20-1310-cv

United States Court of Appeals

for the

Second Circuit

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

Plaintiffs-Counter-Defendants-Appellees,

JOHN DOES 1-20,

Plaintiff-Counter-Defendant,

(For Continuation of Caption See Inside Cover)

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

PROOF BRIEF FOR DEFENDANTS-COUNTER-CLAIMANTS-APPELLANTS

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– v. –

HOWARD TANNER, Village of Union Springs Code Enforcement Officer, 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, VILLAGE OF UNION SPRINGS, NEW YORK, BUD SHATTUCK, Village of Union Springs Mayor, in his official capacity,

Defendants-Counter-Claimants-Appellants,

EDWARD TRUFANT, Village Of Union Springs Mayor, in his official capacity,

Defendant,

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PRELIMINARY STATEMENT

This appeal is the latest chapter in a two-decades long dispute over the Cayuga Nation's actions in building and operating a gaming facility located on fee lands within the Village of Union Springs. The Cayugas opened the gaming facility in 2004, closed it in 2005, and reopened it in 2013. In connection with the opening, and again upon reopening, the Cayugas filed nearly identical lawsuits to block the Village from interfering with its gaming business. Both lawsuits arise from the same core operative facts and involve the same parties and overlapping claims.

The record evidence demonstrates that the Cayugas could have and should have brought all claims in the first action, such that this second lawsuit is barred by res judicata (claim preclusion). The record evidence further shows that the Cayugas asserted in that earlier proceeding what they now present as the central contention in their second lawsuit: that the Indian Gaming Regulatory Act ("IGRA") preempts all local laws restricting Indian gaming on the fee land, including a 1958 antigaming ordinance barring for-profit gaming. Whether or not the Cayugas' earlier reliance on IGRA preemption satisfies the elements of collateral estoppel (issue preclusion), it proves that the Cayugas could have and should have asserted IGRA preemption 15 years ago when seeking to preempt all local laws to enable gaming on the property.

The district court (Hon. David N. Hurd) on cross-motions for summary judgment rejected the Village's preclusion arguments and

reached the merits in this long-running jurisdictional dispute. The district court stated the case now presents a novel question regarding the application of IGRA to fee lands located within a tribe's historic reservation and, specifically its requirement that the gaming parcel be within the tribe's jurisdiction and its governmental power. The question is this: Whether fee lands that are stripped of tribal jurisdiction and governmental power under *Sherrill*[1] and *Union Springs II*[2]—i.e., made subject to plenary state and local taxation and regulation, including zoning and land use laws—nonetheless constitute a "reservation" under IGRA so as to permit Indian gaming on them, although the gaming statute requires the Cayugas to exercise tribal governmental power over them? The circularity of the question presents the answer. The Supreme Court in *Sherrill* meant what it said: long-absent tribes like the Cayugas cannot exercise sovereignty over the fee lands "in whole or in part" (*Sherrill*, 544 U.S. at 202); restoration of tribal sovereignty over such ancient reservation lands is accomplished through the land into trust process authorized under 25 U.S.C. § 465 (re-codified at 25 U.S.C. § 5108). *Id*. at 200 ("Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago.").

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[1] *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) ("*Sherrill*").

[2] *Cayuga Indian Nation of N.Y. v. Village of Union Springs*, 390 F. Supp 2d 203 (N.D.N.Y. 2005) ("*Union Springs II*").

This Court need not reach the Indian gaming question presented because the elements for issue and claim preclusion are met in spades. If claim preclusion does not apply here it does not apply anywhere. After nearly twenty years of jurisdictional conflict, with on-again off-again litigation and outbreaks of violence in the community, the time has come for res judicata to end it.[3]

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 US.C. § 1331 arising from the Cayugas' claims under federal common law and statutory law (*e.g.*, the Indian Gaming Regulatory Act (25 U.S.C. § 2701 *et seq.*)). This Court has jurisdiction under 28 U.S.C. § 1292 because the district court's decision and order (and judgment) entered March 26, 2020, from which this appeal is taken, finally disposed of all claims. The appeal is timely inasmuch as the Notice of Appeal was filed April 20, 2020.

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[3] The Cayugas' exercise of sovereignty over fee lands in central New York, in violation of *Sherrill,* has been accompanied by episodic violence among tribal members, owing to deep divisions within the Tribe. The internal battles have resulted in public displays of violence on fee lands, to the shock and dismay of the larger community. This has included bulldozing buildings and street brawling. ECF Nos. 140 thru 146. *See Cayuga Nation v. Campbell,* 34 N.Y.3d 282, 305 (2019) (Garcia, J. dissenting) ("This dispute over Nation-held property has raged for five years. The allegations in the present complaint speak of violence, force, and theft, and Supreme Court's earlier decision attests to a lack of respect for court process. It is 'essential in an ordered society that' we 'rely on legal processes rather than self-help to vindicate [our] wrongs'") (quoting *Gregg v. Georgia*, 428 US 153, 183 (1976)).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court err in rejecting issue preclusion when the record evidence showed the Cayugas relied on IGRA preemption and prevailed on it (and other grounds) in *Union Springs I*[4], abandoned the argument while losing on all grounds in *Union Springs II,* and did not appeal?

2. Did the district court err in rejecting claim preclusion to foreclose the second lawsuit where the record evidence showed the Cayugas could have and should have included IGRA preemption in its 2003 complaint and otherwise raised it?

3. Did the district court err in finding IGRA preempted Village zoning and land use laws that the Supreme Court in *Sherrill,* and the district court in *Union Springs II,* held were laws of general application that could be enforced against the fee lands in question (and tribal landowner) notwithstanding the lands' status as historic reservation lands?

4. Did the district court err in finding IGRA preempts the 1958 Games of Chance Ordinance?

5. Did the district court err in finding tribal immunity from suit bars the Village from enforcing its zoning and land use and other laws against the gaming parcel and the Cayugas as landowners, where the claim of tribal immunity relates to real property the Tribe purchased within the

[4] *Cayuga Indian Nation of N.Y. v. Village of Union Springs*, 317 F. Supp. 2d 128 (N.D.N.Y. 2004) ("*Union Springs I*").

territorial sovereignty of the Village and is thus subject to the immovable property exception to sovereign immunity from suit?

6. Did the district court err in rejecting *Ex parte Young*,[5] therefore foreclosing the Village from enforcing its laws against the individual tribal officials responsible for violations of local laws?

STATEMENT OF THE CASE

I. Statement of Facts

A. Cayugas' gaming activity in 2003

The Cayugas purchased a former NAPA auto parts store, located on fee land in the Village, for purposes of opening a gaming facility. ECF 131(SMF at Nos. 9, 10). The Cayugas disguised their gaming plans; they chose not to reveal their plans to the Village even when renovating the building to change its use from retail to gaming. ECF 131(SMF at Nos. 11, 34, 38); ECF 130 (2019 Trufant Decl. ¶ 4; Ex. A [2003 Trufant Aff. Dkt 12 ¶¶ 8-9]). The Cayugas did not engage with the Village on zoning because they viewed themselves as sovereign over the fee lands in question because they are located within their historic reservation. ECF 130 (2019 Trufant Decl., Ex. A [2003 Trufant Aff. ¶¶ 13, 20]); ECF 131 (SMF at Nos. 53-54). The Cayugas also knew that their gaming business was indisputably prohibited by a 1958 Games of Chance Ordinance ("Village Gaming Ordinance") that allowed charitable bingo events but precluded for-profit gaming. ECF 123

[5] *Ex parte Young*, 209 U.S. 123 (1908).

(JSF No. 22, Ex D); ECF 126 (Tennant Decl. ¶ 12, Ex. OO [Dep. Tr. B.J. Radford] at 11, 20-22). The Tribe proceeded with the renovation under its own authority. ECF 131 (SMF at No. 34); ECF 130 (2019 Trufant Decl. ¶ 4; Ex. A [2003 Trufant Aff. ¶¶ 19]).

With no knowledge of the Cayugas' plans for the former auto parts store, the Village observed interior renovation work under way in the fall of 2003 and ordered the work stopped. ECF 130 (2019 Trufant Decl. ¶ 4 and Ex. A [2003 Trufant Aff. ¶ 7]). The enforcement action by the Village occurred approximately four months before the Cayugas disclosed in court filings that they were going to engage in gaming. ECF 131 (SMF at Nos. 43-44); ECF 126 (Tennant Decl., Ex. BB [Affidavit of Robert B. Zimmerman, 2003 Dkt 39 ¶¶ 3-5]). Accordingly, the Village's initial enforcement action took place without knowledge that the Cayugas intended to use the property for gaming. ECF 131 (SMF No. 38); ECF 130 (2019 Trufant Decl. ¶ 4, Ex. A [2003 Trufant Aff. ¶ 9]). The district court acknowledged as much in its 2019 decision. ECF 147 at 28.

B. *Union Springs I*

1. October 2003 complaint and provisional relief

The Cayugas filed suit in October 2003 to stop the Village from enforcing any law that would interfere with the Tribe's planned gaming facility. ECF 126 (Tennant Decl., Ex. CC [2003 Complaint]). The Cayugas did not disclose in the complaint their intended use of the property. At the same time, the complaint employed broad language sufficient to preserve

all federal preemption arguments, including IGRA preemption. ECF 126 (Ex. CC [2003 Complaint ¶¶ 5, 31, 36, and Request for Entry of Judgment]).

The district court granted provisional relief on October 21, 2003 on the same expansive terms requested by the Cayugas, enjoining the Village from enforcing any laws or ordinances that would restrict or prohibit the Tribe's use of the parcel for gaming. By its terms, the preliminary injunction blocked the Village Gaming Ordinance, although it was not expressly referenced. *Union Springs I*, 317 F. Supp. 2d at 133-134.

