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 (ROCHESTER)

REPLY BRIEF FOR DEFENDANT-COUNTER CLAIMANT-APPELLANT

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PRELIMINARY STATEMENT

The long-recognized immovable property exception limits the boundaries of tribal sovereign immunity in this case. Indeed, the U.S. Supreme Court has recognized that Indian tribes "possess[] the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *see also Lewis v. Clarke*, 137 S. Ct. 1285, 1292 (2017) (declining to "extend[]" tribal sovereign immunity "beyond what common-law sovereign immunity principles would recognize"). The immunity enjoyed by sovereigns traditionally, as a matter of U.S. domestic and international common law, does not extend to disputes concerning immovable property located in another's sovereign jurisdiction, because sovereigns "ha[ve] a primeval interest in resolving all disputes over use or right to use of real property within [their] own domain." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1658 (2018) (J. Thomas, dissenting) (quoting *Asociacion de Reclamantes v. United Mexican States*, 735 F. 2d 1517, 1521 (D.C. Cir. 1984) (J. Scalia)). This is just such a dispute.

The Cayuga Nation seeks to avoid the immovable property exception by characterizing Seneca County's effort to foreclose its real property tax liens against the Subject Properties as a dispute that is simply "about money, not property." (*See* Br. of the Cayuga Nation ("Opp'n Br.") at 3.) However, the Cayuga Nation

cannot avoid that the U.S. Supreme Court has previously held that a dispute concerning the validity of a real property tax lien falls within the long-recognized immovable property exception to sovereign immunity because it is a "suit to establish an interest in such property." *See Perm. Mission of India to the UN v. City of N.Y.*, 551 U.S. 193, 200 (2007). A proceeding to foreclose real property tax liens would therefore establish and adjudicate the County's interest in the Subject Properties (*i.e.* its tax liens), and—as such—must also be about interests in property.

The Cayuga Nation hinges its opposition on a vague comment to the Restatement (Second) of Foreign Relations Law of the United States (1965), which pertains to the general rule on sovereign immunity (not the immovable property exception) and the authority for which relates only to taxes owed with respect to personal (*i.e.* movable) property. It cites no case law for the proposition that sovereign immunity would preclude enforcement of tax liens against real property, diplomatic and consular property aside.

While the Cayuga Nation argues that this Court should not even consider the immovable property exception due to this Court's prior precedents in *Oneida Indian Nation of N.Y. v. Madison Cty.*, 605 F.3d 149, 159-60 (2d Cir. 2010), *vacated*, 562 U.S. 42 (2011), and affirming the grant of the preliminary injunction in this case, the application of the immovable property exception to tribal

sovereign immunity and to tax foreclosure proceedings in particular simply has not been decided by this Circuit. This exception applies, and this Court of Appeals should therefore reverse the District Court's decision granting summary judgment to the Cayuga Nation on the basis of tribal sovereign immunity and denying summary judgment to Seneca County on the same basis, and remand with instructions to enter summary judgment in favor of Seneca County on the claim that the Cayuga Nation is entitled to the relief sought on the basis of tribal sovereign immunity, all other claims having been dismissed by the District Court.

ARGUMENT

I. This Court's Precedent Does Not Resolve The Issue Presented.

The application of the long-recognized immovable property exception to sovereign immunity to the real property tax foreclosure proceeding at issue here, which was brought against land owned by the Cayuga Nation and over which it lacks sovereign authority, was not previously decided by this Court when it affirmed the District Court's grant of a preliminary injunction. *See Cayuga Indian Nation v. Seneca Cty.*, 761 F.3d 218, 220-21 (2d Cir. 2014). In that decision, this Court expressly rejected the "novel distinction[]" between *in rem* and *in personam* proceedings, and it refused to read any "implied abrogation of tribal sovereign immunity from suit" into *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*,

544 U.S. 197 (2005). But this Court's prior decision is entirely silent on the immovable property exception to sovereign immunity.

This issue also was not decided by the District Court when it granted the request for a preliminary injunction. *Cayuga Indian Nation of N.Y. v. Seneca Cty.*, 890 F. Supp. 2d 240, 247-48 (W.D.N.Y. 2012). Nor was the issue decided in the now-vacated *Madison County* decision. *See* 605 F.3d at 149.

