No. 10-72

IN THE

Supreme Court of the United States

MADISON COUNTY AND
ONEIDA COUNTY, NEW YORK, PETITIONERS

v.

ONEIDA INDIAN NATION OF NEW YORK AND
STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS

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

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION, CITIZENS EQUAL RIGHTS ALLIANCE AND CENTRAL NEW YORK FAIR BUSINESS AS AMICI CURIAE SUPPORTING PETITIONERS

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MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Citizens Equal Rights Foundation (CERF) (1), Citizens Equal Rights Alliance (CERA)(2) and Central New York Fair Business (CNYFBA) (3), (collectively "the Amici"), by their undersigned counsel, respectfully move for leave to file the attached brief as amici curiae in support of the Petition for Writ of Certiorari. The Amici have requested and obtained the written consent to file this brief from Petitioners, Madison County and Oneida County.

The Oneida Indian Nation (OIN) of New York, Respondent, was requested but refused.

The Petition seeks review of the decision of the United States Court of Appeals for the Second Circuit affirming the judgment of the district court that ruled the "OIN is immune from the Counties' foreclosure actions under the principle that "(a)s 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."

The subject of this litigation involves application of federal Indian common law to pre-empt state law.

Moreover, the case concerns the application of this Court's decision in City of Sherrill v. Oneida Indian Nation, 544 U.S 197 (2005). CERF and CERA filed an amici curiae brief in the City of Sherrill case in support

of the City of Sherrill and have continued to have a substantial interest and involvement in the proper application of the decision.

Specifically, the Amici have a substantial interest in this litigation for several reasons. The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights. CERF has a critical interest in this case, as the extension of the decision of the Second Circuit as precedent will affect CERA members who own various assets and pay property taxes on fee lands near tribal fee property all over the United States. Starting with the amicus curiae briefs in City of Sherrill and Carcieri v. Salazar, (2009). CERF has maintained a consistent position on limiting the Indian Reorganization Act (IRA) to only those tribes occupying actual federal Indian reservations in the Western United States. This brief continues the discussion requiring the repetition of some facts and adds new facts on how the IRA was implemented by the Indian Organization Division of the Bureau of Indian Affairs not previously presented to this Court. See http://www.narf.org/sct/sherrill/amiciequalrightsfoundation.pdf and http://www.narf.org/sct/carcieri/ merits/cerf_et_al.pdf.

The Central New York Fair Business, Inc., incorporated in the State of New York, is headquartered in the City of Oneida. It is the purpose

of Fair Business to identify and address significant issues affecting the equality of business opportunity in central New York. Allowing the Oneida Indian Nation to assert sovereign immunity over fee lands to avoid the payment of property taxes will adversely affect all citizens of New York by creating an unequal business advantage and exempting the Oneida Indian Nation (OIN) enterprises from the laws of the State of New York and the regulatory authority of the Counties.

Members of the Central New York Fair Business, Inc., further are resident citizens of Madison and Oneida Counties. They are homeowners and business owners in the area where the parcels at suit are located. They share common roads; common underground water aquifer; and, common streams. They will be impacted as taxpayers by public costs resulting from any proposed use of the parcels made by the OIN, including the impacts of the casino or its expansion. Any proposed use of the parcels by the OIN could affect their property values, character of the community and community safety if the civil and criminal jurisdiction of New York and the Counties are not applicable to the parcels because of tribal sovereign immunity. CERA and CNYFBA are also actual parties in the litigation against the Record of Decision to take most of the parcels of land at issue in the City of Sherrill case into trust using 25 U.S.C. § 465 and the Part 151 regulations

Third, the Amici are experienced in and have been committed to furthering their interests by filing amicus briefs in other cases that have dealt with issues similar to those raised in this litigation.

The Amici are very familiar with the questions involved in this litigation and have reason to believe that one

significant legal question may not be fully addressed by Petitioner. Additional briefing would assist this Court in determining whether to accept the Petition for Certiorari.

The Amici have a longstanding commitment to safeguarding the civil rights of all Americans, and have an abiding interest in the welfare of all Americans, including the Oneida Indians of New York. For these reasons, and those set forth in the attached brief, the Amici respectfully request leave to file a brief amici curiae.

