without a demonstration that the conduct complained of in the [second] action occurred prior to the initiation of the" first, *res judicata* is simply inapplicable. *Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 369 (2d Cir. 1997); *see TechnoMarine*, 758

F.3d at 502–03 (preclusion inapplicable because plaintiffs' "present claim[was] based on the new acts of infringement" committed after the prior suit).

That rule applies even if the two sets of facts "were part of [the] same pattern." *Williams v. Perry*, 229 F.3d 1136, 2000 WL 1506086, at *4 (2d Cir. 2000) (unpublished table decision). For example, even if a plaintiff does not succeed in its first attempt to enjoin a violation of the antitrust laws, claim preclusion does not bar a second action if the conduct continues. *See Storey*, 347 F.3d at 384 (discussing *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 327–28 (1955)). 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)). Because the Village's 2013 and 2015 Orders to Remedy stand on their own to trigger the Nation's right to bring this suit, claim preclusion is no barrier.

2. This Suit Arises From A Fundamentally Different Dispute.

Second, the Orders to Remedy that triggered the 2003 suit teed up a fundamentally different dispute than the 2013 and 2015 Orders. "The fact that several operative facts may be common to successive actions between the same parties does not mean that a judgment in the first will always preclude litigation of the second." *Proctor*, 715 F.3d at 412 (citing *Interoceanica Corp. v. Sound Pilots, Inc.*, 107 F.3d

86, 91 (2d Cir. 1997)). Rather, the causes of action must be "the same," meaning that the later claim must be so "related to the claims that were asserted in the first proceeding that it should have been asserted." *Pike v. Freeman*, 266 F.3d 78, 91 (2d Cir. 2001) (Sotomayor, J.). Where an earlier claim "involved different [rights], different legal theories, and different conduct—occurring at different times," "claim preclusion [does] not and c[an] not bar" a second suit. *Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 140 S. Ct. 1589, 1596 (2020).

That rule applies here. As the district court explained, the 2003 suit stemmed from the Village's 2003 attempt to apply its "zoning and land-use laws … to renovation and construction" at 271 Cayuga Street, notwithstanding the Nation's position that those laws were categorically inapplicable. JA__; *see* JA__ [Dkt.147 at 32; *see* Dkt.126-29 ¶ 26]. The Village thus cited the Nation for not providing (for example) "an asbestos survey or filed architect plans"—not for violating any anti-gaming law. JA__ [Dkt.126-29 ¶ 28]. Indeed, the Village concedes it "did not rely on the [1958] Ordinance in the prior litigation." Br. 34. By contrast, the dispute here is all about gaming—namely, the Village's attempts in 2013 and 2015 to "apply … local law(s) to regulate tribal gaming activities despite an assertion of IGRA's preemptive effect." JA__ [Dkt.147 at 32].

The Village's response is to say that, no matter how different the disputes, the Nation should have picked a fight about gaming because the Nation supposedly

"knew about [1958] Ordinance," "planned … gaming" at the site, and could have brought a "preenforcement challenge." Br. 38. The Village is wrong that the Nation could have argued IGRA preemption in October 2003, *infra* Section IV.C.3—but anyway, that would be insufficient for preclusion. A preenforcement IGRA challenge would not have been the "same claim": It would have focused on different "transaction[s]" (the gaming that would occur at 271 Cayuga Street, not renovations), and different "evidence" and "essential" "facts" (namely, the facts concerning IGRA preemption, *supra* at 10–11, not whether the Nation's inherent sovereignty entitled it to immunity from land-use laws). *TechnoMarine*, 758 F.3d at 499.

Indeed, the Village's argument is nearly identical to the argument rejected in *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). There, Texas claimed the plaintiffs' earlier challenge to one abortion regulation in a statute (the "admitting-privileges requirement") precluded a second challenge to another (the "surgical-center requirement"). Just like the Village, Br. 31, Texas argued that the challenges "involve[d] the same parties and … facilities" and "provisions [that] were motivated by a common purpose [and] administered by the same state officials." 136 S. Ct. at 2307. The Court, however, explained that it had "never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit," and that "lower courts normally treat challenges to distinct regulatory requirements as 'separate claims.'" *Id.* at 2308. That "approach

makes sense," *Hellerstedt* continued, because "treating every statutory enactment as a single transaction which a given party would only be able to challenge one time" would "encourage a kitchen-sink approach to any litigation." *Id.* The Village's position—which would give the Nation only one chance to litigate challenges to *any* Village law affecting Lakeside Entertainment—is even less tolerable.