Additionally, when the Supreme Court recently considered the applicability of the immovable property exception to the doctrine of tribal sovereign immunity in *Upper Skagit Indian*, several of the justices were sympathetic to the argument that Indian tribes are subject to the same rules of immunity applicable to any sovereign, including that immunity does not apply to suits concerning ownership or possession of immovable property located in another sovereign's jurisdiction. (*See*, *e.g.*, A-539 to A-540.) The majority declined to address the argument only because it was made too late in the case. *Upper Skagit*, 138 S. Ct. at 1654. Thus, not only has the issue presented in this appeal **not** been decided by this Court, the application of the long-recognized immovable property exception to sovereign immunity to disputes involving land owned by an Indian tribe remains an open question at the highest level.

II. The District Court's Judgment Should Be Reversed Because Tribal Sovereign Immunity Does Not Extend To Tax Foreclosure Proceedings Brought Against Real Property Owned By An Indian Tribe Like Any Private Landowner Within New York State's Sovereign Territory.

Seneca County does not dispute the general principle that sovereign immunity—where it applies—bars suit against an Indian tribe, absent waiver or Congressional abrogation. However, it is black letter law that the bounds of sovereign immunity do not extend to actions to obtain possession of or to establish an ownership interest in real property located in another sovereign's jurisdiction. The proceeding at issue here—an *in rem* proceeding to foreclose tax liens on real property located in the sovereign jurisdiction of New York State and its local municipalities (and not the Cayuga Nation's sovereign jurisdiction)—is just such an action. Consequently, sovereign immunity does not apply.

The Cayuga Nation does not dispute the validity of the immovable property exception to sovereign immunity.[1] Instead, it argues that: (1) the immovable

[1] The Cayuga Nation suggests that the immovable property exception is somehow ill-fitting for Indian tribes because Indian tribes are accorded absolute immunity, whereas foreign sovereigns may now be sued for their commercial acts. (*See* Opp'n Br. at 26-28 n. 2.) It is true that immunity no longer extends to commercial acts of a foreign sovereign due to adoption of the restrictive theory of sovereign immunity during the 20th century. *See Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486-88 (1983) (the restrictive theory was adopted by the U.S. State Department in the so-called Tate Letter from 1952, and was enacted into law by the Foreign Sovereign Immunities Act of 1976). In contrast, according to the absolute theory of sovereign immunity—which applied to foreign sovereigns until the adoption of the restrictive view—"a sovereign cannot, without his consent, be

property exception does not apply to "tax enforcement actions"; (2) the tax foreclosure action is barred because such an action would be barred if it was brought against a State or the United States; and (3) the immovable property exception does not apply because the land at issue here is part of the Cayuga Nation's historic reservation. All of these arguments fail for the reasons set forth below.

A. The Tax Foreclosure Proceeding At Issue Here Falls Within The Long-Recognized Immovable Property Exception To Sovereign Immunity.

A proceeding brought to foreclose a tax lien pursuant to Article 11 of the N.Y. Real Property Tax Law effectively establishes and adjudicates the County's interest in real property within its jurisdiction that exists as a result of the County's tax lien on the real property. It therefore squarely falls within the immovable property exception to sovereign immunity, whereby immunity "from the exercise by another state of jurisdiction *to enforce* rules of law . . . does not extend to *an action to obtain possession of or establish an ownership interest in* immovable

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made a respondent in the courts of another sovereign." *See* Tate Letter, *reprinted in Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 711 (1976) (Appendix 2 to opinion of J. White). Regardless of any possible distinction pertaining to commercial activities, "[t]here is agreement by proponents of both theories . . . that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property excepted) . . . " *Id.* Therefore, even if the immunity enjoyed by foreign sovereigns and tribal sovereigns differs with respect to commercial activities, the long-standing immovable property exception unquestionably applies in either case.

property located in the territory of the state exercising jurisdiction." Restatement of Foreign Relations Law of the United States (Proposed Official Draft) §§ 68, 71(b) at p. 215, 226 (1962) (emphasis added); *see also* Restatement (Second) of Foreign Relations Law of the United States ("Restatement (Second)") §§ 65, 68 at p. 197, 205 (1965) (same).

The Supreme Court has held that a suit to establish the validity of tax liens on real property falls within the immovable property exception to sovereign immunity because it is a "suit to establish an interest in such property." *Perm. Mission*, 551 U.S. at 200. The Supreme Court looked at the meaning of the terms "lien" and "tax lien" under the N.Y. Real Property Tax Law and Black's Law Dictionary, and concluded that the practical effect is that tax liens are "interests in property." *Id.* at 198. It was therefore "plain that a suit to establish the validity of a lien implicates 'rights in immovable property.'" *Id.* at 199.

