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,

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

REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT IN REPLY

Although a majority of the panel below concluded that its decision "defies common sense" and "calls out" for plenary consideration by this Court, Pet. App. at 32a-33a, the Oneida Indian Nation of New York ("OIN") seeks to minimize the gravity of its refusal to comply with *Sherrill*'s mandate, trivialize the "real-world significance" of its refusal to pay the *Sherrill*-mandated taxes, and malign Petitioners for simply seeking to enforce their sovereign rights upheld in *Sherrill.* According to OIN, Petitioners' only recourse for OIN's continuing refusal to pay its taxes is to appeal to "the practical need for good-neighbor relations, the strong role of the federal government in overseeing tribal actions (here including its trust authority), and the ever-present possibility of congressional action if tribal actions threatened substantial state and local interests." Opp. at 28. These avenues have been ineffectual in obtaining OIN's compliance with its tax obligations for the past 15 to 20 years. Requiring reliance on these measures invites tribal nullification of lawful tax obligations and federal court judgments, and is plainly not what this Court intended in holding that sovereign immunity may not be used defensively in a tax-foreclosure proceeding. *See City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 213-14 & n.7 (2005); *id.* at 222 (Souter, J., concurring). This is not a matter of "special transition circumstances" in following *Sherrill*'s mandate (Opp. at 9), but a simple refusal to comply with that mandate.

OIN ignores the procedural posture of *Sherrill* and misreads footnote 7 in which this Court rejected OIN's

claimed immunity from taxation and tax enforcement. OIN also misstates the holding of *County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992) in which this Court held that a state taxing authority had the power to collect ad valorem property taxes through *in rem* proceedings where those taxes were lawfully imposed on tribally-owned lands held in fee simple. *Yakima* also belies OIN's characterization of this case as "unique." Opp. at 2. And OIN's repeated mantra that the Counties are attempting to "preempt" the trust process by their resort to foreclosure (*id.* at 1, 2, 10) is simply false. In the face of OIN's persistent refusal to pay property taxes, the Counties' only remedy was foreclosure.

OIN seeks to portray this case "as a request for a dramatic new judicial limitation" on *tribal* sovereign immunity. Opp. at 29. Just the opposite is true. It is OIN that is seeking a "dramatically" *expanded* scope of tribal sovereign immunity with respect to real property located in *another* sovereign's jurisdiction — a kind of "super-sovereign" immunity not enjoyed by foreign nations or States in similar circumstances. *Okla. Tax Comm'n v. Chickasaw Nation,* 515 U.S. 450, 466 (1995). Historic and current rules of foreign and state sovereign immunity undermine, rather than support, OIN's refusal to pay property taxes while demanding all customary local services. The decision below is in direct and irreconcilable conflict with numerous state and federal decisions, whose detailed reasoning is not "broad language" and "pure *dicta*" (Opp. at 27-28), but the central rule of decision: there is *no* tribal exception to the rule against sovereign immunity for *in rem* actions

against immovable property held within *another* sovereign's jurisdiction.[1]

I. OIN misreads *Sherrill*.

OIN argues that there was no issue of sovereign immunity from suit in *Sherrill*. Opp. at 22. OIN concedes that footnote 7 stated that "'tax immunity' was not a defense to eviction" (*id.* at 23) but reads this as rejecting only immunity "from the underlying taxation." That reading ignores the procedural posture of the eviction action, the context and text of footnote 7, and the relation of footnote 7 to the dissent. *See* Petition at 3-6 & nn.2-3. The case went to the Second Circuit and then came to this Court in an enforcement posture, and OIN unsuccessfully asserted its alleged sovereign immunity from suit. *Id.* at 3-4. In arguing that it did not raise the defense of sovereign immunity from suit in this Court in *Sherrill* (despite having asserted that defense in its answer and other pleadings in the lower courts), OIN is admitting that it abandoned that defense and therefore waived it.

