20-1310-cv

United States Court of Appeals

for the

Second Circuit

CAYUGA NATION, CLINT HALFTOWN, TIMOTHY TWOGUNS, GARY WHEELER, DONALD EMERSON, MICHAEL BARRINGER, RICHARD LYNCH, B. J. RADFORD, and JOHN DOES 8-20,
Plaintiffs-Counter-Defendants-Appellees,

– v. –

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, in his official capacity; BUD SHATTUCK, Village of Union Springs Mayor, in his official capacity; CHAD HAYDEN, Village of Union Springs Attorney, in his official capacity; BOARD OF TRUSTEES OF THE VILLAGE OF UNION SPRINGS, NEW YORK; and THE VILLAGE OF UNION SPRINGS, NEW YORK,
Defendants-Counter-Claimants-Appellants.

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

FINAL FORM REPLY BRIEF FOR DEFENDANTS-COUNTER-CLAIMANTS-APPELLANTS

DAVID H. TENNANT
LAW OFFICE OF DAVID TENNANT PLLC
3349 Monroe Avenue, Suite 345
Rochester, New York 14618
(585) 281-6682

Attorneys for Defendants-Counter-Claimants-Appellants

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

Treatises

REPLY ARGUMENT

I. Claim preclusion applies because the Cayugas could have and should have included a preenforcement challenge to the Village anti-gaming ordinance in their October 2003 complaint.

A. Preenforcement claims fall within claim preclusion.

An actionable preenforcement claim that "could have" and "should have" been brought will satisfy claim preclusion. *See Gospel Missions of Am. v. City of Los Angeles*, 328 F.3d 548 (9th Cir. 2003) (holding that certain claims that could have been brought as a preenforcement challenge against the City of Los Angeles barred assertion of claims in later lawsuit). The Ninth Circuit concluded that the claims were barred "[e]ven if the City did not enforce these provisions before, because of the relaxed standing doctrines available to free speech claims . . . ." *Id*. at 558. Such relaxed standing rules apply across the board to any preenforcement challenge to civil or criminal laws. Appellants' Opening Brief (AOB) 37-39.

Thus, even if this Court were to apply the so-called "bright-line" standard for claim preclusion that the Cayugas argue renders irrelevant any facts post-dating the filing of the complaint in the first action (which is not accurate), claim preclusion would nonetheless apply here so long as the Cayugas could have included a preenforcement challenge to the enforceability of the Village gaming ordinance when they filed their complaint on October 20, 2003.

B. The Cayugas could have and should have asserted IGRA preemption through a preenforcement challenge in the October 2003 complaint.

The Cayugas themselves advocated for the relaxed and "forgiving" standing rules for preenforcement challenges when appealing the dismissal of this case in 2015 (Second Circuit Dkt. 49 at pp 29-50) arguing that they had standing to challenge the Village anti-gaming ordinance under *Babbitt v. Farm Workers*, 442 U.S. 289 (1979) and *Hedges v. Obama*, 724 F.3d 170 , 197 (2d Cir. 2013). This Court agreed. *Cayuga Nation v. Tanner,* 824 F.3d 321, 331 (2d Cir. 2016) ("Cayuga 2016") (quoting *Hedges*, 724 F.3d at 197); *see* AOB 31-38. Likewise, this Court in *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 70 (2d Cir. 2019) ("*Tweed*") applied the same "forgiving" standing rules in the specific context of a preenforcement challenge to a state law based on federal preemption. *Id*. at 70-71. *See* AOB 37-39. Other decisions of this Court are to the same effect. *See, e.g., Air Transport v. Cuomo*, 520 F.3d 218, 222 (2d Cir. 2008) (holding "preenforcement challenge presents no problem of unripeness or other barriers to justiciability"); *Chemical Specialties Mfrs. Ass'n v. Lowery*, 452 F.2d 431, 433 (2d Cir. 1971).

Cayuga 2016, *Tweed*, and other circuit precedent make clear that the Cayugas could have (and should have) brought their IGRA preemption claim in their first lawsuit. *See* AOB 37-38. Indeed, the circumstances present on October 20, 2003 were ideal for such a preenforcement challenge to the Village anti-gaming law and its criminal penalties. The Cayugas were firmly intent on conducting gaming under IGRA. They had already:

(a) taken legal action to thwart another tribe from intruding into their gaming territory in Seneca and Cayuga Counties (JA 767-794 (ECF 126-38 Ex. LL to Tennant Decl. Sep. 4, 2019)); (b) purchased land in the Village for the specific purpose of opening a gaming facility there; and (c) commenced substantial renovations to turn a former auto parts store into an electronic bingo hall. AOB 5-6. The Cayugas knew about the Village anti-gaming law and that it indisputably prohibited their gaming facility. *Id*. These circumstances without question satisfied the "low threshold" under *Cayuga* 2016 and *Tweed* for bringing a "preenforcement challenge" to the Village anti-gaming ordinance based on IGRA preemption. *See* AOB 37-39.

