No. 10-72 [redacted] JUL 9 2010

IN THE

Supreme Court of the United States

MADISON COUNTY and
ONEIDA COUNTY, NEW YORK,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent,

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,

Putative Intervenor.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005) ("*Sherrill*") this Court held that standards of federal Indian law and federal equity practice precluded the Oneida Indian Nation of New York ("OIN"), the same tribe here, from unilaterally reviving its ancient sovereignty, in whole or in part, over recently-purchased property that had been owned and governed by non-Indians for 200 years. In so holding, this Court expressly rejected the tribe's claim that its sovereign immunity prevented the City of Sherrill in Oneida County, New York, from collecting unpaid property taxes through foreclosure and eviction. Despite *Sherrill*, in these two related cases involving attempts by Madison County and Oneida County to foreclose on OIN-owned fee parcels for nonpayment of lawfully imposed taxes, the lower court held that the remedy of foreclosure is barred by tribal sovereign immunity from suit—a decision which two court of appeals judges expressly (and the third, in effect) implored this Court to review.

The questions presented in this case are:

1. whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes.

2. whether the ancient Oneida reservation in New York was disestablished or diminished.

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.

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Petitioners Madison County and Oneida County, New York respectfully pray that a writ of certiorari issue to review the judgment below.

OPINIONS BELOW

The opinion of the United States Court of Appeals appears in the Appendix, App. 1a to 33a and is reported at 605 F.3d 149 (2d Cir. 2010).

The opinion of the United States District Court in the Madison County case appears at App. 34a to 51a and is reported at 401 F. Supp. 2d 219 (N.D.N.Y. 2005); the Oneida County case appears at App. 52a to 78a and is reported at 432 F. Supp. 2d 285 (N.D.N.Y. 2006).

JURISDICTION

The date on which the United States Court of Appeals decided this case was April 27, 2010. 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 Northern District of New York) was invoked under 28 U.S.C. §§ 1331 and 1362.

STATEMENT OF THE CASE

The decision below held that Madison County and Oneida County, two local taxing authorities, may lawfully impose real property taxes on land owned in fee simple by OIN (consistent with this Court's holding in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) ("*Sherrill*")), but that these same authorities cannot collect the taxes through foreclosure due to OIN's sovereign immunity from suit (inconsistent with *Sherrill*). The Second Circuit recognized the internal contradiction in its holding—where Madison and Oneida Counties have the right to impose real property taxes but not the right to collect them—with two judges saying the result "defies common sense" and is "so anomalous that it calls out for the Supreme Court to revisit *Kiowa* and *Potawatomi*." Petitioner's Appendix ("Pet. App.") at 32a (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. Pet. App. at 21a.[1]

The Second Circuit reluctantly concluded that this result was compelled by 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*"), but it is not. Rather, this Court's decision in *Sherrill* directly rejected OIN's claim of

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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.

immunity from foreclosure and eviction, and the same result is compelled here. This Court should clarify which precedent controls—and why—and provide guidance not just to the parties in this case but in all disputes between state and local taxing and regulatory authorities and Indian tribes asserting tribal immunity from suit.

This Court's Decision In *Sherrill*

In *Sherrill*, this Court rejected OIN's "unification theory" and claim of "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." 544 U.S. at 214. This Court held that "the Tribe cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue." *Id.* at 203. OIN had "refused to pay the assessed property taxes . . . [and] [t]he City of Sherrill initiated eviction proceedings in state court." *Id.* at 211.[2] OIN sued in federal district court and sought a broad injunction premised on OIN's sovereignty over the land and its sovereign immunity from suit. *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 144 (2d Cir. 2003). Specifically, OIN requested an injunction that would forbid the City of Sherrill as the taxing authority from pursuing any of the following three distinct steps: (1) imposing real

2. Prior to commencing the eviction action, the City of Sherrill had obtained title to the parcels through the City's administrative foreclosure procedures, as detailed in the district court's opinion in that case. *See Oneida Indian Nation of New York v. City of Sherrill*, 145 F. Supp. 2d 226, 232-33 (N.D.N.Y. 2001).