The Cayuga Nation dismisses this precedent as inapplicable here on the basis that *Permanent Mission* supposedly interpreted the "statutory" immovable property exception under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), thereby suggesting that the FSIA's immovable property exception is somehow different from the pre-existing immovable property exception recognized as a matter of international law. (*See* Opp'n Br. at 39.) But the Supreme Court was crystal clear in *Permanent Mission* that the immovable property exception in the

FSIA is a "codification of international law at the time of the FSIA's enactment," and it therefore interpreted the statute in accordance with that pre-existing international law. *Perm. Mission*, 551 U.S. at 199; *see also id.* at 200 ("[T]he FSIA was also meant 'to codify . . . the pre-existing real property exception to sovereign immunity recognized by international practice.'") (quoting *Asociacion de Reclamantes*, 735 F.2d at 1521). As such, the Supreme Court held that an action "seeking the declaration of the validity of a tax lien on property is a suit to establish an interest in such property" and "would be allowed" under the immovable property exception to foreign sovereign immunity, as set forth in Section 68 of the Restatement (Second). As a result, *Permanent Mission's* interpretation of the immovable property exception is therefore directly on point.[2]

While *Permanent Mission* did not address the "enforcement" of tax liens via foreclosure, the Cayuga Nation does not set forth any reasoning as to why a proceeding to foreclose a tax lien would be any less of a suit to "to establish an interest in" real property than a suit to establish the validity of a tax lien. The Cayuga Nation did not (and cannot) dispute that the foreclosure proceeding would necessarily result in the establishment of an interest in the immovable property in

[2] The Cayuga Nation's reference to *Samantar v. Yousuf*, 560 U.S. 305 (2010) is inapt. That case has nothing to do with the immovable property exception to sovereign immunity—either under the FSIA or the common law. The Cayuga Nation's references to the United States' arguments set forth in an *amicus* brief submitted to the U.S. Supreme Court in *Upper Skagit* also has no authoritative value. (*See* Opp'n Br. at 40.)

the course of enforcing the County's tax liens, or that such a proceeding would also interfere with the Cayuga Nation's ownership and possession of the immovable property. (*See* Br. of Seneca County ("Appellant Br.") at 24.) A proceeding brought pursuant to Article 11 of the N.Y. Real Property Tax Law to foreclose a tax lien is therefore just as much "'an action to obtain possession of or establish a property interest in immovable property located in the territory of the state exercising jurisdiction'" as is a suit to declare the validity of a tax lien. *See Perm. Mission*, 551 U.S. at 200 (quoting Restatement (Second) § 68(b)).

There is no persuasive force to the Cayuga Nation's effort to re-characterize the tax foreclosure proceeding at issue here, brought pursuant to Article 11 of the N.Y. Real Property Tax Law, as akin to enforcement of an unrelated money judgment. (*See* Opp'n Br. at 32-33.) It is incorrect that the unpaid real property taxes "could be satisfied from any assets." (*Id.* at 32.) As set forth in the County's opening brief, a foreclosure proceeding is the only means to recover unpaid real property taxes. *See Oneida Tribe of Indians v. Vill. of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008); *Oneida Indian Nation v. City of Sherrill*, 145 F. Supp. 2d 226, 263 (N.D.N.Y. 2001). Foreclosure is thus the only means available to the County to enforce its interests in the Cayuga Nation's properties that exist as a result of the County's tax liens.

Although the Cayuga Nation suggests that its "right to use" the properties is not in question, this too is incorrect. (*See* Opp'n Br. at 31.) The Cayuga Nation's "right to use" its real property is exactly what is at stake in the proceeding instituted by the County to foreclose the County's tax liens under Article 11 of the N.Y. Real Property Tax Law. New York law provides that a property owner such as the Cayuga Nation can lose its use, and indeed its ownership and possession, of real property by failing to pay real property taxes incurred in connection with ownership of such lands.

The Cayuga Nation's argument that the immovable property exception to sovereign immunity does not apply to a foreclosure proceeding is premised almost entirely on comment (d) to Section 65 of the Restatement (Second). This comment—which is not a comment on the immovable property exception set forth in Section 68(b)—relates to the general rule that "a state is immune from the exercise by another state of jurisdiction to enforce rules of law." Comment (d) states that "[t]he rule stated in this Section [*i.e.* that "a state is immune from the exercise by another state of jurisdiction to enforce rules of law"] prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial state."

