No. 14-M57

IN THE

Supreme Court of the United States

SENECA COUNTY, NEW YORK,

Petitioner,

v.

CAYUGA INDIAN NATION OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION FOR LEAVE TO FILE A PETITION FOR A WRIT OF CERTIORARI OUT OF TIME AND PETITION FOR A WRIT OF CERTIORARI

PHILIP G. SPELLANE
Counsel of Record
JAMES P. NONKES
AARON T. FRAZIER
HARRIS BEACH PLLC
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800
pspellane@harrisbeach.com

Attorneys for Petitioner

255417

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Petitioner hereby petitions by its undersigned counsel for leave to file a petition for writ of certiorari out of time. The underlying petition for the writ of certiorari is set forth immediately below this motion.

1. Petitioner seeks the requested relief in order to have the Court accept the petition which is out of time by seven business days. The per curiam opinion of the Court of Appeals for the Second Circuit affirming the order of the United States District Court for the Western District of New York, and the corresponding judgment, were filed on July 31, 2014.

2. On August 26, 2014, petitioner directed the undersigned counsel to prepare a petition for a writ of certiorari.

3. Immediately thereafter counsel began to prepare the petition for the writ and also sought to confirm the applicable deadline for filing that petition in this Court. However, as detailed below, the 90 day period for determining when the petition would be due was measured from August 21, 2014, the date of the filing of the judgment mandate, and not from July 31, 2014, the date of the decision and judgment.

4. Counsel's reliance on the date of August 21, 2014 as the start of the 90 day period is based upon the following. On September 3, 2014, we contacted an experienced, well-respected appellate printer, and specifically the director of that printer's United States Supreme Court division. That director is an attorney who is admitted before this Court, specializes exclusively in Supreme Court practice and has assisted us in the past with certiorari submissions to

this Court. Pursuant to his request for materials needed for the appendix, we forwarded the July 31, 2014 opinion of the Court of Appeals (including the notice of decision appended to it); the judgment mandate of August 21, 2014; and the decision of the United States District Court for the Western District of New York.

5. By return email on September 3, the director advised that our due date was November 19, 2014. Mindful of the director's experience in this area as well as our prior dealings with the director, on September 9, 2014, counsel did a non-exhaustive review of the timing rules for filing a petition for a writ of certiorari and accepted the director's statement on the due date.

6. On September 10, 2014, we forwarded to the appellate printer the $300 filing fee for this Court.

7. On September 11, 2014 we spoke with the director who repeated that November 19, 2014 was the due date for filing the petition for a writ of certiorari.

8. In an exchange of emails on October 24, 2014, the director again confirmed to us that November 19, 2014 was the filing date.

9. On the evening of November 4, 2014, counsel had cause to re-examine the calculation of the 90 day period in this case. Doing so led counsel to conclude that the 90 day period began on July 31, 2014, and not August 21, 2014. The period of 90 days from July 31, 2014 had expired five days earlier, on October 29, 2014.

10. Since discovering the foregoing on the evening of November 4, counsel has worked assiduously to complete and file the petition as quickly as possible.

11. It is respectfully submitted that counsel acted promptly and with diligence in addressing and attempting to remedy the situation upon learning of the same. It is further respectfully submitted that, as detailed in the following petition for writ of certiorari, the legal issues presented here are meritorious, compelling and deserving of review by this Court.

12. This application is filed on November 7, 2014. That day is seven business days after October 29, 2014. It is respectfully submitted that, in these extraordinary circumstances and in the interests of justice, such a minimal delay should not be the basis for denying the requested relief.

13. Counsel regrets this out of time filing. Based on the foregoing, however, including counsel's immediate and diligent response to effect this filing as promptly as possible, together with the minimal passage of time between October 29, 2014 and the actual filing on November 7, 2014, petitioner respectfully requests leave to file out of time its petition for a writ of certiorari.

Respectfully submitted,

PHILIP G. SPELLANE
Counsel of Record
JAMES P. NONKES
AARON T. FRAZIER
HARRIS BEACH PLLC
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800
pspellane@harrisbeach.com

Attorneys for Petitioner

QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Second Circuit in Cayuga Indian Nation of New York v. Seneca County, 761 F.3d 218 (2d Cir. 2014) properly determined that tribal sovereign immunity from suit bars taxing authorities from foreclosing certain real property owned by the tribe to collect lawfully imposed but unpaid property taxes.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page. The State of New York appeared as amicus curiae in the Second Circuit in support of the Counties. The United States appeared as amicus curiae in the Second Circuit at the request of the court.

TABLE OF CONTENTS

Table of Contents

TABLE OF APPENDICES

TABLE OF CITED AUTHORITIES

OPINIONS BELOW

The opinion of the United States Court of Appeals, *Cayuga Indian Nation of New York v. Seneca County* ("*Seneca*"), appears in the Appendix, App. _ to _ and is reported at 761 F.3d 218 (2d Cir. 2014).

The opinion of the United States District Court appears at App. _ to _ and is reported at 890 F. Supp. 2d 240 (W.D.N.Y. 2012).

JURISDICTION

The date on which the United States Court of Appeals decided this case was July 31, 2014. No petition for rehearing was filed in this case.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

The jurisdiction of the court of first instance (i.e., the United States District Court for the Western District of New York) was invoked under 28 U.S.C. §§ 1331 and 1362.

STATEMENT OF THE CASE

The decision below enjoined Seneca County, New York ("Seneca County") on grounds of tribal sovereign immunity from foreclosing certain lands owned by the Cayuga Indian Nation ("CIN") in response to CIN's failure to pay lawfully imposed property taxes.

Notwithstanding tribal sovereign immunity, taxes may be lawfully imposed on lands owned by Native

American tribes consistent with this Court's holding in *City of Sherrill v. Oneida Indian Nation of New* York, 544 U.S. 197 (2005) *("Sherrill")*. However, due to widespread confusion and misinterpretation of this Court's precedent, taxing authorities are currently without any remedy when Native American tribes fail to pay taxes lawfully imposed upon their lands.

It is respectfully submitted that this Court sought to address this anomaly when it granted certiorari in *Madison County v. Oneida Indian Nation*, 131 S. Ct. 459 (2010). There, the Court was poised to review the Second Circuit's holding in *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149 (2d Cir. 2010) (*"Madison"*) that although taxing authorities may lawfully impose real property taxes on certain lands owned by Native American tribes, those authorities may not collect the taxes through foreclosure due to the tribes' sovereign immunity. The Second Circuit in *Madison* reluctantly concluded that this holding was mandated by its reading of this Court's prior decisions in *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991) (*"Potawatomi"*) and *Kiowa Tribe of Okla. v. Mfg. Technologies, Inc.*, 523 U.S. 751 (1998) (*"Kiowa"*).