property taxes on OIN-owned properties, (2) pursuing any remedies to collect the taxes that were due, or (3) evicting OIN after taking title to the property for nonpayment of taxes. Court of Appeals Supplemental Appendix ("SA") 10 (OIN's Complaint in *Sherrill*). OIN specifically asserted as an affirmative defense to the eviction action its tribal sovereign immunity from suit. SA-36 (OIN's Answer in *Sherrill*—Second Defense). Tribal sovereign immunity from suit also was pled by the tribe in its complaint seeking injunctive and declaratory relief (SA-8 (Complaint ¶ 21(c)) and in its reply to the City of Sherrill's counterclaims. SA-46 (Reply ¶ 42). *See Oneida Indian Nation of New York v. City of Sherrill*,145 F.Supp.2d 226, 238 (N.D.N.Y. 2001); *Sherrill*, 337 F.3d at 145-46, 169.

This Court in *Sherrill* rejected every aspect of OIN's claimed sovereign immunity from taxation and tax enforcement, and fully endorsed the City of Sherrill's authority to foreclose and evict for nonpayment of taxes. 544 U.S. at 214. The decision in *Sherrill* specifically addressed whether tribal immunity could be raised either offensively or defensively by OIN to prevent the loss of its lands through foreclosure and eviction. Justice Stevens, in dissent, decried the Court's decision, believing it "effectively proclaimed a diminishment of the Tribe's reservation and an abrogation of its elemental right to tax immunity." *Id.* at 225; *see also id.* at 226 ("To now deny the Tribe its right to tax immunity—at once the most fundamental of tribal rights and the least disruptive to other sovereigns—is not only inequitable, but also irreconcilable with the principle that only Congress may abrogate or extinguish tribal sovereignty."). Justice Stevens specifically suggested

that the tribe could raise sovereign immunity "as a *defense* against a state collection proceeding." *Id.* at 225 (emphasis in original).[3] The other eight members of this Court expressly rejected that suggestion:

> The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill. We disagree.

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3. Justice Stevens offered the following analysis regarding tribal immunity as a defense against a state tax collection proceeding:

> As a justification for its lawmaking decision, the Court relies heavily on the fact that the Tribe is seeking *equitable* relief in the form of an injunction. The distinction between law and equity is unpersuasive because the outcome of the case turns on a narrow legal issue that could just as easily, if not most naturally, be raised by a tribe as a *defense* against a state collection proceeding. In fact, that scenario actually occurred in this case: The City brought an eviction proceeding against the Tribe based on its refusal to pay property taxes; that proceeding was removed to federal court and consolidated with the present action; the District Court granted summary judgment for the Tribe; and the Court of Appeals affirmed on the basis of tribal tax immunity. Either this defensive use of tax immunity should still be available to the Tribe on remand, but see ante, at 214, n. 7, 161 L. Ed. 2d, at 401, or the Court's reliance on the distinctions between law and equity and between substantive rights and remedies, see ante at 213-214, 161 L. Ed. 2d, at 400-401, is indefensible.

Id. at 225-26 (emphasis in original).

> The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively.

Id. at 214, n. 7 (internal citation omitted).

Developments Post-*Sherrill*

Following this Court's ruling in *Sherrill*, OIN persisted in its refusal to pay delinquent property taxes on hundreds of recently-purchased properties that, like those in *Sherrill*, had been owned and governed by non-Indians for approximately 200 years and subject to state and local taxation for generations. Madison County and Oneida County then proceeded to foreclose on those properties following their respective *in rem* procedures under New York law.[4]

OIN sought injunctive relief in federal district court. The district court enjoined both counties from foreclosing on four separate grounds, stating "unless directed otherwise by legislation or judicial mandate,

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4. Madison County's procedure requires a foreclosure action in New York State court after the redemption period has expired, while Oneida County follows a different procedure that is non-judicial and involves an administrative transfer of title to the County pursuant to a "tax sale" of all delinquent properties in the County, followed by a three-year redemption period. Pet. App. at 8a-11a. In this regard, Oneida County's procedure is similar to the City of Sherrill's procedure as described by the district court (145 F. Supp. 2d at 232-33) and upheld by this Court in *Sherrill*. The last step in the City of Sherrill's procedure was eviction, which this Court noted. *See Sherrill*, 544 U.S. at 211.

the seizure of land from a sovereign, against its will, will not occur as a result of a ruling from this forum." Pet. App. at 77a.