2. Cayugas argue IGRA preemption starting February 2004

The Cayugas first revealed their gaming operations in court filings in February 2004, having secured NIGC approval of their tribal gaming ordinance. In conjunction with that revelation, the Cayugas submitted declarations and briefs in which they expressly argued IGRA preemption: "IGRA provides a complete federal scheme for the standards and regulation of gaming on Indian lands, *and preempts State and local attempts to regulate or prohibit gaming activities on Indian lands*." ECF 126 (Tennant Decl., Ex. AA [Cayugas' 2/10/04 Reply/Opposition (2003 Dkt 40) at 15 (emphasis added)]); ECF 131 (SMF at No. 48). The Cayugas further made reference to IGRA's animating policies to spur economic development: "state law could not be invoked to block a tribal bingo facility and local zoning and land use ordinances were preempted by federal policies promoting Indian self-government and economic independence." ECF 126 (Tennant Decl., Ex. AA [2003 Dkt 40-2 at 14; *id.* at 2 ("federal law

completely preempts state and local regulations with respect to such facilities.")]).

In making these specific IGRA preemption arguments, the Cayugas cited leading Supreme Court and circuit court cases construing IGRA; discussed IGRA itself (25 U.S.C. § 2701) and the statute's goal of promoting "tribal economic development, tribal self-sufficiency, and strong tribal government"; and cited two federal circuit court cases for the proposition that IGRA preempts state and local laws relating to gaming.[6] ECF 126 (Tennant Decl., Ex. AA [2003 Dkt 40.2, at 14-16]); *see* ECF 126 (Ex. BB [Zimmerman Aff. (2003 Dkt 39) ¶ 3]); ECF 126 (Ex. X [Tr. 4/7/04 hearing (2003 Dkt 69) at 52]); ECF 131 (SMF at Nos. 45, 47, 49).

3. April 24, 2004 decision

The district court concluded that the gaming parcel constituted "Indian country" because it fell within the Cayugas' historic reservation, which had never been disestablished by Congress. 317 F. Supp. 2d at 134-144. As such, the district court ruled, the Tribe was sovereign over the land. In permanently enjoining *all* Village laws that imposed *any* restrictions on the use of the gaming parcel, the district court relied primarily on the parcel's historic reservation status. *Id*. But indisputably, the district court also relied on the Cayugas' IGRA-based preemption argument, stating that:

[6] *Gaming Corporation v. Dorsey Whitney*, 88 F.3d 536, 547 (8th Cir. 1996); *Missouri v. Coeur D'Alene Tribe*, 164 F.3d 1102, 1109 (8th Cir. 1999).

> [t]he Nation correctly points out that it is governed by IGRA, which preempts state and local attempts to regulate gaming on Indian lands, and thus, such a consideration [i.e., the Village's concern over the proximity of a school to the gaming parcel] is irrelevant here.

Id. at 148. The district court thus adopted the Cayugas' IGRA preemption argument to dispose of the Village's concerns that the gaming facility was located only 700 feet from the Union Springs Middle School/High School.[7] The district court recited the purpose of IGRA—to promote tribal economic self-sufficiency—in reaching its decision. *Id*. The district court concluded that IGRA's policy considerations outweighed any harm caused to the Village. *Id*.

Shortly after the district court ruled in *Union Springs I*, the Cayugas opened Lakeside Entertainment, which boasted video slot machines capable of generating more than $500,000 in revenue each month, an amount greater than the entire annual operating budget of the Village. ECF 131 (SMF No. 55); ECF 130 (2019 Trufant Decl., Ex. 4). The Village appealed. ECF 149.

4. *Union Springs I* appeal and intervening *Sherrill* decision

While the Village was appealing *Union Springs I*, the Supreme Court decided *Sherrill*, which according to this Court (and many others) "dramatically altered the legal landscape." *Cayuga Indian Nation of N.Y. v.*

[7] This concern is detailed in an affidavit submitted by then Mayor Edward Trufant (1/9/04) (2003 Dkt. 5:03-cv-01270, ECF 38-7 at 1, 7.) This Court can take judicial notice of these earlier related court records. *Anderson v. Rochester-Genesee Regional Transp*., 337 F.3d 201, 205 n.4 (2d Cir. 2003)).

Pataki, 413 F.3d 266, 273 (2d Cir. 2005). *Sherrill* addressed the identical claim to sovereignty over fee lands made by the Oneidas, who had purchased the land from non-Indians in open market purchases. Judge Hurd had agreed with the Oneidas that they could assert tribal sovereignty, parcel by parcel, over their "reacquired" reservation lands, and were immune to local real property taxes. A split panel of this Court affirmed. The Supreme Court rejected the Oneidas' argument 8-1. 544 U.S. at 200-201. Justice Ginsburg, writing for the Court, concluded that the Oneidas were precluded "from rekindling embers of sovereignty that had long ago grew cold," with the passage of two centuries between the Oneidas' last possession of the land as a tribe and its "reacquisition" through open market purchases from non-Indians. *Id*. at 214. The Supreme Court noted that such unilateral assertions of tribal sovereignty over a patchwork of fee lands—and associated assertions of tribal immunity to real property taxes—was disruptive to settled expectations. *Id*. at 200. The Supreme Court identified the statutory authority under 25 U.S.C § 465 to take land into trust as "the proper avenue" for the Oneidas to reestablish sovereignty over their former reservation lands. *Id*. at 220-221.

In rejecting the Oneidas' claimed immunity to paying real property taxes, the Supreme Court cited *Union Springs I* in a footnote, observing that the Cayugas' assertion of sovereign immunity to resist zoning and land use requirements was even more disruptive to settled expectations than the Oneidas' refusal to pay taxes. *Id*. at 220 n.13.

This Court, upon issuance of *Sherrill, sua sponte* remanded the appeal in *Union Springs I* to Judge Hurd for reconsideration under *Sherrill*. The remand order automatically provided for the case to return to this Court without the need for the parties to file a new notice of appeal. ECF 131 (SMF ¶¶ 63-64).

C. *Union Springs II* (2005)

On remand, the Village argued *Sherrill* stripped the land of tribal jurisdiction, leaving the Village with plenary regulatory authority. The Cayugas argued against the application of *Sherrill* based on purported differences in the tribes' respective histories. The Cayugas chose not to reassert IGRA preemption and did not argue that its gaming parcel constituted Indian lands under IGRA. ECF 131 (SMF Nos. 52, 80). The Cayugas (through an amicus brief submitted on their behalf) specifically disclaimed they were asserting IGRA preemption on remand from *Sherrill*. ECF 137-11 at 7-8, 25-26. The Cayugas argued that the application of IGRA should be left for another day when framed by a "concrete" dispute. ECF 137-11 at 26.

Judge Hurd applied the teachings of *Sherill* and rejected the Cayugas' claim to exercise sovereignty over the lands. 390 F. Supp. 2d at 206. He vacated his prior sweeping permanent injunction premised on the gaming parcel qualifying as "Indian country," and granted summary judgment to the Village, thereby restoring its plenary jurisdiction over the gaming parcel—without exception—which, as a matter of law, necessarily includes the Village Gaming Ordinance. *Id*.

The Cayugas elected not to appeal Judge Hurd's decision in *Union Springs II* despite having the ability to return to this Court without needing to file a new notice of appeal. ECF 131 (SMF Nos. 63-64). The Cayugas saw *Sherrill*'s clear writing on the wall (*Sherrill*, 544 U.S. at 220-221) and applied to have the gaming parcel taken into trust. ECF 131 (SMF Nos. 57-58). The Cayugas closed Lakeside Entertainment in 2005 rather than submit to the jurisdiction of the Village as required under *Union Springs II*, and waited for a decision on their fee-to-trust application. ECF 131 (SMF Nos. 59-60); ECF 126 (Tennant Decl., Ex. HH [Affidavit of Clint Halftown and exhibits (2003 Dkt. 119-2)]); ECF 126 (Ex. K). The Cayugas are still waiting for a decision on that application. ECF 131 (SMF Nos. 61-62).

D. Cayugas' resurrected gaming activities in 2013

The Cayugas decided in July 2013 to reopen their gaming facility on their own-say-so despite no further change in the facts or law. ECF 123, No. 28. *Union Springs II* and *Sherrill* remain controlling. The same Village laws that had forced the Tribe to shut down Lakeside Entertainment in 2005 remained in place. The National Indian Gaming Commission ("NIGC") "cautioned the Nation against reopening their Class II facility at Union Springs," based on the NIGC's conclusion that *Sherrill* precludes the Cayugas from exercising governmental power over the fee lands in the Village such that the gaming parcel does not qualify as "Indian lands" under IGRA. ECF 131 (SMF No. 77); ECF 126 (Tennant Decl., Ex. D

[Internal NIGC Memorandum (5/31/13)]).[8] The Cayugas thus reopened in 2013, just as they had started their gaming plans in 2003, in the face of Village laws that indisputably prohibited their gaming business and presented a "concrete" dispute. ECF 137-11 at 26. In their reprise role as self-declared sovereign, the Cayugas dusted-off their 2003 lawsuit, scaled back some of their sovereignty rhetoric given *Sherrill/Union Springs II*, but nonetheless purported to exercise substantial governmental powers over their fee lands, including police powers, in derogation of Village sovereignty and jurisdiction. ECF 1, 100. This reiteration of tribal authority over fee lands under Village jurisdiction created the same checkerboarding impacts condemned in *Sherrill*, and the same or greater disruptions of settled expectations of Village residents that *Sherrill* and *Union Springs II* expressly bar. *See* ECF 125 (Tanner Decl.); ECF 138-1 (Tanner Reply Decl.); ECF 131 (SMF Nos. 84-95); ECF 128 (Affidavit of Brian Schenck).