Nothing in the comment suggests that it relates to tax claims against real or "immovable" property. On the contrary, the authority cited under Section 65 on

the issue of "taxation" relates to tax liability arising from ownership of personal/movable property.[3] *See* Restatement (Second) at p. 199-200. For example, *French Republic v. Board of Supervisors*, 200 Ky. 18 (1923), dealt with an attempt by a County to tax tobacco owned by the Government of France that was being stored in warehouses in the County. The issue in the case was whether the County could lawfully impose the tax, given that the Kentucky Constitution exempted "public property used for public purposes" from taxation. Regardless of the County's ability to impose tax on the tobacco, it was conceded by the parties that France was not suable in Kentucky's courts without its consent, and that the tobacco itself could not be subjected to payment of the tax. *Id.* at 21. It is telling that the Cayuga Nation does not reference any of the authority underlying Section 65's discussion of "taxation" in its appellate brief. [4]

It also simply does not make sense that a sovereign is not immune from actions "to obtain possession of or establish a property interest in immovable property located in the territory of the State exercising jurisdiction," Restatement

[3] While the Cayuga Nation portends that comment (d) must apply to real property because it uses the terms "tax rolls," "tax liens," and "tax sales," this ignores that personal property may be carried on a tax roll, can be subject to a tax lien, and may be sold through a tax sale.

[4] To the County's knowledge, comment (d) to Section 65 has only been cited in one decision, in *dicta*. *See Rep. of Argentina v. N.Y.*, 25 N.Y.2d 252, 263 (1969)). This decision is distinguishable because (as is further addressed below) it dealt with consular property and it decided the issue of immunity from taxation, not immunity from suit.

(Second) § 68(b), but that a court could not exercise jurisdiction to enforce such claims through remedies like foreclosure or eviction. None of the authority cited by the Cayuga Nation stands for the proposition that sovereigns are immune from execution in actions involving rights in real property owned in another sovereign's jurisdiction.

The Cayuga Nation's brief is silent on the various international authorities set forth in Charles Fairman's article titled *Some Disputed Applications of the Principle of State Immunity*, 22 Am. J. Int'l L. 566 (1928), which stand for the proposition that sovereigns are not immune from suit **or execution** where the sovereign "is sued as owner of real property" that is located in the territory of another sovereign. *Id.* at 567 n. 3-6 ("rights to real property are a matter so intimately connected with the very independence of the state that none other than the local courts could be permitted to pass upon them"). The article by William W. Bishop, Jr., *Immunity from Taxation of Foreign State-Owned Property*, 46 Am. J. Int'l L. 239 (1952), which is cited by the Cayuga Nation, even cites to the Fairman article for the proposition that while immunity from suit usually extends to property of a sovereign, there are "exceptions in the case of real property and of succession." *Id.* at 255 n. 42. Furthermore, the Cayuga Nation criticizes a Harvard Law Review note from 1931 on *Execution of Judgments Against the Property of Foreign States* for stating (on the basis of "just" three international decisions) that

it was then established that "orders of a court are enforceable against immovable property of a foreign state in suits concerning this property," 44 Harv. L. Rev. 963, 965 n. 16, but the Cayuga Nation cited **no cases** in support of its contrary position.

The three cases cited by the Cayuga Nation for the proposition that "courts have not read Comment d as the County does," (*see* Opp'n Br. at 34-36), are inapposite because they all involved diplomatic or consular property. *See City of New Rochelle v. Rep. of Ghana*, 44 Misc. 2d 773, 774-75 (N.Y. Cnty. Ct., Westchester Cnty. 1964) (holding that the court lacked jurisdiction to foreclose tax liens on real property "owned by a foreign government and used exclusively for diplomatic purposes"); *Knocklong Corp. v. Kingdom of Afghanistan*, 6 Misc. 2d 700, 700-01 (N.Y. Cnty. Ct., Nassau Cnty. 1957) (dismissing action to determine title of real property for lack of jurisdiction given "the nature of the property," which was used to house the representative of Afghanistan to the United Nations and as an office for the Permanent Delegation of Afghanistan to the United Nations); *Rep. of Argentina v. N.Y.*, 25 N.Y.2d 252 (1969) (concluding that consular property was exempt from real property taxes).