The Second Circuit's Reading Of *Sherrill* And Other Tribal Sovereign Immunity Cases

The Second Circuit affirmed on the ground that "the foreclosure actions are barred by the OIN's sovereign immunity from suit." Pet. App. at 23a. The Second Circuit declined to "read *Sherrill* as implicitly abrogating the OIN's immunity from suit." *Id.* at 20a. Rather, it found that "*Sherrill* dealt with 'the right to demand compliance with state laws.' It did not address 'the means available to enforce' those laws." *Id.* at 20a (quoting *Kiowa*, 523 U.S. at 755). The Second Circuit believed *Sherrill* belonged to a line of "land-based" sovereignty decisions issued by this Court which address whether tribal sovereignty exists over land—but that *Sherrill* did not decide whether a tribe, which admittedly lacks sovereignty over the land and must pay real property taxes, may nonetheless assert tribal immunity from suit as a defense to foreclosure if it refuses to pay the taxes that are due and owing. *Id.* at 16a-17a. The Second Circuit apparently accepted OIN's argument that there is a difference between sovereign immunity from taxation (sometimes referred to as "tribal tax immunity") and sovereign immunity from suit. As argued by OIN and accepted by the court below, the tribe's inability to remove the property from the tax rolls does not mean the tribe has lost its immunity from suit. According to OIN and the Second Circuit, the result here—however contradictory and illogical—was dictated by this Court's decisions in *Potawatomi* and *Kiowa*.

Judge Cabranes's Concurring Opinion

Circuit Judge Cabranes wrote a concurring opinion (joined by Judge Hall) that characterizes the panel's decision as follows: "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." Pet. App. at 32a. He continued, "[t]his rule of decision defies common sense." *Id.* Characterizing the result "so anomalous that it calls out for the Supreme Court to revisit *Kiowa* and *Potawatomi*" and "[reunite] law and logic," he and Judge Hall nevertheless concurred in the judgment because they concluded they were bound by those decisions as they understood them. *Id.* at 33a.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision erroneously applied this Court's precedents concerning Indian tribal sovereign immunity involving *in personam* actions against a tribe to the distinctly different setting of *in rem* foreclosure to collect real property taxes. Indeed, the lower court did so in a manner that directly conflicts with *Sherrill*, while calling for this Court to revisit the doctrine of tribal immunity from suit. The issues presented in this case are of national significance and recurring practical importance. The Second Circuit's decision that tribal sovereign immunity bars foreclosure on taxable lands purchased by Indian tribes will enable and encourage the disruptive practical consequences and serious burdens on the administration of state and local governments that troubled this Court in *Sherrill*. 544 U.S. at 219-220.

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

This Court should clarify whether the holding in *Sherrill* precludes tribes from asserting sovereign immunity as a defense to foreclosure when the land is subject to real property taxation and the tribe refuses to pay lawfully owed taxes. To the extent *Sherrill* decided that question directly, as the Counties maintained below, law and logic are not in conflict and the Second Circuit's 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 have left open the 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 recurring context. The Second Circuit seemingly recognized that the rule adopted in this case—that the Counties may tax but not foreclose—"eviscerates *Sherrill*, making that essential right of government [to tax properties] meaningless." Pet. App. at 21a (bracketed material in original) (internal quotations marks omitted).

