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.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF THE CALIFORNIA STATE ASSOCIATION OF COUNTIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

JOHN J. SANSONE
County Counsel
C. ELLEN PILSECKER
Senior Deputy
Counsel of Record
OFFICE OF COUNTY COUNSEL
1600 Pacific Hwy., Rm. 355
San Diego, CA 92101
Telephone: 619 531-4860
Ellen.Pilsecker@sdcounty.ca.gov

JENNIFER B. HENNING
Litigation Counsel
CALIFORNIA STATE
ASSOCIATION OF COUNTIES
1100 K St., Ste. 101
Sacramento, CA 95814
Telephone: 916 327-7500
jhenning@coconet.org

Counsel for Amicus Curiae

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THE AMICUS CURIAE SUBMIT THIS BRIEF IN SUPPORT OF PETITIONERS

The California State Association of Counties respectfully submits this brief as *amicus curiae* in support of Petitioners.

INTERESTS OF THE AMICUS CURIAE[1]

The California State Association of Counties (CSAC) is a nonprofit corporation, the membership of which consists of all 58 California counties.[2] As representative of California counties, *amicus* has a compelling interest in Question No. 1, use of tribal immunity as a bar to foreclosure to enforce property tax liens. An appreciable component of the general revenue of California counties is provided by an ad valorem tax imposed on non-exempt real property. In addition, local governments are entrusted with land use authority within their jurisdictions. The Second

[1] The parties have consented to the filing of this brief. This brief was not authored in whole or in part by counsel for any party, and no person or entity other than the *amicus curiae* made a monetary contribution to this brief's preparation or submission.

[2] CSAC sponsors a Litigation Coordination Program, administered by the County Counsel's Association of California and overseen by CSAC's Litigation Overview Committee. The Litigation Overview Committee, which is comprised of county counsels throughout the state, monitors litigation of concern to counties statewide, and has determined that this case involves an issue affecting all California counties.

Circuit's decision threatens state and local governments' ability to collect taxes and regulate land use on non-reservation property purchased by tribes on the open market.

SUMMARY OF ARGUMENT

The decision of the Second Circuit Court of Appeals legitimates a tribe's sovereign domain over property purchased by the tribe in fee outside its reservation boundaries.[3] The court acknowledged the inherently illogical nature of its decision, but concluded that off-reservation property held in fee is not subject to state and local jurisdiction. The court's concurring opinion put the issue this way:

> The holding in this case comes down to this: an Indian tribe can purchase land (including land that was never part of a reservation); refuse to pay lawfully-owed taxes; and suffer no consequences because the taxing authority cannot sue to collect the taxes owed. This rule of decision defies common sense. But absent action by our highest Court, or by Congress, it is the law.

If upheld, the decision would insulate fee land held by tribes from local government jurisdiction and effectively repudiate the mechanism established by Congress for taking property owned in fee into trust

[3] This brief does not address taxation or regulation of Indian county as defined in 18 U.S.C. § 1151.

for a tribe, thus exempting it from state and local taxation and regulation. 25 U.S.C. § 465 ("section 465"); *see Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 220-21 (2005) ("Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory").

The Second Circuit's decision is an unwarranted rejection of the reasoning of *Sherrill*, and other opinions of this Court defining limits on tribal authority over non-trust property. *Sherrill* rejected, on equitable grounds, the assertion that ancient sovereignty could be resurrected by purchasing property on the open market. The decision below eliminates the element of ancient sovereignty and allows the purchase alone to effect the "piecemeal shift in governance" decried by *Sherrill*. 544 U.S. at 21.

ARGUMENT

I. THE BREADTH OF THE ISSUE: THE CALIFORNIA EXAMPLE

California is home to 107 federally recognized tribes. With the exception of the unique situation in Alaska with its large number of tribal corporations, California has the largest number of tribes living within its borders of any State in the nation. In addition, according to the Bureau of Indian Affairs Pacific Region, as of August 2010, there are approximately 15,527 total acres pending in 135 fee-to-trust applications in California. This number does not

include land held by tribes in fee where no fee-to-trust application is pending. Clearly, the issue of tribal land owned in fee is significant in this State. Examination of what is occurring with tribal fee land in California provides this Court with an important context to consider the legal issues presented by this case.

