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VIA E-MAIL AND FEDERAL EXPRESS

Honorable William K. Suter
Clerk
Supreme Court of the United States
One First Street N.E.
Washington, DC 20543
dmcnerney@supremecourt.gov

Re: Madison County and Oneida County, New York v. Oneida Indian Nation of New York, No. 10-72

Dear General Suter:

We write on behalf of the petitioners, Madison County and Oneida County, in reply to the letter of respondent's counsel dated November 30, 2010, advising (p.1) that "respondent Oneida Indian Nation (the Nation) has waived its sovereign immunity as to the enforcement of tax liens on its real property" by adopting a "tribal declaration and ordinance" the previous day, November 29, 2010. Petitioners and their counsel had no notice of this development until yesterday afternoon, when a colleague of Mr. Waxman called the undersigned counsel at the same time the letter was being delivered to the Clerk's office. Petitioners' opening brief has been sent to the printer, and is due to be served and filed in 48 hours. Counsel suggests that petitioners should now "address this development in their opening brief," and adds that his client "would not oppose modification of the briefing schedule" at this late date. (P.1.)

Petitioners disagree, and suggest that this "development" appears to be a classic example of a litigant "attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000). Indeed, petitioners are unaware of any other case in which a party has aggressively litigated an issue for fully 10 years — including up to this Court and then back once more — and then attempted to moot the issue through purely unilateral action taken *after* this Court had granted *certiorari* and *after* briefing on the merits was already underway. As this Court observed in an analogous but less egregious situation, "[i]t is no small matter to deprive a litigant of the rewards of its efforts, particularly in a case that has been litigated up to this Court and back down again. Such action on grounds of mootness would be justified only if it were *absolutely clear that the litigant no longer had any*

need of the judicial protection that it sought." *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (per curiam).

That standard has not remotely been met by the "development" announced in counsel's letter. To begin, in adopting the tribal declaration and ordinance (attached to the letter), the Nation makes clear that it "chooses to preserve its sovereignty" and recites that it adopts the declaration and ordinance "by virtue of its sovereign and inherent powers of self-government." If the Nation has the sovereign authority to take this action, it must necessarily have the sovereign authority to repeal the declaration and ordinance whenever it may choose to do so. This declaration is no more final, irrevocable and perpetual than the Nation chooses it to be. Moreover, it is well known that sovereign waivers of immunity have sometimes been invalidated on the grounds that they violated that sovereign's own laws. *See, e.g., Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921, 925-26, 937-38 (2008) (discussing situation in which State's waiver of sovereign immunity through its Governor was subsequently invalidated by its courts under state law). Beyond the passing observation that the tribal "declaration and ordinance" were "duly enacted" this week (p. 1), the letter offers no assurances as to its validity or reliability. Indeed, the fact that it took counsel so long to convince his client to adopt this "waiver" hardly inspires confidence in its durability.

Nor is the true scope of this purported "waiver" at all certain. Indeed, counsel's letter does not describe the declaration and ordinance as a *change* at all, but merely as intended "to clarify that ...[the Nation] is *prepared* to make payment on all *taxes* that are *lawfully* due," apparently through the "irrevocable letters of credit" that it has proposed as part of the pending land-into-trust process. (Pp. 1-2, emphasis added.) The letter adds the qualifier that the "waiver" is intended "to assure petitioners and the Court" as to the "sufficiency of the letters of credit." (P. 4.) But the Nation already argued its letter-of-credit defense at length in its opposition to *certiorari*, and petitioners demonstrated in their reply in support of *certiorari* why letters of credit in the context of the separate land-into-trust proceedings are a wholly inadequate substitute for the timely payment of taxes that have now been due and owing for years. *See* Reply Br. at 6-7 &n.2. Moreover, the waiver on its face appears to be limited to foreclosure based on nonpayment of *taxes*, as opposed to the nonpayment of the additional interest and penalties that have piled up over the past decade while the underlying taxes have gone unpaid. Such a limited waiver is wholly insufficient to give petitioners the real property foreclosure authority and powers to which they are entitled.