The Cayuga Nation's opposition brief fails to address that these cases all squarely fall within the limitation on the immovable property exception for property used for diplomatic or consular purposes. (*See* Appellant Br. at 27-29.) The Cayuga Nation cites no authority for its general statement that "enforcement

actions are simply outside what the immovable-property exception has always covered." (*See* Opp'n Br. at 35 n. 3.) On the contrary, enforcement actions are only potentially outside of the immovable property exception where diplomatic or consular property is at issue. *See*, *e.g.*, *Hungarian Embassy Case*, 65 I.L.R. 110, 111-112 (Fed. S. Ct., Fed. Rep. of Ger. 1969); *Upper Skagit*, 138 S. Ct. at 1657 (J. Thomas, dissenting) ("there is no dispute that [the immovable property exception] covers suits concerning ownership of a piece of real property used for nondiplomatic reasons"). Indeed, diplomatic residences were at issue in *Permanent Mission*, and thus the FSIA did not allow for execution against such property. *See Perm. Mission*, 551 U.S. at 196 n.1; 28 U.S.C. § 1610(a)(4)(B) (no immunity from execution related to a judgment establishing rights in immovable property situated within the United States, so long as "such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission").

B. The Cayuga Nation Is Impermissibly Arguing That Indian Tribes Enjoy Broader Immunity Than Would Traditionally Be Enjoyed By Any Other Sovereign.

The Cayuga Nation does not refute the general proposition that "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo*, 436 U.S. at 58; *see also Lewis*, 137 S. Ct. at 1292 (declining to "extend[]" tribal sovereign

immunity "beyond what common-law sovereign immunity principles would recognize"). Instead, the Cayuga Nation argues that it enjoys immunity from the foreclosure proceeding at issue because: (1) a State sovereign would be immune from proceedings to foreclose a tax lien on real property owned in a sister State; and (2) the United States is immune from tax foreclosure proceedings involving real property owned in the United States. (*See* Opp'n Br. at 37-38, 44-47.) Both of these arguments are fundamentally flawed, and would give Indian tribes greater immunity than what would have traditionally been enjoyed by other sovereigns.

Evoking the immovable property exception long recognized under international law, the Supreme Court held in 1924 that a State also cannot "claim sovereign privilege or immunity" with respect to a proceeding involving land acquired in another State. *Georgia v. Chattanooga*, 264 U.S. 472 (1924). This holding was not overruled in *Franchise Tax Bd. v. Hyatt*, 139 S. Ct. 1485 (2019), as is suggested by the Cayuga Nation. *Hyatt* holds that the structure of the Constitution **requires** a State to grant a sister State immunity from **private suits**, *i.e.* suits brought by a private citizen against the State in the court of a sister State. *Id.* at 1499. It therefore overruled *Nevada v. Hall*, 440 U.S. 410 (1979), which previously held that sovereign immunity between States was a matter of comity [*i.e.* "the voluntary decision of the second to respect the dignity of the first"], and

not a Constitutional requirement.[5] *Id.* at 425. In other words, immunity from private suits in the courts of a sister State is now mandatory, rather a matter to be determined by the forum State.

Regardless, *Hyatt* (and *Hall* before it) deals with the baseline rule of sovereign immunity applicable to States, not the immovable property exception addressed and applied in *Chattanooga*. In *Chattanooga*, the Supreme Court did not decide that Tennessee was free to deny immunity to Georgia on the basis that the application of sovereign immunity is to be decided by the law of the forum State, as was decided in *Hall.* Instead, *Chattanooga* categorically decided that a State can never "claim sovereign privilege or immunity" with respect to a proceeding involving land acquired in another State. Thus, *Chattanooga* was not overruled by *Hyatt*.[6] The Cayuga Nation's references to *Hyatt* and *Hall* are merely a distraction.

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[5] The Cayuga Nation's assertion that "[u]ntil 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," is incorrect. (Opp'n Br. at 37). This was not the holding of *Hall*. Furthermore, *Hall* did not cite *Chattanooga* "as an illustration of that rule." (*See* Opp'n Br. at 38.)

[6] The Federal Circuit applied *Chattanooga* in a post-*Hyatt* decision for the proposition that state sovereign immunity **did not** apply to the proceedings at issue. *See Regents of the Univ. of Minn. v. LSI Corp.*, 2019 U.S. App. LEXIS 17887, at *28 n. 20 (Fed. Cir. June 14, 2019). As a result, the Federal Circuit clearly did not conclude that *Chattanooga* has been overruled.

The Cayuga Nation's alternative argument that *Chattanooga* is limited to eminent domain proceedings is not persuasive. The Cayuga Nation suggests that because *Chattanooga* involved a condemnation proceeding and because one of the illustrations for the immovable property exception set forth in the Restatement (Second) is an eminent domain proceeding, then the immovable property exception cannot possibly apply to proceedings to foreclose tax liens on real property. (*See* Opp'n Br. at 37.) So, essentially, the Cayuga Nation is arguing that the immovable property exception only applies to condemnation proceedings. This is illogical, and there is no support for this position in any authority cited by the Cayuga Nation.