Respectfully submitted,

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8/12/2010

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INTEREST OF THE AMICI CURIAE

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights. CERF has a critical interest in this case, as the extension of the decision of the Second Circuit as precedent will affect CERA members who own various assets and pay property taxes on fee lands near tribal fee property all over the United States. Starting with the amicus curiae briefs in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) and *Carcieri v. Salazar*, 129 S. Ct 1058 (2009). CERF has maintained a consistent position on limiting the Indian Reorganization Act (IRA) to only those tribes occupying actual federal Indian reservations in the Western United States. This brief continues the discussion requiring the repetition of some facts and adds new facts on how the IRA was implemented by the Indian Organization Division of the Bureau of Indian Affairs not previously presented to this Court. See http://www.narf.org/sct/sherrill/amiciequalrights foundation.pdf and http://www.narf.org/sct/carcieri/ merits/cerf_et_al.pdf .

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Madison and Oneida Counties filed a general consent to any and all amicus curiae briefs that applies to the filing of this Amicus Brief.[1] The Oneida Indian

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[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than amici curiae, CERF and CNYFBA, its members or its parent

Nation denied consent through Michael R. Smith to the filing of this brief. Therefore this brief is accompanied by a motion requesting this amici brief be filed.

SUMMARY OF THE ARGUMENT

The first section of this brief addresses the land status of the former and present state reservation lands and whether those lands qualify as federal "Indian country." This discussion includes how the lower courts and Second Circuit incorrectly applied the prior decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) to reach the erroneous conclusion that the former Oneida reservation is "Indian country." The second section discusses tribal sovereign immunity and how treating the separate tribal governments created by the Indian Reorganization Act as Article 1 territorial governments affected federal case law on sovereign immunity. The final section of this brief explains why the Indian Reorganization Act was originally limited to only those tribes occupying federal Indian reservations on lands reserved before statehood and why this Court needs to continue to limit the Indian Reorganization Act to only those Indian tribes so situated in June 1934 to protect state sovereignty and equal protection of the law for all individual Americans.

ARGUMENT

The Second Circuit concluded that since the land parcels owned in fee are still "Indian country," the

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CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

Oneida tribe enjoys sovereign immunity from the counterclaims brought by Madison and Oneida Counties (Counties) for unpaid property taxes. The Second Circuit made this conclusion while agreeing that in City of Sherrill that this Court held that a state reservation was created by the Treaty of Fort Schuyler in 1788 before the Constitution of the United States took effect. The Second Circuit also concluded that even though the former reservation had been under the continual jurisdiction of the state of New York it was still federal "Indian country."

The Counties petition emphasizes the wrongness of the doctrine of sovereign immunity applying to the Oneida. The Counties attempt to challenge the Second Circuit's conclusion that the taxed parcels are "Indian country" by alleging the Oneida reservation was disestablished or diminished as a matter of federal law. While the *Sherrill* ruling calls into question the equity of reestablishing long extinguished rights of tribal sovereignty, it did not expressly reach the issue of whether the former state reservation of land is or is not presently federal "Indian country."

I. THE CITY OF SHERRILL DECISION OF THIS COURT OVERRULED THE PRIOR RULING OF THE SECOND CIRCUIT THAT THE LANDS PURCHASED BY THE ONEIDA INDIAN NATION WITHIN THE FORMER RESERVATION BOUNDARIES WAS 'INDIAN COUNTRY"

a. The Ruling on Laches

The Second Circuit concluded that this Court had explicitly not decided whether the Oneida reservation was disestablished in the City of Sherrill decision. It therefore reasoned that its prior holding determining that the parcels were "Indian country" was not overruled by this Court. Appendix A, 16a-17a, footnote 6. If the Second Circuit had concluded that the land parcels were not "Indian country" the OIN could not claim sovereign immunity to avoid the property taxes.

The City of Sherrill ruling can be applied to prove that the parcels subject to taxation cannot be federal "Indian country." As submitted by CERA and CNYFBA in their pending Motion for Reconsideration in, 6:08-cv-00660-LEK-GJD, one of the pending fee to trust cases against the Secretary of the Interior, the conclusion by the Second Circuit that the former reservation land was federal "Indian country" was expressly reversed by the application of the doctrine of laches. By definition, laches stands for the proposition that as a matter of equity the matter cannot be brought up because too much time has passed. The Supreme Court expressly held that it would upset "justifiable expectations" to allow the claim. *Sherrill* at 215-7.