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

A. The Decision Conflicts With *Sherrill*.

Sherrill squarely held that OIN is barred from exercising sovereignty—in whole or in part—over the parcels purchased on the open market in fee simple, as to which the "embers of sovereignty . . . [had] long ago [grown] cold." 544 U.S. at 214. From that clear pronouncement denying OIN's claim to present-day sovereignty over the subject land, the conclusion follows that OIN's tribal patchwork of land owned 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 Counties' right to tax the land and its 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 efforts to foreclose on tribally-owned properties for unpaid real property taxes. Specifically, this Court held that a state taxing authority had the power to collect ad valorem property taxes through *in rem* foreclosure proceedings where those taxes were lawfully imposed on tribally-owned lands held in fee simple. 502 U.S. at 270. The lands in question in *Yakima* were fee-patented (alienable) lands within the tribe's reservation. Yakima County assessed ad valorem property taxes on the fee-patented lands, some of which were owned by the Yakima

Nation and others by individual Indians. When the Yakima Nation refused to pay the assessed property taxes, Yakima County commenced *in rem* tax foreclosure proceedings. *Id.* at 256.

This Court recognized Yakima County's right to tax *and* foreclose on the Indian-owned 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 arguments advanced by the Yakima Nation and United States that the resulting parcel-by-parcel taxation of fee-patented lands within the Yakima reservation would create an "impracticable, *Moe*-condemned 'checkerboard' effect." *Id.* at 264.[5] In doing so, the Court in *Yakima* drew a distinction (which the Second Circuit here failed to recognize) between *in rem* and *in personam* jurisdiction:

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

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5. In *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), 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. The *Yakima* Court recognized that such an assertion of state jurisdiction in *Moe* would have "create[d] a 'checkerboard' pattern in which an Indian's personal law would depend upon his parcel ownership . . . and would produce almost surreal administrative problems . . . ." 502 U.S. at 262 (citing *Moe*, 425 U.S. at 478-479).

> While 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.*

Id. at 265 (emphasis added).

This Court further explained 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, this Court in *Yakima* recognized the distinction between an *in rem* proceeding involving real estate held by a tribe, on the one hand, and an *in personam* proceeding against a tribe, on the other hand.[6]

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. Tribal sovereign immunity erects no bar to foreclosure.

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6. In ignoring the fundamental distinction between *in rem* and *in personam* jurisdiction, the Second Circuit also failed to note that the Oneida County administrative foreclosure procedure is similar to the City of Sherrill's administrative foreclosure procedure upheld in *Sherrill*, neither of which involves judicial action, but rather consists of an administrative "tax sale" followed by a redemption period (see n. 4, *supra*). And the Second Circuit did not recognize that a judicial *in rem* tax foreclosure procedure, such as the one employed by Madison County, is not disruptive of tribal sovereignty for the reasons stated in *Yakima*.

C. *Potawatomi* Is Inapposite.

This Court in *Potawatomi* "clarif[ied] the law of sovereign immunity with respect to the collection of sales taxes on Indian lands." *Potawatomi*, 498 U.S. at 509. The Court in *Potawatomi* did not purport to determine anything whatsoever about tribal immunity with respect to *in rem* foreclosure proceedings to collect real property taxes assessed on lands admittedly subject to taxation. *Potawatomi* does not diminish the *Yakima* rule that an *in rem* proceeding to collect property taxes does not violate tribal sovereignty because it is not "significantly disruptive of tribal self-government . . . ." *Yakima*, 502 U.S. at 265.[7] To the contrary, 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 that the principle articulated in *Potawatomi* simply did not control in the case of *in rem* foreclosure proceedings to collect property taxes.

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. Given the tribe's sovereignty over the land (which is altogether missing as to the parcels at issue in *Sherrill* and here) this Court rejected the Oklahoma taxing authority's bid to sue the tribe to

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7. OIN operates the highly profitable Turning Stone Casino (www.turningstone.com), and certainly can pay property taxes without impairing its ability to govern itself. *See* Glenn Coin, *Oneida Nation Profits $115M Report Commissioned by State Shows Nation's Businesses Worth $2 Billion*, The Post-Standard (Syracuse, NY), Mar. 17, 2007, at A1 (2007 WLNR 5097843).

enforce the tribe's sales tax collection obligations for sales of cigarettes to nonmembers of the tribe, even though Oklahoma had a lawful right to tax those sales. *Id.* at 507, 512-513.

