# 19-0032-cv

# United States Court of Appeals

*for the*

# Second Circuit

CAYUGA INDIAN NATION OF NEW YORK,

*Plaintiff-Counter Defendant-Appellee,*

– v. –

SENECA COUNTY, NEW YORK

*Defendant-Counter Claimant-Appellant.*

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

## BRIEF OF THE CAYUGA NATION

Daniel J. French
Lee Alcott
BARCLAY DAMON, LLP
125 E. Jefferson Street
Syracuse, NY 13202
(315) 425-2700

David W. DeBruin
Zachary C. Schauf
Caroline C. Cease*
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000

*Admitted only in Alabama, not admitted in the District of Columbia. Practicing under the partnership of Jenner & Block LLP.

*Attorneys for Plaintiff-Counter Defendant-Appellee*

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

## CASES

**STATUTES**

**OTHER AUTHORITIES**

## INTRODUCTION

The issue that decides this appeal is one this Court has decided twice. Although federal law usually forbids states from taxing Indian-owned reservation lands, the Supreme Court held in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), that New York could tax certain properties that an Indian nation lost in unlawful transactions hundreds of years ago and later reacquired on the open market. Thereafter, New York's subdivisions have at times tried to foreclose on such properties to collect debts they claim the Indian nations owe. The nations (while disputing the debts under state law) have argued that tribal sovereign immunity from suit bars foreclosure. Twice, this Court has agreed.

In *Oneida Indian Nation of New York v. Madison County*, 605 F.3d 149 (2d Cir. 2010), the Court held that such "foreclosure[s] … are barred." *Id.* at 160, *vacated as moot and remanded*, 562 U.S. 42 (2011). And when Seneca County appealed from a preliminary injunction against the foreclosures *in this very case*, the Court again refused to "limit … tribal immunity from suit so as to permit states to bring foreclosure suits to recover uncollected taxes." *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 761 F.3d 218, 220 (2d Cir. 2014).

On remand, the District Court followed this precedent and entered a permanent injunction. This Court should do the same and affirm. While the County may intend to seek Supreme Court review, there is no open question in this Circuit.

Buried in a footnote is the County's single argument for why this precedent is not controlling—namely, the claim that the County has discovered a new argument for limiting tribal sovereign immunity. In *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), the Supreme Court rejected the argument that an "in rem" exception to tribal sovereign immunity, supposedly based on *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), allowed a "quiet-title" action to proceed—foreclosing one of the arguments the County pressed in its prior appeal. A two-Justice dissent, however, would have held that quiet-title actions could go forward based on something called the "immovable-property exception." 138 S. Ct. at 1657 (Thomas, J., dissenting). The County says this exception's application here presents a novel question that "should be addressed by this Court in the first instance." Cty. Br. 13 n.8.

But the County's claims about its "new argument" do not allow it to escape this Court's precedent. In *Cayuga Indian Nation*, this Court explained that tribal sovereign immunity is an "avowedly broad principle" and rejected the "propriety of drawing distinctions that might constrain the broad sweep of that immunity in the absence of express action by Congress." 761 F.3d at 220 (internal quotation marks omitted). And one of the "distinctions" that Seneca County urged in its prior appeal was the immovable-property exception. The County raised the same arguments it presses here and cited many of the same cases. Yet this Court "decline[d] to draw

the novel distinctions … that Seneca County ha[d] urged," including this one. *Id.* at 221. Nothing in *Upper Skagit* or any other decision has dislodged this holding.

Even had this Court not already rejected the County's arguments, they would fail. That is so for many reasons, but most of all this: The County relies on the "common law" immunity principles applicable to foreign countries, which Justice Thomas believed allowed *Upper Skagit*'s quiet-title action to proceed. Cty. Br. 14. But as to tax-enforcement actions like this one, the common law *granted* immunity. That is because such enforcement actions, unlike quiet-title actions, are—at bottom—about money, not property. A local government claims the foreign sovereign owes a money debt (which can be satisfied from any asset) and seeks to seize the property as a stand-in for money it contends is owed. Such money-seeking actions fall outside the immovable-property exception's rationale and in the heartland of what sovereign immunity protects against. Thus, the common law's compendium—the Restatement (Second) of Foreign Relations Law—affirmed that immunity "prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial state," and emphasized that "no case has been found in which the property of a foreign government has been subject to foreclosure of a tax lien or a tax sale." *Restatement (Second) of Foreign Relations Law* § 65 cmt. d (Am. Law Inst. 1965). While the County's brief is chock full of ancient citations, it too fails to cite one case that has permitted a foreclosure action like this one.

As the Supreme Court recently reaffirmed, it "is fundamentally Congress's job, not [the courts'], to determine whether or how to limit tribal immunity." *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782, 800 (2014). That rule precludes the County's attempt—via misbegotten analogies concerning the immovable-property exception—to craft a new exception from tribal sovereign immunity and displace "the plenary power of Congress to define and otherwise abrogate tribal sovereign immunity." *Cayuga Indian Nation*, 761 F.3d at 220.

Affirmance also accords with the federal government's consistent position. In the prior appeal in this case, the federal government urged this Court to hold that "in the absence of an affirmative waiver, [sovereign immunity] bars this foreclosure action against lands possessed by a federally recognized Indian tribe." Letter Br. of United States as *Amicus Curiae* at 2, *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 ("U.S. PI *Amicus*"). And just last year in *Upper Skagit*, the Solicitor General urged that "[s]tate courts cannot circumvent tribal sovereign immunity by exercising *in rem* jurisdiction over tribal property." Br. for United States as *Amicus Curiae* at 7, *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018) (No. 17-387), 2018 WL 637357 ("U.S. *Upper Skagit* Br."). In that quiet-title case, unlike this one, it was undisputed that the common-law immovable-property exception would apply if the "suit had

been brought against a foreign state." *Id.* at 25, 29. But even so, the federal government told the Court that it "[s]hould [n]ot [a]dopt [a]n [i]mmovable-[p]roperty [e]xception," explaining that tribal sovereign immunity is based on tribes' "'special brand of sovereignty' that 'rests in the hands of Congress'" to define or modify. *Id.* at 29–30 (quoting *Bay Mills*, 134 S. Ct. at 2037). That same principle disposes of this far easier case.

## STATEMENT OF ISSUE PRESENTED FOR REVIEW

In its 2014 decision at the preliminary-injunction phase, this Court rejected Seneca County's argument seeking to "limit the doctrine of tribal immunity from suit so as to permit states to bring foreclosure suits to recover uncollected taxes levied against the property of Indian tribes." *Cayuga Indian Nation*, 761 F.3d at 220. It "decline[d] to draw the novel distinctions … that Seneca County ha[d] urged," *id.* at 221, including the arguments Seneca County raises here based on the immovable-property exception and *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005). In this appeal, the issue presented is whether the District Court committed reversible error when it applied that holding to enter a final judgment and a permanent injunction in the Nation's favor.

## STATEMENT OF THE CASE

### A. The Cayuga Nation's Properties And Seneca County's Foreclosure Proceedings.

The Cayuga Nation is a sovereign Indian nation, recognized as such under federal law. *See* Indian Entities Recognized and Eligible To Receive Services from the United States Bureau of Indian Affairs, 83 Fed. Reg. 34,863, 34,863 (July 23, 2018). In 1794, the United States recognized the Nation's 64,000-acre reservation—located within what today are Seneca and Cayuga counties—and pledged that the "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.

Congress never disestablished the Cayuga Nation's federal reservation, nor authorized the sale of the Nation's reservation lands. *See generally Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 260 F. Supp. 3d 290, 307–15 (W.D.N.Y. 2017) (collecting authorities). In 1795 and 1807, however, New York unlawfully purported to purchase all of the Nation's reservation lands. *Id.* at 293–94, 309; *cf.* 25 U.S.C. § 177 ("No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution."). In recent years, the Nation has repurchased parcels of that

land—including land within Seneca County—on the open market. A-65–A-66; A-365.

Seneca County contends that the Nation owes *ad valorem* property taxes on these parcels, and it seeks to collect the money debt it claims the Nation owes by foreclosing on its properties. A-65–A-66; A-368. Usually, states and their subdivisions cannot tax Indian-owned properties on Indian reservations. *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 458 (1995). But in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), the Supreme Court held that the Oneida Nation could not "demand [an] exemption … from local taxation" of similar parcels it reacquired within its reservation, which shares much of the same history as the Cayuga Nation's reservation. *Id.* at 216. The Court explained that the "long lapse of time" since the unlawful sales, "and the attendant dramatic changes in the character of the properties," precluded the Oneida from asserting an exemption from property taxes. *Id.* at 216–17. This Court has applied similar principles to the Cayuga Nation. *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 268–69 (2d Cir. 2005); *see Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 390 F. Supp. 2d 203, 206 (N.D.N.Y. 2005).