The Cayugas nonetheless argue that in October 2003 they "had not entered the field" of gaming and that any such preenforcement action would have rested on numerous contingencies and been "dismissed as unripe." Appellees' Br. 53. But in making this ripeness argument the Cayugas cite only a single out-of-circuit *non-preenforcement* case, *Rawe v. Liberty Mutual Fire Ins*., 462 F.3d 521 (6th Cir. 2006) (Br. 53),[1] while ignoring the controlling Supreme Court and circuit authority—*Cayuga* 2016 and *Tweed*—for assessing standing to bring preenforcement challenges. Under this controlling precedent, the contingencies identified by the Cayugas are not a barrier to bringing such a challenge. "The fact that a project's ultimate

[1]*Rawe* does not address the forgiving standards for bringing a preenforcement action and is otherwise not relevant except for voicing the common concern that serial wrongdoers should not be allowed to escape liability by invoking res judicata. *Id*. at 530. *See* AOB 34-35.

completion may be uncertain because a plaintiff must undertake additional steps, such as obtaining funding, environmental permits, or additional carriers, does not defeat standing." *Tweed*, 930 F.3d at 71. As this Court further explained:

> Nearly every project of any complexity involves contingencies or uncertainties of some sort. The point of a standing inquiry is not to figure out whether a plaintiff will likely achieve a desired result. The point is simply to ensure that a plaintiff has a sufficient nexus to the challenged action in the form of a personal stake in the litigation so that the case or controversy requirements of Article III are met.

Id. (citing *Chevron Corp. v. Donziger*, 833 F.3d 74, 121 (2d Cir. 2016)). The Cayugas clearly had a sufficient personal and direct stake in a preenforcement challenge to the anti-gaming ordinance to satisfy Article III.

C. The Cayugas other stated reasons for not asserting IGRA preemption through a preenforcement challenge also lack merit.

1. There is no "new claim" (or threat).

The Cayugas appear to argue that a preenforcement IGRA preemption challenge, if made part of the October 20, 2003 complaint, would not have been the "same claim" as the one the Cayugas ultimately brought in 2014. Appellees' Br. 51. This argument is hard to fathom since both actions are identical. Each by definition asks the court to determine as a matter of law that IGRA preempts the Village from enforcing its anti-gaming ordinance with respect to the Cayugas' development and use of

271 Cayuga Street for gaming purposes. This legal question presents the purest form of claim preclusion. It rests on the same operative facts of the Cayugas seeking to engage in, or in fact engaging in, Indian gaming under IGRA at that one address within the Village. The facts in 2003 and 2014 are nearly identical. The only material change was the Cayugas' decision to take the bingo hall out of mothballs and provoke another round of jurisdictional disputes, with *Sherrill* and *Union Springs II* holding such unilateral action disruptive and unlawful. AOB 12-13.

The record thus shows the two lawsuits are part of a single, continuous transaction (opening, closing, re-opening) and rest on the same core operative facts presenting the same core grievance. Under *Waldman v. Village of Kirjas Joel*, 207 F.3d 105 (2d Cir. 2000) and other circuit precedent, claim preclusion applies without regard to how the Cayugas moderated their IGRA preemption theory between the first and second iterations of their twin lawsuits against the Village. AOB 32-35.

Nor is there any merit to the Cayugas' argument that they faced a "new threat" in 2014. Appellees' Br. 18. The Cayugas faced that same threat in 2003 when the Cayugas sued the Village because the anti-gaming law was on the books then, and they knew it stood in the way of their gaming facility. The Cayugas kept that ordinance (and all other Village laws) at bay by securing, upon filing the complaint on October 20, 2003, first temporary, and then preliminary and permanent, injunctive relief that blocked the Village from enforcing its laws or ordinances. AOB 6-9. But

that successful first strike in 2003 to enjoin the Village from enforcing *any* and *all* laws does not make for a separate claim in 2014. The threat of criminal prosecution simply *returned* when the Cayugas *re-opened* Lakeside Entertainment on Village fee lands, without those lands held in trust.

2. *Whole Woman's Health* does not help the Cayugas.

The Cayugas misread *Whole Woman's Health v. Hellerstedt*, __U.S.__, 136 S. Ct. 2292 (2016). Appellees' Br. 51-52. That case addressed claim preclusion principles in the context of successive challenges to a Texas abortion law that required abortion clinic doctors to have admitting privileges at a hospital. The first lawsuit was brought immediately upon the law's enactment; it challenged the law as it applied to two abortion clinics. The state had not yet attempted to enforce the law. The second lawsuit rested on important "concrete factual developments" that occurred after the conclusion of the bench trial in the first lawsuit: the fact that "a large number of clinics have in fact closed." *Id*. at 2306. These consequences "were unknowable before [the law] went into effect." *Id*. In finding these closely-related, successive actions were not barred by claim preclusion, the Supreme Court expressly cited and quoted Restatement of Judgments § 24, Comment f, which provides that where "important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, *even a slight change of circumstance* may afford a sufficient basis for concluding that a second action may be brought." *Id*. at 2305 (emphasis added). The Supreme Court observed that the

circumstances had "changed dramatically" since the first lawsuit, and commented that "[c]hanged circumstances of this kind are why the claim in [the first lawsuit] is not the same claim in petitioners' claim here." *Id*. at 2306.

