No. 10-72

IN THE

AUG 12 2010

Supreme Court of the United States

MADISON COUNTY and
ONEIDA COUNTY, NEW YORK,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent.

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

BRIEF FOR THE STATES OF NEW YORK, COLORADO, FLORIDA, IOWA, MICHIGAN, SOUTH DAKOTA, WASHINGTON, AND WYOMING AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether, when a State or local government is authorized to impose real property taxes on real property owned by an Indian tribe, the government is nevertheless barred by tribal sovereign immunity from enforcing the tax through foreclosure or other *in rem* collection proceedings.

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INTEREST OF THE AMICI CURIAE*

States have a vital interest in safeguarding the economic health of their local political subdivisions, and in particular, in ensuring that local governments can collect real property taxes that Indian nations are obliged to pay on taxable tribal lands. The Second Circuit's holding that the petitioner counties cannot enforce their real property taxes on tribally-owned land that this Court recently held to be taxable, *see City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), has rendered the property taxes uncollectible and jeopardized the financial health and well-being of the petitioners as well as of local governments in other parts of New York that were once occupied by Indian tribes. *See, e.g., Cayuga Indian Nation of N.Y. v. Gould*, __ N.E.2d __, 2010 WL 1849339 (N.Y. May 11, 2010) (addressing the status of lands recently acquired by the Cayuga Indian Nation of New York).

In addition, the Second Circuit's reasoning imperils real property tax collection throughout the United States because it permits Indian tribes nationwide to escape enforcement of lawfully imposed real property taxes. Finally, by parity of reasoning, the decision substantially restricts the power of the States and local governments to enforce their regulatory jurisdiction over taxable tribal lands. The States and their local subdivisions have a vital interest in continuing to enforce the tax and regulatory jurisdiction over lands they have governed without interruption for centuries.

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* Pursuant to Rule 37.2, counsel of record for all parties received notice on or before August 2, 2010 of the States' intention to file this brief.

SUMMARY OF THE ARGUMENT

In *Sherrill*, this Court rejected the claim of the Oneida Indian Nation of New York ("OIN") to "present and future sovereign immunity from local taxation" on lands that the OIN had recently acquired in the open market within an "area that once composed [its] historic reservation." *Id.* at 214, 202. The Court held that laches, acquiescence and impossibility barred the Oneidas' long-delayed assertion of sovereignty because of the substantial disruption to state and local governance the claim would cause. *See id.* at 202-03, 221. Moreover, the Court explained, over the objection of Justice Stevens in dissent, that this equitable bar applied whether OIN was asserting sovereignty affirmatively in a declaratory judgment action or defensively in the suit by the city to evict the OIN for failure to pay property taxes. *Compare id.* at 214 n.7 (opinion of the Court) *and* 222 (Justice Souter concurring), *with* 225-26 (Justice Stevens dissenting).

Nevertheless, a panel of the Second Circuit has now held, without so much as mentioning the above statement in *Sherrill*, that this Court's earlier decisions in *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998), and *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.*, 498 U.S. 505 (1991), compel the conclusion that "although the Counties may tax the property at issue here, *see City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), they may not foreclose on those properties because the tribe is immune from suit." Pet. App. 33a (Judges Cabranes and Hall concurring). Two members of the

three-judge panel, in an opinion curiously labeled a "concurring opinion," acknowledged that this result is "anomalous" in view of *Sherrill* and "defies common sense" but believed that it is compelled by this Court's earlier tribal sovereign immunity precedents, which they called upon this Court "to reconsider." *Id.* at 32a-33a.

The Second Circuit's decision should be reviewed by this Court. First, the holding below flies in the face of both the letter and the spirit of *Sherrill*. This Court has already held that the OIN is not immune from the city's eviction proceeding. *See* 544 U.S. at 214, n. 7 (opinion of the Court), 222 (Justice Souter concurring). In addition, tribal sovereign immunity is an attribute of tribal sovereignty generally, and thus, the distinction that the Second Circuit drew between tribal sovereign authority over land and tribal sovereign immunity is illusory. *See* Pet. App. 14a. In *Sherrill*, this Court used the terms "sovereign," "sovereignty" and "sovereign immunity" interchangeably. *See, e.g.*, 544 U.S. at 202, 213, 214. Moreover, by upholding the OIN's claim of immunity here, the Second Circuit effectively denied the State and local governments the power to enforce against the OIN the regulatory jurisdiction that this Court in *Sherrill* ruled that they, not the OIN, exercise over the OIN's recently acquired lands. *See* 544 U.S. at 220 (granting tax immunity would also imply immunity "from local zoning or other regulatory controls that protect all landowners in the area"). The lack of effective enforcement would create the very disruption of "the governance of central New York's counties and towns" that this Court in *Sherrill* sought to avert. *Id.* at 202, *see also* 219 ("disruptive practical consequences"),

220 n.13 ("[o]ther tribal entities have already sought to free historic reservation lands purchased in the open market from local regulatory controls").