In addition, as petitioners argue in their merits brief to be filed Friday, the Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 & n.7 (2005), specifically addressed whether the Nation's sovereign immunity could be raised offensively or defensively as to the enforcement of tax liens on its real property; and the Court decided this issue against the Nation, holding that the Nation may not assert tax immunity defensively in the eviction proceed initiated by *Sherrill*. Since the Court has previously decided that the Nation has no right to assert sovereign immunity to prevent the enforcement of taxes as to its recently-acquired fee property at issue, the Nation purports to "waive" an aspect

of sovereign immunity it does not have. The Nation's declaration is therefore a nullity as a matter of federal law under *Sherrill*. One cannot "waive" a "right" one does not have.

Counsel's letter notes (p.2) that the litigation with Madison County began in 2000. For the past ten years, OIN has steadfastly maintained that it will not pay taxes, even after this Court decided *Sherrill*. This eleventh-hour, unilateral action by the Nation -- after ten years of litigation, after this Court granted *certiorari*, and three days before petitioners' merit brief is to be filed -- attempts to evade a decision by the Court on the merits of the first question presented. We do not think this question is rendered moot by the Nation's action, and counsel's letter never mentions mootness. But if the Nation thinks its action this week now renders the first question moot, then a motion to dismiss for mootness or a suggestion of mootness (Rule 21.2(b)) would seem to be the appropriate way to raise the issue, which should then be fully briefed by the parties. As part of any such suggestion or motion, the Nation should clarify the matters discussed above, as well as specifying precisely what relief it is proposing here. Is it suggesting that the favorable decisions it obtained below now be vacated? Is it proposing to dismiss *with prejudice* its allegations of sovereign immunity over these lands? Will that dismissal with prejudice include other claims of sovereign immunity against the enforcement of valid state and local laws with respect to these lands, or just the specific taxes, interest, and penalties that have accumulated here?

Chief Justice Rehnquist suggested that the Court "should adopt an additional exception to our present mootness doctrine for those cases where the events which render the case moot [which we deny in this case] have supervened since our grant of *certiorari* . . . ." *Honig v. Doe*, 484 U.S. 305, 331-32 (1988) (Rehnquist, C.J. concurring); see id. at 331 (noting that "the case or controversy requirement of Art. III . . . is an attenuated connection that may be overridden where there are strong reasons to override it."). Whether or not the Court agrees with Chief Justice Rehnquist's suggestions, there are strong reasons to consider carefully the Nation's attempt to prevent the Court from reaching the first question presented at this late stage of the litigation, after the expenditure of very significant time and resources by petitioners, and after this Court's decisional process is under way.

As counsel's letter makes clear (pp.2-3), there are many other questions to be resolved in this litigation, including the second question presented to this Court (whether the ancient Oneida reservation in New York was disestablished or diminished) and the other questions not reached by the Second Circuit (due process, Indian Trade and Intercourse Act, and exemption under state law if the reservation is "not disestablished"), as well as issues regarding whether the Nation is liable for interest and penalties and the assessed value of the Nation's properties. The Nation is not, by its action, indicating a willingness to end the litigation but rather seeks a determination of "any taxes that are ultimately held to be due once the disputed issues are resolved." (P.4.)

Because petitioners' merits brief is essentially final and is at the printer, and because it is not clear what exactly the Nation has purported to waive and toward what end, we do not think it is appropriate to address issues raised by counsel's letter in that brief or to seek to delay the merits briefing schedule. Rather, if the Nation thinks its unilateral action this week is sufficient

to deprive this Court of jurisdiction to decide the first question presented, it should so move or suggest to the Court, and this new issue should be fully briefed. The tribal sovereignty issues presented in this case are of national significance and recurring real world importance, and the decision below" defies common sense" and is so "anomalous" that two members of the Second Circuit panel expressly (and the third implicitly) urged this Court to reconsider its tribal sovereign immunity precedents. Gamesmanship by parties, and the specific maneuverings by the Nation here, have no place in resolving the important questions submitted to this Court. A litigant, having prevailed below, should not be allowed to "manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie*, 529 U.S. at 288.

Very respectfully,

David M. Schraver

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cc Seth P. Waxman, Esq. (via e-mail)