New York, however, provides its own exemptions under state law. It exempts from taxation the "real property" in "any Indian reservation owned by the Indian nation," N.Y. Real Prop. Tax Law § 454, and in "any Indian reservation in this state,

so long as the land of such reservation shall remain the property of the nation," N.Y. Indian Law § 6. And the New York Court of Appeals has held that, despite *Sherrill*, the Cayuga Nation's reservation remains a "qualified reservation" under New York law. *Cayuga Indian Nation of N.Y. v. Gould*, 930 N.E.2d 233, 247 (N.Y. 2010) (quoting N.Y. Tax Law § 470(16)(a)). The Cayuga Nation therefore maintains that it owes no property taxes on the properties it owns (which are within the Nation's reservation)—and that, in any event, its sovereign immunity from suit bars Seneca County from using foreclosure to collect the debts it claims the Nation owes.

It is hardly unusual that *Sherrill* allows Seneca County to *impose* taxes on Nation-owned properties, even while sovereign immunity continues to bar the County from suing to enforce any debts by foreclosing on these properties. "There is a difference between the right to demand compliance with state laws and the means available to enforce them." *Madison Cty.*, 605 F.3d at 158 (quoting *Kiowa Tribe of Oklahoma v. Mfg. Techs., Inc.*, 523 U.S. 751, 755 (1998)). Thus, to "say substantive state laws apply … is not to say that a tribe no longer enjoys immunity from suit." *Id.* (quoting *Kiowa*, 523 U.S. at 755). For example, the Supreme Court has stressed that even when a state "may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes." *Id.* (quoting *Kiowa*, 523 U.S. at 755).

Nonetheless, in late 2010, the County initiated proceedings to foreclose on five Nation-owned properties (later merged into four) for nonpayment of taxes, directing a series of "Tax Enforcement Notifications" at the Nation. A-22–A-24; A-34. The Nation commenced this action seeking permanent declaratory and injunctive relief against the County's foreclosures. A-18–A-20. The Nation claimed that New York law exempted the properties from taxation, A-18 (Am. Compl. ¶¶ 21–22), and that, regardless, the County's foreclosures were barred by the Nation's sovereign immunity from suit and the federal Non-Intercourse Act (25 U.S.C. § 177), A-15–A-18 (Am. Compl. ¶¶ 14–21). The Nation also sought a preliminary injunction, relying on sovereign immunity from suit. A-33.

**B. The Preliminary Injunction And This Court's Affirmance.**

The District Court granted a preliminary injunction. It explained that "[e]ven assuming that Seneca County has the right to impose property taxes on the subject parcels owned by the Cayuga Indian Nation, it does not have the right to collect those taxes by suing to foreclose on the properties, unless Congress authorizes it to do so, or unless the Cayuga Indian Nation waives its sovereign immunity from suit." A-37. This Court's 2010 decision in *Madison County*, the District Court found, "clearly reject[ed]" Seneca County's contrary arguments. A-44.

In its interlocutory appeal, Seneca County argued that sovereign immunity did not bar its foreclosures, for at least three reasons. First, in its "Point I," the County

claimed that *Sherrill* established not just that counties may impose property taxes on reservation lands, but that "an Indian tribe may *not* rely on immunity to prevent eviction following foreclosure." Br. for Def.-Appellant Seneca Cty. at 14, *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 (emphasis in original) ("Cty. PI Br.") (relevant excerpts attached as an addendum).

Second, in its "Point II," the County contended that sovereign immunity does not bar foreclosures "because they involve *in rem* … jurisdiction"—*i.e.*, the suit is formally against the property itself—"rather than *in personam* jurisdiction." *Id.* at 18–19. The County relied in part on *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), which it claimed recognized this distinction. Cty. PI Br. 19.

Third, in its "Point III," the County argued 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," relying on cases in which U.S. states and foreign countries supposedly lacked sovereign immunity as to real property they owned outside their domains. *Id.* at 27–28; Reply Br. for Def.-Appellant Seneca Cty. at 14–23, *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 761 F.3d 218, 220 (2d Cir. Apr. 17, 2013) (No. 12-3723), ECF No. 67 ("Cty. PI Reply") (relevant excerpts attached

as an addendum). That argument and those authorities are the same ones Seneca County presses here, as detailed below. *Infra* Part I.

This Court rejected those arguments. The Court's prior "opinion in *Madison County* squarely addressed the question presented here and held that tribal sovereign immunity … bars these foreclosure actions." 761 F.3d at 220. And while Seneca County observed that the Supreme Court had "vacate[d]" *Madison County* after it became moot while on appeal, this Court found that it "need not attempt to discern [any] implied message communicated by th[is] vacatur." *Id.* That was because the Supreme Court had subsequently "issued further guidance regarding both the continuing vitality of the doctrine of tribal sovereign immunity from suit and the propriety of drawing distinctions that might constrain the broad sweep of that immunity in the absence of express action by Congress." *Id.* The Court stressed that in *Michigan v. Bay Mills Indian Community*, 572 U.S. 782 (2014), the Supreme Court made clear that "tribal sovereign immunity from suit is an avowedly broad principle," and that the Supreme Court has "thought it improper suddenly to start carving out exceptions … opting instead to defer to the plenary power of Congress to define and otherwise abrogate tribal sovereign immunity from suit." 761 F.3d at 220 (internal quotation marks omitted).

With that backdrop, this Court "decline to draw the novel distinctions—such as a distinction between *in rem* and *in personam* proceedings—that Seneca County

has urged us to adopt." *Id.* at 221. The Court also explained that it could "read no implied abrogation of tribal sovereign immunity from suit into … *Sherrill* or … *Yakima*." *Id.* The Court therefore "affirm[ed] the district court's injunction of the County's foreclosure proceedings against the Cayuga Nation's property." *Id.*[1]

**C. Remand And Permanent Injunction.**

On remand, the case proceeded to cross-motions for summary judgment. Meanwhile, the Supreme Court decided *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649 (2018), which addressed whether tribal sovereign immunity bars an *in rem* action "to quiet title in a parcel of land [allegedly] owned by a Tribe." *Id.* at 1652 (quotation marks omitted). The Court held that the Washington Supreme Court had erred by relying on *Yakima* as establishing that sovereign immunity does not apply to *in rem* actions—explaining that "*Yakima* did not address the scope of tribal sovereign immunity." *Id.* But the Court declined to address other arguments concerning the scope of tribal sovereign immunity. *Id.* at 1654. In dissent, Justice Thomas (joined by Justice Alito) argued that the quiet-title action at issue there could proceed "based on the immovable-property exception to sovereign immunity." *Id.* at 1657 (Thomas, J., dissenting).

[1] After this Court's opinion, the County attempted to seek Supreme Court review, but the Court dismissed the petition as untimely. *See* Letter from Scott S. Harris, Clerk, U.S. Supreme Court, *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 761 F.3d 218 (2d Cir. Dec. 8, 2014) (No. 12-3723), ECF No. 130.

Because *Upper Skagit* had left this Court's precedent undisturbed, the District Court reached the same result as before. It found that "for essentially the same reasons stated in its Decision and Order … granting the preliminary injunction and in the Second Circuit's decision affirming that ruling, which have not changed, … the Cayuga Nation is entitled to summary judgment on its claims seeking declaratory and permanent injunctive relief based upon tribal sovereign immunity from suit." SPA-8. And because this ruling based on tribal sovereign immunity was sufficient to grant the Nation the full measure of relief it had sought, the District Court did not "reach the remaining aspects of the Nation's summary judgment motion" based on the Non-Intercourse Act and New York state law. *Id.* It therefore dismissed these claims as moot, without prejudice. SPA-5 & n.7; SPA-9.

This appeal followed.

## SUMMARY OF ARGUMENT

I. This Court's precedent squarely forecloses the County's argument that this Court should permit the foreclosures here to proceed based on an "immovable property exception" to sovereign immunity. At the preliminary-injunction stage, this Court considered and rejected an identical request. *Cayuga Indian Nation*, 761 F.3d at 220. It held that "tribal sovereign immunity from suit is an avowedly broad principle," and it "decline[d] to draw the novel distinctions … that Seneca County has urged us to adopt." *Id.* at 220–21 (internal quotation marks omitted). One of

the distinctions the County proposed was the "immovable property" exception. No intervening development has abrogated that precedent, which continues to control.

II.A. *Cayuga Indian Nation* is correct. The "broad principle" of tribal sovereign immunity reflects the respect owed to Indian nations as sovereigns preexisting the Constitution. *Bay Mills*, 572 U.S. at 790. Hence, the "baseline position ... is tribal immunity," absent tribal waiver or congressional abrogation. *Id.* The Supreme Court has "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred"—applying immunity "both on and off [a] reservation" and not distinguishing "between governmental and commercial activities." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754–55 (1998) (internal quotation marks omitted).