However, this Court was ultimately denied the opportunity to settle the question in *Madison* because the Oneida Indian Nation ("OIN") strategically waived its sovereign immunity before the Court could decide the merits, necessitating a vacation and remand. *See, Madison County v. Oneida Indian Nation*, 131 S. Ct. 704 (2011). That OIN's waiver of its immunity at the eleventh hour was a tactical move is buttressed by the Second Circuit's own recognition of the internal contradiction in

its *Madison* holding. Two judges of the *Madison* court acknowledged that their holding "defies common sense" and is "so anomalous that it calls out for the Supreme Court to revisit *Kiowa* and *Potawatomi*." 605 F.3d at 164. (Circuit Judges Cabranes and Hall, concurring). The third member of the panel, writing for the court, illustrated the self-contradiction of the holding by quoting a nonsense nursery rhyme[1]. *Id.* at 159.

Many of the arguments that follow appear in the petition for certiorari in *Madison* because the issues raised herein are virtually identical, and Seneca County gratefully acknowledges the contributions of prior petitioners' submissions. This case presents the Court with another opportunity to finally settle the question of what, if any, recourse taxing authorities have when Native American tribes fail to pay taxes lawfully assessed against real property owned by the tribes.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision below erroneously applied this Court's precedents concerning Native American tribal sovereign immunity with respect to *in personam* actions against a tribe to the categorically distinct setting of *in rem* foreclosure proceedings to collect real property taxes. The Second Circuit did so in a manner that, at best clashes with, and at worst, affirmatively contradicts *Sherrill*, and that begs for this Court to revisit the doctrine of tribal immunity from suit.

1. "Mother, may I go out to swim?
Yes, my darling daughter;
Hang your clothes on a hickory limb,
And don't go near the water."

The issues presented in this case are of national significance and recurring practical importance. The Second Circuit's decision in *Seneca* that tribal sovereign immunity bars foreclosure on taxable lands purchased by Native American tribes, no less than its similar decision in *Madison*, will enable and encourage the disruptive impracticalities, inefficiencies and serious burdens on the administration of state and local governments that troubled this Court in *Sherrill*. 544 U.S. at 219-220.

Although this Court just recently opined on tribal sovereign immunity in *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024 (2014) ("*Bay Mills*"), this Court should again address tribal sovereign immunity because *Bay Mills* did not address the Question Presented herein of tribal sovereign immunity as it relates to the distinction between *in personam* and *in rem* jurisdiction.

I. THE NEED TO CLARIFY FEDERAL INDIAN LAW CONCERNING TRIBAL IMMUNITY FROM FORECLOSURE.

This Court should clarify whether the holding in *Sherrill* prevents Native American tribes from defensively invoking sovereign immunity when their land is threatened with foreclosure because the tribe refuses to pay lawfully owed taxes. To the extent *Sherrill* decided that question directly, as Seneca County maintained below, law and logic are in harmony and thus the Second Circuit's *Seneca* decision directly conflicts with *Sherrill*. Accordingly, this Court should grant this petition to correct the clear error of law below.

To the extent *Sherrill* can be read to be either silent or ambiguous on the precise question of whether tribal immunity from suit is a defense to foreclosure to collect lawfully imposed property taxes, this Court should grant this petition to clarify how, if at all, the doctrine of sovereign immunity from suit applies in this frequently occurring scenario. The Second Circuit in *Madison* was sympathetic that the rule adopted in that case and applied in this case—that local and state authorities may tax but not foreclose—"is inconsistent and contradictory." 605 F.3d at 159.

II. THE SECOND CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS.

A. The Decision Conflicts with *Sherrill*.

Sherrill unequivocally held that Native American tribes are barred from exercising sovereignty—in whole or in part—over previously owned parcels repurchased on the open market in fee simple, when the "embers of [tribal] sovereignty . . . [had] long ago [grown] cold" with respect to the parcels. 544 U.S. at 214. Thus, *Sherrill* stands for the proposition that land acquired by a tribe in the modern era in fee simple is subject to the full jurisdiction and taxing authority of local governments. Following *Sherrill*, no valid distinction can be drawn between the authorities' right to tax the land and their right to enforce those taxes through foreclosure and eviction. *Id.* at 214, n.7.

B. The Decision Conflicts with *Yakima*.

In *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251(1992)

("*Yakima*"), this Court upheld a local government's attempt to foreclose tribal land in response to unpaid real property taxes. Specifically, this Court held that a state taxing authority is empowered to collect *ad valorem* property taxes through *in rem* foreclosure proceedings if those taxes were lawfully imposed on tribal lands held in fee simple. 502 U.S. at 270.

The lands in question in *Yakima* were alienable lands within the tribe's reservation. Yakima County assessed *ad valorem* property taxes on the lands, some of which were owned by the Yakima Nation and others by individual members of the tribe. When the Yakima Nation refused to pay the assessed property taxes, Yakima County commenced *in rem* tax foreclosure proceedings. *Id.* at 256.

This Court confirmed Yakima County's right to tax and foreclose on the tribal lands in question, observing that the alienability of the lands "rendered them subject to assessment and forced sale for taxes." *Id.* at 263-64. This Court rejected the Yakima Nation's and United States' arguments that the resulting parcel-by-parcel taxation of alienable lands within the Yakima reservation would create an "impracticable, *Moe*[2]-condemned 'checkerboard' effect." *Id.* at 264. This argument did not concern the Court in *Yakima* because it drew a distinction (which the Second Circuit here failed to recognize) between *in rem* and *in personam* jurisdiction:

2. In *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976) ("*Moe*"), this Court rejected a construction of the General Allotment Act, urged by the State of Montana, that would have extended the state's *in personam* jurisdiction to not only allottees (covered by § 6 of the Act) but also subsequent Indian owners of the allotted parcels.

> "[B]ecause the jurisdiction is *in rem* rather than *in personam*, it is assuredly not *Moe*-condemned; and it is not impracticable either." *Id.* at 265.

The *Yakima* Court recognized that such an assertion of state jurisdiction in *Moe* would have created a "checkerboard" pattern in which the sovereign to which any given Native American must defer would depend upon his parcel ownership, producing "almost surreal administrative problems." 502 U.S. at 262 (citing *Moe*, 425 U.S. at 478-479).

Although the *in personam* jurisdiction over reservation Indians at issue in *Moe* would have been significantly disruptive of tribal self-government, "the mere power to assess and collect a tax on certain real estate is not." *Yakima*, 502 U.S. at 265.

This Court made clear in *Yakima* that the assessment of *ad valorem* property taxes "creates a burden on the property alone," such that the "[l]iability for the *ad valorem* taxes flows exclusively from ownership of realty on the annual date of assessment." *Id.* at 266. Thus, there is no doubt that the Second Circuit in *Seneca* overlooked the nuances of this Court's treatment in *Yakima* of the distinction between *in personam* actions and *in rem actions* when a tribal sovereign immunity defense has been raised.