1. Cayugas' failure to secure required use variance

The Cayugas throughout the long-running jurisdictional conflict always acted on their own authority. In the first round in 2003, they did

[8] The NIGC's determination that the fee lands in the Village did not qualify as "Indian lands" under IGRA, appears to have been its position since at least 2009, despite repeated submissions by the Cayugas seeking to convince the Commission otherwise. ECF 126 (Tennant Decl. Ex. E). The NIGC appears to have changed its view in 2018. *See* ECF 131 (SMF at No. 82), discussed *infra* at 48 n.18.

not engage with the Village at all with respect to zoning, land use or any other local law. ECF 125 (Tanner Decl. ¶¶ 20, 23). In the second round in 2013/2014, they did not engage except to declare that their own architect had found the Cayugas' property was in compliance. *Id.*, ¶ 50; ECF 138-1 ¶¶ 2, 7, 17-19); ECF 138-2 (Hayden Reply Decl. ¶¶ 3-6, 9-18). The Cayugas did not meet with the Village Code Enforcement Officer to see if he agreed with their internal compliance assessment. ECF 125 (Tanner Decl. at ¶ 20). Had they done so, they would have understood that they needed to secure a use variance to account for the change in use from a former auto parts store to a video slots gaming parlor. A for-profit gaming facility is not a permitted use in a commercial zone; nor is it allowed in that zone by special use permit. That means the Tribe was required to secure a use variance from the Zoning Board of Appeals. ECF 125 (Tanner Decl. ¶¶ 29-31). The Tribe was advised of this fact in 2003 (ECF 125 (Tanner Decl., Ex. G [2003 Halftown Affidavit (internal Ex. B) (emphasis added)]) and again in 2013 and 2014. *See* ECF 100-6 (Order to Remedy Violations dated 12/20/13); *see also* ECF 100-7 (Ex. G to First Amended Complaint [3/24/14 Letter from Tanner to Radford]). The Cayugas have never complied with this basic requirement of zoning law.

The district court made no explicit findings regarding the use variance requirement, but appears to have accepted the Cayugas' assertion that they alone get to determine compliance with Village laws—their own

architect's report was enough. ECF 147 at 15-19. No developer is allowed to do that. ECF 138-2 (Hayden Reply Decl. ¶¶ 4-18).

2. 2014 lawsuit featuring IGRA preemption

The Cayugas employed the same litigation "playbook" from 2003 by seeking and obtaining from Judge Hurd sweeping declaratory and injunctive relief enjoining the Village from enforcing any and all laws that would restrict or prohibit the operation of its gaming facility. ECF 100; ECF 147. In this copycat lawsuit, the Cayugas offered a variation of their earlier preemption arguments. The Cayugas argued that IGRA preempted all local laws seeking to prohibit or restrict Indian gaming authorized under IGRA, including the Village Gaming Ordinance, contending that the gaming parcel constitutes a "reservation" under IGRA. ECF 100. In other words, the Cayugas converted their earlier IGRA preemption argument in *Union Springs I*—an argument adopted by Judge Hurd as a reason to reject the Village's concern that the gaming facility was located close to a school—into a broader IGRA preemption argument that bars the Village from asserting any and all zoning and land use requirements and likewise forecloses the Village from enforcing its anti-gaming law.

II. Course of Proceedings and Rulings Below

A. 2015 motion practice and appeal (*Union Springs III*)

After the Cayugas filed their second lawsuit in 2014, the Village moved to dismiss the complaint on two grounds: (1) plaintiffs' lack of

standing to bring the lawsuit on behalf of the Tribe, given the internal governance dispute between rival factions; and (2) res judicata and collateral estoppel given the duplicative litigation in 2013, retreading the facts and law from a decade earlier. ECF 32 and 32-6.

Judge Hurd concluded that the plaintiffs had not established standing in light of the internal leadership dispute and unresolved questions about who had the authority to sue on behalf of the Tribe. ECF 50. Judge Hurd did not reach the Village defense that this copycat lawsuit was precluded by issue and claim preclusion, although in oral argument on the Village's motion to dismiss on January 28, 2015, the district court acknowledged the force of the res judicata argument:

> THE COURT: But what about—I mean, there is prior decisions after the Second Circuit's that said that the Cayuga Nation was subject to local laws. And how does that—isn't that—it doesn't have to be the exact local law we are talking about here, but we are talking about a 1958 law and also the requirement to get a certificate of occupancy. So even though it may not be the same, isn't the principle the same?

ECF 69-1 at 9.

B. *Cayuga Nation v. Tanner*, 824 F.2d 321 (2d Cir. 2016)

This Court reversed Judge Hurd on the "standing" issue. *Cayuga Nation v. Tanner*, 824 F.2d 321, 333 (2d Cir. 2016). This Court concluded that since federal courts are powerless to determine internal tribal affairs, the district court had to accept the plaintiffs' authority to prosecute the

case. *Id*. at 328. This Court also addressed the question whether the Cayugas had standing to bring a lawsuit challenging the anti-gaming ordinance before the Village sought to enforce it against the Tribe. The Court held that standing under the Declaratory Judgment Act is readily established when seeking preenforcement review as to the application of a criminal law. *Id*. at 330-333. (*See* Argument I i*nfra* at 36-39.)

C. Decision appealed

The case stalled in the district court until the Village secured resources from the State of New York to continue defending the lawsuit. Upon new counsel appearing on behalf of the Village defendants in March 2019, Judge Hurd ordered the matter set for trial July 2019. The parties worked cooperatively to identify ways to truncate the proceedings and resolve core legal issues by cross-motions for summary judgment.

The district court ruled on the parties' cross-motions for summary judgment on March 26, 2020. ECF 147. The district court accepted every argument and drew every inference in favor of the Cayugas, granting all relief requested by the Tribe. The district court denied all relief requested by the Village. In rejecting the Village's defense of collateral estoppel, the district court denied that it had adopted the Cayugas' IGRA-based preemption argument, contradicting language in the 2004 opinion to the contrary. ECF 147 at 28. With respect to the defense of res judicata, the district court never made any findings as to whether the Cayugas could

have included in its October 2003 complaint for declaratory and injunctive relief a claim seeking preenforcement review of the enforceability of the Village Gaming Ordinance, as the Tribe ultimately did when it filed suit again in 2014.

SUMMARY OF ARGUMENT

I. Collateral estoppel and res judicata bar all claims.

The central question of whether IGRA preempts Village laws was already decided in the prior litigation, first adversely to the Village (in *Union Springs I*) and then favorably to the Village in *Union Springs II* which vacated the injunction. The Cayugas chose not to appeal. ECF 131 (SMF Nos. 63-64). Accordingly, collateral estoppel (issue preclusion) applies to preclude the Cayugas from relitigating here the previously litigated and abandoned IGRA preemption argument. (*See infra* Argument I at 21-29.)

Res judicata (claim preclusion) precludes all claims by the Cayugas here even if collateral estoppel does not apply. The Cayugas undeniably "could have" and "should have" included in their prior lawsuit against the Village each claim raised here. The current action and the prior litigation (*Union Springs I/II*) involve the same parties and rest on nearly identical facts. Both lawsuits started with the Cayugas' unilateral decision to operate a Class II gaming facility on fee lands within the Village (the same Lakeside Entertainment on the same gaming parcel), which provoked the Village to enforce its laws and ordinances to shut it down; and the corresponding claims and demands by the Cayugas to prevent

enforcement of the Village laws and ordinances. The Cayugas have no legitimate explanation for why they did not include these 2014 claims in their prior lawsuit. (*See infra* at 30-39.)

II. Even if the Cayugas' lawsuit is not precluded under issue and/or claim preclusion, the district court erred in granting summary judgment in favor of the Tribe and denying summary judgment to the Village.

A. IGRA does not preempt the Village Gaming Ordinance because the gaming parcel does not constitute "Indian lands" within the meaning of IGRA.

To qualify as "Indian lands" under IGRA, the Cayugas must exercise governmental power over it. (*See infra* Argument II at 40-48.) But *Union Springs II* and *Sherrill* bar the Tribe from exercising sovereign authority and governmental power over the fee lands they own within the Village, including the gaming parcel. The holdings in both decisions could not have been clearer about the absence of tribal sovereignty over such fee lands and *Sherrill*'s requirement that those fee lands must be transferred into trust before tribal governance can be established. The Cayugas' recent effort to create the appearance of tribal governmental power over the fee lands is legally irrelevant and factually inconsequential, while extraordinarily disruptive to settled expectations. They have no actual governmental powers to exercise over the fee lands in question.

B. The Cayugas' reliance on 18 U.S.C. § 1166 is misplaced.

This tag-along IGRA preemption argument is precluded by both res judicata/collateral estoppel, and also because the gaming parcel does not qualify as "Indian lands" under IGRA. But even if the Cayugas could show this "enforcement arm" of IGRA applies, the state remains free to enforce the Village's Gaming Ordinance. (*See infra* at 49.)

C. Tribal sovereign immunity from suit does not bar this action.

The Cayugas' assertion of immunity from suit is ten years too late and not available in any event because of the immovable property exception to sovereign immunity from suit that applies to tribes, as it does to foreign nations and states. Under this long-standing common law doctrine, a sovereign has to "lay down its prince" when it purchases real property located within the territorial jurisdiction of another sovereign, and is subject to the other sovereign's laws, including being subject to suit in that jurisdiction. (*See infra* at 49-52.)

D. The Village is entitled to enforce the Village Gaming Ordinance against the individual tribal officials under *Ex parte Young*.

Even if tribal sovereign immunity from suit blocked enforcement of the Village laws/ordinances against the Tribe (it does not), the individual tribal officers responsible for those violations of Village law are subject to

suit for injunctive relief under the doctrine of *Ex parte Young*, as it specifically applies to tribes**.** (*See infra* at 53.)