The *Whole Woman's Health* decision is properly limited to its unique abortion context. The analysis is expressly tied to the fact that the claims "involve important human values" and the decision itself rests on a specific Restatement rule tailored to such special circumstances. *Id*. No similar considerations are present in the dispute over the Cayugas' commercial bingo hall. And unlike in *Whole Woman's Health,* where circumstances had "changed dramatically" in the short time between the two actions, the record here shows the opposite. The factual circumstances on the ground had remained static—indeed frozen in time for eight years—as the Cayugas put their gaming facility on hold to await the land going into trust.[2]

D. The district court did not discuss whether the Cayugas could have asserted IGRA preemption in a preenforcement challenge in October 2003.

The district court never reached the critical issue of whether the Cayugas could have included an IGRA-preemption challenge through a

[2] On July 31, 2020, the Department of Interior denied the Cayugas' fee-to-trust application citing concerns about the ongoing tribal violence in Central New York. A copy of the Department's denial is being submitted under Rule 28(j) of the Federal Rules of Appellate Procedure.

preenforcement challenge in their October 20, 2003 complaint. The district court's omission stands in sharp contrast to Judge Hurd's *sua sponte* ruling in 2015 (JA 194 (ECF 50)) that the individual plaintiffs lacked standing to argue IGRA preemption on a preenforcement basis, which this Court reversed in *Cayuga* 2016. Because Judge Hurd did not address this central question below, this Court has no ruling to review. The Cayugas' after-the-fact effort to fill in the missing analysis fails. Like the district court, the Cayugas do not address the controlling precedent including *Cayuga* 2016 and *Tweed*. The Cayugas' failure to assert such an actionable claim *preenforcement* precludes this second action. *See Gospel Mission,* 328 F.3d at 558.

II. Claim preclusion also applies here because there is a single continuous transaction (opening, closing and re-opening) with the same core grievance, property, parties and motivations.

The Cayugas advocate for an inflexible "bright line rule" that precludes a court from considering conduct post-dating the filing of the first lawsuit. Appellees Br. 54. That rigid view is not borne out even by the decisions cited by the Cayugas, which note that courts "generally" do not consider conduct post-dating the complaint in the first action. *See Storey v. Cello Holdings*, L.L.C, 347 F.3d 370, 383 (2d Cir. 2003); *Securities and Exchange Comm'n v. First Jersey Securities, Inc*., 101 F.3d 1450, 1464 (2d Cir. 1996). And *Waldman* and *Soules v. Connecticut*, 882 F.3d 52 (2d Cir. 2018) do not apply such a rigid approach. Both considered conduct that postdated the filing of

the original complaint.[3] How parties moderate their arguments and theories in their briefs, present argument in hearings, and press the district court to reach issues over the course of litigation may inform the application of res judicata. *See Waldman*, 207 F.3d at 111 (evaluating plaintiff's pleadings and trial strategy); *Waldman v. Village of Kiryas Joel*, 39 F. Supp. 2d 370, 375 (S.D.N.Y. 1999); (considered arguments advanced by plaintiff in a pre-trial brief); *Soules*, 882 F.3d at 55-56 (briefing and argument).

Waldman illustrates the fact-specific inquiry that must be undertaken in each case to determine the application of claim preclusion, in particular to assess whether there is a single transaction or series of related transactions that arise out of the same "nucleus of operative facts" and forms the "same core grievance"; whether the claims form "a convenient trial unit" and that having them tried together would "conform[] to the parties' expectations." *See Waldman*, 207 F.3d at 113; 39 F. Supp. 2d at 378.

As in *Waldman*, this case presents successive lawsuits against a municipal defendant where the underlying conduct by the Cayugas forms a distinct "core grievance," a single transaction premised on the same

[3] The Cayugas argue for this "bright-line rule" based on *Morgan v. Covington Twp.*, 648 F.3d 172, 177-78 (3d Cir. 2011), which string cites several cases including *Computer Assocs. Int'l, Inc. v. Altai*, Inc., 126 F.3d 365, 369-70 (2d Cir. 1997). But *Morgan* involved successive lawsuits alleging employment discrimination whereas *Computer Associates* addressed serial copyright infringement. A more on point decision of this Court is *Soules*, 882 F.3d 52, which, like *Morgan*, addressed successive actions alleging employment discrimination. *Soules* did not apply a bright-line test.

nucleus of operative facts: a continuous course of conduct to open a gaming facility in the Village in violation of Village civil and criminal laws and ordinances. The facts essential to the second lawsuit were necessarily present in the first because the Cayugas knew about the Village's gaming ordinance and obtained injunctive relief from the district court that was broad enough in scope to prohibit its enforcement. How the Cayugas chose to moderate their legal theories over the course of their twin lawsuits against the Village—including not bringing an express preenforcement challenge to the anti-gaming radiance in October 2003 and choosing to aggressively press IGRA preemption starting in February 2004—informs the claim preclusion analysis. It shows not only that the Cayugas could have and should have raised IGRA preemption in the first lawsuit, but in fact did.