Accordingly, this Court's precedent is clear that taxing authorities have the right, under *Sherrill* and *Yakima*, to impose and collect real property taxes assessed on tribal lands held in fee simple, and that tribal

sovereign immunity is not a defense to a tax foreclosure action against taxable parcels of tribal lands.

C. *Potawatomi* Is Inapposite.

In *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 509 (1991), this Court sought to "clarif[y] the law of sovereign immunity with respect to the collection of sales taxes on Indian lands." However, the Court in *Potawatomi* did not purport to address tribal immunity as it relates to *in rem* foreclosure proceedings to collect real property taxes assessed on taxable tribal lands. Instead, the Court in *Potawatomi* observed that the tribal store in question was located on federal trust lands, and acknowledged the tribe exercised sovereignty over that land. 498 U.S. at 508, 511. In light of the tribe's undeniable sovereignty over the land (which is not true of the parcels at issue in *Sherrill* and here) this Court rejected the Oklahoma taxing authority's attempt to sue the tribe to enforce the tribe's sales tax collection obligations for sales of cigarettes to nonmembers of the tribe at the store, even though Oklahoma had a lawful right to tax those sales. *Id.* at 507, 512-13.

The Court specifically noted that the State of Oklahoma was not left without a remedy because it could collect the sales tax from the wholesale distributor, and because the State could sue individual members of the tribe who violated Oklahoma law with respect to collecting sales taxes on cigarettes sold at the store. *Id.* at 514. In stark contrast, the Second Circuit's reading of *Sherrill* in its *Madison* and *Seneca* decisions, completely strips the local and state taxing authorities of any meaningful remedy for nonpayment of real property taxes.

Potawatomi simply does not diminish the *Yakima* rule that *in rem* proceedings to collect property taxes do not violate tribal sovereignty because it is not "significantly disruptive of tribal self-government." *Yakima*, 502 U.S. at 265. Interestingly, the Court in *Yakima* did not rely on *Potawatomi* even though both the Yakima Nation and the United States cited *Potawatomi* in their briefs. This Court appeared to recognize in *Yakima* that the principle articulated in *Potawatomi* was not on point in the context of *in rem* foreclosure proceedings to collect property taxes.

Accordingly, this Court's decision in *Potawatomi* does not address whether taxing authorities have the right, under *Sherrill* and *Yakima*, to impose and collect real property taxes assessed on Indian-owned land held in fee simple because tribal sovereign immunity erects no bar to *in rem* foreclosure proceedings.

D. *Kiowa* Is Inapposite.

Although the Second Circuit in *Seneca* claimed to be following *Kiowa*, that case is not on point. *Kiowa* did not involve state taxation or any regulatory action. Rather, *Kiowa* involved an *in personam* breach of contract action against the tribe, brought by a private party. *Kiowa*, 523 U.S. at 754. This Court concluded that the *in personam* action was barred by the doctrine of tribal sovereign immunity. *Id.* at 760. Although the Court mentioned that "there are reasons to doubt the wisdom of perpetuating the [tribal immunity] doctrine," *id.* at 758, the Court articulated that it felt compelled to adhere to it *in personam* actions because Congress had not dispensed with it. *Id.* at 759-60. The Court, however, did not imply

at all that it was overruling or restricting *Yakima*, and said nothing to support the notion that a state sovereign is powerless to collect legitimately imposed real property taxes that are due.

E. *Bay Mills* Is Inapposite.

This Court in *Bay Mills* clarified that pursuant to the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701 *et seq.*, tribal sovereign immunity barred local authorities from suing Native American tribes to enjoin tribes' operations of casinos on off-reservation land. *Bay Mills*, 134 S. Ct. at 2028. This Court concluded that IGRA only permitted tribes to be sued for violations of IGRA occurring on reservation land. *Id.* at 2033-34. The Court concluded that states have other options for regulating operations at off-reservation Indian casinos, such as denying a license to the tribe for an off-reservation casino, and had to rely on those options. *Id.* at 2028, 2035. The Court in *Bay Mills* did not purport to determine anything at all about tribal immunity with respect to *in rem* foreclosure proceedings to collect real property taxes assessed on lands indisputably subject to taxation.

III. THIS COURT SHOULD REVISIT THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY.

Many Indian tribes are engaged in casino gambling and other business enterprises that generate great wealth and entail the tribes acquiring on the open market large plots of off-reservation real property on which to establish or expand these business enterprises.

Given the expansion of commercial activities by tribes and the assertion of tribal immunity from suit in settings that do not implicate tribal self-governance, this Court should revisit the judicially-created doctrine of tribal sovereignty from suit in order to restore the balance between tribal sovereignty and efficient local governance. It is not a new argument that the doctrine's rationale "can be challenged as inapposite to modern, wide-ranging tribal enterprises extending well beyond traditional tribal customs and activities." *Kiowa*, 523 U.S. at 757-58. As this Court observed in *Kiowa*, the doctrine of tribal immunity from suit "developed almost by accident" and derives from a case that "simply does not stand for that proposition." *Id.* at 756. The doctrine is now ripe for abrogation or restriction given that modern tribal activities and historical developments have completely disrupted the equilibrium between Indian nations and local governments the doctrine was originally designed to foster.

A relatively recent example of a tribe's assertion of sovereign immunity from state and local laws and regulatory action can be found in *Oneida Tribe of Indians v. Vill. of Hobart*, 542 F. Supp. 2d 908 (E.D. Wis. 2008). In that case, the Oneida Tribe of Indians attempted to prevent state and local governments from condemning or assessing land it acquired on the open market by invoking sovereign immunity. *Id.* at 920-21. The district court in *Village of Hobart* rejected the tribe's argument relying in part on *Sherrill* to demonstrate, by means of a very pertinent *reductio ad absurdum* analogy, why tribal sovereign immunity does not and cannot stretch as far as the tribe would argue:

> "Unless a state or local government is able to foreclose on Indian property for nonpayment of taxes, the authority to tax such properties is meaningless, and the Court's analysis in *Yakima*, *Cass County*[3] and *Sherrill* amounts to nothing more than an elaborate academic parlor game. Since it hardly seems likely that the Court was simply playing a game in those cases, I conclude, contrary to the district court in the *Oneida Indian Nation* cases on remand from *Sherrill*, that implicit in the Court's holding that Indian fee lands are subject to *ad valorem* property taxes is the further holding that such lands can be forcibly sold for nonpayment of such taxes. And, of course, if Indian lands are not exempt from forced alienation for nonpayment of state or local property taxes, it also follows that they are not exempt from the Village's power to condemn such land for a public highway and, further, to assess such property for the cost of improvements that specially benefit the property." *Id.* at 921.