STANDARD OF REVIEW

All of the legal issues presented on appeal are reviewed de novo:

1. Cross-motions for summary judgment are reviewed de novo with the added consideration that the reviewing court adopt a "Janus-like" approach that requires separate analysis of the competing motions. *Darnet Realty Associates, LLC v. 136 East 56th Street Owners, Inc.*, 153 F.3d 21, 23 (2d Cir. 1998).

2. This Court reviews a district court's application of the principles of res judicata and collateral estoppel de novo, accepting all factual findings of the district court unless clearly erroneous. *Computer Associates Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 368-69 (2d Cir. 1997).

3. This Court reviews questions of statutory construction de novo *United States v. Miles*, 748 F.3d 485, 489 (2d Cir. 2014).

4. Determinations as to the availability of tribal sovereign immunity from suit are reviewed de novo except as to factual determinations, which are reviewed under a clearly erroneous standard. *Gingras v. Think Fin., Inc.*, 922 F.3d 112, 120 (2d Cir. 2019).

5. The application of *ex parte Young* to allow actions against individual tribal officials for prospective, injunctive relief presents a question of law reviewed de novo. *Id.*

ARGUMENT

I. The Cayugas should not be allowed to relitigate claims that were raised or could have been raised in the prior litigation.

Successive litigation between the same parties often gives rise to issue prelusion or claim preclusion, and "they often overlap in a particular case." *Parker v. Corbisiero*, 825 F. Supp. 49, 54 (S.D.N.Y. 1993) ("Both doctrines have a common objective: the finality of judgments . . . .") (citing as an example *Kremer v. Chemical Const. Corp.* 465 U.S. 461 (1982)); *e.g. NLRB v. United Technologies Corp.*, 706 F.2d 1254, 1260 (2d Cir. 1983). Both forms of preclusion apply in this case.

A. Legal standards for precluding duplicative litigation

1. Applicable law concerning issue preclusion (collateral estoppel)

The following four elements must be met for issue preclusion to apply:

> (1) the issues of both proceedings must be identical; (2) the relevant issues were actually litigated and decided in the prior proceeding; (3) there must have been "full and fair opportunity" for the litigation of the issues in the prior proceeding; and (4) the issues were necessary to support a valid and final judgment on the merits.

Central Hudson Gas Elec. v. Empresa Naviera, 56 F.3d 359, 368 (2d Cir. 1995).

2. Applicable law concerning claim preclusion (res judicata)

a. res judicata policy considerations

The doctrine of claim preclusion (res judicata) holds that "a final judgment on the merits of an action precludes the parties or their privies

from relitigating issues that were *or could have been raised in that action*." *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (emphasis added). The doctrine "prevents a party from litigating any issue or defense that *could have been raised or decided in a previous suit, even if the issue or defense was not actually raised or decided*." *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38 (2d Cir. 1992) (emphasis added) (citations omitted); *see Monahan v. New York City Dept. Of Corrections*, 214 F.3d 275, 284-285 (2d Cir. 2000) (citation omitted). It extends to "every ground or theory of recovery that might also have been presented." *Federated Dept. Stores v. Moitie*, 452 U.S. 394, 411 (1981) (Blackmun, J. dissenting).

The doctrine of res judicata is predicated on the desire to "conserve judicial resources" and free parties from "the cost and vexation of multiple lawsuits." *Waldman v. Village of Kiryas Joel*, 39 F. Supp. 2d 370, 378 (S.D.N.Y. 1999), *aff'd* 207 F.3d 105 (2d Cir. 2000); *see In re Teltronics Services, Inc.*, 762 F.2d 185, 190 (2d Cir. 1985).[9] Res judicata "is a rule of fundamental and substantial justice" that serves "vital public interests." *Moitie*, 452 U.S. at 401. The Supreme Court endorses "rigorous application" of res judicata principles free from considerations of "simple justice" or "public policy." *Id*. at 400-401. "There is simply 'no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of *res*

[9] This Court has stated that "the strong public interest in economizing the use of judicial resources by avoiding relitigation" justifies allowing a court to raise res judicata sua sponte. *Salahuddin v. Jones*, 992 F.2d 447, 449 (2d Cir. 1993).

judicata.'" *Id*. at 401 (quoting *Heiser v. Woodruff*, 327 U.S. 726, 733 (1946)); *see Mohamad v. Rajoub*, 767 Fed. Appx. 91, 93 (2d Cir. 2019) (citing *Moitie* and holding that declining to apply res judicata on equitable grounds is "expressly foreclosed by well-established precedent").

b. res judicata elements

To prove the affirmative defense of res judicata a party "must show that 1) the previous action involved an adjudication on the merits; 2) the previous action involved the plaintiffs or those in privity with them; and (3) the claims asserted in the subsequent action were, or could have been, raised in the prior action." *Monahan,* 214 F.3d at 285 (citing *Allen v. McCurry,* 449 U.S. at 94).

c. narrower res judicata rule for serial violations

Courts recognize a limitation on the scope of claim preclusion in the context of serial violations of copyrights, trademarks, domain names, securities laws, antitrust laws and other "abatable" serial violations of law like trespass. In that context, where a serial violator stands to invoke res judicata to effectively immunize subsequent violations in perpetuity—and where recognizing the defense would impose an undue burden on victims of that ongoing conduct to keep amending the complaint upon each new violation—the law states that "[t]he scope of the litigation is framed by the complaint at the time it is filed." *See Computer Associates,* 126 F.3d at 369-370 (articulating restrictive scope of res judicata defense involving serial copyright violations in the United States and Europe). The panel in

Computer Associates cited a 1984 decision from the Ninth Circuit that involved serial violations of a desegregation order, to support its conclusion that res judicata does not reach events occurring after the filing of the complaint. *Id*.

This restrictive res judicata rule is applied in other continuing violation settings, including serial securities violations (*Securities and Exchange Commission v. First Jersey Securities, Inc.*, 101 F.3d 1450, 1464 (2d Cir. 1996), serial antitrust violations (*see, e.g., Lawlor v. Nat'l Screen Serv.*, 349 U.S. 322, 329 (1955)), and serial trademark and domain name infringement (*see, e.g., Storey v. Cello Holdings, L.L.C.*, 347 F.3d 370, 384-385 (2d. Cir. 2003)). These courts recognize that res judicata rules must be applied pragmatically to avoid immunizing the conduct of serial violators. They apply the concept of "abatable" offenses drawn from nuisance law, where "an abatable nuisance may—frequently give rise to more than a single cause of action" even though there is "essentially the same course of wrongful conduct." *See Lawlor*, 349 U.S. at 327-328 (noting antitrust violations are expressly made abatable by federal statute, citing Restatement, Judgments § 62 (May 15, 1942)). The abatable treatment of serial violations of antitrust laws, security laws, copyright laws and trademark laws, has nothing to do with the Cayugas' two duplicative lawsuits against the Village ten years apart, involving a single course of conduct in violation of Village zoning laws.

d. flexible common-sense rule for non-serial violation cases

Outside the specific context of ongoing violations by serial wrongdoers, this Court has adopted a flexible common-sense approach to defining the universe of claims covered by res judicata. The court starts with the allegations of the complaint in the original action and considers the arguments actually made and the strategy pursued by the party whose claim is sought to be barred. *See, e.g., Waldman*, 207 F.3d at 111 ("Waldman's argument is belied by the pleadings and trial strategy adopted by counsel for the plaintiffs in that action."); *Waldman*, 39 F. Supp. 2d at 375 (district court considered pre-trial brief and parties' joint pre-trial order in determining relatedness of issues in holding res judicata applied to bar plaintiff's third action).

Under this flexible approach, the preclusive nature of the first action "depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." *Woods*, 972 F.2d at 38 (citing *United Technologies,* 706 F.2d at 1260). This determination requires "'a flexible, common-sense construction' that recognizes the practical realities presented." *Waldman*, 39 F. Supp. 2d at 377 (quoting *InterOceanica Corp. v. Sound Pilots*, 107 F.3d 86, 91 (2d Cir. 1997)). Courts applying this more flexible approach focus on the factual basis of the claims asserted, "[f]or it is the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies." *Expert Electric, Inc. v.*

Levine, 554 F.2d 1227, 1234 (2d Cir. 1977) (citation omitted). "[W]hatever legal theory is advanced, when the factual predicate upon which claims are based are substantially identical, the claims are deemed to be duplicative for purposes of res judicata." *Berlitz Sch. of Languages v. Everest House*, 619 F.2d 211, 215 (2d Cir. 1980); *Waldman*, 39 F. Supp. 2d at 377 ("new legal theories do not amount to a new cause of action as to defeat res judicata").

B. Collateral estoppel / issue prelusion bars the Cayugas from relitigating their IGRA preemption argument made in *Union Springs I*.

The record evidence indisputably shows that the Cayugas argued IGRA preemption in *Union Springs I* (317 F. Supp. 2d at 148; ECF 137, (Cayugas 2/10/04 Reply/Opposition [2003 Dkt. 40]); ECF 126 (Tennant Decl., Exs. X, AA, BB); ECF 131 (SMF Nos. 45, 47-49), and was successful in doing so by securing sweeping permanent injunctive relief that was supported (in part) by that specific argument. The Cayugas denied relying on IGRA preemption in *Union Springs I*, understanding that to acknowledge what was in their legal briefs and arguments in the earlier litigation would foreclose relitigating that same issue here. [10] To avoid finding the Cayugas' 2014 IGRA preemption argument was precluded by

[10] The Cayugas consistently denied that they relied on IGRA preemption in *Union Springs I*, falsely contending in court that IGRA preemption was never part of the case. These false statements were made in post-*Sherrill* proceedings in the Northern District of New York in 2005 (ECF 131, (SMF No. 52)), and in argument in 2015 in this case. ECF 131 (SMF No. 80). The record in *Union Springs I* conclusively shows the Cayugas relied on IGRA preemption starting no later than February 2004.

collateral estoppel, the district court repudiated the key language in its own 2004 opinion that expressly adopted the Tribe's argument. The district court sought to justify expurgating the discussion of IGRA preemption from 2004 opinion by stating that "the Village rips from context a short quotation." ECF 147 at 28. This criticism is without merit. The following longer quotation from the 2004 opinion underscores that Judge Hurd discussed and adopted the Cayugas' affirmative argument that IGRA preempts Village zoning laws:

> Nevertheless, defendants referring to the Nation's letter regarding its expected revenue from Class II gaming on the Property, argue that the fact that the Property is located within 700 yards of the Union Springs Central School also weighs in favor of the imposition of zoning regulations to activities thereon See Aff. of Edward Trufant, Jan. 19, 2004 at 5, 1. The Nation correctly points out that it is governed by IGRA, which preempts state and local attempts to regulate gaming on Indian lands, and thus, such a consideration is irrelevant.