The Court specifically noted that the State of Oklahoma was not left without a remedy inasmuch as 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. The Second Circuit's reading of *Sherrill*, in contrast, leaves the Counties without any meaningful remedy for nonpayment of real property taxes.[8]

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8. The Second Circuit suggests, without explaining, that "[i]ndividual tribal members and tribal officers in their official capacity remain susceptible to suits for damages and injunctive relief" in connection with the OIN's nonpayment of property taxes. Pet. App. 23a. This suggestion would only lead to more litigation without any assurance that this "remedy" is viable. Susceptibility to suit may, but does not necessarily, equate to individual liability for unpaid tribal property taxes. Whether the Northern District of New York was right or not, it concluded in 2001 that it was "clear that the [OIN] representatives cannot be held personally liable for the unpaid property taxes" owed to the City of Sherrill. *Sherrill*, 145 F. Supp. 2d at 263; *aff'd on other grounds*, 337 F.3d at 169 (affirming dismissal of claims against tribal members and officers on ground that lands were not taxable), *rev'd*, 544 U.S. at 203, 212; *see also Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008) (observing "no other means of recovery for unpaid property taxes exists" besides foreclosure).

D. *Kiowa* Is Inapposite.

Although the Second Circuit purported to follow *Kiowa*, that case is wholly inapposite. *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. At the same time, this Court frankly noted that "there are reasons to doubt the wisdom of perpetuating the doctrine," *Id.* at 758, but felt compelled to adhere to it because Congress had not dispensed with it. *Id.* at 759-760. The Court, however, did not suggest that it was overruling or restricting *Yakima* in any way, and certainly did not suggest that a state sovereign is powerless to collect real property taxes that are due and owing.

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

Many Indian tribes (such as OIN) are engaged in casino gambling and other business enterprises that generate great wealth, with a single tribe expected to invest $1 billion in economic development projects in Tulsa, Oklahoma.[9] Tribal gaming revenue alone

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9. *See* Indianz.com, http://64.38.12.138/News/2010019038.asp ("Muscogee Nation plans $1B investment in Tulsa Projects") (last visited July 1, 2010). Tribes are reportedly engaged in operating hotels and resorts, oil companies, compressed natural gas fuel stations, wind energy projects, manufacturing plants (furniture, cigarettes), tourism, organic farming, gas stations, (Cont'd)

exceeded $26.5 billion in 2008.[10] One incident of tribal wealth and commercial activity is the purchase of real property within the boundaries of current or former reservations, as well as in areas that have never been reservation or even aboriginal lands of the particular tribe.

In light of the dramatic expansion of commercial activities by tribes and the assertion of tribal immunity from suit in settings that do not implicate tribal self-

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(Cont'd)

drug stores, and smoke shops. *See e.g,* Indianz.com, http://64.38.12.138/News/2010019423.asp ("Louis Bull Tribe expands holdings with purchase of hotel") (last visited July 1, 2010); Indianz.com, http://64.38.12.138/News/2010019800.asp. ("Chickasaw Nation opens compressed natural gas fuel station") (last visited July 1, 2010); Indianz.com, http://64.38.12.138/News/2010019584.asp ("Shakopee Tribe to open organic, natural foods store in fall"); Indianz.com, http://64.38.12.138/News/2010019038.asp ("Passamaquoddy Tribe eyes purchase of furniture factory") (last visited July 1, 2010).