Under the Federal Rules of Civil Procedure a dismissal under the doctrine of laches is a dismissal pursuant to Rule 12(b)(6) for failure to state a claim. If on a motion made under Rule12(b)(6) matters outside the pleading are presented then the motion is treated as a motion for summary judgment. Fed. R. Civ. Pro. 12. See also *Lennon v. Seaman*, 63 F.Supp.2d 428, 438-9 (S.D.N.Y. 1999). Therefore, the Supreme Court by expressly reversing the judgment of the Second Circuit by applying laches and precluding the hearing of the Oneida's claim that the land was not under the sovereign jurisdiction of New York nullified all the factual findings and legal conclusions of the Second Circuit ruling in the *Sherrill* case.

In addition, the Supreme Court ruling in *Sherrill* applied laches to expressly reject that the Oneida Indians could assert any sort of sovereignty over the reacquired parcels. Justice Ginsburg addressed the factual background from the standpoint that the land in question had been under state jurisdiction since 1805. *Sherrill* at 202. Determining that an area is federal Indian country is a determination that the area is under federal jurisdiction. Justice Ginsburg specifically concludes that the land is under state jurisdiction, it therefore cannot be under federal jurisdiction or be "Indian country." This legal conclusion alone overrules by implication the Second Circuit conclusion that the land is currently "federal Indian country" that entitles the OIN to claim sovereign immunity to avoid taxation.

b. The Counties argue that the Oneida Reservation was Disestablished or Diminished

Justice Ginsburg concluded that the Oneida Indian reservation was established by the Treaty of Fort Schuyler in 1788. This treaty was between the State of New York and the Oneida Indian Nation. It was in effect before the Constitution of the United States went into effect in 1789. The Oneida tribe ceded all of its lands to New York and then the state reserved for the use of the Oneidas the land they mutually agreed the Oneidas would retain for their occupancy. *Sherrill* at 205. The Supreme Court further clarifies its opinion in Footnote 1, directly citing the Second Circuit's previous 1988 decision that the Oneida reservation was a reservation of state land. Sherrill at 203-4.

Justice Ginsburg continued that the Treaty of Canandaigua in 1794 "acknowledged" the Oneida reservation. Then explains what that acknowledgement meant and how the land stayed under state jurisdiction. *Sherrill* at 204-5. By contrast the Second Circuit concluded that the federal government in the 1794 treaty "recognized" the Oneida reservation. See 337 F.3d at 167. There is no such thing as the federal government "recognizing" an Indian reservation and thereby federalizing a state reservation of land. A federal Indian reservation can only be established by "reserving" federal public domain land for a group of Indians by treaty, executive order or congressional action. None of these occurred in New York because all of the land within the exterior boundaries of New York was under the jurisdiction of New York and not the

government of the United States.

This Court in the *City of Sherrill* ruling applied the equitable doctrine of laches to limit its holding in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)(*Oneida I*) and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*) that allowed the Oneida Indian Nation to sue to claim aboriginal rights they contended were violated by New York not complying with the Nonintercourse Act of 1790, 25 U.S.C. § 177. The majority opinion in *City of Sherrill* expressly did not overrule Oneida II. Sherrill at 213. This Court in deciding *City of Sherrill* underestimated the confusion that resulted regarding the sovereignty of the State of New York by its decision in *Oneida I.*