3. *The Nation Could Not Have Raised Its IGRA Preemption Arguments In October 2003.*

Third, the Nation could not have raised IGRA preemption when it filed the 2003 suit. The critical rule is that, for "the 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 (citation omitted). Thereafter, 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. *Id.* at 370. But it "is not required to do so." *Id.* And absent amendment, preclusion "does not bar litigation of claims arising from transactions" occurring 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*"). Where the claims "could not have been asserted" in the first suit, they are "not barred in the second." *Pike*, 266 F.3d at 91 & n.15.

Under that settled rule, this is an easy case. The Village cites *Tweed-New Haven Airport Authority v. Tong*, 930 F.3d 65 (2d Cir. 2019), *cert. denied*, 140 S.

Ct. 2508 (2020), for the proposition that Article III standing can exist to challenge preempted statutes without express enforcement threats. But standing aside, the Nation had no ripe IGRA *defense* to raise in October 2003. IGRA, again, preempts "the field in the governance of gaming." *Mashantucket*, 722 F.3d at 469–70. In October 2003, however, the Nation had not entered that field. The Nation had not enacted a gaming ordinance, the NIGC had not approved such an ordinance, and the Nation would not begin gaming until May 2004. *Supra* at 9–10. Had the Nation in October 2003 raised an IGRA preemption claim, it would have been asking the court to hypothesize that (1) the Nation would enact a gaming ordinance; (2) the 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. And "res judicata does not apply to claims that were not ripe at the time of the first suit." *Rawe v. Liberty Mut. Fire Ins. Co.*, 462 F.3d 521, 530 (6th Cir. 2006).

The giveaway that the Village cannot win under this settled law is how fervently it argues that the *Computer Associates* principle should not apply. The Village depicts this principle as a "narrow[]" rule limited to "serial violations of copyrights, trademarks, domain names, securities laws, antitrust laws and other 'abatable' serial violations of law like trespass." Br. 24. But this limit is completely invented; no decision of this Court supports it. Quite to the contrary, this Court has

applied the *Computer Associates* principle—that preclusion turns on the facts when the complaint was filed—not just to copyright suits, 126 F.3d at 369, and securities suits, *First Jersey*, 101 F.3d at 1464, but to retaliatory-discharge claims, *Soules v. Connecticut, Department of Emergency Services & Public Protection*, 882 F.3d 52, 56 (2d Cir. 2018), and due-process claims, *Proctor*, 715 F.3d at 412.

Hence, the Third Circuit correctly identified this Court as among "[f]ive … Courts of Appeals … adopt[ing] a bright-line rule that *res judicata* does not apply to events post-dating the … complaint." *Morgan v. Covington Twp.*, 648 F.3d 172, 177–78 (3d Cir. 2011). As the Seventh Circuit explained, it "does not matter whether, as in the case of harassment, the unlawful conduct is a practice, repetitive by nature … that happens to continue after the first suit is filed, or whether it is an act, causing discrete, calculable harm, that happens to be repeated." *Smith v. Potter*, 513 F.3d 781, 783 (7th Cir. 2008). Because post-October 2003 events suffice to support this suit, and because indeed the Nation could not have raised its IGRA claims in October 2003, claim preclusion is no bar.

4. The Village's Contrary Arguments Fail.

The Nation agrees that the Village's lead authority—*Waldman v. Village of Kiryas Joel*, 207 F.3d 105 (2d Cir. 2000)—is "instructive." Br. 32. Namely, *Waldman* underscores why preclusion is inapplicable. Waldman first sued the Village of Kiryas Joel claiming that the village's alleged theocracy discriminated

against him in violation of "the Establishment and Free Exercises Clauses." 207 F.3d at 107. Waldman then sued again, claiming that the "pervasive entanglement" between the village and the church violated the Establishment Clause. *Id.* at 108, 112. This Court found claim preclusion because, in each of the three respects detailed above, *Waldman* was the opposite of this case.