The district court in *Village of Hobart* recognized that one answer to implausible assertions of tribal sovereignty is to simply apply *Sherrill* to prevent the disruptive effects of improper invocations of tribal immunity. *See* 544 U.S. at 219-20 (noting "disruptive practical consequences" would result "[i]f OIN may unilaterally reassert sovereign control and remove these parcels from the local tax rolls . . . [or] free the parcels from local zoning or other regulatory

3. *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998)

controls that protect all landowners in the area."); *see also id.* at 220, n.13.

If Sherrill does not provide the answer to the abuses of tribal immunity that are occurring more and more frequently, then the best alternative answer is for this Court to take this opportunity to abrogate or curtail the doctrine of tribal immunity from suit. By eliminating or restricting that judicially-created doctrine, this Court could restore the ability of state and local authorities to seek judicial relief when tribes take actions that violate the law, disrupt the administration of state and local government, and threaten neighboring landowners. It is respectfully submitted that, as shown by the events in this case and *Village of Hobart*, absolute tribal sovereign immunity from suit "defies common sense."

IV. THE TRIBAL SOVEREIGNTY ISSUES PRESENTED IN THIS CASE ARE OF NATIONAL SIGNIFICANCE AND RECURRING PRACTICAL IMPORTANCE.

The issue of tribal sovereign immunity from suit has arisen in states from coast to coast in this nation, and in various contexts. The Second Circuit's *Seneca* decision only briefly addressed the doctrine in the context of *in rem* tax foreclosure, and refused to recognize any difference in the application of the doctrine between *in rem* and *in personam* actions, instead urging this Court to examine the issue. *See, Seneca County*, 761 F.3d at 221 ("[W]e decline to draw the novel distinctions—such as a distinction between *in rem* and *in personam* proceedings—that Seneca County has urged us to adopt.").

As stated previously, many Native American tribes are engaged in casino gambling and other business enterprises that enable tribes to purchase large amounts of land in fee simple on the open market. Judge Cabranes' concurring opinion in *Madison* cautioned that the Second Circuit's holding in *Madison* can be applied to any land purchased by an Indian tribe, "including land that was never part of a reservation." 605 F.3d at 163. Accordingly, the "anomalous" result in this case, in which the Second Circuit held tribal sovereign immunity prevented taxing authorities from foreclosing to collect real property taxes, has national implications.

Under the current state of the law, tribes can plausibly cite the Second Circuit *Madison* and *Seneca* decisions to assert tribal immunity as a defense not just to foreclosure proceedings to collect real property taxes but also against enforcement of zoning, environmental and other regulatory laws, all beyond the borders of any existing or ancient reservation.

The lives and wellbeing of citizens across this country who live near tribal lands, and the efficient administration of local governments situated near tribal lands, will continue to suffer and be disrupted if the Second Circuit's *Seneca* decision, which effectively gives tribes free rein to refuse to pay lawfully imposed property taxes and take actions in violation of state and local law, is not reviewed by this Court.

CONCLUSION

For the foregoing reasons, there exist important issues of federal law that need to be determined by this Court and the petition for a writ of *certiorari* should therefore be granted.

Respectfully submitted,

PHILIP G. SPELLANE
Counsel of Record
JAMES P. NONKES
AARON T. FRAZIER
HARRIS BEACH PLLC
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800
pspellane@harrisbeach.com

Attorneys for Petitioner

APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT, FILED JULY 31, 2014

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 12-3723

CAYUGA INDIAN NATION OF NEW YORK,

Plaintiff-Appellee,

v.

SENECA COUNTY, NEW YORK,

Defendant-Appellant.

Argued January 7, 2014
Decided July 31, 2014

Before: KATZMANN, *Chief Judge*, JACOBS and CARNEY, *Circuit Judges.*

OPINION

PER CURIAM:

We are called upon to review an order of the United States District Court for the Western District of New York (Charles J. Siragusa, *District Judge*), which preliminarily enjoined defendant-appellant Seneca County, New York from foreclosing upon certain real property owned by

plaintiff-appellee the Cayuga Indian Nation of New York ("Cayuga Nation").

Our standard of review of a district court's decision to grant or deny a preliminary injunction is well established, as are the general requirements placed upon a party seeking a preliminary injunction. *See Oneida Nation of N.Y. v. Cuomo*, 645 F.3d 154, 164 (2d Cir. 2011). The only issue in dispute in this appeal is whether the district court properly determined that the Cayuga Nation was likely to succeed on the merits. We review the legal conclusions underlying the district court's decision *de novo* and the district court's factual determinations for clear error. *See id.*

Seneca County initiated foreclosure proceedings against certain of the Cayuga Nation's real property in an attempt to recover uncollected *ad valorem* property taxes. After invoking the doctrine of tribal sovereign immunity and our vacated decision in *Oneida Indian Nation of N.Y. v. Madison County*, 605 F.3d 149 (2d Cir. 2010), *vacated*, 131 S. Ct. 704, 178 L. Ed. 2d 587 (2011), the district court preliminarily enjoined the County's foreclosure proceedings. Seneca County timely appealed the district court's order, contending that we should limit the doctrine of tribal immunity from suit so as to permit states to bring foreclosure suits to recover uncollected taxes levied against the property of Indian tribes.

Seneca County acknowledges that our opinion in *Madison County* squarely addressed the question presented here and held that tribal sovereign immunity

from suit bars these foreclosure actions, *see* 605 F.3d at 156-60, but the County emphasizes that the Supreme Court's decision to vacate our opinion leaves this panel free from otherwise binding precedent and urges us to conclude that *Madison County* misconstrued Supreme Court precedent regarding the doctrine of tribal sovereign immunity. The State of New York, appearing as *amicus curiae*, further contends that the vacatur of our prior opinion casts substantial doubt on the correctness of the reasoning of *Madison County*.

We need not attempt to discern the implied message communicated by the vacatur of our prior opinion because the Supreme Court has since issued further guidance regarding both the continuing vitality of the doctrine of tribal sovereign immunity from suit and the propriety of drawing distinctions that might constrain the broad sweep of that immunity in the absence of express action by Congress. In *Michigan v. Bay Mills Indian Community*, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014), the Supreme Court once again held that tribes retain, as "'a necessary corollary to Indian sovereignty and self-governance,'" a common-law immunity from suit. *Id.* at 2030 (quoting *Three Affiliated Tribes of Fort Berthold Reservation v. World Eng'g, P.C.*, 476 U.S. 877, 890, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986)). Under this "settled law," *id.* at 2030-31 (quoting *Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 756, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998)), courts must "dismiss[] any suit against a tribe absent congressional authorization (or a waiver)," *id.* at 2031. This treatment of tribal sovereign immunity from suit is an avowedly "broad principle," *id.* at 2031, and the Supreme

Court (like this Court) has "thought it improper suddenly to start carving out exceptions" to that immunity, opting instead to "defer" to the plenary power of Congress to define and otherwise abrogate tribal sovereign immunity from suit, *id.* (quoting *Kiowa*, 523 U.S. at 758).