This Court concluded in *Oneida I* that the federal right of occupancy or "Indian title" was vested in the United States for all Indian land. *Oneida I* at 667-70. It even concluded that this doctrine of a federal right of occupancy was absolute and applied to the original colonies as interpreted in *Fletcher v. Peck*, 10 U.S. 87 (1810) and *Worcester v. Georgia*, 31 U.S. 515 (1832). This led to the conclusion that the Oneida Indian Nation had a present right of occupancy over the former state reservation and could sue the State of New York to reassert its sovereign rights. After 30 years of litigation in various federal court actions, this Court decided in *City of Sherrill* that the doctrine of laches applied to the claims of the OIN to prevent the OIN from rekindling embers of sovereignty that had long ago grown cold but did not expressly overrule any of the prior holdings against the State of New York and Counties. This means that there is still an absolute

federal right of occupancy or "Indian title" in OIN that as a matter of equity will not be heard but can serve as the basis for the OIN retaining inherent sovereignty over the former state reservation to have tribal sovereign immunity from paying property taxes. It is not surprising that attorneys and judges in New York are confused by federal Indian common law that allows extinguishing inherent tribal sovereignty by diminishing or disestablishing the land base of a federal reservation while under *Oneida I* the "Indian title" can never be extinguished from the state reservation.

II. TRIBAL SOVEREIGN IMMUNITY

Federal Indian common law defines inherent tribal sovereignty as existing as long as "Indian title" (as was defined in *Johnson v. McIntosh*, 21 U.S. 543 (1823) and *Worcester v. Georgia*, 31 U.S. 515 (1832)) has not been extinguished. The holding in *Oneida I* concluded that the "Indian title" of the Oneidas was still in existence. The holding in *City of Sherrill* prevents the OIN from suing to reclaim its rights to rekindle a sovereignty that had long ago grown cold by applying the doctrine of laches. This statement from *City of Sherrill* implies that the OIN does not enjoy inherent sovereignty over the former state reservation. It is the disconnect between inherent tribal sovereignty and tribal sovereign immunity that creates the problem in this case. Inherent tribal sovereignty was severed from Indian title in *City of Sherrill* as explained above. The question then is what is the basis of tribal sovereign immunity if it is not based on inherent sovereignty?

This Court has already determined that the legal basis of tribal sovereign immunity makes the whole

doctrine suspect. *See Kiowa Tribe v. Manufacturing Technologies*, 523 U.S. 751 (1998). The Court mistakenly allowed tribal sovereign immunity to continue because it assumed that Congress would act and define limits for the doctrine. Tribal sovereign immunity is a federal common law creation. If it is going to be limited, it is up to this Court to do it. As a recent law review article concludes, tribal sovereign immunity is now the strongest part of tribal sovereignty.[2] The law review article makes suggestions on how to use tribal sovereign immunity to make new claims of tribal sovereignty.[3]

a. Origin of Tribal Sovereign Immunity

Tribal sovereign immunity did not even exist until 1940 and the decision in *United States v. United States Fidelity and Guarantee Co. et al.*, 309 U.S. 506 (1940). This decision cites *United States v. Minnesota*, 305 U.S. 382 (1939) that extended federal sovereign immunity to the Indian Nations under the tutelage of the United States. *U.S. Fidelity* at 513, Fn 14. The Minnesota Court found that Section 2 of the IRA, 25 U.S.C. § 462, extending indefinitely the trust period for allotted lands had negated previous acts of Congress that gave the states specific rights to sue and condemn Indian allotments in state court without naming the United States as an indispensable party. *Minnesota* at 387. In *Minnesota v. United States*, the sovereign immunity of the United States was expanded to include

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[2] *See* Indian Country's Border: Territoriality, Immunity, and the Construction of Tribal Sovereignty, by Katherine J. Florey, Boston College Law Review Volume 51:595

[3] *Id.* at 649-53

all "Indian land" per a regulation promulgated in 1938. *Minnesota* at 390, Fn 7. One year later, the *U.S. Fidelity* Court extended federal sovereign immunity to cover tribal interests because of public policy. *U.S. Fidelity* at 512-4. This new public policy was created by the adoption of the Indian Reorganization Act (IRA) of 1934 as discussed in *U.S. v. Minnesota. Minnesota* at 387-90.

While the *Minnesota* and *U.S. Fidelity* cases expanded federal sovereign immunity and effectively made the federal courts the exclusive courts to hear claims to condemn Indian lands for public purposes, these cases do not actually decide that the sovereign immunity belongs to the Indian tribe. In fact, this Court in *U.S. Fidelity* concludes "It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." *U.S. Fidelity* at 512.