Union Springs I, 317 F. Supp. 2d at 148. Rather than address the pertinent quoted language above from its 2004 decision, the district court now points to the Cayugas' broader reliance on federal preemption based on its inherent sovereignty, as well as the Village's IGRA-based defense that "exceptional circumstances" existed to permit regulation of the gaming facility. ECF 147 at 28-30. But the quoted language in the 2004 opinion does not vanish because the Cayugas advanced other preemption arguments on which it also prevailed, or the Village advanced an IGRA-

based argument that failed. The fact remains that the district court's 2004 opinion relied on the Cayugas' articulation of IGRA preemption as blocking state and local laws (as detailed in the Tribe's affidavits and briefs, *see supra* at 27 n.10), recited IGRA's policy to promote economic development and self-sufficiency through gaming (317 F. Supp. 2d at 146), and on the basis of IGRA, rejected the Village's specific concern about the proximity of the gaming facility to the school.[11] *Id*. at 148.

Moreover, in adopting the Cayugas' argument that IGRA preempts *all local laws that seek to regulate the location of the Cayugas' gaming facility (Id.* at 151*),* the court's reasoning necessarily extended to the Village Gaming Ordinance. The broad IGRA argument advanced by the Cayugas, and accepted by the district court, necessarily subsumed within it the Village Gaming Ordinance. Thus, the precise issue to be litigated here was actually litigated and decided in the prior action through *Union Springs I* (resolution favorable to the Cayugas) and *Union Springs II* (final resolution favorable to the Village). The fact that the Cayugas chose not to assert that argument on remand from *Union Springs I* and chose not to appeal the decision in *Union Springs II*, renders the decision in favor of the Village

[11]The Cayugas' advocacy of IGRA preemption of local laws—and the district court's adoption of that argument—is also displayed in the district court's May 20, 2004 decision denying the Village's application for a stay pending appeal (2003 Dkt 5:03-cv-1270 (ECF 66, at 5 n.2, 9)). IGRA preemption was important enough for the Cayugas to make and the district court to reference and adopt in *Union Springs I*.

final and also demonstrates the Tribe's waiver and abandonment of the IGRA preemption argument, further precluding the Cayugas' reliance on it now. This is true whether it is precluded by collateral estoppel, res judicata, law of the case, waiver or abandonment—a party cannot obtain a ruling on a preemption argument and then walk away from it on remand without suffering preclusive effect. *See FCA US, LLC v. Spitzer Autoworld Akron, LLC*, 887 F.3d 278, 286 (6th Cir. 2018); *see generally Moitie*, 452 U.S. at 400-01 (holding res judicata barred relief when parties "made a calculated choice to forgo their appeals").

On this record, the elements are met for issue preclusion because: (1) the issue of IGRA preemption of local laws is identical; (2) that issue was actually litigated and decided in the prior proceeding; (3) there was a "full and fair opportunity" for the Tribe to litigate the issues in the prior proceeding; and (4) Judge Hurd's citation of and reliance on IGRA preemption was necessary to support a valid and final judgment on the merits, albeit originally in the Tribe's favor in *Union Springs I* and then in the Village's favor in *Union Springs II*. *See Central Hudson Gas Elec.*, 56 F.3d at 368; *Ali v. Mukasey*, 529 F.3d 478, 489 (2d Cir. 2008) (quoting *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 44 (2d Cir. 1986)).

Of course, even if the elements for issue preclusion were not met on this record (they are) the fact remains that the Cayugas' actions in advancing IGRA preemption in *Union Springs I* support the application of claim preclusion (res judicata) because it shows the Tribe could have and

should have raised that claim in the prior litigation—and did so, even if not to the extent needed to satisfy collateral estoppel.

C. Res judicata / claim preclusion bars all of the Cayugas' claims under the flexible common-sense approach as well as the narrower approach for serial violators.

1. *Waldman* supports precluding all claims under the flexible, pragmatic approach as well as the narrower standard.

Res judicata applies here because the Cayugas' two lawsuits against the Village (2003 and 2014) repeat the same pattern: (1) the Cayugas seek to operate a gaming facility on fee lands in the Village on their own say-so and in violation of local laws and ordinances; (2) the Village brings a code enforcement action to stop it; and (3) the Tribe files a lawsuit in federal court seeking declaratory and injunctive relief to enjoin that enforcement activity. These nearly identical proceedings satisfy the doctrine of res judicata. As the case law makes clear, res judicata applies when the prior and current proceedings address the "same core grievance" (*Waldman*, 39 F. Supp. 2d at 378) or "same nucleus of operative facts." *Waldman*, 207 F.3d at 113). The Cayugas' two lawsuits advance the same core grievance against the Village and its local laws restricting gaming; both lawsuits necessarily arise from the "same nucleus of operative facts." Indeed, the two lawsuits share the same parties, the same parcel of land, the same jurisdictional relationships of the parties to the land and each other, the same motivations of the parties as landowner and regulator, and nearly identical

legal actions filed in the same court and decided by the same judge. The almost complete overlap of the two actions presents a textbook example of where res judicata should be applied to prevent wasteful duplicative litigation.

The decision in *Waldman,* 39 F. Supp. 2d 370, is particularly instructive in applying res judicata in the context of repeated lawsuits by the same plaintiff suing the same municipality for the same core grievance based on the same core operative facts. The long-running dispute involved three separate lawsuits by a dissident member of a Hassidic Sect (sometimes joined by others) against the same local municipality. All three actions involved allegations of harm to the plaintiffs stemming from the religious entanglement of the Sect in the affairs of the local government, effectively creating a theocracy. *Id*. at 378. Plaintiffs argued that some of the overlapping evidence had been offered in earlier actions as "background" and was "not necessary" to the resolution of the earlier suits." *Id*. at 375, 378. Then-District Court Judge Barrington Parker disagreed, concluding that all three actions involved the "same core grievance," even if the facts of the lawsuits were not identical and legal theories changed. *Id*. at 378. The district court stated that the underlying principle of res judicata is "to litigate all available claims in one action." *Id*. With respect to plaintiffs' claim that the overlapping facts were "not necessary" to the outcome of the earlier lawsuits, Judge Parker was not persuaded:

> The evidence Waldman points to is 'not necessary' only because he chose to moderate his pursuit of particular legal theories and particular remedies. These differences should not be permitted to obscure the fact that the same substantial body of evidence and the same core grievance was relevant to all these actions. In other words, Waldman was aware, during the prior actions, of the essential issues and facts asserted in the present case.… The case law makes clear that the relevant inquiry is not what evidence was introduced or how aggressively its significance was argued, but whether a particular claim could have been raised in a prior suit.

Id.

This Court agreed that claim preclusion applied to bar the third lawsuit. In affirming the district court, this Court concluded that the third action was based upon the same "common nucleus of operative facts" as the second lawsuit. 207 F.3d at 113. In reaching that conclusion, this Court reviewed the pleadings and the "trial strategy adopted by counsel for the plaintiffs" and concluded that the record belied plaintiffs' assertion that the overlapping facts were not "necessary" to the resolution of the prior lawsuit. *Id*. at 111. The Court found the necessary relatedness between the two actions even though plaintiffs advanced different legal theories in each and the facts of the lawsuits were not identical. *Id*. at 108-109. This Court stated, "[i]t is instead enough that 'the facts *essential to the second* were [already] present in the first.'" *Id*. at 111 (quoting *Computer Assocs.*, 126 F.3d at 369 (emphasis in original)).

As in *Waldman*, the Cayugas' 2014 lawsuit is based on the same "common nucleus of operative facts" and presents the "same core

grievance" as their earlier 2003 action against the Village. The facts essential to the second lawsuit necessarily were present in the first lawsuit because the Cayugas knew about the Village Gaming Ordinance at that time, and obtained injunctive relief from the district court that was broad enough in scope to prohibit its enforcement. The fact that the Village did not rely on the Gaming Ordinance in the prior litigation is of no legal consequence whatsoever. Indeed, because the Village was the subject of sweeping prohibitory injunctions from October 21, 2003 to October 5, 2005, the Village had no opportunity or ability—without violating an order of the district court—to enforce the Gaming Ordinance once the Cayugas started operating Lakeside Entertainment in 2004.

The Cayugas' twin lawsuits are properly viewed as bookends of the same transaction. Nothing changed factually or legally since the Cayugas voluntarily shut down Lakeside Entertainment in response to *Union Springs II*. The Cayugas simply ran out patience with the fee-to-trust application process. But there is no "administrative delay" exception to the application of res judicata. *See Moitie*, 452 U.S. at 401. Accordingly, the principles of res judicata operate here to prevent the Cayugas from having a second (or really third) bite at the apple. Res judicata thus presents an absolute bar to raising IGRA preemption here even if the Cayugas had never asserted that defense in the prior litigation. The Cayugas, of course, did raise IGRA preemption in the prior litigation and "should have" and

"could have" raised the subsidiary argument that IGRA preempts the Gaming Ordinance.