While the Cayuga Nation criticizes the various decisions cited in Seneca County's opening brief as having relied on *Chattanooga* to reject claims of State immunity with respect to property that is located within another State's territorial jurisdiction, (*see* Appellant Br. at 22-23), the Cayuga Nation does not cite to a single case for the proposition that sovereign immunity bars a proceeding to foreclose tax liens on real property owned by a State within another State's jurisdiction. The fact that immunity was not expressly addressed in *Augusta v. Timmerman*, 233 F. 216 (4th Cir. 1916) (allowing a tax sale involving a three-acre parcel of land owned by the City of Augusta, Georgia in South Carolina), and *Burbank v. Fay*, 65 N.Y. 57 (1875) (noting that property owned by the State of

Massachusetts within New York State is "subject to all the incidents of ordinary ownership"), supports the observation by Charles Fairman, writing in 1928, that the relative lack of cases "where a state has presumed to claim immunity from judicial process in actions incident to real estate owned abroad . . . probably means that there is a realization that no such pretension would be admitted." *See* 22 Am. J. Int'l L. at 567.

Moreover, although *State v. Hudson*, 231 Minn. 127 (1950), and *People v. Streeper*, 145 N.E.2d 625, 629 (Ill. 1957), describe the property owned by one State in another State as being held in a "private" capacity, such treatment is actually the basis for the immovable property exception to sovereign immunity. *See*, *e.g.*, *Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812) ("A prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction; he may be considered as so far laying down the prince, *and assuming the character of a private individual*.") (emphasis added). The idea that a State owning property outside of its sovereign jurisdiction owns such property as any private individual is therefore not a reference to the commercial activities exception to foreign sovereign immunity, as argued by the Cayuga Nation. (*See* Opp'n Br. at 38-39.)

Alternatively, the Cayuga Nation argues at length that *United States v. Alabama*, 313 U.S. 274 (1941) is determinative of this case. (*See* Opp'n Br. at 24-

25, 44-46.) However, the sovereign immunity of the United States within its own sovereign domain is distinguishable from this case, given that the Subject Properties are located within the sovereign domain of New York State and its local municipalities, and not of the Cayuga Nation.

Alabama held that a tax sale of property owned by the United States within Alabama was invalid "in the absence of its consent to the prosecution of such proceedings." *Id.* at 282. It relied on *The Siren*, 7 Wall. 152, 154 (1869), for this holding, which states as follows:

> It is a familiar doctrine of the common law, that the sovereign cannot be sued *in his own courts* without his consent. The doctrine rests upon reasons of public policy; the inconvenience and danger which would follow from any different rule. It is obvious that the public service would be hindered, and the public safety endangered, if the supreme authority could be subjected to suit at the instance of every citizen, and consequently controlled in the use and disposition of the means required for the proper administration of the government. The exemption from direct suit is, therefore, without exception. This doctrine of the common law is equally applicable to the supreme authority of the nation, the United States. They cannot be subjected to legal proceedings at law or in equity without their consent; and whoever institutes such proceedings must bring his case within the authority of some act of Congress.

Id. at 153-54.

Indeed, "the immunity of a truly independent sovereign from suit *in its own courts* has been enjoyed as a matter of absolute right for centuries. Only the sovereign's own consent could qualify the absolute character of that immunity." *Hall*, 440 U.S. at 414, *overruled on other grounds*, *Hyatt*, 139 S. Ct. 1499

(emphasis added); *Alden v. Maine*, 527 U.S. 706, 715 (1999) ("When the Constitution was ratified, it was well established in English law that the Crown could not be sued without consent *in its own courts*.") (emphasis added). That is why the United States is immune from suit with respect to disputes concerning real property claimed by it within its own jurisdiction in *Alabama* and *Minnesota v. United States*, 305 U.S. 382, 386-87 (1939).

Here, the real property that was the subject of the foreclosure proceeding is not within the Cayuga Nation's sovereign jurisdiction. Unlike the facts of *Alabama*, this case is as if the United States purchased land in Canada, refused to pay property taxes, and then asserted sovereign immunity from suit in response to a foreclosure action. Assuming the property was not used for diplomatic or consular purposes, the United States would not enjoy immunity from a proceeding to foreclose the tax liens. Therefore, if the United States was really in the Cayuga Nation's "shoes," it would not enjoy immunity from suit. So granting immunity to the Cayuga Nation would impermissibly grant it immunity "broader than the protection offered by state or federal sovereign immunity."[7] *Lewis*, 137 S. Ct. at 1293.