Second, the decision is at odds with this Court's decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), approving the *in rem* foreclosure of taxable tribal real property. The Second Circuit mistakenly relied instead on this Court's decisions in *Potawatomi* and *Kiowa*, but those cases involved *in personam* jurisdiction and do not govern the foreclosure of taxable tribal land.

Third, as the Second Circuit recognized, because that court's holding is equally applicable to "land that was never part of a reservation," Pet. App. 32a (Judges Cabranes and Hall concurring), the resulting disruption of state and local governance is not limited to former Indian lands in central New York but threatens every community throughout the United States.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Decision Conflicts with this Court's Decision in *Sherrill*.

This Court should grant the petition for certiorari to resolve the conflict between the Second Circuit's holding that the counties' tax enforcement proceedings are barred by tribal sovereign immunity and this Court's holding in *Sherrill* that the OIN is precluded by laches and other delay-based doctrines from asserting sovereignty regarding its recently acquired lands. *See* Sup. Ct. R. 10(c); *Potawatomi*, 498 U.S. at 509 (certiorari granted "to resolve an apparent conflict with this Court's precedents and to clarify the law of sovereign immunity with respect to the collection of sales taxes on Indian lands").

The conflict is direct and apparent. First, in *Sherrill*, this Court expressly concluded that the OIN was not immune from the city's tax enforcement proceedings. There, the OIN sued, among others, the City of Sherrill in federal court after the city initiated eviction proceedings against the OIN following the OIN's nonpayment of taxes. *See Sherrill*, 544 U.S. at 211; *see also Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 145 F. Supp. 2d 226, 236-40 (N.D.N.Y. 2001) (in *Sherrill*, the OIN sought to bar local governments from foreclosing or otherwise enforcing their real property taxes), *aff'd*, 337 F.3d 139 (2d Cir. 2003), *rev'd and remanded*, 544 U.S. 197 (2005). The OIN sought "declaratory and injunctive relief recognizing its present and future *sovereign immunity from local taxation* on parcels of land the [OIN] purchased in the open market." *Sherrill*, 544 U.S. at 214 (emphasis added).

This Court rejected the OIN's assertion of sovereign immunity from local taxation, holding that the OIN "cannot unilaterally revive its ancient sovereignty, in whole or in part, over the parcels at issue." *Id.* at 203; *see also id.* at 222 (Justice Souter concurring) (the OIN "is not now immune from the taxing authority of local government"). In particular, the Court held that the OIN could not invoke immunity to defend against the city's real property tax enforcement proceedings. In his dissent, Justice Stevens suggested that tribal immunity could be raised "as a *defense* against a state collection proceeding" and observed that *Sherrill* itself presented that very issue. *Id.* at 225. However, the Court's majority squarely rejected that argument:

> The dissent suggests that, compatibly with today's decision, the Tribe may assert tax immunity defensively in the eviction proceeding initiated by Sherrill. *Post*, at 225. *We disagree. The equitable cast of the relief sought remains the same whether asserted affirmatively or defensively.*

Id. at 214 n.7 (emphasis added); *see also id.* at 222 (Justice Souter concurring) (rejecting claim of tribal sovereignty, "whether affirmative or defensive"). Accordingly, in *Sherrill* this Court rejected the very claim of immunity from tax enforcement upheld below by the Second Circuit.

Second, the distinction that the Second Circuit drew between tribal sovereign authority over land and tribal sovereign immunity is untenable in the *Sherrill* context. The court found that the OIN had sovereign immunity

from tax enforcement although the OIN was barred from exercising sovereignty over the land. Pet. App. 14a-20a. But this Court drew no such distinction in *Sherrill*, repeatedly using the words "sovereign" and "sovereignty" in holding that the OIN's claim of "sovereign immunity from local taxation" was barred. 544 U.S. at 214; *see also id.* at 202, 203, 213, 214, 215 n.9, 216, 219, 220, 221 n.14. As the term implies, "sovereign immunity" is an attribute of sovereignty generally. *See Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 24-25, 30-31 (1st Cir. 2006) (en banc) ("tribal sovereign immunity is most accurately considered an incidence or subset of tribal sovereignty" and "[t]he Tribe has not explained how being subject to the *enforcement* of the State's cigarette tax scheme is an infringement on its retained sovereignty when being subject to the *requirements* of the scheme is not"). Indeed, this Court's decision in *Potawatomi* recognized that tribal sovereign immunity is part of the tribes' "inherent sovereign authority over their members and territories." *Potawatomi*, 498 U.S. at 509 (suits against Indian tribes "are *thus* barred by sovereign immunity" absent waiver or abrogation) (emphasis added). Thus, the sovereignty that *Sherrill* bars the OIN from exercising regarding these lands necessarily includes the assertion of sovereign immunity from foreclosure and other property tax enforcement proceedings.