In particular, this "baseline" extends to suits involving property. "[T]here is no distinction between suits against [a] government directly, and suits against its property." *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868). And the Supreme Court has squarely held that this rule applies to bar tax foreclosure actions against real property owned by the United States. *United States v. Alabama*, 313 U.S. 274 (1941). It is for Congress alone to depart from this baseline; "the Supreme Court (like this Court) has 'thought it improper suddenly to start carving out exceptions.'" *Cayuga Indian Nation*, 761 F.3d at 220 (quoting *Bay Mills*, 572 U.S. at 790). While that approach has yielded dissatisfaction in some quarters—it means, for example,

that Indian sovereigns are immune from suits arising out of commercial activities even though foreign nations and states are not—the Supreme Court has declined the invitation to embark on a judicial narrowing of tribal sovereign immunity.

B. The County here seeks exactly this sort of judicial narrowing. Contending otherwise, the County claims that if this case involved a "foreign or State sovereign[]" that owned real property in "another's sovereign territory," the "immovable property" exception would permit the foreclosures here to proceed—and it asks this Court to deem the same rule applicable to Indian nations. Cty. Br. 13, 18. But for two reasons, the County's arguments lack merit.

First, the County gets the common law wrong: Even for foreign and state sovereigns, the "immovable property" exception did not apply to tax enforcement actions. This exception, where it governs, reflects the view that "[a] territorial sovereign has a primeval interest in resolving all disputes over *use or right to use* of real property within its own domain." *Upper Skagit*, 138 S. Ct. at 1658 (Thomas, J., dissenting) (emphasis added) (quotation marks omitted) (alteration in original). By contrast, tax enforcement actions are about money. There is no question that, today, the Cayuga Nation owns and has the "use or right to use" of the disputed properties. Instead, the County claims that the Nation owes it a debt—which could be satisfied from any assets—and seeks to seize property as a stand-in for the money it claims is owing. The desire to obtain money falls outside the immovable-property exception's

rationale. Hence, Comment d to Section 65 of the Restatement (Second) of Foreign Relations Law explained that sovereign immunity "prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial state," and emphasized that "no case has been found in which the property of a foreign government has been subject to foreclosure." Restatement (Second) of Foreign Relations Law § 65 cmt. d (Am. Law Inst. 1965). The County cites not one case or source showing that the "immovable property" exception applies to money-seeking tax enforcement actions.

The County's position is especially meritless because this case arises on the Nation's reservation. When the separate opinions in *Upper Skagit* suggested that the immovable-property exception might apply to quiet-title actions, they deemed it important that *Upper Skagit* involved non-reservation land. That is why these Justices believed it might be appropriate to treat Indian nations in Washington state like a foreign nation present there. That reasoning does not apply to lands on an Indian tribe's own reservation.

Second, regardless of whether foreign and state sovereigns were subject to tax foreclosure actions at common law, the County still would lose here. It is undisputed that the *federal* sovereign is not subject to a tax foreclosure action, *United States v. Alabama*, 313 U.S. 274, and "tribal sovereign immunity is deemed to be

coextensive with the sovereign immunity of the United States." *Somerlott v. Cherokee Nation Distribs., Inc.*, 686 F.3d 1144, 1150 (10th Cir. 2012) (opinion joined by Gorsuch, J.) (quotation marks omitted). That is because tribal sovereign immunity derives from, and partakes of, the federal government's immunity—reflecting the special relationship of trust and guardianship between Indian nations and the federal government, as well as Indian nations' historic sovereignty over virtually all the land that came to be the United States. To the Nation's knowledge, neither this Court nor the Supreme Court has ever held that Indian nations lack sovereign immunity when the federal government, in their shoes, would possess it. If *Bay Mills* and *Cayuga Indian Nation* mean anything, they forbid this Court from narrowing tribal sovereign immunity by picking a more restrictive rule than the one that applies to the federal government.

## ARGUMENT

### I. This Court's Precedent Squarely Resolves The Issue Presented.

Seneca County urges this Court to recognize an exception to the Nation's sovereign immunity "with respect to Seneca County's efforts to enforce unpaid real property taxes through *in rem* foreclosure proceedings." Cty. Br. 2, 12. But it says barely a word about this Court's precedent rejecting that precise argument, instead building its brief on the fiction that this issue is an open one in this Circuit. Its only

response, squirrelled away in a footnote, is that this Court's decision in *Cayuga Indian Nation* was based "primarily" on "the distinction between *in rem* and *in personam* jurisdiction that had been urged by Seneca County in reliance on … *Yakima*." *Id.* at 13 n.8. The County thus implies that the only issue before this Court in the prior appeal was the same one the Supreme Court resolved in *Upper Skagit*—and that all its other arguments (including "the immovable property exception") present open questions that "should be addressed by this Court in the first instance." *Id.*

That is wrong, both as a matter of what Seneca County argued and what this Court held. In *Cayuga Indian Nation*, this Court broadly considered whether to "limit the doctrine of tribal immunity from suit so as to permit states to bring foreclosure suits to recover uncollected taxes levied against the property of Indian tribes." 761 F.3d at 220. The Court refused to do so—and it did so by adopting a broad rule: that "tribal sovereign immunity from suit is an avowedly 'broad principle,'" from which this Court "'thought it improper suddenly to start carving out exceptions,'" instead "'defer[ing]' to the plenary power of Congress to define and otherwise abrogate tribal sovereign immunity." *Id.* (quoting *Bay Mills*, 572 U.S. at 790).

In particular, the Court "decline[d] to draw the novel distinctions … that Seneca County has urged us to adopt." *Id.* at 221. To be sure, the Court identified

Seneca County's "*in rem*" argument as an *example* of the distinctions it was rejecting. *Id.* But the Court did not limit its holding to this one distinction, as the full quotation makes clear:

> [W]e decline to draw the novel distinctions—*such as* a distinction between *in rem* and *in personam* proceedings—that Seneca County has urged us to adopt….

*Id.* (emphasis added).

Nor can there be any doubt that the "immovable property exception" was among the arguments that Seneca County raised and that this Court decided, contrary to what the County contends. *See* Cty. Br. 13 n.8. In its brief here, the County characterizes that exception as providing that "sovereigns are not immune from actions concerning possession or ownership of immovable property that is located" "outside of its sovereign jurisdiction" and "in another sovereign's territory." Cty. Br. 12, 18. That is exactly the argument the County's prior appeal pressed as its "Point III." There, the County argued that "sovereign immunity from suit does not bar the foreclosure proceedings because the Nation has acted outside of any sovereign territory." Cty. PI Br. 27 (capitalization omitted); *see id.* at 2 (County stating its third issue presented as "[e]ven if it somehow otherwise had immunity from suit, whether the Nation is nonetheless subject to New York foreclosure laws because … the Nation is not acting within any sovereign territory").

In reply, the County reiterated that argument, asserting that "case law holds that a sovereign entity does not have immunity from suit with respect to properties it owns outside its sovereign jurisdiction." Cty. PI Reply 16; *accord* Cty. PI Br. 27 ("Case law holds that a sovereign entity does not have immunity from suit with respect to properties it owns outside its sovereign jurisdiction…."). No less than 13 pages of the County's opening and reply briefs elaborated on this argument, which is precisely the same argument the County presses here. *See* Cty. PI Br. 11, 27–29; Cty. PI Reply 14–23. The County even called the principle it invoked the "immovable property" "exempt[ion]," just as it does here. Cty. PI Reply 21.

In developing its argument, the County also relied on many of the same cases and sources it invokes here, including:

- *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924) (*compare* Cty. Br. 21–22, *with* Cty. PI Br. 11, 27, *and* Cty. PI Reply 17, 19);
- *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812) (*compare* Cty. Br. 18–19, 21–22, *with* Cty. PI Reply 21);
- *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517 (D.C. Cir. 1984) (*compare* Cty. Br. 20, *with* Cty. PI Reply 20–21);
- *People ex rel. Hoagland v. Streeper*, 145 N.E.2d 625 (Ill. 1957) (*compare* Cty. Br. 22–23, *with* Cty. PI Br. 27–28, *and* Cty. PI Reply 17);
- *State v. City of Hudson*, 42 N.W.2d 546 (Minn. 1950) (*compare* Cty. Br. 22, *with* Cty. PI Reply 17);
- *Restatement (Second) of Foreign Relations Law* (Am. Law Inst. 1965) (*compare* Cty. Br. 21, 24, 25–26, *with* Cty. PI Reply 22); and

- *Restatement (Third) of Foreign Relations Law* (Am. Law Inst. 1987) (*compare* Cty. Br. 28, *with* Cty. PI Reply 22).

Indeed, in case there were any doubt that this argument was *distinct* from the County's "*in rem*" argument based on *Yakima*, the County dispelled it—stressing that its immovable-property argument derived from "[a] separate but related line of cases." Cty. PI Reply 14.

Thus, there can be no doubt that the immovable-property exception was one of the "distinctions … that Seneca County … urged" and that this Court "decline[d] to draw." 761 F.3d at 218. Otherwise, this Court could not have affirmed the District Court's preliminary injunction, as it did.