It is not until *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165 (1977) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978) that this Court reinterprets *U.S. Fidelity* to find independent tribal sovereign immunity as a matter of federal Indian common law. The Justice Department acting in an amicus capacity stated that the Solicitor General has no authority to waive the sovereignty of the tribe. Therefore, this Court was left to decide either the tribe had no sovereign immunity or the tribe's sovereign immunity is separate from the sovereign immunity of the United States. See *Puyallup* at 170-1. A similar ploy was used in *Santa Clara* by the Justice Department where they cut and pasted clauses from separate sentences in *U.S. Fidelity* to have this Court

conclude "But 'without congressional authorization,' the 'Indian Nations are exempt from suit.' *Id.* at 512." *Santa Clara* at 58.

As this Court correctly concluded in *U.S. Fidelity* and *Minnesota*, since the IRA was passed in 1934 all Indian land over which a tribe can exercise inherent sovereignty is held in trust for Indian tribes by the United States. Therefore, it is the sovereign immunity of the United States as the trustee to the Indians and as owner of the Indian land that is controlling. To hold otherwise allows the United States to be completely unaccountable when it supports the Indian tribes and individual Indians as federal instrumentalities to challenge state jurisdiction. This Court realized that it had been misled about the expansion of tribal sovereignty being "harmless" when it smacked into the loss of individual rights and state jurisdiction that would have occurred if the United States had been able to "sell" tribal criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201 (1978). Unfortunately, the realization that tribal sovereignty had to be restricted in keeping with their status as dependent sovereigns did not translate into the realization that tribal sovereignty was threatening the constitutional structure of federalism for almost twenty years. This Court should now consider limiting tribal sovereign immunity to comport with the IRA.

b. The City of Sherrill Ruling is Unenforceable if Tribal Sovereign Immunity Applies to the Parcels Owned in Fee by the Oneida Indian Nation

This Court ruled in *City of Sherrill* that the Oneida Indians cannot rekindle embers of sovereignty that have long ago grown cold. This statement is not accurate if the State of New York and the Counties of Madison and Oneida are prevented from enforcing state jurisdiction because of tribal sovereign immunity. Most importantly, the "unification theory" that inherent sovereignty through Indian title can somehow be rejoined to lands purchased in fee must be completely laid to rest. Nothing threatens state sovereignty more than a federal Indian common law theory that inherent Indian sovereignty can be restored to Indian tribes that have lands placed into trust status or reacquire fee ownership over lands within a former reservation. And this Courts ruling in *Oklahoma Tax Commission v. Potawatomi Tribe*, 498 U.S. 505 (1991) raises the very possibility that all lands placed into trust by the United States can restore tribal sovereignty by holding that all such lands are subject to tribal sovereign immunity. *Id.* at 511.

The question presented in *Potawatomi* was artfully constructed to misconstrue the federalism conflict. "The issue presented in this case is whether a State that has not asserted jurisdiction over Indian lands under Public Law 280 may validly tax sales of goods to tribesmen and nonmembers occurring on land held in trust for a federally recognized Indian tribe." *Id.* at 507. This characterization of the issue makes it

appear that the state refused to exercise jurisdiction over Indian land except to assess taxes on it. The parcel of land on which the convenience store that sold the cigarettes was situated was held in trust by the United States pursuant to the IRA. *Id.* at 507. In fact, the parcel where the convenience store was located was off reservation fee land that had probably been taken into trust pursuant to the IRA, 25 U.S.C. § 465. Id. at 511. For the first time the Oklahoma Tax Commission argued that these newly acquired off reservation lands should be treated as continuing under state jurisdiction. This Court summarily rejected the idea:

> "Here, by contrast, the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in *John*,[United States v. John, 437 U.S. 634 (1978)] we find that this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes. 437 U. S., at 649."

Id. at 507. This conclusion directly contradicts the rationales in the more recent decisions of *Nevada v. Hicks*, 533 U.S. 353 (2001), *City of Sherrill v. Oneida Indian Nation, Carcieri v. Salazar and Hawaii v. Office of Hawaiian Affairs*, 129 S.Ct 1436 (2009) and many other rulings that have limited the removal of state jurisdiction by the United States on behalf of Indian tribes.