II. OIN misstates *Yakima*.

OIN argues, "[q]uite simply, there was no tribal sovereign immunity issue presented in [*Yakima*] and no

1. OIN argues that several conflicting decisions are distinguishable because they involved zoning and condemnation issues, rather than the supposedly "distinctive" issues involved in tax foreclosures. Opp. at 20-21 & n.10, 26-28. But *Sherrill* squarely rejected that claimed distinction, emphasizing that that there is no basis to treat tax enforcement proceedings differently from other types of state and local *in rem* jurisdiction over real property held within their jurisdiction. *See* 544 U.S. at 214 n.7, 219-20 & n.13.

issue of foreclosure of tribally owned land." Opp. at 24. That statement is belied by the record and by the decisions of this Court and the Ninth Circuit in *Yakima*. *See Yakima*, 502 U.S. at 256 (noting that "Yakima County proceeded to foreclose on properties throughout the county for which ad valorem . . . taxes were past due, including a number of reservation parcels in which the Tribe or its members had an interest . . ."); *Confederated Tribes and Bands of the Yakima Nation v. County of Yakima*, 903 F.2d 1207, 1208-1209 (9th Cir. 1990) ("This case concerns the power of the State of Washington to levy *and collect* ad valorem . . . taxes . . .") (emphasis added). The Yakima Nation sought an "injunction against the future levy or collection of taxes" and specifically sought to enjoin the sale of "28 parcels of fee land at a tax sale." *Id.* *See* Pet. Br. *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, Nos. 90-408, 90-577, 1991 WL 521727, at *5 (noting Tribe brought action "seeking injunctions against . . . the foreclosure sale of those tribal-owned and member-owned fee properties within the Reservation . . . ."). This Court recognized that Yakima County's power to impose the ad valorem taxes necessarily carried with it the concomitant power to collect that tax through foreclosure. *Yakima*, 502 U.S. at 256, 263-264; *see id.* at 274, 277-278 (arguing that Yakima County's attempts to "foreclose" and "seize" Nation-owned property presented "a threat to tribal integrity and self-determination. . . .") (Blackmun, J., dissenting). Given the record of tax enforcement proceedings in *Yakima*, and this Court's unconditional affirmance of Yakima County's right to impose and collect ad valorem property taxes (with a specific endorsement of *in rem* foreclosure proceedings), it is of no moment how the

parties chose to frame their questions presented or argue the case. The power to impose real property taxes must carry with it the right to collect those taxes through the enforcement tool of foreclosure, or the taxing power is meaningless. This Court in *Yakima*, as in *Sherrill*, did not endorse only a theoretical right to impose a tax that vanishes upon a tribe claiming sovereign immunity from suit. Rather, this Court in *Yakima* explained why tribal sovereign immunity from suit does not bar foreclosure because, as an *in rem* proceeding, it is not significantly disruptive of tribal sovereignty. *Yakima*, 502 U.S. at 265. Both the Second Circuit and OIN ignore this critical distinction between *in rem* and *in personam* jurisdiction. *See* Petition at 10-12 and n.6.

III. The Counties did not preempt, or attempt to preempt, the trust process.

OIN repeatedly accuses the Counties of attempting to "preempt" the trust process. Opp. at 1, 2, 10. That accusation is false and is an attempt to divert the Court's attention from the real issues in this case. As the Second Circuit specifically found, the Counties' foreclosure actions are neither inconsistent with the ongoing land-into-trust process nor mooted by that process.

Madison County initiated foreclosure proceedings in 2000, well before *Sherrill* or OIN's trust application in 2005. *See* CA App. A-34-41. After *Sherrill*, the Counties resorted to foreclosure only after OIN advised that it would continue to refuse to pay its taxes. The Counties never refused to negotiate but concluded they had no choice except to seek the only remedy available to them when a property owner refuses to pay its taxes.

The Counties' motive was not to preempt the trust process (of which they received official notice from the Department of the Interior months later), but to collect property taxes.