The precedent established in *Cayuga Indian Nation* controls this appeal. A "panel is bound by prior decisions of this court unless and until the precedents established therein are reversed *en banc* or by the Supreme Court." *United States v. Jass*, 569 F.3d 47, 58 (2d Cir. 2009). Here, the only intervening development is *Upper Skagit*—whose sole holding was to reject the Washington Supreme Court's view that *Yakima* created an "*in rem*" exception to tribal sovereign immunity. 138 S. Ct. at 1653; *see* Cty. Br. 9–10 (conceding as much). While the County relies heavily on Justice Thomas's *Upper Skagit* dissent, *see* Cty. Br. 10, 13, 20–21, a two-Justice dissent cannot under any circumstances abrogate this Court's precedent (even leaving aside that, in this case, the County's argument would fail even under Justice Thomas's dissent, *see infra* at 28–43). Consistent with the decision below, another

court in this Circuit has recognized that, because *Upper Skagit* "did not resolve the issue of whether to limit the scope of sovereign immunity with respect to immovable property," the "settled precedent in the Second Circuit" continues to require rejecting that exception. *Oneida Indian Nation v. Phillips*, 360 F. Supp. 3d 122, 133 (N.D.N.Y. 2018) (citing *Cayuga Indian Nation*, 761 F.3d at 220).

## II. Even If The "Immovable Property" Exception Were An Open Question In This Circuit, It Would Not Allow Seneca County To Collect Money Debts By Foreclosing On Nation-Owned Properties.

Even had the Court not already rejected the County's "immovable property" arguments, they would fail. As *Bay Mills* reiterated, "[t]he baseline position ... is tribal immunity," absent tribal waiver or congressional abrogation. 572 U.S. at 790. There is no merit to the County's efforts to avoid that baseline rule by invoking the "common law" "immovably property" exception supposedly applicable to "foreign or State sovereign[s]." Cty. Br. 12–13, 18.

### A. Sovereign Immunity Bars Suit Against A Tribe Or Its Property, Unless The Tribe Waives Immunity Or Congress Abrogates It.

Tribal sovereign immunity is broad, and—absent congressional action—unyielding. Indian nations are "separate sovereigns pre-existing the Constitution." *Bay Mills*, 572 U.S. at 788 (quoting *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978)). And while they have become "'domestic dependent nations,'" Indian nations continue to "exercise 'inherent sovereign authority.'" *Id.* (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509

(1991)). One of the "core aspects of sovereignty that tribes possess" is their sovereign immunity, which the Supreme Court has regarded as "a necessary corollary to Indian sovereignty and self-governance." *Id.* This immunity accords with the recognition—dating to the Founding—that it "is 'inherent in the nature of sovereignty not to be amenable' to suit without consent." *Id.* at 788–89 (quoting The Federalist No. 81, at 511 (Alexander Hamilton) (B. Wright ed. 1961)).

What this means, as *Bay Mills* explained, is that "[t]he baseline position … is tribal immunity." 572 U.S. at 790. The Supreme Court thus has "sustained tribal immunity from suit without drawing a distinction based on where the tribal activities occurred"—applying immunity "both on and off [a] reservation" and declining to distinguish "between governmental and commercial activities of a tribe." *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754–55 (1998) (internal quotation marks omitted); *see Bay Mills*, 572 U.S. at 790. Meanwhile, "Congress has consistently reiterated its approval of the immunity doctrine," which accords with its "desire to promote the 'goal of Indian self-government, including its "overriding goal" of encouraging tribal self-sufficiency and economic development.'" *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 510 (1991) (citations omitted).

This "baseline position" extends to suits involving a sovereign's property, whether the suit is styled as *in personam* or *in rem*. "[T]here is no distinction between suits against [a] government directly, and suits against its property." *The Siren*, 74 U.S. (7 Wall.) 152, 154 (1868). This principle has been applied to every type of sovereign and diverse types of property—including to *in rem* actions against ships in the possession of U.S. states, *see California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998), or foreign countries, *The Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812); *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926), to quiet-title actions, *see Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281–82 (1997), and to—for example—bank accounts, *Long v. The Tampico*, 16 F. 491 (S.D.N.Y. 1883); *F.W. Stone Eng'g Co. v. Petroleos Mexicanos de Mexico, D.F.*, 42 A.2d 57 (Pa. 1945).

Especially relevant here, the Supreme Court has squarely held that this rule applies to tax foreclosure actions against real property owned by the United States. In *United States v. Alabama*, 313 U.S. 274 (1941), Alabama claimed that property taxes were owing on properties owned by the federal government, and it sought to satisfy that debt via "tax sales." *Id.* at 282–83. While agreeing with Alabama that the debts were valid, the Supreme Court held that sovereign immunity barred foreclosure: A "proceeding against property in which the United States has an interest is a suit against the United States." *Id.* at 282 (citing *The Siren*, 74 U.S. (7 Wall.) at

154). And "in the absence of [the federal government's] consent to the prosecution of such [foreclosure] proceedings," the state "court was without jurisdiction and its … tax sales … were void." *Id.*; *see Minnesota v. United States*, 305 U.S. 382, 386–87 (1939) ("Minnesota [could] not maintain [its] suit" because a "proceeding against property in which the United States has an interest is a suit against the United States"); *accord United States v. Nordic Vill., Inc.*, 503 U.S. 30, 38 (1992); *United States v. Davidson*, 139 F.2d 908, 911 (5th Cir. 1943); *United States v. Lewis Cty.*, 175 F.3d 671, 678 (9th Cir. 1999).

This broad scope of immunity is in keeping with the broad purposes immunity furthers. The "preeminent purpose of ... sovereign immunity is to accord ... the dignity that is consistent with ... status as sovereign entities," recognizing that it is an "impermissible affront to [this] dignity to be required to answer the complaints of private parties in ... courts." *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 760 (2002); *accord Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1318–19 (2017) (same, as to foreign states); *Bay Mills*, 572 U.S. at 808–09 (Sotomayor, J., concurring) (same, as to Indian nations). Suits concerning a sovereign's property, like any other suit against the sovereign, inflict exactly this affront. As the Supreme Court has observed, a sovereign is "effectively" "haled into court without its consent ... when ... the object of the suit ... is

to reach funds in the ... treasury or acquire ... lands." *Va. Office for Prot. & Advocacy v. Stewart*, 563 U.S. 247, 258 (2011).

The Supreme Court has also addressed the ways—and the only ways—that the "baseline position" of tribal sovereign immunity may change. Immunity applies unless "Congress has authorized [a] suit," or the Indian nation has "waived" immunity. *Bay Mills*, 572 U.S. at 790–91; *see id.* at 789. This approach has made "tribal sovereign immunity from suit" into "an avowedly 'broad principle,'" from which the Supreme Court (like this Court) has 'thought it improper suddenly to start carving out exceptions.'" *Cayuga Indian Nation*, 761 F.3d at 220 (quoting *Bay Mills*, 572 U.S. at 790).

This approach of "defer[ence]" to the political branches, *id.*, is not unique to tribal immunity. As to foreign sovereigns, the Supreme Court's early decision in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116 (1812), had a "narrow" holding concerning *in rem* libel actions but nonetheless "'came to be regarded as extending virtually absolute immunity." *Kiowa*, 523 U.S. at 759 (quoting *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983)). Foreign sovereigns retained "complete immunity from suit" until "the political branches" acted to narrow it. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983). Courts then narrowed that immunity only in "defer[ence]" to the political branches. *Id.*; *see*

*Kiowa*, 523 U.S. at 759 (deeming that approach "instructive" in "considering Congress' role in reforming tribal immunity").

To be sure, this approach has been criticized, particularly as the political branches have acted to narrow foreign (and state) immunity without also modifying tribal immunity. For example, the political branches determined to "deny[] immunity for the commercial acts" and commercial property "of a foreign nation." *Kiowa*, 523 U.S. at 759; *see Verlinden*, 461 U.S. at 486. But Congress has never similarly limited tribal immunity. And that yielded complaints, from litigants and some Justices, that "tribes have broader immunity … than other sovereigns." *Bay Mills*, 572 U.S. at 797–98; *see Kiowa*, 523 U.S. at 765 (Stevens, J., dissenting). But nonetheless, the Supreme Court declined to abandon its approach and to embark upon judicial narrowing of tribal sovereign immunity. Instead, the Court reaffirmed that "it is fundamentally Congress's job, not ours, to determine whether and how to limit tribal immunity." *Bay Mills*, 572 U.S. at 800. This Court acknowledged and applied that rule in *Cayuga Indian Nation*, recognizing that any other approach would "'run counter to the principle that we must 'defer' to Congress about whether to abrogate tribal [sovereign] immunity.'" 761 F.3d at 221 (quoting *Bay Mills*, 572 U.S. at 790).