Third, the Second Circuit's decision treats this Court's decision in *Sherrill* as a mere theoretical exercise that is devoid of any practical significance. *Sherrill* made clear that the disruption of the long established local governance that would result if the OIN were held to be immune from the counties' tax and regulatory jurisdiction justified the

Court's invocation of laches, acquiescence and impossibility. That reasoning is equally applicable to the OIN's assertion of sovereign immunity. If the State and the local governments are unable to enforce their tax and regulatory jurisdiction against the OIN, then as a practical matter the OIN cannot be compelled to pay the real property taxes that this Court held it owes or to comply with state and local land regulations.[1] Depriving the counties of their enforcement authority will inevitably result in the "disruptive practical consequences," including jurisdictional "checkerboard[ing]," that led this Court to reject the OIN's unilateral revival of sovereignty in the first place. *Sherrill*, 544 U.S. at 219; *see id.* at 220 and n. 13 (observing that OIN's claim would also immunize it "from local zoning or other regulatory controls that protect all landowners in the area"); *see also New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 298 (E.D.N.Y. 2007) (finding of immunity from enforcement would "completely undermine" *Sherrill*'s holding because the state and local governments could not use the courts to avoid the disruptive impact that the Court "clearly stated they

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[1] While the U.S. Department of the Interior decided to take into trust for the OIN approximately 13,000 of the 17,000 acres of land at issue here, and while the OIN claims to have secured the payment of back taxes on all of the land at issue, the Second Circuit correctly concluded that this case is not moot. *See* Pet. App. 12a-13a. The Second Circuit's decision will apply to the 4,000 acres of OIN land that were not taken into trust as well as to future land purchases by the OIN and other tribes. In addition, both the validity of the Interior Department's trust determination and the adequacy of the OIN's purported security have been challenged in the pending trust litigation. *See, e.g.*, *New York v. Salazar*, No. 6:08-cv-644, 2010 WL 2346317 (N.D.N.Y. June 9, 2010).

have the equitable right to prevent") (appeal pending); *Oneida Tribe of Indians of Wis. v. Village of Hobart, Wis.*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008) (*Sherrill* permits forced sale of land for nonpayment of taxes). Therefore, contrary to the holding of the Second Circuit, the same equitable principles of laches, acquiescence and impossibility that barred the OIN's claim of sovereignty in *Sherrill* bar the OIN's similarly disruptive assertion of sovereign immunity here.

II. This Court Should Clarify That Tribal Sovereign Immunity Does Not Bar Foreclosure of Taxable Tribal Real Property.

This Court should also grant the petition for certiorari to clarify that its decision in *County of Yakima v. Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), rather than the Court's decisions in *Potawatomi* and *Kiowa*, govern foreclosure of taxable tribal real property. In *Yakima*, the Court permitted the *in rem* foreclosure of tribal land that was subject to local taxation without invoking tribal sovereign immunity. The Second Circuit, disregarding *Yakima*, concluded instead that *Potawatomi* and *Kiowa* compelled the conclusion that the OIN was immune from the counties' foreclosures. Pet. App. 14a-23a. But *Potawatomi* and *Kiowa* involved *in personam* jurisdiction and arose in circumstances very different from this case. This Court should clarify that tribal sovereign immunity does not extend to the *in rem* real property tax foreclosures involved here.

The clear import of this Court's decision in *Yakima* is that tribal sovereign immunity does not bar the

foreclosure of taxable tribal real property. In *Yakima*, the Court held that section 5 of the General Allotment Act permitted the county to impose an ad valorem tax on reservation land patented in fee pursuant to the Act. *See Yakima*, 502 U.S. at 270. The Court reasoned that, when section 5 rendered the allotted lands alienable and encumberable, "it also rendered them subject to assessment *and forced sale for taxes*." *Id.* at 263-64 (emphasis added). In so holding, the Court did not distinguish between "fee patented lands held by the Tribe or its members," although the county sought to foreclose on tribal as well as member-owned lands. *Id.* at 256. The Court noted that "[l]iability for the ad valorem tax flows exclusively from ownership of realty on the annual date of assessment" and "creates a burden on the property alone." *Id.* at 266. The Court also observed that unlike *in personam* jurisdiction, the "mere power to assess and collect a tax on certain real estate" is not significantly disruptive of tribal self-government. *Id.* at 265. *See also Permanent Mission of India to the United Nations v. City of New York*, 551 U.S. 193, 199 (2007) ("[a]s a threshold matter, property ownership is not an inherently sovereign function").