First, Waldman's second suit was not about "subsequent" transactions that post-dated the first, *Proctor*, 715 F.3d at 412; rather, the second suit could not prevail without relying on village actions preceding the first. *Waldman* cataloged the "overlapping" and "new" facts, concluding that the "new allegations … do not … establish the sort of pervasive … entanglement" necessary to make out Waldman's claims in his second suit. *Waldman*, 207 F.3d at 113. Second, *Waldman* found that the fundamental dispute—the "ongoing and pervasive entanglement between church and state"—was the same as between the two suits. *Id.* at 110. Third, *Waldman* concluded that all the necessary facts had "existed for over two decades" and Waldman thus "could … have brought his current claim" as "part of *Waldman I*." *Id.* at 112. For the reasons given above, this case differs in each respect.

The Village also asserts that *Waldman* applied a different legal rule than *Computer Associates*. Br. 26–27. But in fact, *Waldman* reaffirmed that 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; *accord NLRB v. United Techs. Corp.*, 706 F.2d 1254, 1260 (2d Cir. 1983) (the Village's other favored authority, which applied the same rule to "conclude that the present proceeding is not barred by res judicata"). That rule simply did not help Waldman because it was "not plausible to characterize Waldman's [second] claim as one based in any significant way" upon facts post-dating his first suit. 207 F.3d at 113.[9] In so holding, the Court looked to the plaintiff's "trial strategy" in his first suit only to confirm what his claims always were, not to sweep in post-complaint events. *Id.* at 111; *contra* Br. 26.[10]

Finally, the Village argues that the relief sought in 2003 was broad enough to "extend[] to the [1958] Ordinance." Br. 29. But that broad relief reflected the breadth of the theory the Nation pressed in 2003, when it contended that its inherent sovereignty rendered local ordinances categorically inapplicable. JA__ [Dkt.126-29 ¶ 26]. The Supreme Court has rejected the argument that claim preclusion bars a

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[9] Indeed, *Waldman* cautioned that its narrow preclusion holding did not "bar Waldman from instituting a new suit to prevent enforcement of the Village ordinance passed to block religious dissidents from marching on the Rabbi's street," or from seeking an "injunction prohibiting the location of the polling place in the Congregation's place of worship" or "protecting his candidacy for public office from the Congregation's interference." *Id.* at 113.

[10] This Court has applied preclusion where a party "effectively amended his complaint … through motion papers." *Soules*, 882 F.3d at 56. The Village has never made that argument here, and of course, cannot do so for the first time in its appellate reply. Anyway, the 2003 suit's record shows that IGRA issues entered that case only due to the Village's own arguments. The Nation did not "constructively amend" its complaint by responding.

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).[11]

D. Claim Preclusion Does Not Bar The Sovereign Immunity Claim.

The Village's citation-free preclusion argument as to sovereign immunity, Br. 40–41, fails for these reasons and more. Not only does this suit concern new threats based on new grounds, *supra* Section IV.C, but the Village ignores settled immunity law. It argues, via preclusion, that the Nation's 2003 suit waived its immunity as to any later Village action to enforce any local law at Lakeside Entertainment. But to "relinquish … immunity, a tribe's waiver must be 'clear,' and thus it 'cannot be implied but must be unequivocally expressed.'" *Seneca Cnty.*, 761 F.3d at 221 n.1. The Nation's 2003 suit did not "unequivocally" waive immunity as to later enforcement actions. Indeed, precisely because waiver must be "clear," 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); *see Wagoner Cnty. Rural Water Dist. No. 2 v. Grand River Dam Auth.*, 577 F.3d 1255, 1260 (10th Cir. 2009) (Tacha, J., joined by Gorsuch, J.).

[11] The Village is also wrong that claim preclusion bars Count II's reliance on 18 U.S.C. § 1166. Br. 40. As the Village observes, that "section was enacted … along with IGRA," and thus the same reasoning applies. *Id.*

In fact, in a series of suits the federal government brought and defended "on behalf of … Indian Nations," the Supreme Court 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 (1940). 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," the Court held that "immunity should prevail." *Id.* at 514–15.

CONCLUSION

The Court should affirm the judgment below.

Dated: October 27, 2020 Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Local Rule 32.1(a)(4)(A) because this brief contains 13,926 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

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Dated: October 27, 2020

By: */s/* David W. DeBruin
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CERTIFICATE OF SERVICE

I hereby certify that on October 27, 2020, I electronically served the foregoing Brief via ECF upon the following:

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