10. National Indian Gaming Commission (NIGC), Gaming Revenue Reports, 2008 Report, available at http:www.nigc.gov/Gaming_Revenue_Reports.aspx (last visited July 1, 2010). According to the NIGC Report to the Secretary of the Interior on Compliance with the Indian Gaming Regulatory Act (December 31, 2009), approximately 240 tribes are licensed by the NIGC to conduct gaming operations, with those tribes located in Arizona, California, Colorado, Connecticut, Florida, Iowa, Nebraska, Idaho, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Montana, North Carolina, North Dakota, New Mexico, Nevada, New York, Oklahoma, Oregon, South Dakota, Texas, Washington, Wisconsin, and Wyoming. (The NIGC's December 31, 2009 report is available at http://www.nigc.gov).

governance, this Court should revisit the judicially-created doctrine of tribal sovereignty from suit (although it need not do so to rule in the Counties' favor as *Sherrill* directly controls and permits the remedy of foreclosure). Indeed, 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 stated 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's questionable foundation and inapposite rationale to modern tribal activities makes the doctrine ripe for abrogation or restriction.

The decision below demonstrates the practical disruptions that occur when tribes assert sovereign immunity to avoid their lawful obligations. As construed by the Second Circuit, tribal sovereign immunity would allow OIN to purchase the Empire State Building on the open market, in fee simple, and deprive the City of New York of all real property taxes in perpetuity.

A recent example of a tribe's assertion of sovereign immunity from state and local laws and regulatory action is seen in *State of New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185 (E.D.N.Y. 2007) ("Shinnecock"). The Shinnecock Nation began to clear land to construct and operate a casino in the Hamptons on Long Island on a parcel of non-reservation property as to which the tribe's aboriginal title was extinguished in the 17th century. The tribe did so without seeking or obtaining any of the required permits from New York State and local authorities. When the various state and

local entities sought to enjoin the tribe from proceeding with the casino construction, the tribe argued that tribal sovereign immunity barred enforcement of any gaming, zoning, environmental, building, fire, sanitation and other regulatory laws. 523 F. Supp.2d at 187-190. The district court in *Shinnecock* rejected the tribe's argument relying in part on *Sherrill*: "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." *Id.* at 298.[11]

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11. In a footnote, the district court expressly disagreed with the Northern District of New York's finding in this case that the OIN is immune from county real property tax enforcement proceedings regarding the lands at issue in *Sherrill*. 523 F. Supp. 2d. at 298, n.73. Similarly, the Eastern District of Wisconsin in *Village of Hobart*, 542 F. Supp. 2d at 921, observed:

> 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* 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.

As the district court in *Shinnecock* recognized, one answer to such extreme assertions of tribal sovereignty is to apply *Sherrill* to prevent the disruptive effects—as intended by this Court. *See* 544 U.S. at 219-220 (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 controls that protect all landowners in the area."); *see also id.* at 220, n.13. Another answer would be 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. As shown by the events in this case and *Shinnecock*, 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 from Washington State to New York State and in various contexts. The Second Circuit's decision addressed the doctrine in the context of *in rem* tax foreclosure (although it ignored the difference between *in rem* and *in personam* jurisdiction). As noted above, many Indian 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's concurring opinion cautioned that the Second Circuit's holding in this case can be applied to *any land* purchased by an Indian tribe, "including land that was never part of a reservation." Pet. App. at 32a. 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. Moreover, tribes can cite the Second Circuit decision 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.

These disruptive consequences will result from the Second Circuit's decision if tribes, on account of tribal immunity from suit, refuse to pay lawfully-owed property taxes (as here) and take actions in violation of state and local law (as in *Shinnecock*), without being held accountable or suffering any consequences.