Therefore we decline, as has the Supreme Court, to read a "commercial activity" exception into the doctrine of tribal sovereign immunity from suit, *see id.*; *Kiowa*, 523 U.S. at 758, and we decline to draw the novel distinctions—such as a distinction between *in rem* and *in personam* proceedings—that Seneca County has urged us to adopt, *see Bay Mills*, 134 S. Ct. at 2031; *see also The Siren*, 74 U.S. 152, 154, 19 L. Ed. 129 (1868) ("[T]here is no distinction between suits against the government directly, and suits against its property.").

Notwithstanding Seneca County and the State of New York's vigorous argument, we read no implied abrogation of tribal sovereign immunity from suit into *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 125 S. Ct. 1478, 161 L. Ed. 2d 386 (2005), or *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 112 S. Ct. 683, 116 L. Ed. 2d 687 (1992). Such implied abrogation would be clearly at odds with the Supreme Court's solicitous treatment of the common-law tribal immunity *from suit*—as opposed to immunity from other, largely prescriptive, powers of the states such as the levying of taxes. *See Madison County*, 605 F.3d at 156-59. And implied abrogation would also run counter to the principle that we must "'defer' to Congress about whether to abrogate tribal [sovereign]

immunity," *Bay Mills*, 134 S. Ct. at 2031 (quoting *Kiowa*, 523 U.S. at 758).

In short, in the absence of a waiver of immunity by the tribe, "[u]nless Congress has authorized [the] suit, . . . precedents demand," *id.* at 2032, that we affirm the district court's injunction of the County's foreclosure proceedings against the Cayuga Nation's property.[1]

Accordingly, the order of the district court is **AFFIRMED.**

1. Seneca County also contends that the Cayuga Nation has either waived sovereign immunity or should be otherwise estopped from asserting the defense based on the Nation's arguments before the New York Court of Appeals in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 930 N.E.2d 233, 904 N.Y.S.2d 312 (N.Y. 2010). *See* Br. of Defendant-Appellant at 30-32. "[T]o relinquish its immunity, a tribe's waiver must be 'clear,'" *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 418, 121 S. Ct. 1589, 149 L. Ed. 2d 623 (2001) (quoting *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991)), and thus it "'cannot be implied but must be unequivocally expressed,'" *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978) (quoting *United States v. Testan*, 424 U.S. 392, 399, 96 S. Ct. 948, 47 L. Ed. 2d 114 (1976)). None of the statements cited by the County represents an unequivocal expression by the Cayuga Nation that it has waived its immunity from suit with respect to the parcels in question.

APPENDIX B — DECISION AND ORDER OF THE UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF NEW YORK, FILED AUGUST 20, 2012

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

11-CV-6004 CJS

CAYUGA INDIAN NATION OF NEW YORK,

Plaintiff,

-v-

SENECA COUNTY, NEW YORK,

Defendant.

DECISION AND ORDER

INTRODUCTION

This action presents the question whether Seneca County ("Defendant") may foreclose on real property owned by the Cayuga Indian Nation of New York ("Plaintiff") for failure to pay *ad valorem* property taxes. Now before the Court is Plaintiff's application for preliminary injunctive relief, enjoining Defendant from foreclosing on the subject parcels, on the grounds of tribal sovereign immunity. (Docket No. 4). For the reasons that follow, the application is granted.

Appendix B

BACKGROUND

Plaintiff is a federally-recognized Indian Tribe which owns real property in Seneca County. The subject dispute involves land that was formerly part of the 64,000-acre Cayuga Reservation acknowledged by the Treaty of Canandaigua in 1794. Shortly after 1794, the Cayuga Nation sold large portions of the Reservation lands to the State of New York. Plaintiff maintains that such sales were illegal and void *ab initio*, since they did not comply with the requirements of the Non-Intercourse Act, 25 U.S.C. § 177. Plaintiff contends, therefore, that the entire 64,000-acre Cayuga Reservation remains intact to this day. Amended Complaint [#9] at ¶ 10. Defendant disagrees.

Approximately two centuries after selling off the Reservation land to the State of New York, Plaintiff began purchasing parcels of property on the open market that lie within the geographic area of the aforementioned Reservation. Plaintiff contends that such properties are now Reservation land and are "Indian Country" within the meaning of federal law. *See*, Amended Complaint [#9] at ¶ ¶ 7-10. Defendant again disagrees.

The subject action involves five[1] such parcels of property located in Seneca County, which were originally included in the Reservation, but which were later sold to third parties, and then re-purchased by Plaintiff. Defendant has attempted to collect *ad valorem* property

1. The Amended Complaint indicates that there are five parcels. Amended Complaint [#9] at ¶ 7. However, an affidavit submitted by Plaintiff's counsel indicates that there are four properties. Alcott Aff. [#6] at ¶ 3.

taxes on the parcels, and Plaintiff has denied any obligation to pay them. As a result, Defendant initiated foreclosure proceedings, pursuant to Article Eleven of the New York State Real Property Tax Law.

On January 5, 2011, Plaintiff commenced this action, seeking permanent declaratory and injunctive relief. At the same time, Plaintiff made the subject application for preliminary injunctive relief, enjoining the County from foreclosing on the properties. Plaintiff contends that it is entitled to injunctive relief because the foreclosure actions are barred by sovereign immunity. Specifically, Plaintiff contends that "[a]s a federally-recognized Indian nation, [it] possess[es] tribal sovereign immunity [from suit], which bars administrative and judicial proceedings against the [Indian] Nation," even if the taxes are properly owed.[2] In that regard, Plaintiff relies, in large part, on the Second Circuit's decision in *Oneida Indian Nation of New York v. Madison County and Oneida County*, 605 F.3d 149 (2d Cir. 2010) ("*Oneida*").

2. Plaintiff maintains that in this action it is not claiming that the property is "immune from taxation." Pl. Reply Memo [#21] at 1 ("The Nation does not claim the parcels at issue here are immune from taxation as a matter of *federal* law.") (emphasis added). Instead, Plaintiff contends that while the County may impose taxes, it has no right to collect them. *Id.* ("It is well-established that, even where there is no immunity from taxation, sovereign immunity from suit may bar a state from resorting to a judicial remedy to enforce its tax."). Although, Plaintiff's Amended Complaint indicates that under New York State law, "an Indian tribe's property [is exempt] *from taxation* if located within an Indian reservation." Amended Complaint [#9] at ¶ 1 (emphasis added); *see also, id.* at ¶ 21 (citing New York Real Property Tax Law § 454).