In this case, the conflict between Oklahoma Tax *Commission v. Potawatomi Tribe* and *City of Sherrill v. Oneida Indian Nation* could not be more stark. If the Second Circuit ruling is not overturned against Madison and Oneida Counties it will effectively negate

the City of Sherrill ruling.

III. STATE SOVEREIGNTY IS THREATENED BY FEDERAL INDIAN COMMON LAW

To fully grasp the nature of this threat to the sovereignty of the State of New York it is necessary to define the underlying policy of the IRA and that policy has been interplayed and expanded through federal Indian common law. As came to light in the briefing of Carcieri v. Salazar, the IRA as passed by Congress was not the very expansive original version of the IRA submitted by John Collier. This led to serious problems of the Bureau of Indian Affairs and the solicitors for the Department of the Interior over interpreting the very limited act actually passed by Congress. The Bureau of Indian Affairs had created a special division of Indian Organization on January 1, 1934 in anticipation of the passage of the sweeping IRA proposal. The Indian Organization Division (IOD) was the sponsor of the ten special Indian congresses that were held all over the country to promote the passage of Commissioner John Collier's IRA. This division led personally by Commissioner Collier made many promises at the conferences and in correspondence to specific tribes over how the IRA would help them to gain their support for its passage in Congress. Many promises were made by the IOD while legislation was pending that the IRA would apply to the tribes that no longer had a land base or tribal organization, including the California Indians. Congress in particular reacted negatively against the idea of "restoring" tribal identities in California that had been wiped out by the Spanish and Mexican Mission system.

Although the most extreme parts of Collier's IRA were removed by Congress, the IRA as passed by Congress did adopt Commissioner Collier's concept of creating separate tribal municipal governments. There is only one clause of the Constitution that contains authority for the federal government to establish local municipal governments: the Property Clause, Art. IV, Sec. 3, Cl. 2. The Property Clause expressly sets the authority of the Congress to acquire territorial lands and dispose of the territorial lands of the United States. The Property Clause also allows territorial land to be reserved for federal uses and to establish local governments to prepare the people in those areas for citizenship. *See United States v. Gratiot, et al*, 39 U.S. 526 (1840).

These "tribal governments" created by the IRA were not based on the traditional and often unique customs of the various tribes. In fact, the IOD for each region of the BIA created a model constitution for what the division considered the most advanced tribe that was only slightly modified for other tribes. The differences in the tribal constitutions between regions are minor. The solicitors and staff of the IOD in Washington, D.C. were solely responsible for the creation of all of these tribal constitutions that ape the three part system adopted for our national government and states. The tribal constitutions contain no checks and balances, no separation of powers and no defined court system of any kind although they all contain provisions for some type of tribal court to be set up. These tribal constitutions were obviously not written to be sustainable forms of government. There purpose was to educate the Indian people about our system of government. If a tribe voted to reject the mock

constitution given to them by the IOD, they lost the benefits of being an IRA tribe. In addition, no tribe even now can amend an IRA constitution without federal approval.

Commissioner Collier fervently believed that all "Indians" needed to learn to become good citizens of the United States and that the IRA should apply to all of them regardless of whether they lived on a federal Indian reservation or not. He believed Congress was wrong for limiting the application of the IRA in 25 U.S.C. § 479. Collier and the IOD became very creative in interpreting Section 479 to avoid its' limitations. The IOD through its own solicitors started court cases to expand or justify their interpretation of the IRA. This included solicitor Felix Cohen who was assigned by IOD to write the Handbook of Federal Indian Law. The blatant and aggressive actions of Collier and the IOD to expand the IRA to be more like Collier's original bill helped create the fervor in Congress to repeal the IRA just two years after it was made law. This Court contributed to this furor by allowing almost total deference to the IOD's interpretations of federal Indian policy in at least the four cases discussed below.

One of the first cases brought by suggestion of the IOD was *United States v. Minnesota*, 305 U.S. 382 (1938). The legislation of the IRA as passed did not repeal any of the prior allotment acts of Congress. It is through the federal Indian common law decision in Minnesota that the IOD could extend the IRA over all former allotted lands. The next case was *United States v. McGowan*, 302 U.S. 535 (1938). In *McGowan*, the BIA was allowed to characterize fee lands purchased for the Indian colony in Nevada to be defined as "Indian land."