Interactions between counties and tribes related to activities on fee land occur regularly throughout California. While it is beyond the scope of this brief to detail each such instance, the County of Amador provides a prime example. Located in the foothills and Sierra Nevada Mountains, the County has a population of less than 40,000 residents. Despite its small size, it is home to a large Indian Casino and Resort; two additional resorts are in the planning stages. One of the planned gaming projects will be situated on a 67.16 acre parcel which is owned in fee by the Buena Vista Rancheria of Me-Wuk Indians tribe. The tribe formally requested the Department of Interior to take this parcel into trust, but the Department has refused to do so. Although the land is merely held in fee, the tribe has declined to pay ad valorem real property taxes on this parcel. Indeed, the tribe has advised the County, in writing, that it refuses to pay the unpaid taxes. The County has filed multiple tax assessments totaling $13,627.45 against the property. The assessments remain delinquent.

The County of San Diego also has a significant interest in activities on fee-owned tribal land. The County consists of 4,281 square miles in the southern

part of the State, and contains 18 reservations with 17 tribal governments, more than any other county in the nation. Currently, 128,205 acres are held in trust for tribes in San Diego County. Importantly, another 7,811 acres are owned by tribes in fee. Since 2000, the Department of the Interior has granted 16 fee-to-trust applications, covering 4,711 acres within the County. An additional 39 applications, encompassing 5,653 acres, are pending. The total estimated annual property tax loss resulting from these 55 applications is $5,599,883.

San Diego County has encountered difficulties with tribes using fee property impermissibly. For example, signs advertising casinos were placed on scenic highways. In another instance, a tribe began using an unpaved lot adjacent to a major highway as a parking lot. This created problems with dust, lighting that violated dark sky regulations, and unsafe ingress and egress. In each of these instances, code enforcement was used effectively to resolve the concerns. As these examples demonstrate, a decision by this Court allowing tribes to raise the defense of sovereign immunity to prevent land use enforcement actions on non-trust lands would create significant health and safety issues.

In the County of Tulare, which is slightly larger in land mass than San Diego County, but has a significantly smaller tax base, the Tule River Indian Tribe has 961 acres currently subject to fee-to-trust applications. One of these parcels is 878 acres and is currently used by the tribe as grazing land. The tribe

has applied to the county for a special use permit to construct a wastewater treatment plant on the parcel. Under the theory of the Second Circuit's decision, if the tribe were to construct the wastewater treatment plant on its fee-owned property without the requisite county permits and approvals, Tulare County could impose fines and penalties for the violations, but could not take any measures to collect those fines to ensure compliance with its land use regulations and safety requirements.

Similarly, Sonoma County which consists of 1,598 square miles in Northern California is home to five federally recognized tribes. Two tribes hold land in fee, these parcels total approximately 200 acres, including sensitive wetland and oak woodland areas. The tribes have considered large housing developments and commercial projects on these lands, which present significant risks to the sensitive resources and are inconsistent with the County General Plan. If County jurisdiction essentially could be usurped through advancement of sovereign immunity defenses in enforcement actions, it would create a regulatory hole where neither state nor federal jurisdiction effectively applied.

As these examples illustrate, the implications of this case go far beyond a tax dispute between one tribe and two counties in New York State. Indeed, this case will impact many thousands of acres of tribe-owned fee land in California and across the nation, potentially threatening tens of millions of dollars of ad valorem taxes and the essential services

they fund. As further explained below, extension of the Second Circuit's opinion would raise critical questions about the ability of local governments to exercise their historic police powers to regulate land use, an important function of protecting the health and welfare of county residents.

II. THE SECOND CIRCUIT'S DECISION JEOPARDIZES THE COLLECTION OF PROPERTY TAX AND THE ENFORCEMENT OF LAND USE REGULATIONS

Exact figures are not available, but with well over 15,000 acres of land owned by tribes in fee in California, the fiscal and regulatory impact on local governments of shielding such property from tax collection and regulatory enforcement are tremendous. The Second Circuit's decision, if allowed to stand, would effectively remove tribal fee land from the property tax rolls, and raise questions about enforcement of land use regulations. As referenced above, the fiscal impact of such a step in San Diego County alone would be nearly $6 million. Multiplied by the total number of acres owned in fee statewide, the fiscal impact on counties in California, which are already facing a collective fiscal crisis, is significant.

A. California's Property Tax Scheme

State property taxes fund essential services, such as police and fire protection, libraries, parks, and municipal planning. In California, the procedures for

assessing and collecting the property tax are established by the State Constitution and state statutes. Taxes are assessed annually. Cal. Const. Arts. 13, 13A; Cal. Rev. & Tax. Code §§ 405, 1817. The obligation to pay the assessed amount is secured by a lien on the property. Cal. Rev. & Tax Code § 2187. The imposition of personal liability for the payment of property taxes is generally prohibited.[4] *Atchison, Topeka & Santa Fe Ry. Co. v. Reclamation Dist. No. 404*, 173 Cal. 91, 92-93 (1916). Thus, the remedy for nonpayment is normally foreclosure of the lien.