Thus, this "avowedly broad principle," *id.* at 220 (internal quotation marks omitted), continues to govern here.[2]

### B. The "Immovable Property" Exception Does Not Permit The Tax Enforcement Actions Here.

The County seeks exactly the judicial narrowing of tribal immunity the Supreme Court has long rejected. To evade the baseline rule of immunity, and *United States v. Alabama*'s square holding applying immunity to tax foreclosures, the County invokes the "common law" "immovable property" exception. Cty. Br. 13, 18. It claims that, if this case concerned a "foreign or State sovereign[]" that owned real property in "another's sovereign territory," this exception would have permitted these tax foreclosures to proceed. *Id.* And it asks this Court to deem that supposed rule, rather than *Alabama*, applicable to Indian nations.

---

[2] This point also shows what is wrong with the County's premise that "[i]f anything, Indian tribes actually retain less immunity than that of foreign sovereigns or the States"—implying that if foreign or state sovereigns would not possess immunity, Indian sovereigns cannot either. Cty. Br. 30. The County gets the rules governing foreign and state immunity badly wrong, as explained below. *Infra* Part II.B. But the more fundamental point is that tribal immunity is different but not always less—as is clear from the fact that Indian nations, but not foreign countries, are immune even from suits arising from commercial acts. *Supra* at 27; *see Kiowa*, 523 U.S. at 755–56 (explaining that "the immunity possessed by Indian tribes is not coextensive with that of the States," in particular because "tribes were not at the Constitutional Convention" and therefore "not parties to the 'mutuality of … concession' that 'makes the States' surrender of immunity from suit by sister States plausible'" (citation omitted)); *Bay Mills*, 572 U.S. at 789–99 (similar). The identical argument thus did not move this Court in the County's prior appeal, *see* Cty. PI Reply 20, and it is no more persuasive today.

But for two reasons, these arguments fail. First, the County gets the common law wrong: Even for foreign and state sovereigns, the "immovable property" exception did not apply to tax enforcement actions like this one—which, at bottom, are about money and not property. Second, even if the County were right as to foreign and state sovereigns—and it is not—these analogies in any event ignore that Indian sovereigns' immunity derives from the federal government's immunity. The County thus cannot avoid the rule in *United States v. Alabama* based on other rules supposedly applicable to "foreign or State sovereign[s]." The County has not cited, and the Nation has not found, any case in which the Supreme Court or this Court held that Indian nations lack immunity where the federal government would possess it. Neither the County's flawed analogies, nor its claims of inadequate remedies, change the simple, controlling rule: "[I]t is fundamentally Congress's job, not [the courts'], to determine whether and how to limit tribal immunity." *Bay Mills*, 572 U.S. at 800.

### 1. The "Immovable Property" Exception Applicable To Foreign Sovereigns Does Not Apply To Tax Enforcement Actions, Which Are About Money And Not Property.

#### *a. The Common Law Granted Immunity From Tax Enforcement Actions Like This One.*

Incorrectly, the County claims that, for foreign and state sovereigns, the common-law "immovable property" exception stripped immunity from debt-enforcement actions like foreclosure. Cty. Br. 18–29. But in fact, the common-law

*granted* immunity from such actions, just as *Alabama* did as to the federal government. The immovable-property exception, and debt enforcement actions like tax foreclosure proceedings, are separate subjects governed by separate rules, which the County badly errs in conflating. The County's barrage of citations—which do not address tax foreclosure actions like those here—cannot make up for the County's inability to cite a *single* case permitting foreclosures against *any* sovereign.

As to tax enforcement actions, the common law rule is provided by Comment d to Section 65 of the Restatement (Second) of Foreign Relations Law. That document embodies the American view of the common law, before Congress began dealing with the issue by statute in the Foreign Sovereign Immunities Act ("FSIA"). *See infra* at 39–40. The Restatement (Second) provides:

> *d. Immunity of foreign state from jurisdiction to enforce tax laws*. The rule stated in this Section prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial state…. In some instances particular types of property of foreign governments may be carried on the tax rolls and be made the subjects of levy and assessment. But no case has been found in which the property of a foreign government has been subject to foreclosure of a tax lien or a tax sale. The inability of the territorial state actually to enforce its tax claims against the property of a foreign state and the fact that most states have some property within the territory of others have led to a high degree of reciprocal exemption of state property from taxation, by international agreement, by statute, or by practice.

Restatement (Second) of Foreign Relations Law § 65 cmt. d (Am. Law Inst. 1965). This provision thus starts with the caption: "Immunity of foreign state from jurisdiction to enforce tax laws." *Id.* It elaborates that the "rule stated in this Section"—

*i.e.*, the rule of immunity—"prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial state." *Id.* Then, it explains precisely the distinction that separates this case from *Sherrill*, cautioning that foreign property may sometimes "be carried on the tax rolls and be made the subjects of levy and assessment." *Id.* But despite the property being *subject* to tax, the Restatement continues with the critical empirical finding that confirms the common-law rule—that "no case has been found in which the property of a foreign government has been subject to foreclosure of a tax lien or a tax sale." *Id.* And last, the Restatement observes that this "inability … actually to enforce … tax claims against the property of a foreign state" has led many states to exempt "state property from taxation" altogether. *Id.* From beginning to end, Comment d thus confirms that foreclosure actions are not part of any immovable-property exception and that foreign sovereigns possessed immunity from such proceedings.

The common law drew this line because foreclosure actions fall outside the immovable-property exception's rationale. In Justice Thomas's telling, this exception reflects the view that "[a] territorial sovereign has a primeval interest in resolving all disputes over *use or right to use* of real property within its own domain." *Upper Skagit*, 138 S. Ct. at 1658 (Thomas, J., dissenting) (emphasis added) (alteration in original) (quoting *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984)). *Upper Skagit* was that type of case:

It was a quiet-title action in which Washington's courts sought to referee where the boundary fell between two tracts. 138 S. Ct. at 1652.

By contrast, tax enforcement actions are—fundamentally—about money, not property. There is no question that, today, the Cayuga Nation owns and has the "use or right to use" of the disputed properties. *Upper Skagit*, 138 S. Ct. at 1658 (quotation marks omitted). Without contesting these rights, the County claims that the Nation owes it a money debt—which could be satisfied from any assets—and seeks to seize property as a substitute for the money it claims is owing. *See* Cty. Br. 33 (admitting that "a foreclosure proceeding is [a] means to recover unpaid … taxes"). This desire to obtain money falls outside the "primeval interest" Justice Thomas identified, *Upper Skagit*, 138 S. Ct. at 1658 (quotation marks omitted), and within what immunity has always protected, *cf. Fed. Mar. Comm'n*, 535 U.S. at 765 ("immunity serves the important function of shielding state treasuries").

To be sure, the Nation supposedly owes its debts *because* it owns property. But the Restatement (Second) underscores that its "[i]mmovable property" exception does not reach every "claim arising out of a foreign state's ownership or possession of immovable property." Restatement (Second) of Foreign Relations Law § 68 cmt. d. Thus, immunity applies to a suit seeking to apply premises liability as a result of "an injury suffered in a fall on the stairway"—even though that suit

arises out of property ownership, and even if the plaintiff seeks to enforce any judgment solely by establishing and foreclosing upon a lien. *Id.* § 68 cmt. d, ill. 7. Such cases, like this one, do "not contest[]" who *today* has lawful "ownership or the right to possession" of the property. *Id.* § 68 cmt. d. The Restatement's immovable-property exception therefore "does not preclude immunity" with respect to such suits. *Id.* Indeed, Justice Thomas himself indicated such cases might fall beyond "the outer bounds" of the immovable-property exception—citing as an example of actions that immunity might bar "attaching a foreign prince's debts to immovable property." 138 S. Ct. at 1657 n.2 (citing C. Bynkershoek, De Foro Legatorum Liber Singularis 22–23 (G. Laing trans. 2d ed. 1946)). By contrast, if Seneca County's overbroad reading of § 68 were correct, it would permit any suit over a money debt to circumvent sovereign immunity, so long as the plaintiff sought—as relief—to satisfy that debt by "establish[ing] a property interest in immovable property." Cty. Br. 25–26 (quotation marks omitted). That radical proposition cannot be correct.

There is nothing to Seneca County's attempt to shrug off Comment d to § 65 as pertaining only to "movable property," or as limited by other exceptions stated elsewhere, "including the immovable property exception set forth in Section 68." Cty. Br. 25-26. As just explained, § 68's immovable-property exception does not apply to debt-enforcement actions like this one, even when directed at immovable

property. And the County simply has nowhere to hide from § 65's categorical statement that "no case has been found" in which foreign property "has been subject to foreclosure of a tax lien or a tax sale," with no caveat or limit to movable property. Beyond any doubt, this observation in the Restatement proves that the County here seeks to limit sovereign immunity by drawing a "novel distinction[]," applied in "no case" before—precisely what *Bay Mills* and *Cayuga Indian Nation* forbid courts from crafting. 761 F.3d at 220–21; Restatement (Second) of Foreign Relations Law § 65 cmt. d. In addition, the County's crabbed reading makes nonsense of Comment d's text: It would be strange indeed for the Restatement to refer, categorically, to "tax rolls," "tax liens," and "tax sales" if it meant to memorialize a rule applicable only to *movable* property.