By equating all types of "Indian land" as a matter of federal common law, the IRA is not confined to federal "reservations" as defined in Section 479. The IOD then used the Indian trust to invoke the paramount sovereign authority of the United States in *United States as Guardian of the Walapai v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). This decision arguably makes all former "Indian land" federal "Indian country" again as a matter of federal Indian common law. These cases along with *U.S. Fidelity* to extend federal sovereign immunity over tribal interests to create "tribal sovereign immunity" as federal Indian common law discussed at length above were designed to get around the restrictions placed into 25 U.S.C. § 479. Collier and the IOD thought they had the IRA right where they had wanted it until Attorney General Robert Jackson at the urging of Congress created a "uniform policy to be followed by the departments and agencies of the Federal Government in securing jurisdiction over lands acquired by the United States" to stop Collier and the IOD from removing any lands from state jurisdiction without express state consent. Letter from Attorney General Jackson to Secretary of the Interior Harold Ickes, dated March 31, 1941, No. 151695, Record Group 75, Entry 132B, Departmental Memo, Box 1, BIA Orders. The actual form the state was required to complete is attached to the letter. When the Executive branch changed its position, this Court soon followed with the ruling in *Hynes v. Grimes Packing*, 337 U.S. 86, 123 (1949) that placed the federal Indian trust lands within the overriding context of the equal application of the law. Whether this application of equal protection was used to invoke a limitation of federal Indian common law by applying a rationale similar to the one used in *Erie Railroad Co. v.*

Tompkins, 304 U.S. 817 (1938) is not made clear by the decision.

Fundamentally the policy of the IRA was to create separate municipal like governments to be governed under Article I authority of the United States Congress just like all territories of the United States. To this day, all tribal courts derive their authority from the Administrative Article 1 Courts of Indian Offenses. By allowing the policy of the IRA to be expanded through Supreme Court rulings expanding federal Indian common law has threatened how Congress intentionally limited the IRA. It has also allowed the IRA to apply to bands of Indians not occupying reserved federal land or a federal enclave to directly challenge the sovereignty of the state by claiming to displace its jurisdiction over any land owned by "Indians."

With President Nixon's Message to Congress of July 8, 1970, the era of the Nixon Indian Policy began. It was based on making the policy of the IRA permanent. Because the Secretary claimed he could define which Indian tribes were "recognized" as a continuing power, the power claimed by President Nixon was unlimited by any constitutional restraints. As the first heading of the Nixon Message says: Self-Determination Without Termination. The policy goes on to articulate how any federal program can be delegated to tribal authority. This is unlimited Executive authority to define the Indian trust. No longer is there any deference to Congress required as this Court assumed in *United States v. Kagama*, 118 U.S. 375, 384-5 (1886). President Nixon took his newly declared "Indian trust" power without any act of

Congress and proceeded to the federal courts to have his assumed power legitimized as federal Indian common law. Starting with *Mescalero Apache v. Jones*, 411 U.S. 145 (1973) and *McClanahan v. Arizona*, 411 U.S. 164 (1973), this Court again allowed off reservation "trust responsibility" as it had previously acknowledged in *U.S. v. Minnesota, McGowan* and *Santa Fe Pacific Railroad.* This Court allowed the Nixon Administration to reinterpret the IRA into a permanent policy to intentionally threaten the constitutional structure and federalism. See *Morton v. Mancari*, 417 U.S. 535, 545 (1974). This virtually unlimited executive power is what the Supreme Court unleashed on the people and State of New York in holding that as a matter of federal Indian common law the Oneida Indian Nation could sue to claim its purported federal rights to its former Indian reservation in *Oneida I.*

b. The Sherrill Decision

This Court began placing the Indian trust power back within the structure of the Constitution of the United States with the *City of Sherrill* ruling by specifically rebalancing the equities to limit the jurisdiction of the federal courts to expand the "Indian trust" through federal common law rulings. *Sherrill* at 218-20. This Court in *Sherrill* expressly rejected the "unification theory" of the Nixon administration that allowed a merger of Indian title and fee ownership to restore tribal sovereignty to land that had been under state jurisdiction. *Id.* at 213-4. But *Sherrill* has not resolved the underlying problem of the loss of state jurisdiction to tax the parcels owned in fee by the Oneida tribe that are the subject of this case or the jurisdiction of Seneca