This Court's decision in *Soules*, 882 F.3d 52, builds on the notion that a plaintiff's actions in litigating a case may support the application of claim preclusion. In some circumstances, as *Soules* recognized, a plaintiff may inject enough material about events post-dating the filing of the original complaint that he or she will be found to have "implicitly" amended the complaint to include that claim and therefore be barred from bringing a second lawsuit. This Court concluded the plaintiff did so by injecting substantial materials about his termination as a police officer in a pending lawsuit that challenged disciplinary action taken against him. When the plaintiff separately commenced suit eight months latter to challenge his termination, the claim was deemed precluded. *Id*. at 54-55. This Court concluded that Soules had aggressively injected into his first lawsuit the

fact of his claimed unlawful termination, and by doing so had "implicitly" amended his complaint. *Id*. at 54. In finding claim preclusion, for conduct that post-dated the filing of the complaint in that action, this Court distinguished the "bright line" circuit authority cited by Soules (equally relied on by the Cayugas here). Specifically, Soules argued that under *Computer Assocs. Int'l, Inc.*, 126 F.3d 365 and *Proctor v. LeClaire*, 715 F.3d 402 (2d Cir. 2013), res judicata did not bar his retaliatory termination claim because it occurred after he filed his first lawsuit. *Soules*, 882 F.3d at 56. This Court recognized, however, that "Soules' argument fails because his post-complaint conduct in *Soules I* effectively amended his complaint to add a retaliatory termination claim." *Id*. This Court further explained "if *res judicata* did not apply, the duplication of proceedings that would ensue, with the attendant waste of resources and risk of inconsistent results, is precisely what the doctrine of claim preclusion prevents." *Id.*

Thus, both *Waldman* and *Soules* support the application of res judicata to the Cayugas' 2014 reprise of their 2003 lawsuit, taking into account the Cayugas' aggressive reliance on IGRA preemption beginning in February 2004. This is true under the res judicata analysis articulated in *Waldman*, as well as under this Circuit's concept of "implicit amendment" in *Soules*. The analysis in *Soules* applies equally to the Cayugas' twin lawsuits involving the same course of conduct, motivations, and parties.[4]

[4] The Cayugas contend in a footnote (Appellees' Br. 56 n.10) that the Village has waived reliance on *Soules*' articulation of "implicit amendment." That makes no sense given the res judicata arguments made by the Village throughout this case. The Village has argued from the get-go that the

III. Issue preclusion is triggered because the Cayugas in fact raised and litigated IGRA preemption, even prevailing on it in *Union Springs I*.

The record shows without dispute that the Cayugas filed briefs and affidavits in February 2004 that gave full voice to IGRA preemption and that the district court expressly relied on the Cayuga's assertion of IGRA preemption in *Union Springs I* when it rejected the Village's argument, premised on its zoning laws, that the Cayugas' gaming facility was located too close to a school. AOB 8-9, 28. There is nothing "distorted" about that record. These facts emerged as "inconvenient truths" for the Cayugas when they launched their IGRA preemption lawsuit in 2014.

To be sure, the Cayugas' October 2003 complaint did not expressly assert IGRA preemption while it broadly asserted that federal law displaced *all* local laws and ordinances. And it is also true that the Village first cited IGRA in January 2004 when arguing the Cayugas' facility was not compliant with IGRA. JA 989 (ECF 137-8 (Schauf Ex. O)). But the Cayugas did not just oppose the Village's argument. Instead, they affirmatively asserted IGRA preempted the enforcement of any and all laws pertaining to the gaming parcel. The Cayugas could have joined issue

---

Cayugas' assertion of IGRA preemption in their briefs and affidavits, starting in February 2004, made IGRA preemption part of the case and part of the *Union Spring I* decision, and supports the application of both claim preclusion and issue preclusion. AOB 22-40. Those arguments are broad enough to encompass the concept of "implicit amendment" and any other legal construct that this Court might adopt in considering the nearly identical lawsuits under the doctrine of res judicata.

on the Village's IGRA argument simply by asserting there is no private right of action under that statute, which is an argument the Cayugas in fact made and prevailed on. They did not need to turn the statute back against the Village by invoking its broad preemption of state law. That was a litigation choice.

The Cayugas' effort to portray these facts as "distortions" reflects an advocate's jaundiced view of unhelpful facts in the record. Appellees' Br. 43-44.[5] And, of course, even if it were accurate that the Cayugas had "just responded" to the Village, and had not affirmatively advanced IGRA preemption for their own reasons, the fact remains that IGRA preemption was litigated and made its way into the holding in *Union Springs I*. For purposes of applying issue preclusion, it does not matter which party raises the issue or presses it. Issue preclusion will be found if (a) the issue was in fact litigated; (b) it was necessary to the resolution of the case; and (c) *the party against whom issue preclusion is to be applied* had a full and fair opportunity to present argument on that issue. Each of these preclusion elements is satisfied in the case of the Cayugas.

IV. The Village's use variance requirement, triggered by the change in use of the subject parcel from an auto parts store to a bingo hall, remains in effect and was never satisfied by the Cayugas.

The Cayugas are not currently compliant with Village zoning law, and will not be until they secure a use variance. This requires them to

[5] Judge Hurd adopted the Cayugas' characterization of the record. But the record shows otherwise.

apply for a use variance from the Zoning Board of Appeals. JA 672-673 (ECF 125 (Tanner Decl. ¶¶ 52, 48)); JA 1198 (ECF 138-2 (Hayden Reply Decl. ¶ 15)).