2. The district court in 2015 articulated the flexible, common-sense approach to res judicata

During the hearing on the Village's motion to dismiss the original 2014 complaint based on claim preclusion, the district court correctly described the reach of res judicata. (Dkt 69-1) at 9; *see supra* at 16. The district court appeared to appreciate that a party, like the Cayugas, cannot launch a series of lawsuits to challenge different local laws in successive actions, breaking off one law at a time, as each is enforced against it, despite the lawbreaker knowing the full universe of laws that apply to its actions. As the district court recognized, it is sufficient for the application of res judicata that the claims are part of the same transaction or series of transactions.

3. The district court in 2019 adopted the narrower approach but did not address its key inquiry: Whether the Cayugas could have sought preenforcement review in 2003.

The district court took a very different approach in ruling on cross-motions in 2019. The district court did not discuss *Waldman* and instead adopted the Cayugas' narrowing construction of res judicata, relying on *Computer Associates* for the proposition that "the scope of the litigation is framed by the complaint at the time it is filed." ECF 147 at 32. As explained above, that rule evolved in the context of serial violations of

copyright, trademark, securities, antitrust and other laws perpetrated by a serial wrongdoer who threatened to invoke res judicata to secure immunity in perpetuity. The resulting restrictive construction of res judicata is properly limited to serial violation cases posing that threat. It was not applied in *Waldman*, and it does not logically apply here.

The interrelated conduct by the Cayugas in 2003-2005 and from 2013 to present involves almost identical facts concerning the opening, closing, and reopening of Lakeside Entertainment. Those facts are unlike any of the facts in the serial violation cases. The Cayugas' twice-a-decade wrongful conduct does not give rise to the special concerns that underlie the rulings in those cases, namely that a serial violator of the law might escape prosecution if res judicata laws were broadly applied. Instead, the facts of the on-again-off-again duplicative litigation in the Northern District of New York falls squarely into the mainstream decisional law, including *Waldman*, 207 F.3d 105, and *United Technologies Corp.*, 706 F.2d at 1258-1259, that make these two intimately connected lawsuits the "poster child" for res judicata.

But even if the narrower approach is correct, the district court did not determine if the Cayugas could have sought preenforcement review of the Village Gaming ordinance in its 2003 Complaint. ECF 147 at 32-33. The district court apparently credited the Cayugas' argument that any IGRA argument would have been irrelevant and premature at that point—but

nothing exists in the record for this Court to review on that score. As explained below, nothing prohibited the Cayugas from seeking such preenforcement review in 2003, just as they ultimately did in 2014. Res judicata therefore precludes the Cayugas' IGRA preemption claim even if this defense requires such proof.

4. The Cayugas could have and should have included within their 2003 Declaratory Judgment Action the claim that IGRA preempted the Village Gaming Ordinance.

The Cayugas could have and should have obtained preenforcement review of the enforceability of the Village Gaming Ordinance in their October 2003 complaint. Such preenforcement review was available to them at that time just as it was in 2013/2014. The Cayugas did not need to wait for Lakeside Entertainment to open or to find themselves the target of an actual criminal enforcement action by the Village. The purpose of the Declaratory Judgment Act is to avoid putting "'the challenger to the choice between abandoning his rights or risking prosecution.'" *Tweed-New Haven Airport Auth. v. Tong*, 930 F.3d 65, 70 (2d Cir. 2019) (quoting *Medimmune, Inc. v. Genentech, Inc.*, 546 U.S. 118, 129 (2007)); *id*. at 70 ("[t]he very purpose of the Declaratory Judgment Act was to avoid requiring a litigant to confront this dilemma."). The threshold for bringing preenforcement actions is "low" and "quite forgiving." *Cayuga Nation v. Tanner*, 824 F.3d at 331 (quoting *Nedlmmune, Inc. v. Greentech, Inc*. 549 U.S. 111, 129 (2007)); *see Hedges v. Obama*, 724 F.3d 170, 197 (2d Cir 2013) (describing and applying

"permissive standard"). A challenger need only establish a credible threat of prosecution and not an actual enforcement action. *Tweed,* 939 F.3d at 71; *Cayuga Nation v. Tanner*, 824 F.3d at 331 ("[A] plaintiff has standing to make a preenforcement challenge when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative."). It is sufficient that the challenger alleges an intention to engage in a course of conduct that is "indisputably proscribed" by a specific statute. *Hedges,* 724 F.3d at 197.

Under this "low" threshold the Cayugas had the ability to include within their October 2003 complaint a request for declaratory and injunctive relief to seek preemption of the Village Gaming Ordinance under IGRA, just as they did in their 2014 lawsuit. *See Cayuga Nation v. Tanner,* 824 F.3d at 321. In October 2003, the Cayugas were well under way with their plans to open a Class II gaming facility in the Village, with substantial renovation work occurring at the gaming parcel to make that opening happen, and the Cayugas knew about the Village Gaming Ordinance that indisputably prohibited the Tribe's planned for-profit gaming business.

This Court's decision in *Tweed* demonstrates that the Cayugas had the ability to include IGRA preemption in their 2003 lawsuit. The putative defendant in *Tweed* was an airport operator who wanted to extend the length of a runway, but was confronted by a state law that expressly limited runway length. The operator believed the state law was preempted

by the Federal Aviation Act and sought preenforcement review. Standing was established by virtue of the fact that the airport operator intended to lengthen its runaway and the applicable state law indisputably prohibited it. *Id*. at 70.

Under the reasoning of *Tweed*, the Cayugas could have and should have asserted IGRA preemption in October 2003, when seeking broad injunctive relief to enjoin all Village laws. *See id*. at 70; *see Waldman*, 207 F.3d at 112-13 (rejecting argument that the subsequent action against a municipality "would have been premature before the occurrence of events that only took place after the filing of the prior suits"). The undisputed record evidence shows that the Cayugas chose not to avail themselves of the pleading opportunity in October 2003, even though they were busy making preparations to open a gaming facility, and despite knowledge that the Village maintained an anti-gaming ordinance that expressly prohibits for-profit gaming. Instead of seeking a preenforcement ruling on the legality of their gaming business, the Cayugas chose to moderate their actions and their legal claims, delaying several months before raising IGRA preemption. However, all salient facts existed in October 2003. Nothing prohibited the Cayugas from obtaining preenforcement review at that time, and their election not to do so precludes them from doing so here.

5. Res judicata likewise precludes the Cayugas from claiming IGRA's criminal enforcement provision (18 U.S.C. § 1166) preempts Village enforcement of its Gaming Ordinance.

The principles of res judicata apply equally to the Cayugas' assertion of IGRA section 23, the criminal enforcement provision of IGRA, codified as 18 U.S.C. § 1166. This section was enacted in 1988 along with IGRA. *See Stand Up for Cal.! v. U.S. Dep't of the Interior*, 328 F. Supp. 3d 1051, 1062 & n.8 (E.D. Cal. 2018); *United States v. Cook*, 922 F.2d 1026, 1028 (2d Cir. 1991). The Cayugas could have and should have raised this argument as part of their prior IGRA preemption argument.

6. Res judicata precludes the argument that tribal sovereign immunity prevents the Village from enforcing its laws and ordinances.

The Cayugas took pains to preserve their claim to sovereign immunity from suit when they sued in 2003, including specific language in their complaint to avoid waiver. ECF 126 (Ex. CC to Tennant Decl. [2003 Complaint at 1]). But the Cayugas never asserted sovereign immunity from suit in response to the Village's enforcement actions. Even if the Cayugas believed the district court did not need to decide their sovereign immunity from Village enforcement action while the district court's sweeping prohibitory injunctions were in place, the Cayugas were faced with a use-it-or-lose-it decision when the Second Circuit remanded the case to the district court to apply *Sherrill*. The Cayugas chose not to assert their immunity from suit and instead tried to distinguish *Sherrill*, arguing that

the Cayugas' history was different from that of the Oneidas. However, to avoid claim preclusion now, the Cayugas were required to assert both IGRA preemption as a statutory exception to *Sherrill*, and assert sovereign immunity from suit to block any enforcement action against them. Having failed to raise those arguments in the prior litigation, even when given a second opportunity to do so on remand, the Cayugas cannot do so here for the first time. Res judicata prevents such claim splitting.

II. Even if the Cayugas' claims escape preclusion under collateral estoppel and res judicata, the claims are without merit.

A. The gaming parcel does not constitute "Indian lands" within the meaning of IGRA.[12]

1. Fee lands that the Supreme Court held in *Sherrill* cannot be tribally governed "in whole or in part" do not constitute a "reservation" within the meaning of IGRA.

Lands that are declared by the Supreme Court to be under the plenary jurisdiction of New York State and its political subdivisions—and conversely land over which the Cayugas are categorically barred from exercising tribal jurisdiction "in whole or in part"—fail to satisfy any accepted definition of an Indian reservation. Tribes naturally have jurisdiction and governmental power over tribally-owned reservation

[12] "Indian lands" are defined in 25 U.S.C. § 2703(4) as:
(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.

lands. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 142 (1980) (tribes exercise "attributes of sovereignty over both their members and their territory"); *State of Alaska v. Native Vill. of Venetie*, 856 F.2d 1384, 1390 (9th Cir. 1988) ("A tribe exercises its sovereign governmental authority within its tribal territory.") (citing F. Cohen, Handbook on Federal Indian Law 27 (1982 ed.)[13]

The ancient reservations in New York that *Sherrill* stripped of tribal jurisdiction because of the passage of time are unlike any other reservation, and are not what Congress intended when it used the word "reservation" in IGRA in 1988. Congress was focused on then-extant reservations and the goal of limiting gaming to lands that were located "within the tribe's jurisdiction" and subject to its "governmental power." A "reservation" was presumed to satisfy those requirements. Congress adopted these common understandings at that time. [14] *See generally Bedroc Ltd. v. United*

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[13] Reservations lands are immune to state and local taxation (*McClanahan v. Arizona State Tax Comm'n*., 411 U.S. 167-170 (1973); *Yakima v. Confederated Tribes*, 502 U.S. 251, 258 (1992)) and generally not subject to state and local laws including land use and zoning laws. *Alaska v. Native Vill. of Venetie*, 522 U.S. 520, 527 n.1 (1998); 25 C.F.R. § 1.4; *see also Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 15 (1987); *Duro v. Reina*, 495 U.S. 676, 696 (1990).