The Court granted Plaintiff's request for an expedited hearing, and scheduled the matter to be heard on January 13, 2011. However, the parties agreed to stay the foreclosure proceedings, and stipulated to a briefing schedule, thereby mooting the request for an expedited hearing.

On February 3, 2011, Defendant filed opposing papers. Defendant observes that after Plaintiff's application was filed, the U.S. Supreme Court vacated and remanded the Second Circuit's *Oneida* decision, and argues that such decision now "has no precedential value whatsoever." Spellane Aff. [#12-1] at 2. Defendant contends, *inter alia*, that the Second Circuit's opinion was incorrectly decided in any event, since it was contrary to Supreme Court precedent, most notably *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251, 112 S.Ct. 683, 116 L. Ed. 2d 687 (1992) ("*Yakima*") and and *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 125 S.Ct. 1478, 161 L. Ed. 2d 386 (2005) ("*Sherrill*"). According to Defendant, *Yakima* established that tribal sovereign immunity does not bar *in rem* property tax foreclosure proceedings against property owned by an Indian tribe, while *Sherrill* held that an Indian tribe cannot revive its sovereign authority over land by purchasing it after years of inaction.[3]

3. Defendant also maintains that the subject foreclosure actions are not barred by the Indian Trade and Intercourse Act of 1834, also known as the Non-Intercourse Act. Plaintiff had argued, in its moving papers, that the foreclosure actions violated the Non-Intercourse Act, which prompted Defendant to devote a large part

On May 5, 2011, counsel for the parties appeared before the undersigned for oral argument.

DISCUSSION

Plaintiff seeks an injunction enjoining the state-court tax foreclosure proceeding, pursuant to the All-Writs Act, 28 U.S.C. § 1651(a) (Providing that federal courts "may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."); *see also*, 28 U.S.C. § 2283 (A federal court may grant an injunction to stay state court proceedings "where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."). The parties dispute whether tribal sovereign immunity applies, and therefore disagree as to whether the Court should enjoin the state court proceedings.

A lengthy discussion is unnecessary, since, according to the Second Circuit's *Oneida* decision, Supreme Court precedent clearly determines the outcome of this motion, and holds as follows: Even assuming that Seneca County has the right to impose property taxes on the subject parcels owned by the Cayuga Indian Nation, it does not have the right to collect those taxes by suing to foreclose

---

of its responding brief to that issue. *See*, Def. Memo of Law [#12] at pp. 19-33. However, Plaintiff's reply brief disclaims reliance on the Non-Intercourse Act as a basis for the subject motion. *See*, Pl. Reply Memo of Law [#21] at p. 2, n. 2 (Indicating that tribal sovereign immunity provides a sufficient basis for granting the motion, without regard to the Non-Intercourse Act). Accordingly, the Court need not address the Non-Intercourse Act at this time.

on the properties, unless Congress authorizes it to do so, or unless the Cayuga Indian Nation waives its sovereign immunity from suit. Congress has not authorized Seneca County to sue the Cayugas, and the Cayugas have not waived their sovereign immunity. Consequently, the Cayugas' motion for an order enjoining the foreclosure actions must be granted.

The cases upon which the foregoing paragraph rests are well-known to the litigants and to the courts that will undoubtedly be called upon to review this Court's ruling. For the benefit of anyone reading this decision who is not familiar with them, and who may be understandably perplexed by this ruling, the Court will briefly review the controlling law.

In *Kiowa Tribe of Oklahoma v. Manufacturing Tech., Inc.*, 523 U.S. 751, 118 S. Ct. 1700, 1702, 140 L. Ed. 2d 981 (1998), the Supreme Court reaffirmed the federal common law doctrine that Indian tribes cannot be sued unless Congress authorizes the suit or unless the tribes waive their immunity. Significantly, the Supreme Court held that even if a state has the authority to tax or otherwise regulate an Indian tribe in a particular instance, it does not have the ability to sue the tribe to enforce the tax or regulation, unless Congress authorizes the suit, or unless the tribe waives its sovereign immunity:

> As a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity.... Our cases allowing States to apply

> their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In [*Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505, 111 S.Ct. 905, 112 L. Ed. 2d 1112 (1991)], for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. *There is a difference between the right to demand compliance with state laws and the means available to enforce them.*

Id., 118 S.Ct. at 1702-1703 (emphasis added, citations omitted). In doing so, the Supreme Court questioned "the wisdom of perpetuating the doctrine" of Tribal sovereign immunity, but deferred to Congress to make any changes in that regard. *Id.*, 118 S.Ct. at 1704-1705 ("The capacity of the Legislative Branch to address the issue by comprehensive legislation counsels some caution by us in this area. . . . [W]e decline to revisit our case law and choose to defer to Congress."). To date, Congress has declined that invitation.

In *Sherrill*, the Supreme Court rejected the Oneida Indian Nation's claim to have sovereign authority, in the form of exemption from property taxation, over real

property which had been part of the Oneida's reservation, but which had been sold, and then re-purchased by the Oneidas on the open market:

> In this action, [the Oneida Indian Nation] seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations. We now reject th[at] unification theory . . . and hold that standards [of federal Indian law and federal equity practice preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.[4]

Id., 125 S.Ct. at 1489-1490. Although the Supreme Court held that the Oneidas' property was subject to taxation, as well as to "local zoning or other regulatory controls," it did not explicitly hold that the City of Sherrill could sue the Oneidas to collect unpaid taxes.

Approximately five years later, in *Oneida*, the Second Circuit addressed a dispute that flowed from the Supreme Court's decision in *Sherrill*. Specifically, in the wake of *Sherrill's* holding that the property recently purchased

4. The Supreme Court observed, however, that the Oneidas could seek to have the land taken into federal trust, and thus exempted from State and local taxation, pursuant to 25 U.S.C. § 465. *Id.*, 125 S.Ct. at 1495 ("Section 465 provides the proper avenue for [the Oneidas] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago.").

by the Oneidas was subject to taxation, Madison County and Oneida County attempted to collect unpaid taxes from the Oneidas, by foreclosing on the properties. The Oneidas responded by seeking an injunction in federal [district court, enjoining the foreclosure actions, on the grounds of tribal sovereign immunity from suit. The district court granted summary judgment on that basis for the Oneidas, and the Second Circuit Panel affirmed that ruling, stating: "We affirm on the ground that the [Oneida Indian Nation] is immune from suit under the long-standing doctrine of tribal sovereign immunity. The remedy of foreclosure is therefore not available to the Counties." *Id.*, 605 F.3d at 151.