V. THE ANCIENT ONEIDA RESERVATION SHOULD BE DECLARED DISESTABLISHED OR DIMINISHED.

Lastly, the Second Circuit's decision should be reversed because it failed to recognize that the ancient Oneida reservation in New York was disestablished or diminished by the 1838 Treaty of Buffalo Creek (7 Stat. 550, Jan. 15, 1838), removal of Oneidas from New York, and other developments in the 19th Century. The status of the ancient Oneida reservation previously was addressed by the district court and Second Circuit in *Sherrill*. Both courts rejected the Counties' historical and legal contentions. *See* 145 F.Supp.2d at 248-254; 337 F.3d at 159-

165. This Court in *Sherrill* rejected OIN's claims of sovereign immunity from foreclosure and eviction without reaching the issue of disestablishment. 544 U.S. at 216, n. 9 ("This Court need not decide today whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation."). Even so, this Court, in reversing the Second Circuit in *Sherrill*, repeatedly referred to the Oneida reservation in the past tense, using the adjectives "ancient", "historic" and "former" (*id.* at 202-203, 213, 215, 221) while observing "the longstanding, distinctly non-Indian character of the area and its inhabitants[.]" *Id.* at 202.

The district court below relied on the Second Circuit's 2003 decision in *Sherrill* (reversed by this Court) in concluding that the Oneida reservation was "not disestablished" and exists in some form in central New York (Pet. App. at 73a-74a) —although the district court (in a subsequent decision) refused to identify the reservation's present-day boundaries. *See Oneida Indian Nation of New York v. Madison County*, 235 F.R.D. 559, 561 (N.D.N.Y. 2006). The district court below also determined that OIN's "not disestablished" reservation qualifies as an Indian reservation under New York law and therefore is not subject to taxation under state law. Pet. App. at 73a-74a.

The Second Circuit below stated that "a tribe's immunity from suit is independent of its lands," and noted that it need not reach the Counties' argument that OIN's reservation had been disestablished because its conclusion did not depend on it. Pet. App. at 16a. The Second Circuit nonetheless addressed the status of the ancient Oneida reservation in a footnote, observing that this Court in *Sherrill* "explicitly declined to resolve the question of

whether the Oneida reservation had been 'disestablished'. . . ." Pet. App. at 16a n. 6. The Second Circuit then concluded "[o]ur prior holding on this question—that 'the Oneidas' reservation was not disestablished,' *Oneida Indian Nation of N.Y.*, 337 F.3d at 167—therefore remains the controlling law of this circuit." Pet. App. at 17a n. 6. The Second Circuit thus reaffirmed its finding on disestablishment even though this Court in *Sherrill* cast serious doubt on the Second Circuit's previous analysis and reversed its decision.

The uncertain status of the ancient Oneida reservation—disestablished, diminished or possibly existing as a kind of legal fiction despite having no physical existence in New York for approximately 200 years and no defined boundaries today—continues to be an issue in this case and others. Uncertainty about the status of the Oneida and other ancient Indian reservations in central New York continues to cause conflict between Indian and non-Indian communities. A decision by this Court concerning the ancient Oneida reservation would benefit not only the parties in this case but would provide much needed guidance to other litigants and courts in New York struggling to determine the status of other former, historic reservations. *See, e.g., Cayuga Indian Nation of New York v. Cayuga County Sheriff David S. Gould*, 2010 NY Slip Op. 4023, *17, 2010 N.Y. LEXIS 981, **39 (N.Y. Ct. of App. May 11, 2010) ("To be sure, the Supreme Court has not yet determined whether parcels of aboriginal lands that were later reacquired by the [Cayuga] Nation constitute reservation property in accordance with federal law. Its answer to that question would settle the issue."). These former, historic reservations have not been physically extant for two centuries and involve lands governed and taxed for generations by state and local governments.

Accordingly, based on the historical realities, equitable considerations, and threats of disruption recognized in *Sherrill*, this Court should declare the ancient Oneida reservation to be disestablished or diminished.[12]

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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12. The historical realities include the 1838 Treaty of Buffalo Creek and subsequent removal of almost all Oneidas from New York shortly thereafter. *See Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 269, n.24 (1985) ("There is . . . a serious question whether the Oneida did not abandon their claim to the aboriginal lands in New York when they accepted the Treaty of Buffalo Creek of 1838. . . .") (Stevens, J., dissenting in part) *quoted in Sherrill*, 544 U.S. at 215, n. 9.

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