[14] IGRA's requirement that a tribe exercise governmental power over the gaming parcel is settled law. *See Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556, 566 (2d Cir. 2016) ("[A]ny tribe seeking to conduct gaming on land must have jurisdiction over that land. [Citation.] 'Jurisdiction,' in this context, means 'tribal jurisdiction'—'a combination of tribal and federal jurisdiction over land, to the exclusion (with some exceptions) of state jurisdiction.' ") (quoting *Citizens Against Casino*

States, 541 U.S. 176, 184-185 (2004) (holding that courts interpret terms used by Congress based on contemporaneous understanding at the time of enactment).

To be sure, the history of dividing Indian reservations into fragments through federal allotment acts and surplus land acts involving Western tribes created widely varying patterns of landholdings and checkerboarded jurisdictions—all known to Congress in 1988. The district court cited *Solem v. Bartlett*, 465 U.S. 462, 470 (1984), in which the Supreme Court addressed the impact of federal allotment acts and treatment of the checkerboarded reservation lands in terms of diminishing or disestablishing reservations. These cases, together with the jurisdiction sharing federal statutes referenced by the district court,[15] illustrate the sometimes confusing jurisdictional patchworks involved with reservation lands that have been

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Gambling in Erie Cnty. v. Chaudhuri, 802 F.3d 267, 279-280 (2d Cir. 2015)); *see Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618, 625-626 (1st Cir. 2017). This is how the NIGC interprets IGRA (*see* https://www.nigc.gov/general-counsel/indian-lands-opinions). Under that standard, the NIGC concluded from 2009 until 2018 that the gaming parcel did not qualify as Indian lands precisely because the Cayugas, after *Sherrill* and *Union Springs II*, cannot exercise governmental power over the gaming parcel. ECF 131 (SMF Nos. 71-79, 81-82).

[15] The district court's opinion also references federal statutes like Public Law 280 that delegate federal authority to certain states to enforce civil and criminal law on reservations. ECF 147 at 39-40. While such federally-authorized jurisdiction sharing gives rise to overlapping law enforcement responsibilities (state, federal and tribal), that body of law has nothing to do with *Sherrill* or the status of the Cayugas' gaming parcel under *Sherrill*.

opened up for settlement. But the cited authority does not encompass or presage a "not disestablished" ancient reservation that is stripped of tribal jurisdiction. Until *Sherrill*, no legally existing reservation had consisted of 100% fee lands over which the tribe was categorically barred from asserting jurisdiction. The elimination of tribal jurisdiction and governmental power for "historic" "ancient" "not disestablished reservations" in New York make them "reservations" in name only. Properly understood, *Sherrill*'s "not disestablished reservations" are de facto *former* reservations—they are not reservations that exist today in any real world sense. The fee lands within those historic reservations can legally become reservation lands again only through the land into trust process.[16] *See Sherrill*, 544 U.S. at 220-221.

Sherrill's legal construct of a sovereign-less ancient reservation represents a "dramatic" change in the "legal landscape." *Pataki*, 413 F.3d at 273. That break in precedent was not anticipated by the courts working on the Oneida and Cayuga cases for thirty years (*Union Springs II*, 390 F. Supp. 2d at 205), and could not have been anticipated by Congress. Under

[16] The Supreme Court's recent decision in *McGirt v. Oklahoma,* No. 18-9526 (July 9, 2020) addressing state criminal jurisdiction exercised over Indians on the Creek's reservation in Oklahoma, has no application to this case. The Supreme Court did not discuss *City of Sherrill*, which remains controlling law with respect to New York ancient reservations. *McGirt* leaves in place the *Sherrill* principles that forbid all New York tribes from unilaterally claiming sovereignty over fee lands within their historic reservations. Those lands must be taken into trust before the tribes may lawfully exercise tribal jurisdiction and governmental power over them.

Sherrill, tribal jurisdiction and governmental power is precisely what the Oneidas and Cayugas do not possess and cannot exercise with respect to fee lands within their historic reservations, and is precisely what the Cayugas must demonstrate to establish eligibility for gaming under IGRA.

This Court in *Upstate Citizens*, 841 F.3d 556, recognized that *Sherrill* stripped tribal jurisdiction from New York's " historic" "ancient" "not disestablished" reservations, making the fee lands within those ancient reservations ineligible for gaming under IGRA: "The Supreme Court has already rejected the [Oneidas'] claim that it may exercise tribal jurisdiction over the Turning Stone land without the Department first taking the land into trust on the Tribe's behalf." *Id*. at 566. While this Court analyzed the *Sherrill*/IGRA issue in connection with a question of Article III standing, it is hardly dicta. In reaching that issue, which was necessary to resolve the standing question, this Court correctly read *Sherrill* and its blanket prohibition on tribal sovereignty over fee lands, unless and until taken into trust. *Id*. at 563 (quoting *Sherrill*, 544 U.S. at 220-221). That is the "proper" method for long-absent tribes to restore sovereignty over ancient reservation fee lands. *Sherrill*, 544 U.S. at 220-221.

This Court correctly noted that "the legal implications of the term [reservation] vary," and stated that, after *Sherrill*, in the case of the "not disestablished" ancient reservations in central New York: "The Supreme Court has held that a state's long-standing exercise of jurisdiction over reservation land can preclude a tribe from reasserting its right to exercise

tribal jurisdiction on that reservation land." *Id*. at 562 n.4 (citing *Sherrill*, 544 U.S. at 216-219). In other words, it persists today as a reservation in name only. That is not what Congress meant when it authorized gaming on reservations in 1988.[17]

2. The district court erred in its analysis of "Indian lands" under IGRA.

Judge Hurd reached the opposite conclusion from this Court in *Upstate Citizen*, finding *Sherill* presents no barrier to the Cayugas exercising some unquantified degree of ill-defined "residual" inherent sovereignty over the fee lands so as to satisfy IGRA's requirement of governmental power over the gaming parcel. ECF 147 at 43. In doing so, the district court (a) failed to apply the canon of construction requiring the court to interpret "reservation" in IGRA according to its contemporaneous understanding in 1988 (*see supra* at 42-43); (b) ignored S*herrill*'s blanket prohibition on tribal sovereignty "in whole or in part"; (c) relied on an inapposite case from the First Circuit construing IGRA's application to federal trust lands that were expressly set aside by congressional act; and (d) largely ignored this Court's decision in *Upstate Citizen*, dismissing it as

[17] The district court adopted the Cayugas' argument that "all lands within the limits of any Indian reservation" includes a "not disestablished" reservation that is stripped of tribal jurisdiction by the Supreme Court. ECF 147 at 37-38 (emphasis original). But no one alive in 1988 could have envisioned an Indian reservation on which the resident Indian tribe is unable to exercise its sovereignty anywhere, in whole or in part. That is not any kind of reservation known in 1988.

dicta and attempting to distinguish it on the inapposite ground that it dealt with Class III gaming instead of Class II gaming (a distinction without a difference). ECF 147 at 36-44.

a. The district court's reliance on Narragansett is misplaced

The district court relied on *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685 (1st Cir. 1994), involving land that was set aside for the Narragansett Tribe under the Rhode Island Indian Claims Settlement Act of 1978, 25 U.S.C. §§ 1701- 1716. The First Circuit addressed "whether [IGRA] applies to lands now held in trust by the United States for the benefit of the Narragansett Indian Tribe (the Tribe)." *Narragansett*, 19 F.3d at 688. To answer that question, the First Circuit looked to the terms of the congressional settlement act to determine what jurisdiction and governmental power could be exercised by the tribe over its own settlement lands, held in trust by the federal government. As *Narrangansett* illustrates, such acts are heavily negotiated among the constituents in resolving decades of land claim litigation with the parties allocating jurisdiction in the process.

The First Circuit's construction of the Rhode Island Settlement Act and its provisions concerning the tribe's jurisdiction over its own *trust lands*, provides no help in answering the question presented here, which involves *fee lands over which the Cayugas are not sovereign* under *Sherrill*. The First Circuit's determination that the Narragansett Tribe exercises

concurrent jurisdiction over the settlement trust land sufficient to invoke IGRA, 19 F.3d at 689, is irrelevant to the analysis of New York fee lands under *Sherrill*. The Narragansetts—unlike the Cayugas— *lawfully* exercise concurrent jurisdiction and governmental power over trust lands created under a congressional settlement act.[18]

b. *The district court's decision ignores the difference between the unlawful exercise of sovereignty by the Cayugas and the lawful exercise of sovereignty required under IGRA*.

Judge Hurd ignored *Sherrill, Union Springs II*, and the record evidence submitted by the Village[19] when he concluded that: "Because there is no reasonable dispute that the Nation exercises some degree of concurrent jurisdiction over the Property, the requirement [of governmental power over the gaming parcel] is satisfied as a matter of law." ECF 147 at 43. The district court's conclusion is incorrect. Every exercise of Nation sovereignty over the fee lands that is cited as evidence of concurrent jurisdiction disrupts settled expectations and is barred by *Sherrill*. The district court never explains how any actions taken by the Cayugas as declared sovereign over fee lands constitutes a *lawful* exercise

[18] The NIGC appears to have reversed in 2018 its long-held view that *Sherrill* and *Union Springs II* barred the Cayugas from exercising governmental power, misreading the First Circuit's decision in *Massachusetts v. Wampanoag Tribe of Gay Head (Aquinnah)*, 853 F.3d 618 (1st Cir. 2017). ECF 131 (SMF No. 82). That decision is on all fours with *Narragansett* and similarly inapposite to this case.