It is no surprise, then, that courts have not read Comment d as the County does. In *Republic of Argentina v. City of New York*, 250 N.E.2d 698 (N.Y. 1969), the Court of Appeals considered whether New York law imposed taxes on real property owned by Argentina. In holding the answer was no, the Court emphasized that "it would be difficult, if not impossible, to enforce the collection of any tax levied against a friendly foreign government if the latter were not disposed to pay it." *Id.* at 701. It explained that this "unenforceability of a claim for taxes stems from the fact that no sovereign state can itself be sued without its consent, and its governmental property is not susceptible to attachment, levy or seizure by the courts or other

authorities of a foreign country." *Id.* at 701–02. The court therefore determined that it would not interpret New York law to impose a tax in the first instance, given "this inability to enforce a tax claim"—citing, for this last proposition, Section 65 Comment d of the Restatement (Second). *Id.* at 702–03. The Court of Appeals thus did not understand this Comment to be limited to movable property, or superseded by the immovable-property exception. *Id.*[3]

Nor does *Republic of Argentina* stand alone. *See In re City of New Rochelle v. Republic of Ghana*, 44 Misc. 2d 773, 774 (N.Y. Cty. Ct., Westchester Cty. 1964) (noting that "the overwhelming weight of opinion holds that jurisdiction over proceedings such as these"—seeking "to enforce [tax debts] by *in rem* foreclosure proceedings"—"should not be exercised"); *Knocklong Corp. v. Kingdom of Afghanistan*, 6 Misc. 2d 700, 700 (N.Y. Cty. Ct., Nassau Cty. 1957) (dismissing suit against

[3] While *Republic of Argentina* limited its holding to property "used for a 'public' or 'governmental' purpose," 250 N.E.2d at 704, that limit reflects principles inapplicable to Indian nations. As explained above, during the 20th century, the United States came to deny immunity in "cases arising out of a foreign state's … commercial acts"—a position crystallized in the "Tate Letter." *Verlinden*, 461 U.S. at 487. *Republic of Argentina* duly applied this "restrictive" view. 250 N.E.2d at 258 n.1 (citing Tate Letter). But as to Indian nations, the Supreme Court has rejected an equivalent limitation. *Kiowa*, 523 U.S. at 759; *Bay Mills*, 572 U.S. at 801 n.10. Likewise, when Seneca County asserts that the "only" exception to the "immovable property exception" is for "property … 'employed for diplomatic or consular purpose,'" Cty. Br. 27, it repeats the error that infects its entire brief. The tax-enforcement rule memorialized in Section 65 Comment d is not an *exception* to the immovable-property exception. Such enforcement actions are simply outside what the immovable-property exception has always covered.

Kingdom of Afghanistan brought by holder of a "tax deed" regarding real property owned in fee by the Kingdom). And treatise writers—the few that actually address foreclosure—agree. For example, when William W. Bishop discussed the "[v]arious reasons" that nations decline even to *impose* taxes on foreign-owned property, he "point[ed] to the impossibility of collecting any taxes, since foreign states and their property are not subject to suit or judicial process." William W. Bishop, Jr., *Immunity From Taxation of Foreign State-Owned Property*, 46 Am. J. Int'l L. 239, 256 (1952).

***b. The County's Sources Do Not Support Its Position.***

Not one of the County's sources supports its position. Virtually none of the County's litany of sources even purports to address the issue that this case *actually* presents: tax enforcement actions. Instead, they merely elaborate generalities about the immovable-property exception. While such sources may have been relevant to the quiet-title action Justice Thomas addressed in *Upper Skagit*—which, almost exclusively, is the origin of the County's sources—they are quite irrelevant here.[4]

[4] *See, e.g.*, *Schooner Exchange*, 11 (7 Cranch) U.S. 116; Cornelius van Bynkershoek, De Foro Legatorum Liber Singvlaris, *A Monograph on the Jurisdiction over Ambassadors in Both Civil and Criminal Cases* at 22 (Gordon J. Laing trans., Oxford Univ. Press 1946) (1744); Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law*, bk II § 83 at 138–39 (Charles D. Fenwick trans., Carnegie Inst. of Wash. 1916) (1758); 2 Charles Cheney Hyde, *International Law, Chiefly as Interpreted and Applied by the United States* § 258 at 848 n.33 (2d rev. ed. 1945); *Competence of Courts in Regard to Foreign States: Article 9—Ownership of or interests in, Immovable Property*, 26 Am. J. Int'l L. Supp. 451, 572–90 (1932); Francis

In analogizing Indian nations to U.S. states, the County relies heavily (Cty. Br. at 21–22) on *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924). But that case is doubly irrelevant. First, it was an eminent domain case that concerned the state's need to acquire *particular* property for *particular* public purposes—not enforcement of a monetary debt, where one dollar is no different than another. 264 U.S. at 478–79. The Restatement (Second) thus identifies eminent-domain actions, unlike foreclosure cases, as covered by the immovable-property exception. Restatement (Second) of Foreign Relations Law § 68 cmt. d, ill. 6. *Chattanooga* expressly limited its holding to that context. 264 U.S. at 482 ("[W]e need not decide the broad question whether Georgia has consented generally to be sued in the courts of Tennessee in respect of all matters arising out of the ownership and operation of its railroad property in that state.").

Second, *Chattanooga* also implicated structural provisions of the U.S. constitutional order that do not apply to tribal sovereigns. Until May 2019, the rule was that one state was *never* entitled to immunity in another state's courts, whether a case concerned immovable property or anything else. *Nevada v. Hall*, 440 U.S. 410,

---

Wharton, *A Treatise on the Conflict of Laws or Private International Law* § 273 at 607 (George H. Parmele ed., 3d ed. 1905); *Asociacion de Reclamantes*, 735 F.2d at 1521; *Chattanooga*, 264 U.S. 472; *Streeper*, 145 N.E.2d at 629; *Burbank v. Fay*, 65 N.Y. 57, 62 (1875); Charles Fairman, *Some Disputed Applications of the Principle of State Immunity*, 22 Am. J. Int'l L. 566, 567 nn.3–6 (1928).

426 n.29 (1979) (citing *Chattanooga* as an illustration of that rule); *cf. Kiowa*, 523 U.S. at 756 ("[T]ribal immunity is a matter of federal law and is not subject to diminution by the States."). The Supreme Court has now overruled *Nevada v. Hall* and held that states possess *absolute* immunity in each others' courts—leaving it anyone's guess whether *Chattanooga* remains good law even as to states. *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1490 (2019); *see id.* at 1501–02 (Breyer, J., dissenting) (identifying *Chattanooga* as "illustrat[ing]" the *Hall* principle). Certainly, *Chattanooga* cannot provide a firm foundation for this Court to consider crafting novel limits on tribal sovereign immunity.

Even worse are the state-court decisions the County cites as supposedly applying *Chattanooga*'s rule. Not only did these cases involve the distinctive rules that govern states, but several do not even purport to address sovereign immunity *at all*,[5] others do not claim to address tax enforcement actions,[6] and still others rely on the theory that states were acting in their "private" and commercial capacities[7]—a

[5] *Burbank*, 65 N.Y. at 62–63 (no immunity defense raised); *City Council of Augusta v. Timmerman*, 233 F. 216 (4th Cir. 1916) (deciding case based on rule that courts "will not interfere by injunction with the collection of the public revenue, on the ground that a tax is illegal, unless it clearly appears that the complainant has no adequate legal remedy"). Here, the County has "withdraw[n]" any argument that the Anti-Injunction Act bars this suit. *See* Def.'s Reply Mem. in Further Support of Cross-Motion for Summ. J. at 12 n.3, ECF No. 67.

[6] *Streeper*, 145 N.E.2d 625; *Burbank*, 65 N.Y. at 62.

[7] *City of Hudson*, 42 N.W.2d at 549; *Streeper*, 145 N.E.2d at 629.

distinction that, as noted above, the Supreme Court has rejected for Indian sovereigns.[8]

As to foreign sovereigns, the County relies heavily on the Supreme Court's decision in *Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007). But that case does not address either foreclosure or the common law. It held that the FSIA's *statutory* immovable-property exception (enacted in 1976) allows suits "to declare the *validity* of tax liens on property held by the sovereign"—not that these liens could be enforced via foreclosure (much less that the common law permitted as much). *Id.* at 195. In fact, New York City "concede[d] that even if … the liens [are] valid," the foreign government was "immune from foreclosure proceedings." *Id.* at 196 n.1. While the County hypothesizes that New York City did so "[b]ecause diplomatic residences were at issue," Cty. Br. 28, that only confirms that *Permanent Mission* did not address the only disputed issue in this case.