and Cayuga Counties to enforce state law to prevent the sale of untaxed cigarettes. In fact, the New York State Court of Appeals in *Cayuga Indian Nation v. Gould*, 2010 N.Y. Lexis 981 (May 11, 2010) expressed its own confusion on whether federal Indian law preempts state jurisdiction not knowing how to apply Sherrill against the direct assertions of the tribe and the United States that it does not have jurisdiction to enforce its laws on lands claimed to still have some federal protection.

Then on August 9, 2010 the Second Circuit used Sherrill to end all land claims by the Oneida in New York. See *Oneida Indian Nation of New York, et al. v. County of Oneida, et al.*, 07-2430-cv(L), 07-2548-cv(XAP), 07-2550-cv(XAP). It is very unlikely that the Oneida Tribes and United States will allow the Second Circuit to end forty years of land claim litigation expressly allowed by *Oneida I* and *Oneida II* without challenging the *Sherrill* decision. The *Sherrill* ruling also did not resolve the fee to trust issue in New York. The Secretary of Interior asserts the authority to take 13,004 acres of fee land into trust for the Oneida Indian Nation of New York. See Record of Decision, May 20, 2008. 73 F.R. 30144-30146. It is the position of Amici that fee to trust as currently interpreted in the Part 151 regulations is just another version of the same "unification theory" rejected in the *Sherrill* decision. As stated earlier in this brief, the *Sherrill* ruling does not correct forty years of the jurisdiction of the State of New York being challenged by the United States on the sole behalf of Indian tribes.

It is the position of Amici that the ruling in *Oneida I* that "Indian title" did not cede to the State of

New York along with the right of preemption in *Fletcher v. Peck* was a fundamental error in constitutional law that undermines state sovereignty. This is especially true because *Worcester v. Georgia* can be easily distinguished from the situation in New York by distinguishing the cession treaty of the Cherokee made with United States from the Treaty of Fort Schuyler that was made between the New York Indians and the State of New York. All sovereignty is based on the right to govern land. By removing "Indian title" from the original thirteen colonies, a significant power was removed from the bundle of authority left to the states and people that could be used to attack the very basis of state sovereignty. This fundamental mistake in weakening state sovereignty has been aptly demonstrated in New York by the constant and continual threats of removing land from state jurisdiction.

The removal of "Indian title" from the preemption rights of the original colonies could arguably make "Indian title" an asset of the United States subject to plenary authority under the Indian Commerce Clause, Art. I, Sec. 8, Cl. 3. Admittedly, this would be a major stretch of the legal concept of "Indian title." However, it would make sense as the basis for the so-called "unification theory" put forward by the Oneida Indian Nation in Sherrill. The idea that fee title could be unified with never extinguished "Indian title" to restore inherent tribal sovereignty is exactly the sort of theory that attorneys for the Nixon administration were promoting. See http//: citizensalliance.org Nixon Memorandum. Fungible "Indian title" could also be the underlying basis for tribal sovereign immunity applying when the tribe

claiming the immunity has no sovereignty over the land as in this case. Because decisions like *Oneida I* were made in the context of federal Indian common law, the federal courts accepted whatever the United States was proposing as long as it appeared to be on behalf of the Indians. No questions were asked about where the federal power came from because it was all under the "Indian trust relationship." As the Nixon Memorandum exposes, at least this one administration was more than willing to take advantage of using the Indians to massively expand Executive authority knowing they were unbalancing the Constitution and flaunting separation of powers. Once the policy was established, it is hard to imagine bureaucrats and politicians under any administration not reaching to use it.

It is time to correct this fundamental error in constitutional law and restore inviolable state sovereignty. This Court has laid the groundwork that allows for the rebalancing of the sovereign interests so important to maintaining our system of constitutional self-government. This case and the other cases coming to this Court from New York create the opportunity to rectify most of the harm that has been done against state sovereignty by the Nixon Indian policy.

CONCLUSION

The Court should reverse the decision of the Second Circuit.

Respectfully submitted,
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