[7] *Somerlott v. Cherokee Nation Distribs.*, 686 F.3d 1144, 1149-50 (10th Cir. 2012), is not to the contrary. (*See* Opp'n Br. at 44.) *Somerlott* considered whether a limited liability company organized under state law and owned by an Indian tribe was entitled to sovereign immunity. The Court concluded that because "the United States' sovereign immunity does not extend to its sub-entities incorporated as

The Cayuga Nation appears to argue that it enjoys the same exact immunity as does the United States, meaning that the Cayuga Nation's sovereign immunity is analyzed as if the United States actually owns the Subject Properties. Despite the Cayuga Nation's citation to various legal authorities for the general proposition that Indian tribes are "domestic dependent nations" that nonetheless enjoy sovereign immunity from suit (which is not disputed), it cites absolutely no authority for its broad supposition that this status "vest[s] in Indian sovereigns the full measure of the federal government's immunity." (*See* Opp'n Br. at 45.) No case cited by the Cayuga Nation states or suggests that Indian tribes are treated **as if they are in fact the United States** for purposes of sovereign immunity analysis. While the Cayuga Nation might be on to something if the real property were held in trust by the United States, *see Minnesota*, 305 U.S. at 386-87 (holding that the United States was an indispensable party to a condemnation proceeding because it owned the fee of Indian allotted lands in trust for the allottees and could not be sued without its consent), the Subject Properties have not been put into trust pursuant to 25 U.S.C. § 465.

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distinct legal entities under state law," sovereign immunity also did not apply to the tribally-owned entity that was organized under the law of a State sovereign (Oklahoma). *Id.* The question here is the same—would the United States be entitled to immunity from foreclosure proceedings with respect to property owned abroad (assuming such property was not used for diplomatic or consular purposes)? The answer for the United States is "no," and the answer for the Cayuga Nation is therefore "no" as well.

C. The Claimed Continued Existence Of The Cayuga Nation's Historic Reservation Does Not Change The Present-Day Reality That The Cayuga Nation's "Embers Of Sovereignty" Over Such Lands "Long Ago Grew Cold."

The Cayuga Nation argues that it maintains "some" regulatory jurisdiction over its historic reservation lands within New York State in a last-ditch effort to avoid application of the immovable property exception. (*See* Opp'n Br. at 41-43.) However, it is undisputable that, by application of *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Cayuga Nation does not have any sovereign power or authority with respect to the Subject Properties, or any of its other recently purchased properties in Seneca County. *Id.* at 214 (concluding that the Oneida Indian Nation could not "rekindl[e] embers of sovereignty that long ago grew cold" over any of its recently repurchased properties, regardless of their purported reservation status).

The Cayuga Nation admits—as it must—that *City of Sherrill* applies to its recently purchased real property parcels within its historic reservation, including the Subject Properties. (*See* Opp'n Br. at 7.) Yet the Cayuga Nation vaguely—and incorrectly—argues that it maintains "some" regulatory jurisdiction over its historic reservation lands. (*See id.* at 43.) There is no authority for this contention, and none is cited.

This hollow assertion is also contrary to the only authority on point, which demonstrates that the Cayuga Nation lacks regulatory authority over its recently

purchased properties. *See Cayuga Indian Nation v. Gould*, 14 N.Y.3d 614, 642-643 n.11 (2010) (*City of Sherrill* precludes the Cayuga Nation from asserting sovereign power over recently purchased properties situated within historic reservation lands for the purpose of avoiding real property taxes); *Cayuga Indian Nation v. Vill. of Union Springs*, 390 F. Supp. 2d 203 (N.D.N.Y. 2005) (*City of Sherrill* precludes the Cayuga Nation from asserting sovereign power over recently repurchased properties within its purported historic reservation for the purpose of avoiding local zoning laws). Thus, regardless of the status of the Cayuga Nation's historic reservation, the Subject Properties are located within the sovereign territory of New York State and its local municipalities, not within the sovereign territory of the Cayuga Nation.[8]

The land at issue in *Upper Skagit* was strikingly similar to the Cayuga Nation's properties here. The Upper Skagit Indian Tribe asserted that the parcel at issue was part of its "ancestral lands," and even described the property as its "sovereign land." (*See Upper Skagit Indian Tribe v. Lundgren*, U.S. Case No. 17-387, Br. for Pet. at 1, 30 (filed on Jan. 28, 2018)). Yet, like here, the Upper Skagit Indian Tribe had purchased the land—which was located within the boundaries of its historic reservation and had not been put into trust—in an open-market purchase