The Cayugas argue that (1) "the Village has never cited the Nation for violating this requirement, raising it only once in an informal letter"; and (2) it is nothing more than an end run around IGRA's preemptive effect. Appellees' Br. 35-36. Neither contention is true. First, the Village cited the Cayugas on October 15, 2003 for an improper "*change in use* of a structure … without required Village zoning and building permits" as the Cayugas established through their own submissions in the prior lawsuit. JA 689 (ECF 125 (Tanner Decl., Ex. G [2003 Halftown Affidavit (internal Ex. B) (emphasis added))). Upon reopening their gaming facility in 2013, the Cayugas were advised of this continuing violation and the need for compliance (*see* JA 249 (ECF 100-6 [Order to Remedy Violations dated 12/20/13])) and were again reminded of this obligation by letter dated 3/24/14. JA 253 (ECF 100-7 (Ex. G to First Amended Complaint)). Thus, the Cayugas were on notice since 2003 that, at the very least, a dispute existed regarding the need for a use variance. They cannot fairly claim surprise now, and indeed there would be no surprise if the Cayugas had ever engaged in meaningful zoning and land use discussion with the Village. Instead, they chose to assert tribal sovereignty and ignore Village authority. Every other developer would have to satisfy these zoning requirements.

It is no answer for the Cayugas to now say that these long-standing, facially neutral zoning laws constitute an "indirect" attempt to impermissibly regulate gaming. The Village never enacted zoning laws and ordinances in an attempt to prevent the Cayugas from engaging in economic development. The Cayugas operate other commercial establishments within the Village (gas station and convenience store) that are, and historically have been, permitted uses. Had the Cayugas chosen to operate 271 Cayuga Street as a retail store or another expressly permitted use, the variance requirement would not come into play. Had the Cayugas decided to operate the parcel as an adult bookstore or an adult entertainment enterprise, they, like any other similarly situated property owner, would have been required to obtain a use variance or otherwise comply with Village zoning and land use laws.

The Cayugas argue that forcing them to request a use variance would be futile (Appellees' Br. 36), but that claim rests on speculation since they never engaged with the Village zoning officials. And the Tribe is not without a remedy. If the Zoning Board of Appeals denies their request, the Cayugas can challenge that decision in New York State Supreme Court through a CPLR Article 78 proceeding. *See Matter of Sasso v. Osgood*, 86 N.Y.2d 374, 384-385 (1995); *Manculich v. Bucci*, 3:05-cv-1441, at *12 n. 3 (N.D.N.Y. Apr. 25, 2006). The Cayugas should be required to exhaust their administrative remedies and should not be treated differently from other developers who seek to renovate buildings on lands within the Village. *See*

Murphy v. New Milford Zoning Com'n, 402 F.3d 342, 348-349 (2d Cir. 2005) ("federal courts do not sit as zoning boards of review" and recognized that "local bodies 'are better able than federal courts' to address such disputes").

V. The fee lands in the Village of Union Springs are not Indian lands within the meaning of IGRA.

The fee lands in the Village are undeniably *within the Village's own taxing and regulatory jurisdiction* under binding precedent. *Sherrill* broadly declared that the Oneidas could not revive their long-dormant sovereignty over the fee lands "in whole or in part." That declaration, while rendered in a tax foreclosure dispute, had immediate application to other disruptive assertions of tribal sovereignty and jurisdiction over fee lands within the regulatory jurisdiction of New York State and its political subdivision. This included the Supreme Court expressly calling out the disruptive actions of the Cayugas in the Village in asserting tribal jurisdiction over the fee lands and resisting Village zoning and land use laws. The decision in *Sherrill* necessarily rendered New York Indians non-territorial sovereigns over the fee lands just as Congress did with respect to Native Alaskan tribes through passage of the Alaska Native Claims Settlement Act of 1971.[6] For

[6] *See Koniag, Inc. v. Kanam,* 2012 WL 2576210 (D. Alaska July 3, 2012), *4 ("territorial jurisdiction is not available to Alaska Native tribes") (citing *Native Village of Venetie Tribal Government*, 522 U.S. 520, 523 (1998)); *see State v. Cent. Council of Tlingit & Haida Indian Tribes of Alaska*, 371 P.3d 255, 261-262 (Alaska 2016). Such non-territorial sovereigns remain sovereign over

New York Indians, the fee-to-trust process under 25 U.S.C. § 5108 is "the proper" (i.e. one and only) way for New York tribes to lawfully restore sovereignty and tribal jurisdiction over the fee lands that fall within the limits of their "historic" reservations. *See City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 200 (2005); *Upstate Citizens for Equality, Inc. v. United States,* 841 F.3d 556, 563 (2d Cir. 2016).

The Cayugas nonetheless try to bootstrap from general principles of inherent retained sovereignty to create territorial sovereignty and governmental power over the Village fee lands that cannot be reconciled with *Sherrill* and *Union Springs II*. Putting the present jurisdictional conflict into sharpest relief is the Tribe's resistance to the application of *Ex parte Young*. Even though this Court stated the doctrine was applicable to the Oneidas on their "not disestablished" reservation, *Oneida Indian Nation v. Madison County*, 605 F.3d 149, 160 (2d Cir. 2010), the Cayugas argue that it only applies to off reservation conduct, not to their actions "*on the reservation*." Appellees' Br. 40-41. Their argument reinforces the correctness of the conclusion that Village fee lands are not reservation lands.