[8] Indeed, while the County tries to make it sound like *State v. City of Hudson* considered facts similar to this case, Cty. Br. 22, *Hudson* addressed whether another state was exempt from taxes on "personal property," not real property—and it did so under a state constitutional provision exempting from taxation "property used exclusively for … public purpose[s]." 42 N.W.2d at 547–48. The County concedes (Cty. Br. at 25) that common-law immunity principles preclude enforcement of *personal* property taxes—which shows beyond any doubt that *Hudson* was based on state statutory and constitutional law, not common-law principles.

Indeed, the FSIA treats the immovable-property exception separately from matters of enforcement like foreclosure—contrary to the County's relentless efforts to conflate those concepts. *Compare* 28 U.S.C. § 1605(a)(4) (immovable-property exception), *with id.* §§ 1609–1611 (execution, including foreclosure). For that matter, *whatever* the FSIA might provide about foreclosure, it could hardly be relevant here. As the Solicitor General has explained, "Congress has not adopted an immovable-property exception to tribal sovereign immunity like the one that applies to foreign states in the FSIA." U.S. *Upper Skagit* Br. 9; *see id.* at 29. And even if the County were right that the FSIA—generally speaking—"codifi[ed] … international law at the time of [its] enactment," *Permanent Mission*, 551 U.S. at 199, nobody thinks it did so in every particular. *See*, *e.g.*, *Samantar v. Yousuf*, 560 U.S. 305, 321–25 (2010) (concluding that the FSIA did not codify every type of immunity afforded at common law and that "[e]ven if a suit is not governed by the Act, it may still be barred by foreign sovereign immunity under the common law"); U.S. *Upper Skagit* Br. 32 (explaining that while "pre-FSIA legal scholarship described the immovable-property exception in narrow terms," the FSIA's statutory exception was "somewhat broader"). As to tax foreclosures, there is no need to guess about the common-law rule—because Section 65 Comment d provides it: Immunity "prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial

state," such that "no case has been found in which the property of a foreign government has been subject to foreclosure of a tax lien." Restatement (Second) of Foreign Relations Law § 65 cmt. d.

That leaves just one source, in the County's entire brief, that purports to address enforcement against immovable property—"a Harvard Law Review note, published in 1931." Cty. Br. 26. Even that note does not address *tax foreclosure* actions. And regardless, with all due respect to the third-year law student who penned the note, it could hardly be less persuasive. Its authoritative-sounding proclamation that non-immunity "may be taken as established" wobbles with its caveat that "definitive decisions are few" and collapses with its citation to just three cases—one of which *granted* immunity. Note, *Execution of Judgments Against the Property of Foreign States*, 44 Harv. L. Rev. 963, 965 n.16 (1931) (citing Supreme Court of Czechoslovakia, April 16, 1928, 1928 Sbirka Rozhodnuti Nejvyssich Stolic Sondnich Republiky Ceskoslovenske 632). This is not the stuff that can support a new exception from tribal sovereign immunity.

#### *c. The County's Position Is Especially Meritless Because This Case Arises On The Nation's Reservation.*

At the preliminary-injunction stage, this Court held that the Nation possessed sovereign immunity from suit without mentioning the land's reservation status—recognizing that such immunity does not turn on reservation boundaries. *Cayuga Indian Nation*, 761 F.3d at 221. But the County's position is especially meritless

because this case arises on the Nation's reservation. *Upper Skagit* involved non-reservation land, 138 S. Ct. at 1652, and that fact was essential to the Justices who believed the immovable-property exception might apply. *See id.* at 1662 (Thomas, J., dissenting) (tribe was acting "outside its territory"); *id.* at 1655 (Roberts, C.J., concurring) (stressing that case "involv[ed] non-trust, non-reservation land"); *id.* (the "only question" is whether immovable-property exception applies in "actions involving off-reservation land"); *id.* (immovable-property exception potentially applicable to a sovereign "holding real property outside its territory"); *id.* at 1656 (issue is whether "rule … extend[s] to tribal assertions of rights in non-trust, non-reservation property"). That is why these Justices believed it might be appropriate to treat Indian nations in Washington state like the United Kingdom or California.

But there is no warrant for that analogy in a reservation case like this one. On reservations, sovereignty is *always* shared. States may exercise significant authority—but so, too, do Indian nations possess their own sovereignty they are entitled to exercise. *Nevada v. Hicks*, 533 U.S. 353, 361–62 (2001). Justice Thomas's concerns about derogating from "the exclusive right[s]" of territorial sovereigns, 138 S. Ct. at 1659 (quotation marks omitted), are thus off-point when it comes to reservation lands.

The County implies that the Court should disregard the land's reservation status because of *Sherrill*. Cty. Br. 12. But this Court has already—and repeatedly—

rejected the proposition that *Sherrill* has anything to say about tribal sovereign immunity from suit. *See Cayuga Indian Nation*, 761 F.3d at 221 ("we read no implied abrogation of tribal sovereign immunity from suit into … *Sherrill*"); *Madison Cty.*, 605 F.3d at 159 ("we do not read *Sherrill* as implicitly abrogating the [Oneida Nation's] immunity from suit"). Here, that conclusion is especially well-grounded. *Sherrill* does not change the reservation status of reservation lands. *Madison Cty.*, 605 F.3d at 157 n.6. And while *Sherrill* entitles New York and its subdivisions to exercise some "regulatory jurisdiction" over the affected lands, *Sherrill*, 544 U.S. at 215–16, it does not deprive Indian tribes of the ability to exercise their sovereignty in other respects. The United States explained as much in its *amicus* brief at the preliminary-injunction stage in this case: "The County incorrectly refers to the land at issue here as 'non-sovereign' land. Because the land is located within the boundary of the Cayuga reservation it is reservation land over which Cayuga may exercise tribal sovereign powers consistent with the County's concurrent authority to impose its *ad valorem* tax." U.S. PI *Amicus* 4 n.1 (internal citation omitted).[9]

[9] In the County's prior appeal, the Cayuga Nation argued that "sovereign immunity from suit [does not] depend on" the status of the Nation's reservation. Br. for Pl.-Appellee Cayuga Nation at 3 n.1, *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 761 F.3d 218 (2d Cir. Apr. 3, 2013) (No. 12-3723), ECF No. 64. The Nation continues to maintain, as it previously argued and as this Court previously held, that "regardless of the reservation status of Nation-owned lands, the Cayugas' sovereign immunity from suit prohibits the County from foreclosing on those lands for non-payment of taxes." *Id.* at 16–17 n.5. The Nation's point in this subsection is merely

### 2. The Court May Not Narrow Tribal Sovereign Immunity Where, As Here, The Federal Government Would Be Immune In The Tribe's Shoes.

Even if everything in the prior section were wrong, the County still could not carry its burden to overcome the Nation's sovereign immunity. At best for the County, that would yield two dueling rules—on the one hand, the County's immovable-property exception supposedly applicable to foreign and State sovereigns, and on the other, *Alabama*'s rule applicable to the federal government.

In the case of such competing rules, *Bay Mills* and *Cayuga Indian Nation* forbid this Court from narrowing tribal sovereign immunity by picking a more restrictive rule than the one that applies to the federal government. As the Tenth Circuit observed in an opinion joined by then-Judge Gorsuch, "tribal sovereign immunity is deemed to be coextensive with the sovereign immunity of the United States." *Somerlott*, 686 F.3d at 1150 (quotation marks omitted). By contrast, to the Nation's knowledge, neither this Court nor the Supreme Court has *ever* held that Indian nations lack sovereign immunity when the federal government, in their shoes, would possess it.

The County may insist that *Alabama* is inapplicable to Indian nations because the federal government—as the national sovereign—was not acting "outside of its

---

that, now that the County has invoked the separate opinions in *Upper Skagit*, it cannot dodge the importance that these opinions attributed to reservation status.

sovereign jurisdiction." Cty. Br. 18. But there are strong reasons, grounded in the history and purposes of tribal sovereign immunity, that show *Somerlott*'s contrary view is correct.

From the start, the Supreme Court has viewed tribal sovereign immunity as linked to the federal government's. When the Court first recognized tribal sovereign immunity, it explained that the same "public policy … exempted the dependent as well as the dominant sovereignties from suit without consent." *United States v. U.S. Fid. & Guar. Co.*, 309 U.S. 506, 512 (1940). It was, in the Court's view, "as though the immunity which was [Indian nations'] as sovereigns passed to the United States for their benefit." *Id.* That is consistent, too, with the Supreme Court's recognition that Indian nations are "domestic dependent nations" of the *federal* government, *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), "under the 'tutelage' of the United States," *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 177 (2011) (quotation marks omitted), and "subjected to [the United States'] guardian-ship and protection as dependent wards," *United States v. Sandoval*, 231 U.S. 28, 45 (1913). The federal government's "guardianship and protection" has not always been a friend to Indian nations. But here, it operates to vest in Indian sovereigns the full measure of the federal government's immunity.