Significantly, on June 10, 2005 (months after OIN filed its trust application), Associate Deputy Secretary of the Interior James E. Cason advised OIN (after quoting the *Sherrill* text that refers to footnote 7), "Thus, it is our opinion that [the] Court in *City of Sherrill* unmistakably held that the lands at issue (property interests purchased by OIN on the open market) are subject to real property taxes. In the event these taxes are not paid, we believe such lands are subject to foreclosure." CA App. A-488. Secretary Cason's letter further stated the Department's policy was "not to accept into trust lands that are encumbered by tax liens. Accordingly, we urge the Nation to resolve any outstanding tax liens that may now encumber any of the lands for which you are seeking the United States to accept in trust." CA App. A-489. The letter does not suggest in any way that foreclosure would be viewed as an attempt to "preempt" the trust process. OIN resorted to a new round of litigation rather than pay the taxes.

The State and Counties (and others – *see* Opp. at 4 and n.2) are challenging the Secretary's decision to take over 13,000 acres into trust based on, among other things, Interior's failure to comply with applicable law and regulations, the so-called letters of credit,[2] and the absence of authority to take land into trust for OIN

2. Despite Interior's policy and regulations not to accept into trust lands that are encumbered by tax liens, OIN posted letters of credit instead of paying taxes. No other taxpayer may avoid (continued)

under *Carcieri v. Salazar*, ___ U.S. ___, 129 S. Ct. 1058 (2009). Those issues are not involved in this case despite OIN's argument (Opp. at 29) to the contrary. The Counties seek to maintain their communities and 200-year governance and to avoid the disruption of a new 13,000-acre reservation scattered over two counties and multiple cities, towns, villages and school districts.

The Counties did not attempt to preempt the trust process. Issues relating to the trust process are pending in a separate case and are not involved here. As the Second Circuit stated, developments after oral argument did not render moot any of the issues on appeal or affect its consideration of the appeal. Pet. App. at 12a-13a. Even if 13,000 acres are taken into trust, OIN will still refuse to pay taxes on 4,000 acres not in trust and other properties it buys in the future.

(continued)
paying property taxes by posting letters of credit which do not provide needed county revenues, eliminate tax liens, or avoid the disruption condemned in *Sherrill*. Moreover, the letters of credit are subject to conditions and limitations that materially impair their value. They are not assurance of payment or an adequate tender of payment. They impose various risks on the Counties, including credit risk related to the solvency of the issuer at the time a drawing is presented, termination risk if OIN should not renew them after they expire, unclear drawing conditions, and drawing conditions that may never be satisfied. Indeed, OIN has allowed letters of credit to lapse and to be underfunded.

IV. The decision below creates a "supersovereign" immunity not enjoyed by state and foreign sovereigns in comparable circumstances.

Far from requesting "a dramatic new judicial limitation" on tribal sovereign immunity (itself a judicially-created doctrine) (Opp. at 29), Petitioners are simply asking that tribes be subject to the same principles of sovereign immunity that govern foreign countries and States in similar circumstances. OIN fails to come to terms with *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), and numerous other decisions holding that a State's sovereign immunity does not extend to *in rem* actions against immovable property held within another State's jurisdiction. *See* Town of Lenox *Amicus* Br. at 11-14. As this Court emphasized in *Sherrill*, rules of state sovereignty "provide a helpful point of reference" in tribal immunity cases even though they "do not dictate a result." 544 U.S. at 218 (doctrine of acquiescence). OIN offers no explanation *why* it should enjoy "super-sovereign" immunity greater than that of a State. *Chickasaw Nation*, 515 U.S. at 466.

Similarly, as to foreign sovereign immunity, all of the real property decisions cited by OIN (Opp. at 16-19) involve diplomatic and consular properties, which have always been subject to special rules not applicable here, and which *exempt* them from the traditional rule that real property in another country is subject to *in rem* proceedings and dispossession. *See* Town of Lenox *Amicus* Br. at 7-11.