---

internal tribal affairs (e.g., membership) and over people who consent to deal with the tribe. But tribal governmental power does not exist over *land*.

A. The Cayugas' plain meaning construction of IGRA falters on "Reservation."

The Cayugas argue that the question of "Indian lands" under IGRA is simply answered by looking at the language that defines "Indian lands" as [including] "*all lands* within the limits of *any* Indian reservation" under 25 U.S.C. § 2703(4). Appellees' Br. 22-23 (emphasis added in their brief). But the cited language begs the question as to whether the legal fiction known as a "not disestablished" New York reservation—where the fee lands are stripped of tribal sovereignty and jurisdiction by Supreme Court precedent—logically fits within the definition of "Indian reservation" under IGRA. AOB 45-46; *Upstate Citizens*, 841 F.3d at 562 n.4. The varying "legal implications" of the term "reservation" preclude reliance on the plain meaning rule.

B. Congress did not use "any" and "all" in IGRA as "all inclusive."

By its terms, IGRA applies to some reservations and not others. Specifically, it leaves out state-created reservations occupied by state-recognized tribes. *See* IGRA §2703(5) (IGRA limited to federally-recognized tribes). While the exclusion of state-created Indian reservations does not present a barrier to the Cayugas, given their federal status, it shows that the expansive terms "any" and "all" in IGRA, like all language in the gaming statute, must be interpreted in light of the statute's structure and purpose.

C. The Cayugas' reading of IGRA destroys its foundation.

The real problem with the Cayugas' application of the plain meaning rule to IGRA is that it drives the legal analysis to an illogical conclusion, one where IGRA applies to fee lands over which the Supreme Court has ruled the tribe has no jurisdiction. That makes no sense whatsoever under IGRA because tribal sovereignty and jurisdiction was a *sine qua non* of any and all "Indian reservations" in 1988 and what Congress manifestly intended to make a requirement under IGRA. This is evident from the structure and purpose of IGRA:

> Congress adopted IGRA in response to [the Supreme] Court's decision in *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 221-222, (1987), . . . which held that States lacked any regulatory authority over gaming on Indian lands. *Cabazon* left fully intact a State's regulatory power over tribal gaming outside Indian territory ….

Michigan v. Bay Mills Indian Cmty., 134 S. Ct. 2024, 2034 (2014); *id*. at 2034 ("So the problem Congress set out to address in IGRA (*Cabazon*'s ouster of state authority) arose in Indian lands alone. And the solution Congress devised, naturally enough, reflected that fact."); *id*. ("Everything—literally everything—in IGRA affords tools (for either state or federal officials) to regulate gaming on Indian lands, and nowhere else.")

It cannot be seriously disputed that IGRA requires the applicant tribe to demonstrate that the proposed gaming parcel is under the governmental power of the tribe. AOB 12-13, 41-49. That is the only way the tribe can enact a gaming ordinance and exercise jurisdiction over the gaming parcel.

Because the Cayugas cannot lawfully exercise territorial sovereignty over the fee lands in whole or in part after *Sherrill*, any exercise of tribal jurisdiction over the fee lands is in derogation of state/local sovereignty and disrupts settled expectations in violation of *Sherrill*. Such "distinctly non-Indian lands" under *Sherrill* do not qualify as "Indian lands" under IGRA.[7] That was the position of the National Indian Gaming Commission from at least 2009 to 2018. This Court reached the same conclusion in *Upstate Citizens*, 841 F.3d at 566.[8]

---

[7] The Cayugas contend that "*Sherrill* did not address the Nation's authority to exercise its own inherent governmental power, much less hold that all the varied exercises of governmental power described above are unlawful." Appellees' Br. 31. But *Sherrill* broadly proscribed long-absent New York tribes from exercising sovereignty in whole or in part with respect to fee lands they purchase within their historic reservations. Any tribal exercise of *territorial sovereignty* over those fee lands is in derogation of state/local governmental authority and thus impermissibly disruptive to settled expectations under the reasoning of *Sherrill*. The Cayugas' reliance on *New York v. Salazar*, No. 6:08– CV–644, 2009 WL 3165591, at *9 (N.D.N.Y. Sept. 29, 2009) is misplaced. That case reviewed the lawfulness of Interior's 2008 decision to take land into trust for the Oneidas, and analyzed IGRA in relation to the Oneidas' Turning Stone Casino. While that casino initially was located on fee lands, the Oneidas applied to have the lands taken into trust in 2005, on direction from *Sherrill*. *Salazar* does not speak to whether the Cayugas' fee lands qualify as Indian lands under IGRA.