That is especially true for claims involving land. *All* the lands in the United States were once within the domains of Indian nations. While ultimate "sovereignty

and eminent domain" transferred to the federal government, *Johnson v. M'Intosh*, 21 U.S. (8 Wheat.) 543, 568 (1823), the respect owed to Indian nations as "separate sovereigns pre-existing the Constitution," *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 56 (1978), means that Indian nations are entitled to the full measure of sovereign immunity possessed by the federal government—unless and until Congress modifies it. And that imperative, again, applies with particular force in cases arising on an Indian nation's *own* reservation lands. *Supra* at 41–43.

The Supreme Court's recent decision in *Lewis v. Clarke*, 137 S. Ct. 1285 (2017)—which the County invokes to argue that tribal sovereign immunity is limited to what the "common law" would provide, Cty. Br. 29—underscores the novelty of what the County seeks here. There, the Supreme Court rejected the argument that "an Indian tribe's sovereign immunity bars individual-capacity damages actions against tribal employees for torts committed within the scope of their employment." *Id.* at 1288. But in so holding, the Court stressed that applying sovereign immunity on *Lewis*' facts would have made "tribal sovereign immunity … broader than … state *or federal* sovereign immunity." *Id.* at 1292 (emphasis added). *Lewis* did not undertake, as Seneca County urges here, to slice off an entire category from Indian nations' immunity so as to leave them with *less* immunity than the federal government in their shoes would possess.

Thus, the controlling point remains that the County here well and truly seeks a "novel" exception to tribal sovereign immunity—one supported by not a single on-point judicial decision, and one contrary to a legion of authorities. *Cayuga Indian Nation*, 761 F.3d at 221. In those circumstances, the responsibility "to define and otherwise abrogate tribal sovereign immunity from suit" resides with "the plenary power of Congress." *Id.* at 220. Courts cannot narrow that immunity via dubious analogizing to inapplicable "common law" rules. Cty. Br. 29.

### 3. The County's Miscellaneous Arguments Fail.

The County raises two more arguments, both squarely foreclosed by this Court's precedent.

First, the County says the Court should fashion a new exception to tribal sovereign immunity because "a foreclosure proceeding is the only means to recover unpaid real property taxes," Cty. Br. 33, relying on a footnote in *Bay Mills* reserving the question of whether the Court might "abandon[] precedent" if "no alternative remedies were available" to a plaintiff who had "not chosen to deal with a tribe." 572 U.S. at 799 n.8. But to begin, that argument again presents no open question in this Circuit: The County's remedies today are the same ones it had when, after *Bay Mills*, this Court declined to narrow tribal immunity in *Cayuga Indian Nation*. 761 F.3d at 221.

Indeed, the County *does* have a remedy—the same one territorial sovereigns in its position have always had. When the Supreme Court in *Alabama* applied sovereign immunity to bar the state's foreclosure, it emphasized that the tax liens remained on the property and would be "effective as against subsequent purchasers." 313 U.S. at 282; *see Permanent Mission*, 551 U.S. at 197; *see id.* (noting that potential remedy). To be sure, this may not be the remedy the County prefers. But sovereign immunity applies even when it "bars the State from pursuing the most efficient remedy." *Potawatomi*, 498 U.S. at 514. If the County is dissatisfied, its recourse is to "seek appropriate legislation from Congress." *Id.*

In addition, *Bay Mills*' footnote 8 also concerns potential circumstances in which the *Supreme Court* might consider "abandoning precedent." 572 U.S. at 799 n.8. It does not authorize lower courts to carve out new exceptions from sovereign immunity contrary to the Supreme Court's firmly established precedents governing tribal sovereign immunity. *See Velez v. Levy*, 401 F.3d 75, 87 (2d Cir. 2005) (It "is [the Supreme] Court's prerogative alone to overrule one of its precedents." (alterations in original) (quoting *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997))).[10]

[10] The County also cannot claim to be a wholly innocent bystander. *See* Cty. Br. 32. The Cayuga Nation is in its present position only because New York unlawfully purchased the Nation's reservation lands without adherence to the requirements of federal law. *Supra* at 6. While *Sherrill* may limit the Nation's remedies for that violation, the County is nothing like a "tort victim" who genuinely had no choice in whether to deal with an Indian nation. *Bay Mills*, 572 U.S. at 799 n.8.

Second, the County argues that the Supreme Court's *Sherrill* decision held not just that localities could *impose* taxes on Nation-owned lands, but that they could also "foreclose on the tribe's land for nonpayment of taxes." Cty. Br. 36. This is exactly the "vigorous argument" this Court rejected at the preliminary-injunction stage, when it ruled it would "read no implied abrogation of tribal sovereign immunity from suit into … *Sherrill*." 761 F.3d at 221. The Court explained that such "implied abrogation 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 this is exactly the argument this Court rejected in *Madison County*, when it likewise would "not read *Sherrill* as implicitly abrogating the [Oneida Nation's] immunity." 605 F.3d at 156–59.[11]

[11] The County's argument is also meritless. The County mines the depths of *Sherrill*'s record to suggest that the Oneida Nation raised sovereign immunity from suit as a defense *in the lower courts*. Cty. Br. at 34–36. But the only question that matters is whether the *Supreme Court* addressed sovereign immunity. And the answer to that question is no, as this Court has held. The County relies on *Sherrill*'s rejection, in a footnote, of the notion that "the Tribe may assert tax immunity defensively in the eviction proceeding." *Sherrill*, 544 U.S. at 214 n.7. But that statement concerned only immunity from taxation (*i.e.*, whether the taxes could be *imposed*), not sovereign immunity from suit. The majority grounded its holding in the equitable nature of the relief the Oneida Nation sought, evoking "doctrines of laches, acquiescence, and impossibility." 544 U.S. at 221. In dissent, Justice Stevens argued that the majority's "distinction between law and equity [wa]s unpersuasive" because the "narrow legal issue" before the Court—the question of the tribe's "tax immunity"—also could have been raised "by a tribe as a *defense* against a state collection proceeding," *i.e.*, in an action at law. *Id.* at 225–26 (Stevens, J., dissenting). The

## CONCLUSION

For the foregoing reasons, the Court should affirm the judgment below. If the Court does not affirm based on sovereign immunity, it should vacate and remand so that the District Court may reconsider its order dismissing the Nation's other claims. The premise for that order was that these claims were moot because sovereign immunity provided the Nation the full measure of relief it sought. SPA-5, SPA-8.

Dated: July 15, 2019

Respectfully Submitted,

*/s/ David W. DeBruin*

David W. DeBruin
Zachary C. Schauf
Caroline C. Cease
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000

Daniel J. French
Lee Alcott
BARCLAY DAMON, LLP
125 E. Jefferson Street
Syracuse, NY 13202
(315) 425-2700
*Attorneys for the Cayuga Nation*

---

majority responded that the Oneida could not assert tax immunity defensively because "[t]he equitable cast of the relief sought remains the same." *Id.* at 214 n.7. In other words, the majority said that the Oneida Nation could not avoid tax enforcement suits by claiming immunity *from taxation*. It said nothing about the tribe's ability to claim immunity *from suit.*

## 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 12,574 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013, Times New Roman 14-point.

Dated: July 15, 2019

By: */s/ David W. DeBruin*
David W. DeBruin

## CERTIFICATE OF SERVICE

I hereby certify that on July 15, 2019, I electronically served the foregoing Brief via ECF upon the following:

Brian Laudadio
Mary P. Moore
BOND, SCHOENECK & KING, PLLC
350 Linden Oaks, 3rd Floor
Rochester, New York 14625
(585) 362-4700

Louis P. Dilorenzo
600 Third Avenue, 39th Floor
New York, New York 10016
(646) 253-2300

Dated: July 15, 2019

By: */s/ David W. DeBruin*
David W. DeBruin

# ADDENDUM

# ADDENDUM

# 12-3723-cv

## United States Court of Appeals

*for the*

## Second Circuit

CAYUGA INDIAN NATION OF NEW YORK,

*Plaintiff-Appellee,*

– v. –

SENECA COUNTY, NEW YORK,

*Defendant-Appellant.*

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

**BRIEF FOR DEFENDANT-APPELLANT**

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

# TABLE OF CONTENTS

## JURISDICTIONAL STATEMENT

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

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

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

## ISSUES PRESENTED FOR REVIEW

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

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

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

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

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

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

## STANDARD OF REVIEW

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

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

## SUMMARY OF ARGUMENT

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## POINT III

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

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

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

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

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

145 N.E.2d at 629.

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

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

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

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

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

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

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

# 12-3723-cv

## United States Court of Appeals

*for the*

## Second Circuit

CAYUGA INDIAN NATION OF NEW YORK,

*Plaintiff-Appellee,*

– v. –

SENECA COUNTY, NEW YORK,

*Defendant-Appellant.*

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

**REPLY BRIEF FOR DEFENDANT-APPELLANT**

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

# TABLE OF CONTENTS

## POINT II

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

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

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

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

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

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

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

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

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

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

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

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

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

264 U.S. at 480.

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

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

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

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

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

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

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

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

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

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

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

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

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

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