OIN relies on other inapposite cases involving suits against federal property located within U.S. jurisdiction or state property located within state boundaries —

situations that plainly do not involve immovable property located in *another* sovereign's jurisdiction. *See* Opp. at 15-16. As to cases that *do* involve the traditional "immovable property" exception to rules of sovereign immunity — such as real property held by foreign nations and States outside the scope of their own territorial sovereignty – OIN fails to offer a single reason why it should enjoy broader immunity than a foreign nation or a State in similar circumstances.

V. The sovereign immunity question presented is of national significance and "real world" importance.

OIN argues that the sovereign immunity question presented is not of national significance and is based only on hypotheticals. Opp. at 1-2, 25-26. The *amici* States see it differently. *See* Brief for the States of New York, Colorado, Florida, Iowa, Michigan, South Dakota, Washington and Wyoming as Amici Curiae in Support of Petitioners, filed herein, at 1 ("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.")

In the real world, tens of millions of dollars in unpaid real property taxes are owed by OIN to the Counties. *See* CA App. 610-13, 1937-38. Nor are OIN's occasional so-called payments "in lieu of taxes" (Opp. at 6) an adequate substitute for satisfaction of those unpaid tax obligations. OIN characterizes such payments as gifts (called "Silver Covenant Chain of Friendship Grants"), and whether such gifts are made (or not) and in what

amounts is determined solely by OIN. Such voluntary and uncertain payments are no substitute for taxes and are not commonly understood as payments in lieu of taxes. For example, when OIN reneged on its promise to make such payments to a school district in Madison County, the school district found itself in "financial crisis." CA App. A-614-622; *see also* CA App. A-626-629 (unilateral revocation of OIN gift to school district and failure to pay school taxes caused "fiscal chaos," "contributed significantly to the need for an increase of 22% in the tax rate," and "resulted in a significant, unnecessary and unjustified hardship to the students and taxpayers of the community").

OIN cites post-*Sherrill* tax agreements with the small cities of Oneida and Sherrill in support of its argument that "it would simply be inappropriate to presume that the traditional means of dispute resolution involving tribal sovereigns will prove unsuccessful." Opp. at 2, 5-6. Citing a hearsay ("Although I was not present at the meeting") affidavit of its lawyer about one post-*Sherrill* meeting to explore resolution "of all outstanding disputes," OIN claims the Counties refused to negotiate over payments of penalties and interest. Opp. at 6, citing CA App. at A-631. To the contrary, the Counties have made multiple unsuccessful attempts through the years to negotiate the resolution of various disputes with OIN, which have been rejected by OIN.

OIN argues "any new limitations on immunity from suit should be left to Congress." Opp. at 28. To follow this Court's decisions in *Sherrill* and *Yakima* would not create "new limitations" on tribal immunity from suit. As shown in the Counties' petition, neither *Potawatomi*,

Kiowa, nor any other decision by this Court stand for the proposition that tribes have sovereign immunity from *in rem* proceedings against non-trust property they hold *outside* their tribal jurisdiction. Indeed, this Court has squarely held that tribal *personal* property that is tax-delinquent may be seized when outside the tribe's jurisdiction. *See, e.g., Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980). Given the "primeval" importance of a sovereign's control over real property within its jurisdiction and regulatory authority, *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984), it would be irrational to allow *in rem* actions against tax-delinquent *personal* property but not against tax-delinquent tribal *real* property.

VI. Oneida territory in New York has consisted of only 32 acres since the early 20th Century.

In *Sherrill*, this Court recognized that by 1838, "the Oneidas had sold all but 5,000 acres of their original reservation" and "during the 1840's, sold most of their remaining lands to the State." 544 U.S. at 206-207 (citations omitted). "That acreage dwindled to 350 in 1890; ultimately, by 1920, only 32 acres continued to be held by the Oneidas." *Id*. at 207. It is not only the 1838 Treaty of Buffalo Creek that diminished or disestablished the Oneida reservation but also the historical realities described in *Sherrill*. To ignore these realities and to perpetuate a questionable pre-*Sherrill* finding that there is a "not disestablished" Oneida reservation of some 250,000 acres can only perpetuate uncertainty, jurisdictional and tax disputes, and community disruption in Madison and Oneida Counties.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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