In that regard, the Second Circuit discussed the difference between "two distinct doctrines: tribal sovereign authority over reservation lands and tribal sovereign immunity from suit." *Oneida*, 605 F.3d at 156. The Court specifically stated that *Sherrill* involved only the former doctrine, and not the latter. That is, the Circuit Panel held that *Sherrill* merely authorized the imposition of taxes on the Oneida's properties, but did not authorize the taxing counties to take legal action to collect the taxes:

> [W]e do not read *Sherrill* as implicitly abrogating the [Oneidas'] immunity from suit. No such statement of abrogation was made by the *Sherrill* Court, nor does the opinion call into question the *Kiowa* Court's approach, [that any such abrogation should be left to Congress. *Sherrill* dealt with the right to demand compliance with state laws. It did not address the means available to enforce those laws.

Id. at 157-159 (citations and internal quotation marks omitted). Although the Second Circuit Panel agreed with the Counties, "that the notion that they may tax but not foreclose is inconsistent and contradictory," it nevertheless concluded that the foreclosure actions had to be enjoined, since Congress had not authorized them, and since the Oneidas had not waived their sovereign immunity. *Id.* at 159.

In a concurring opinion in *Oneida*, Judge Cabranes removed any possible doubt as to the meaning of the Panel's decision:

> The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed. This rule of decision defies common sense. But absent action by our highest Court, or by Congress, it is the law.

Id. at 163 (footnote omitted); *see also, id.* at 164 (Indicating that the Panel's ruling was required by "unambiguous guidance from the Supreme Court," but calling upon the Supreme Court, or Congress, to correct the "anomalous" result and "reunite" "law and logic.").

The county defendants in *Oneida* petitioned for writ of certiorari, and the Supreme Court agreed to hear the appeal. However, in an eleventh-hour tactical move, the

Oneidas avoided review by belatedly agreeing to waive sovereign immunity. Consequently, the Supreme Court vacated and remanded the action to the Second Circuit for further action in light of the Oneidas' waiver. *See, Madison County, N.Y. v. Oneida Indian Nation of New York*, 131 S.Ct. 704, 178 L. Ed. 2d 587 (2011) (Mem). On remand, the Second Circuit affirmed the district court's decision in part, reversed in part, vacated in part, and remanded with instructions, on grounds unrelated to the issue of sovereign immunity from suit. *Oneida Indian Nation of New York v. Madison County*, 665 F.3d 408 (2d Cir. 2011).

Against the backdrop of these cases, Defendant maintains that it is entitled to foreclose on the Cayugas' properties, and asks this Court to issue a ruling that is directly contrary to the Second Circuit's ruling in *Oneida*. Defendant maintains that the *Oneida* decision has no force, since it was vacated by the Supreme Court. However, the Court disagrees. Although the Supreme Court vacated the Second Circuit's ruling, it did not do so on the merits, and there is no reason to believe that the Second Circuit would reach a different decision today. To the contrary, Judges Cabranes' concurring opinion, which Judge Hall joined, indicated that the Panel's ruling was necessitated by "unambiguous guidance from the Supreme Court," which has not changed.

Defendant nevertheless insists that *Oneida* was wrongly decided. According to Defendant, *Sherrill* necessarily held that the Oneidas could not invoke sovereign immunity from suit to avoid the *collection* of the disputed property taxes. On this point, in *Sherrill*, the Supreme Court stated:

> [G]iven the longstanding, distinctly non-Indian character of the area and its inhabitants, the regulatory authority constantly exercised by New York State and its counties and towns, and the Oneida's long delay in seeking judicial relief against parties other than the United States, we hold that the Tribe *cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue.*

Sherrill, 125 S.Ct. at 1483 (emphasis added). Defendant argues that pursuant to *Sherrill*, an Indian tribe that purchases real property that may have previously been Reservation land is treated no differently than any non-Indian land owner with regard to that property.

At least one district court in this Circuit has agreed with Defendant on this point. In *New York v. Shinnecock Indian Nation*, 523 F.Supp.2d 185, 298 (E.D.N.Y. 2007), which did not involve property taxes, the district court interpreted *Sherrill* as permitting a lawsuit against the Oneidas to collect the unpaid taxes:

> [I]t is clear from the Supreme Court's decision in *Sherrill* that a tribe can be prevented from invoking a defense of sovereign immunity where equitable doctrines preclude the tribe from asserting sovereignty over a particular parcel of land. In other words, the *Sherrill* Court held that the [Oneidas] could not invoke sovereign immunity to defend against local real property tax enforcement proceedings, including eviction

> proceedings. 544 U.S. at 211, 125 S.Ct. 1478. Specifically, . . . Justice Stevens argued in his dissent that tribal immunity could be raised "as a defense against a state collection proceeding." *Id.* at 225, 125 S.Ct. 1478. However, the majority opinion specifically [rejected that reasoning. *See id.* at 214 n. 7, 125 S.Ct. 1478 ("The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding against Sherrill. We disagree."); *see also id.* at 221, 125 S.Ct. 1478 (Souter, J., concurring) (rejecting claim of territorial sovereign status whether affirmative or defensive). Thus, *Sherrill* allows a tribe to be sued by a state or town, such as the instant case, to enforce its laws with respect to a parcel of land if equitable principles prevent the tribe from asserting sovereignty with respect to that land. To hold otherwise would completely undermine the holding of *Sherrill* because, if defendants are immune from suit, plaintiffs here would be left utterly powerless to utilize the courts to avoid the disruptive impact that the Supreme Court clearly stated they have the equitable right to prevent.

(emphasis added). However, the Second Circuit subsequently vacated the district court's decision in *Shinnecock* for lack of subject matter jurisdiction, without addressing the merits of the ruling. *See, New York v. Shinnecock Indian Nation*, 686 F.3d 133 (2d Cir. Jun. 25, 2012).

The New York Court of Appeals has also seemingly interpreted *Sherrill* as permitting lawsuits against the Oneidas, and, by extension, the Cayugas, to collect property taxes on properties that were recently bought on the open market. In that regard, in *Cayuga Indian Nation v. Gould*, 14 N.Y.3d 614, 640, 642-643, 930 N.E.2d 233, 904 N.Y.S.2d 312 (2010), the Court of Appeals made the following observation about the *Sherrill* decision:

> In *City of Sherrill*, the Supreme Court applied the doctrines of laches, acquiescence and impossibility to bar a claim by the Oneida Indian Nation that its repurchase of aboriginal lands resulted in the reassertion of that tribe's sovereign authority relieving the tribe of the obligation to pay real property taxes on the reacquired parcels.
>
> ***
>
> *City of Sherrill* certainly would preclude the Cayuga Nation from attempting to assert sovereign power over its convenience store properties for the purpose of avoiding real property taxes[.]

(emphasis added).