[8] The Cayugas argue that the Village overstates *Sherrill*'s holding and that "similarly" unmoored readings of *Sherrill* have been "considered and discarded' by this Court. Appellees' Br. 31. Not so. Both cited cases addressed the distinct argument that *Sherrill* impliedly abrogated sovereign immunity from suit. *Cayuga Indian Nation York v. Seneca Cnty.*, 761 F.3d 218, 221 (2d Cir. 2014); *Seneca Cnty.*, No. 19-0032, 2020 WL 6253332, *9–11 (2d Cir. Oct. 23, 2020). Those decisions say nothing about whether the Cayugas

This Court should not accept the Cayugas' efforts to read out of IGRA the requirement of tribal governmental power over the gaming parcel or allow them to satisfy it by unilateral unlawful actions taken in direct violation of *Sherrill / Union Springs II*. [9]

D. The Cayugas other arguments are without merit.

1. The Cayugas' textual interpretation of "Indian lands" is flawed.

The Cayugas reading of IGRA (25 U.S.C. § 2703(4)) which defines "Indian lands," (Appellees' Br. 22-23) should be rejected.[10] It flies in the

---

lawfully exercise sovereignty and jurisdiction over the fee lands in the Village.

[9] The Cayugas contend that the Village has not separately addressed § 2710(b)(1)'s requirement that a gaming parcel must be on Indian lands "within such tribe's jurisdiction," seemingly drawing a distinction between a tribe's geospatial jurisdiction ("*where*") and whether it actually exercises governmental power in that location. Appellees' Br. 32-34. The fee lands in the Village are not eligible for gaming under IGRA because, under the binding precedent of *Sherrill/Union Springs II,* and this Court's ruling in *Upstate Citizen,* the Cayugas cannot exercise territorial sovereignty or jurisdiction, or any aspect of governmental power, over those fee lands.

[10] "Indian lands" include

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

25 U.S.C. § 2703(4).

face of IGRA's history and NIGC's construction of IGRA, including the NIGC's long-held view that the fee lands in the Village do not qualify as Indian lands after *Sherrill* precisely because the Cayugas do not exercise governmental power over them.[11] This Court's reading of IGRA in *Upstate Citizen* precludes the Cayugas' reading here.

The fact that Section 2703(4) subparagraph (A) does not use "over which an Indian tribe exercises governmental power" does not mean the requirement is absent. To the contrary, it is implicit in the term "Indian reservation." *See* F. Cohen, Handbook of Federal Indian Law at 27 ("tribes exercise substantial governing powers within their territory") (1982 ed.); *see generally id*. at 34-38; F. Cohen, Handbook of Federal Indian Law at 507 ("A tribe's inherent sovereignty over its territory extends to the regulation of both members and nonmembers conducting activity on Indian lands or affecting tribal interests") (2012 ed.). Tribal reservation lands are thus by definition and conception under a tribe's governmental power. *See generally id.* (1982 ed.) at 34-38. Tribally-owned trust land is the same. *See id*. (2012 ed.) at 718. Restricted fee lands fall into a different category due to vagaries in allotments to individual Indians that pass into the hands of non-Indians.

---

[11] The NIGC website where it lists "Indian lands" opinions (https://www.nigc.gov/general-counsel/indian-lands-opinions) (last visited Nov. 14, 2020) states that the applicant tribe, in addition to having a reservation, trust land or restricted fee land within the meaning of 25 U.S.C. § 2703),"must have jurisdiction and exercise governmental powers over the gaming site."

See generally, F. Cohen, Handbook of Federal Indian Law (1942 ed.) at 108-109. IGRA's express statutory requirement of tribal governmental power logically applies to this last category of uncertain Indian lands, which is consonant with the "grammatical rule of the last antecedent." *See Barnhart v. Thomas*, 540 U.S. 20, 26-37 (2003).

2. The stipulation does not limit Village arguments.

The Cayugas claim (Appellees' Br. 2) the Village has "not walked back" its stipulation that the Cayuga reservation has not been disestablished under current precedent. JA 257-258 (ECF 111 at 2). But under the terms of the stipulation, the Village is free to argue every point raised on appeal, including that *Sherrill* leaves New York tribes as non-territorial sovereigns with no tribal jurisdiction over the fee lands located within their "historic" "not disestablished" reservations.

3. *McGirt* is inapposite.

The Cayugas' rely heavily on *McGirt v. Oklahoma,* 140 S. Ct. 2452 (2020) (Appellees' Br. 3, 22. 25, 28. 36), but the decision is inapposite. The Supreme Court did not cite *Sherrill* or invoke its formulation of Indian laches that directly applies to assertions of tribal sovereignty by New York tribes who purchase fee lands within the boundaries of their historic reservations. Rather, the Supreme Court in *McGirt* resolved the parties' differing positions on the proper interpretation of specific federal treaties pertaining to the tribes in Oklahoma, and the historical treatment of the

Creek Reservation under the common law standards governing the disestablishment or diminishment of reservations.[12]

4. *Narragansett* and *Aquinnah* are inapposite.