The Court's reasoning in *Yakima* is equally applicable here. The Court tied together taxability and tax enforcement—the alienability of the lands made them subject to *both* "assessment" and "forced sale for taxes." *Yakima*, at 263-64. In *Sherrill*, this Court determined that the OIN's parcels were subject to local real property taxation. Consequently, the OIN's parcels are subject to the same *in rem* remedies, including foreclosure, as were the tribal parcels in *Yakima*. Under New York law, the unpaid property taxes are liens upon

the OIN's parcels, and the proceedings to foreclose the tax liens are proceedings *in rem*. *See* N.Y. Real Prop. Tax Law §§ 902, 1120 (McKinney 2000).[2] Thus, under *Yakima* the counties' *in rem* foreclosures are not barred by tribal sovereign immunity.

The Second Circuit's reliance on *Potawatomi* and *Kiowa* was misplaced. Unlike the real property tax foreclosures here, *Potawatomi* and *Kiowa* were *in personam* actions against the tribes, rather than *in rem* proceedings against tribal property. In addition, sound policy reasons counsel against relying on those decisions in the foreclosure context. In *Potawatomi*, this Court held that Oklahoma could not sue the tribe to enforce the cigarette taxes that the tribe was required to collect on its reservation sales to non-tribal members. The Court relied on the availability of other enforcement options regarding cigarette taxes. *See Potawatomi*, 498 U.S. at 514 (noting that the State, although barred from suing the tribe to collect its cigarette taxes, could in the alternative sue tribal officers, enforce against wholesalers, enter agreements with the tribes or seek relief from Congress). The Second Circuit stated that similarly, an alternative remedy was available here, because tribal officers "remain susceptible to suits for damages and injunctive relief." Pet. App. 23a.

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[2] Oneida County follows an *in rem* process, which is described in the district court's decision below. *See* Pet. App. 37a-39a; *see also* Petition for Certiorari ("Pet.") at 6, n.4.

The Second Circuit's reliance on *Potawatomi*'s list of alternative cigarette tax enforcement strategies does not support a finding of immunity here because there is no meaningful real property tax enforcement alternative to a foreclosure action. The action to foreclose a lien for unpaid real property taxes provides a high probability of prompt payment, and thus foreclosure is a venerable and universal tax collection mechanism. In contrast, the Second Circuit's suggested alternative involves uncertainty and delay. *See* Pet. at 14, n. 8.

Nor did *Kiowa's* holding disturb the Court's earlier holding in *Yakima*. *Kiowa* involved a private lender's *in personam* action against the tribe on a promissory note — a garden-variety commercial loan transaction. Private parties that choose to enter into commercial relationships with tribes can negotiate waivers of tribal sovereign immunity, and the waivers will be enforced. *See C & L Enter., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411 (2001) (tribal contract waived sovereign immunity).

In the present case, there is nothing voluntary about the counties' relationship with the OIN. When the OIN bought the properties in the open market, it became a real property owner liable, *Sherrill* holds, for the payment of real property taxes to the counties. However, unlike a private party contemplating a commercial relationship with the OIN, the counties had no power to walk away from their new relationship with the OIN, nor could they require that the OIN waive immunity from suit before buying the properties. Nor are the counties akin to involuntary tort creditors with *in personam* claims. Under these circumstances, *Kiowa*

should not be extended to bar *in rem* foreclosure proceedings brought by the local governments that this Court held to be sovereign over these lands. The Court should reject the Second Circuit's broad expansion of tribal sovereign immunity and clarify that *Yakima* and *Sherrill*, not *Kiowa* and *Potawatomi*, govern this case.

III. The Second Circuit's Decision Would Bar Foreclosure Of Any Real Property Owned By An Indian Tribe Anywhere.

Finally, as a majority of the Second Circuit panel recognized, that court's holding extends tribal sovereign immunity to bar tax foreclosure even as to "land that was never part of a reservation." Pet. App. 32a (Judges Cabranes and Hall concurring). Under the court's analysis, the OIN, or any other Indian tribe, could buy real property anywhere in the United States, *e.g.*, the Empire State Building, refuse to pay real property taxes, and invoke sovereign immunity as an absolute defense to the resulting foreclosure action. The Second Circuit's holding does not depend on the tribal history or legal status of the land but follows solely from the fact of tribal fee ownership today. This ruling threatens to extend the potential disruption of state and local governance from two counties in central New York to every community in the United States. This Court should grant the petition to clarify that its tribal sovereign immunity holdings do not support this dramatic expansion of tribal power at the expense of all the States and their local subdivisions.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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