Consequently, if this Court were writing without the benefit of guidance from the Second Circuit, it might well have been inclined to agree that *Sherrill's* broad language bars the Cayugas from asserting any sovereign

authority involving the recently-purchased parcels, including sovereign immunity from suit. *See, Sherrill*, 125 S.Ct. at 1483 ("[T]he tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue."). On this point, the Court finds one of Plaintiff's statements at oral argument to be particularly interesting. Specifically, Plaintiff's counsel indicated that the Tribe does not claim to have sovereign immunity against tax foreclosure proceedings on all real property that it owns, regardless of location, but instead, only claims such immunity with regard to its property within the geographic boundary of the Cayuga Reservation as established by the Treaty of Canandaigua. In other words, Plaintiff maintains that it has sovereign immunity from suit as to foreclosure actions against properties within the Reservation, which it maintains has never been disestablished, but not as to properties outside the Reservation.[5] This argument seems to admit that the Cayugas' ability to claim sovereign immunity from suit is inherently tied to its ability to exercise at least

5. On this point, Plaintiff curiously seems to claim less sovereign immunity from suit than it could have, pursuant to *Oneida*, since in that case, the Second Circuit indicated that sovereign immunity from suit applied even to foreclosure actions involving property that was never part of an Indian reservation. *See, Oneida*, 605 F.3d at 163 ("[A]n Indian tribe can purchase land (*including land that was never part of a reservation*); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed.") (emphasis added) (Cabranes, J., concurring opinion). Plaintiff 's position also seems inconsistent with the statement in *Oneida* that the doctrines of tribal sovereign authority over tribal land and sovereign immunity from suit are entirely distinct.

some amount of sovereign authority over the land. This position, though, does not appear helpful to Plaintiff, since, according to *Sherrill*, the Cayugas cannot assert any sovereign authority over the recently-purchased land, "in whole or in part," due to equitable considerations, even though it may lie within the Reservation.

Accordingly, there is some persuasive force to Defendant's argument that Plaintiff cannot assert sovereign immunity from suit involving the subject properties, based upon the same practical and equitable considerations that drove the *Sherrill* decision. However, for the reasons stated above, the Court will follow the Second Circuit's ruling in *Oneida*, which, although technically without effect after being vacated, clearly rejects Defendant's argument.

Defendant nevertheless argues that the Second Circuit's *Oneida* decision is erroneous because it failed to consider that the subject foreclosure actions are *in rem* proceedings, to which, Defendant argues, tribal sovereign immunity from suit does not apply. However, in the district court decision that was on appeal in *Oneida*, Judge Hurd expressly rejected the same argument by Madison County, that tribal sovereign immunity from suit did not apply to *in rem* foreclosure actions: "The County cannot circumvent Tribal sovereign immunity by characterizing the suit as *in rem*, when it is, in actuality, a suit to take the tribe's property." *Oneida Indian Nation of New York v. Madison County*, 401 F.Supp.2d 219, 229 (N.D.N.Y. 2005). On appeal to the Second Circuit, the county defendants again argued that the Oneidas'

tribal immunity from suit did not apply in an *in rem* tax foreclosure proceeding. *See*, Brief and Special Appendix for Defendants-Counterclaimants-Appellants, 2007 WL 6432637 at pp. 58 [("*Yakima* and other cases make it clear that any sovereignty possessed by a tribe *qua* tribe is irrelevant in an *in rem* tax foreclosure proceeding.") & 60 ("It is clear from *Sherrill* and *Yakima* that different standards govern Indian claims of sovereign immunity, depending on whether there is a claim against the tribe itself, or a claim against land owned by the tribe that is not sovereign Indian country. This central distinction is rooted in the limited nature of an *in rem* action, which looks only to the property for relief.") (footnote omitted).

As already discussed, though, the Second Circuit disagreed with the Counties' arguments, and specifically found that the foreclosure actions were barred by the doctrine of tribal sovereign immunity from suit. *See, Oneida Indian Nation of New York v. Madison County and Oneida County*, 605 F.3d 149 (2d Cir. 2010). Although the Panel did not discuss Defendant's argument about *in rem* proceedings in the decision, it obviously considered and rejected it. Accordingly, the Court need not revisit that issue.

To the extent that Defendant's argument on this point relies upon the Supreme Court's decision in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 112 S.Ct 683, 116 L. Ed. 2d 687 (1992), the Court disagrees that the case stands for the proposition that tribal sovereign immunity from suit is inapplicable to *in rem* proceedings. *Yakima* involved the State of Washington's ability to tax certain "fee patent"

parcels of land, located within the Yakima Reservation, that had become alienable under the General Allotment Act. *Yakima's* use of the terms *in rem* and *in personam* pertained to the difference between the *imposition*, not collection, of taxes on a piece of land, as opposed to an individual. The Supreme Court concluded that Yakima County had the power to impose an ad valorem tax on the land, pursuant to an express grant from Congress, but not the ability to impose an excise tax on sellers of the land. Admittedly, the *Yakima* decision did refer in passing to the "power to assess and collect a tax on certain real estate." *Id.*, 112 S.Ct. at 692 (emphasis added). However, that statement appears to be dicta, since the *Yakima* decision did not involve tribal sovereign immunity from suit.

Defendant next contends that the Cayuga Nation waived any sovereign immunity from suit to which it may be entitled, by paying taxes on some properties. However, a waiver of tribal sovereign immunity must be "clear." *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 509, 111 S.Ct. 905, 909, 112 L. Ed. 2d 1112 (1991) ("Suits against Indian tribes are thus barred by sovereign immunity absent a clear waiver by the tribe or congressional abrogation.") (citation omitted). The Cayugas' payment of taxes on certain parcels of property does not amount to such a waiver.

Finally, Defendant argues that the Cayugas should be estopped from claiming sovereign immunity from suit, since, in a separate action before the New York Court of Appeals, they indicated that they were paying property taxes on their lands. *See, Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d at 642, n. 11 ("The Cayuga Indian

Nation acknowledges its obligation to pay real property taxes and comply with local zoning and land use laws on these parcels and it is undisputed that the Nation has, to date, fulfilled those obligations."). However, that language from the *Gould* decision referred specifically to the two "convenience store properties," one in Cayuga County and one in Seneca County, that were the subject of that decision, not to all tribe-owned parcels that had been purchased on the open market. Accordingly, [the Cayugas are not estopped from claiming sovereign immunity from suit merely because they acknowledged that they were paying taxes on parcels unrelated to this action.

For the foregoing reasons, the Court finds that Plaintiff has demonstrated that the subject foreclosure actions are barred by the Tribe's sovereign immunity from suit, and that it is therefore entitled to preliminary injunctive relief.

CONCLUSION

Plaintiff's application for preliminary injunctive relief [#4] is granted.

SO ORDERED.

Dated: August 20, 2012
Rochester, New York

/s/
CHARLES J. SIRAGUSA
United States District Judge