[19] *See* ECF 131 (SMF Nos. 84-95); ECF 128 (Affidavit of Brian Schenck).

of concurrent jurisdiction. Allowing the Cayugas to establish eligibility under IGRA through assertions of sovereignty declared unlawful under *Sherrill* and *Union Springs II* would reward improper self-help and undermine the rule of law.

c. *The district court's decision ignores the zoning law requirements that are neutral, nondiscriminatory and enforceable under Union Springs II/Sherill.*

The record evidence shows the Cayugas never engaged with the Village over zoning; never understood the zoning requirements that applied to the gaming parcel; and never secured the required use variance. ECF 131 (SMF Nos. 15, 17-20). They were cited for that violation in 2003 and again in 2013/2014. That zoning requirement is neutral, nondiscriminatory and of general application. The Cayugas were required to obtain a use variance when the changed the use of the property. (*See supra* at 14-15.) The Cayugas' two decades long violation of that neutral zoning law is exactly the kind of disruptive resistance to zoning laws that *Sherrill* and *Union Springs II* expressly prohibits. The Village should not be deprived of this Supreme Court protection against disruption of settled expectations based on the Cayugas' claim that this neutral law somehow impermissibly restricts gaming.

B. The Cayugas' reliance on IGRA's criminal enforcement provision (18 U.S.C § 1166) is similarly misplaced.

New York State has concurrent prosecutorial jurisdiction in Indian country within the state under 25 U.S.C. § 232. *United v. Cook*, 922 F.2d 1026, 1033 (2d Cir. 1991). *Cook* addressed the interplay of IGRA and New York anti-gaming laws, including New York's right to enforce laws that "license the operation of games of chance by authorized charitable organizations." *Id*. This Court concluded that, after IGRA's enactment, the state and federal governments enjoyed concurrent jurisdiction to prosecute gambling offenses in Indian country. *Id*. Contrary to the district court's ruling below, premised on "implied repeal" (ECF 147 at 45), *Cook* indicates § 232 jurisdiction survives IGRA and that New York continues to exercise criminal jurisdiction in Indian country to enforce its anti-gaming laws.

C. The common law immovable property exception to sovereign immunity, applicable to foreign nations and the Several States, applies to the Cayugas.

Indian tribes are " 'domestic dependent nations' " that exercise "inherent sovereign authority" (*Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Tribe of Okla*., 498 U.S. 505, 509 (1991) (quotation omitted)) that "are subject to plenary control by Congress" and who "remain 'separate sovereigns pre-existing the Constitution' " unless Congress expressly says otherwise. *Michigan v. Bay Mills Indian Community*, 572 U.S. 782, 788 (2014) ("*Bay Mills*") (quotation omitted). One "core aspect[] of sovereignty" that

tribes possess is the "common-law immunity from suit." *Id*. at 788 (quotation omitted).

The immovable property exception to sovereign immunity is a long-recognized principle of international law that requires a foreign state that owns real property outside of its jurisdiction to "follow the same rules as everyone else." *City of New York v. Permanent Mission of India*, 446 F.3d 365, 374 (2d Cir. 2006), *aff'd* 551 U.S. 193 (2007). The Supreme Court expressed the unavailability of sovereign immunity in immovable property cases in *Schooner Exchange v. McFaddon*, 11 U.S. (7 Cranch) 116, 145 (1812), and relied upon the writings of Cornelius van Bynkershoek, De Foro Legatorum 22 (Godon J. Laing trans. 1946) (1744), which observed that "[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." The immovable property exception applies to both foreign (*Permanent Mission,* 551 U.S. at 200) and state sovereign immunity. *Georgia v. Chattanooga*, 264 U.S. 472, 480 (1924) (state sovereign immunity does not extend to "[l]and acquired by one State in another State").

The immovable property exception to sovereign immunity is "well established" "hornbook law" that "plainly extends to tribal immunity." *Upper Skagit Indian Tribe v. Lundgren*, 138 S. Ct. 1649, 1657 (2018) (Thomas, J. dissenting). While the majority's decision in *Upper Skagit* refrains from

deciding the immovable property exception due to preservation issues (138 S. Ct. at 1654), the oral argument transcript documents the broad support for that doctrine's application to tribes. ECF 126, Exhibit PP to Tennant Decl.

Here, the Cayugas were required to "lay down the prince" when they acquired 271 Cayuga Street in the Village in fee simple on April 28, 2003. They did just the opposite as the self-declared sovereign claiming to exercise full jurisdiction over the fee lands in derogation of Village authority. Failing to apply the immovable property exception to the Cayugas (and other tribes) would make them "super-sovereigns." *Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995). As Justice Scalia explained in Upper Skagit, "[a]llowing the judge-made doctrine of tribal immunity to intrude on such a fundamental aspect of state sovereignty contradicts the Constitution's design, which 'leaves to the several States a residuary and inviolable sovereignty.' " *Upper Skagit,* 138 S. Ct. at 1633 (quoting *New York v. United States*, 505 U.S. 144, 188 (1992) (quotation marks omitted).

The district court in *Oneida Indian Nation v. Phillips*, 360 F. Supp. 3d 122, 133 (N.D.N.Y. 2018) refused to apply the immovable property exception based on that court's understanding that it represented a novel limitation of tribal sovereign immunity that requires Congressional action. Not so. The immovable property exception represents a centuries old

common law rule, pre-dating the constitution, logically and fairly applied uniformly to foreign nations, states and tribes.

If tribes are given a special exemption from the immovable property doctrine, they will be free to "repurchase" as much land as their casino wealth permits, take the property off the tax rolls, engage in activities that drain local services, develop the property in ways that violate local zoning and land use laws, interfere with the rights of adjacent landowners, and perhaps engage in noxious business activities (e.g., waste disposal, pig farming, or fracking) with serious off-site impacts, and not be subject to the enforcement powers of state or local authorities. *See Oneida Indian Nation v. Madison Cty,* 605 F.3d 149, 159 (2d Cir. 2010) (reciting nonsense nursery rhyme to illustrate absurdity of making tribal fee lands subject to ad valorem property taxes but depriving local taxing authorities of right to collect the taxes that are lawfully due and owing). Chief Justice Roberts voiced similar concerns in his concurrence in *Upper Skagit*, 138 S. Ct. at 1655 (joined by Kennedy, J.), noting the lack of recourse for private citizens who have a dispute involving tribal ownership of non-trust, non-reservation land: "The correct answer cannot be that the tribe always wins no matter what; otherwise a tribe could wield sovereign immunity as a sword and seize property with impunity, even without a colorable claim of right."

Giving tribes greater sovereign power than states and foreign nations cannot be reconciled with the diminished status of tribes as "quasi-sovereigns" under the Constitution and federal common law. *See e.g., Three*

Affiliated Tribes, 476 U.S. at 890-891 ("Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy") (quoting *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513 (1940)). Thus, especially after the Supreme Court's ruling in *Sherrill* – that the Oneidas' sovereignty could not be revived "in whole or in part" – the similarly situated Cayugas cannot be said to have greater sovereign power or immunity than the State of New York and its political subdivisions. *See Sherrill*, 544 U.S. at 198.

D. Even if the Cayugas have immunity from suit, the Village can enforce its laws against individual tribal officials under the doctrine of *Ex parte Young*.

The Village is authorized to enforce its laws against the individual named Plaintiffs (and other tribal officials) who are responsible for the illegal gaming and zoning law violations occurring at Lakeside Entertainment. The Supreme Court in *Bay Mills* "blessed *Ex parte Young*-by-analogy suits against tribal officials for violations of state law." *Gingras*, 922 F.3d at 121 (citing *Bay Mills*, 572 U.S. at 785). In *Gingras*, this Court held that "under a theory analogous to *Ex parte Young*, tribal sovereign immunity does not bar state and substantive federal law claims for prospective injunctive relief against tribal officials in their official capacities for conduct occurring off of the reservation." *Id*. at 120; *id*. at 121 ("tribal officials can be sued to stop unlawful conduct by a tribe"). Notably, in *Bay Mills*, 572 U.S. at 782, 796, the Supreme Court stated that the *Ex parte Young*

doctrine applied in a case where the tribe raised the defense of IGRA preemption.

The individual tribal officials in this action are responsible for the violations of Village laws/ordinances and are appropriately subject to the *Ex parte Young* doctrine, in keeping with the Village's regulatory jurisdiction under *Sherrill/Union Springs II* and this Court's decision finding these officials have standing to bring actions on behalf of the Tribe. *See Cayuga Nation v. Tanner*, 824 F.3d at 330-331.

The district court nonetheless rejected the availability of enforcement through *Ex parte Young* based on the Cayugas' novel argument that it does not apply here because the fee lands in the Village are a "reservation" and the doctrine only applies to actions taken "off reservation." ECF 147 at 47-48. The gaming parcel is unmistakably within the regulatory jurisdiction of the Village under *Sherrill/Union Springs II*. The Cayugas' "off reservation" argument, taken to its (il)logical conclusion, renders *Sherrill* and *Union Springs II* meaningless and effectively eliminates this long-recognized exception to sovereign immunity from suit. The Village has the right to obtain prospective injunctive relief to stop tribal officials from violating Village laws occurring within its jurisdiction and regulatory authority.

CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request that the Court reverse the district court's decision and order and direct entry of judgment in favor of the Village (and its officials) to allow

enforcement of all Village laws and ordinances with respect to the gaming parcel and thereby vindicate the rule of law.

Respectfully submitted,

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