[8] The Cayuga Nation's reference to *Nevada v. Hicks*, 533 U.S. 353 (2001), is inappropriate. The Indian tribe's sovereign authority over its reservation lands had not been extinguished.

less than two years before the litigation began. (*See Upper Skagit Indian Tribe v. Lundgren*, U.S. Case No. 17-387, Br. for Resp. at 11 (filed on Feb. 21, 2018)). The respondents therefore argued—in reliance on *City of Sherrill*—that the Upper Skagit Indian Tribe could not revive its ancient sovereignty over the land through open-market purchases. *Id.*

Although there was no dispute as to the propriety of the Upper Skagit Indian Tribe's conveyance of its "ancestral lands" to the United States in 1855, this distinction does not make a difference. The Upper Skagit Indian Tribe did not have sovereign authority over its ancestral lands, and neither does the Cayuga Nation over its claimed historic reservation lands. New York State and its local municipalities therefore have a primeval interest in resolving this dispute regarding Seneca County's tax liens on the Cayuga Nation's real properties, which are located within the State's—and not the Nation's—sovereign domain.

D. Allowing Foreclosure Of The Real Property Tax Liens To Proceed Is Consistent With Tribal Sovereign Immunity Precedent As Recognized By The U.S. Supreme Court.

The Cayuga Nation does not persuasively refute that the U.S. Supreme Court's prior decisions interpreting the scope of tribal sovereign immunity support the conclusion that immunity does not apply to a proceeding to foreclose tax liens on real property owned by an Indian tribe like any other private landowner within

the sovereign territory of a State, not of the Indian tribe. (*See* Appellant Br. at 31-37.)

In *City of Sherrill*, the Supreme Court rejected the Oneida Nation's claim of sovereign immunity in the context of an eviction proceeding following foreclosure. If the Supreme Court's decision only reached the County's right to impose tax on the land, but not its ability to enforce the real property taxes through foreclosure and eviction, one would think the Supreme Court would have mentioned it, particularly given that the relief sought and arguments made to the Supreme Court by the Oneida Nation extended to collection and enforcement of the unpaid real property taxes.[9] (*See* Appellant Br. at 34-36.) *City of Sherrill* therefore necessarily reached, and rejected, the Oneida Nation's claim that its sovereign immunity barred the eviction proceedings, as well as the *in rem* foreclosure proceeding upon which the eviction proceeding was based.

Additionally, in response to the majority's concern in *Michigan v. Bay Mills Indian Cmty.*, 572 U.S. 782 (2014), that tribal sovereign immunity not be applied so as to leave a plaintiff, who has not chosen to deal with the Tribe, without

[9] Seneca County is cognizant that this Court previously held that it would "read no implied abrogation of tribal sovereign immunity from suit into [*City of Sherrill*]." *Cayuga Indian Nation*, 761 F.3d at 221. Seneca County is instead arguing that the Supreme Court previously upheld the right to both assess **and** to collect real property taxes on Nation-owned properties. Moreover, the relief sought and arguments made to the Supreme Court by the Oneida Nation in *City of Sherrill* were not previously presented during this Court's consideration of the preliminary injunction.

alternative remedies, *id.* at 134 S. Ct. at 2036 n. 8, the Cayuga Nation responds that Seneca County is not a "wholly innocent bystander" and that it can enforce the tax liens against subsequent purchasers. (*See* Opp'n Br. at 48 n. 10.) In essence, the Tribe seeks to foist its $3.76 million (and growing) real property tax bill associated with its 65 real property parcels owned throughout Seneca County onto subsequent purchasers, if and to the extent it ever sells these parcels on some unknown future date. That leaves the County, which relies on tax revenues in order to provide public services such as schools, roads, and public health services (including to occupants of Nation-owned properties), without a remedy for the foreseeable future. Although the Cayuga Nation contends that its ancient reservation was unlawfully sold to New York State, this is unrelated to Seneca County or to any of the County's present-day inhabitants.

CONCLUSION

For the reasons set forth herein and in Seneca County's opening brief in support of its appeal, Seneca County respectfully requests that this Court of Appeals reverse the District Court's decision granting summary judgment to the Cayuga Nation on the basis of tribal sovereign immunity and denying summary judgment to Seneca County on the same basis, and remand with instructions to enter summary judgment in favor of Seneca County on the claim that the Cayuga

Nation is entitled to the relief sought on the basis of tribal sovereign immunity, all other claims having been dismissed by the District Court.

s/ Brian Laudadio

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CERTIFICATE OF COMPLIANCE WITH F.R.A.P. 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). It contains 6,653 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

2. 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). It has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14 point font.