What the Cayugas call "especially telling" (Appellees' Br. 27-30) are two cases from the First Circuit that have nothing to do whatsoever with the jurisdictional status of the Cayugas' fee lands in New York, which is governed by *Sherrill* and *Union Springs II*. In the two cited New England tribal cases, unlike in the case of the Cayugas and other New York Indians, Congress set aside federal trust lands to resolve tribal land claims. Each congressional act provides for concurrent state-federal-tribal jurisdiction over those trust lands based on the negotiated settlement. AOB 47-48. *Sherrill* and *Union Springs II* in contrast addressed the peculiar status of New York Indians on fee lands within their "not disestablished" reservations, and that binding precedent demonstrates that the Cayugas have no territorial sovereignty and tribal jurisdiction over those fee lands. *Sherrill* makes clear that the statutory fee-to-trust process is "the proper" avenue for New York tribes to restore tribal sovereignty and jurisdiction, thereby converting the fee lands into trust lands over which the tribe exercises jurisdiction and can satisfy IGRA's requirements. Both

[12] The history of the Oklahoma tribes is dramatically different from that of New York Indians. *See* F. Cohen, Handbook of Federal Indian Law at Ch. 22 ("New York Indians") and Ch. 23 ("Special Laws Relating to Oklahoma") (1942 ed.).

Narragansett and *Aquinnah* affirm the necessity of the tribe having trust land under tribal governance as a prerequisite to finding the lands eligible for gaming under IGRA. *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 694 (1st Cir. 1994); *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 624– 25 (1st Cir. 2017).

VI. The immovable property exception should be applied to allow the Village to enforce its laws despite the Cayugas' claim of tribal immunity from suit.

The Cayugas argue that this Court's decision in *Cayuga Indian Nation of New York v. Seneca County*, No. 19-0032, 2020 WL 6253332, at *1 (2d Cir. Oct. 23, 2020) forecloses the Village from relying on the immovable property exception. Appellees' Br. 38-40. That decision adopted a narrow reading of the doctrine that made it inapplicable to a tax foreclosure proceeding. The Village disagrees with that panel's interpretation of the doctrine and rejects the analogy drawn by the panel between the County's core sovereign authority to impose and collect real property taxes to fund essential services, and a private party's action to collect a debt through attachment. But the Village acknowledges that its regulatory enforcement actions against the Cayugas, relating to the Tribe's ownership and use of the fee lands, would not fare any better than a tax foreclosure action under the reasoning employed by the prior panel. The Village rests on its opening brief and realistically understands that relief may come through a petition for certiorari in that case, or here.

VII. *Ex parte Young* provides an enforcement mechanism through which to vindicate the Village's important interests in enforcing its own laws.

This Court's decision in *Madison County*, 605 F.3d at 160, permits the Village to enforce its laws under *Ex parte Young* to address the unlawful actions taken by individual Cayuga members with respect to the Village fee lands. *Madison County* addressed the Oneidas' identical "not disestablished reservation" and stated that "[i]ndividual tribal members and tribal officers in their official capacity remain susceptible to suits for damages and injunctive relief." *Id*. at 160 (citing *Puyallup Tribe, Inc. v. Dep't of Game of State of Wash*., 433 U.S. 165, 171 (1977)); *see Bay Mills,* 134 S. Ct. at 2035.

Madison County is directly on point because it establishes the applicability of *Ex parte Young* to the conduct of tribal members occurring on tribally-owned fee lands located within the tribe's "not disestablished" historic reservation in New York. *Bay Mills* also makes clear the Village can proceed under *Ex parte Young* to enforce its laws against individual Cayuga members for violating Village laws. *Bay Mills* endorsed the application of *Ex parte Young* in the context of unlawful actions by tribal members occurring on fee lands within the state's territorial sovereignty. Thus, without question, the Village has the right to proceed under *Ex parte Young* to enforce its laws against the individual Cayuga members (plaintiffs) for their illegal activity on the fee lands.

The Cayugas never address *Madison County* and *Bay Mills* but instead seek to extrapolate a contrary rule from *Gingras v. Think Finance, Inc.*, 922 F.3d 112 (2d Cir. 2019), limiting *Ex parte Young* to "off reservation" conduct. Appellees' Br. 40-41. In holding that *Ex parte Young* allowed private litigants to bring state and federal claims for prospective, injunctive relief against the Chippewa Cree tribal officers who operated an off-reservation pay-day lending business, this Court in *Gingras* addressed the facts before it. It did not geographically limit the doctrine's reach in any way, and did not discuss its application to the conduct of New York tribal members occurring on fee lands within their "not disestablished" historic reservations. *Madison County* addressed that particular context and expressly endorsed the application of *Ex parte Young* to lawsuits against individual tribal members for unlawful actions taken with respect to such fee lands. The Village has the right to sue the tribal members in their official and individual capacities under *Ex Parte Young* for violating Village laws and ordinances, just as the Village has with respect to any other property owner.

CONCLUSION

The Village respectfully requests this Court to finally resolve this dispute and confirm that the Village may apply its laws of general application to the Tribe and its members, just as it does to all other

landowners in the Village.

Dated: November 17, 2020

Respectfully submitted,

/s/ David H. Tennant
David H. Tennant
Kathy L. Eldredge
LAW OFFICE OF DAVID TENNANT PLLC
3349 Monroe Avenue, Suite 345
Rochester, New York 14618
(585) 281-6682
Attorneys for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B), the word limit of Local Rule 32.1(a)(4) (A) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f): this document contains 6,983 words.

This document 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 document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point font Book Antiqua.

/s/ David H. Tennant

David H. Tennant