California uses a non-judicial process of foreclosure. Failure to pay property taxes results in a declaration of default. Cal. Rev. & Tax. Code § 3371, subd. (a). The declaration starts the period of redemption, typically five years for residential and three years for nonresidential commercial property. Cal. Rev. & Tax. Code § 3361, subd. (a), (c). If the tax remains unpaid after expiration of the redemption period, the tax collector is empowered to sell the property at public auction to satisfy the lien. Cal. Rev. & Tax. Code § 3691, subd. (a)(1)(A). Upon sale, the tax collector executes and records a deed in favor of the purchaser. Cal. Rev. & Tax. Code §§ 3708, 3708.1.

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[4] There are exceptions to this general rule when the value of the property is insufficient to secure the lien, or the property is transferred to a government agency. Cal. Rev. & Tax. Code §§ 134, 2921.5, 2951.

B. Land Use Regulation

Comprehensive and consistent planning and zoning processes are essential to the growth and maintenance of communities. It has long been recognized that counties and cities may validly exercise their police power through zoning and land use regulations. *Euclid v. Amber Realty Co.*, 272 U.S. 365, 386-95 (1926) (zoning ordinance cannot be declared unconstitutional unless "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare"); *Village of Belle Terre v. Boraas*, 416 U.S. 1, 9 (1974) (police power "not confined to elimination of filth, stench, and unhealthy places," but may be used to establish "an area of sanctuary for people"). Zoning and regulatory controls protect the interests of all landowners in a given area. *See Sherrill*, 544 U.S. at 219-20.

Enforcing land use regulations and ensuring compliance with conditions imposed in permits or development approvals depends upon the ability of local governments to assert jurisdiction over the property. In California, infractions of local ordinances or codes are punishable by fines. Cal. Gov. Code § 36900. Counties are also permitted to adopt ordinances that subject any person who violates an ordinance to an administrative fine or penalty. Cal. Gov. Code § 53069.4. If enforcement fines and fees are not paid within 45 days, counties can impose a lien against the property that is the subject of the enforcement activity. Cal. Gov. Code § 54988.

In the decision below, the Second Circuit found that taxes could be imposed on fee land, but could not be collected through *in rem* proceedings. By analogy, if fines for land use violations can be imposed on tribal land owned in fee, but cannot be collected through the lien process, there would effectively be no way for a local government to assert its traditional land use authority over this land. As such, the reasoning of the Second Circuit's decision goes beyond creating a tax exempt status for land owned in fee by tribes; it could also be used to permit such fee land to be effectively immune from land use controls.

III. THE DECISION BELOW WOULD ENCOURAGE DISREGARD OF THE FEE-TO-TRUST PROCESS

The Second Circuit's reasoning would render section 465's fee-to-trust provisions largely superfluous. 25 U.S.C. § 465. That section authorizes the Secretary of Interior ("Secretary") to place land owned by a tribe into trust for the benefit of the tribe.[5] *Id.* Taking property into trust results in its being exempt from state and local taxation and land-use regulations. *Id.*; *Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998); 25

[5] The statute also authorizes acquisition of property for an individual Indian. An individual may not assert sovereign immunity. *See Puyallup Tribe, Inc. v. Dept. of Game of State of Wash.*, 433 U.S. 165, 171 (1977). Therefore, this discussion is limited to property owned in fee by a tribe.

Code Fed. Regs. § 1.4, subd. (a). As the Court recognized in *Cass County*, "Congress has explicitly set forth a procedure by which lands held by Indian tribes may become tax-exempt. It would render this procedure unnecessary, as far as exemption from taxation is concerned, if we held that tax-exempt status automatically attaches when a tribe acquires reservation land." *Id*. The concern is potentially greater for fee land outside reservation, given the justifiable expectations of local governments and their residents that municipal laws will apply.

The established fee-to-trust process ensures an evaluation of potential impacts to local agencies and neighboring property owners. *See, e.g.*, *State of South Dakota v. U.S. Dept. of the Interior*, 423 F.3d 790 (8th Cir. 2005), *cert. denied*, 594 U.S. 813 (2006) (state, city and county challenged grant of trust status; court determined that "the Secretary reasonably and appropriately evaluated the relevant factors"). The criteria to be considered by the Secretary in evaluating requests for the acquisition of land in trust include "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls" and "potential conflicts of land use." 25 Code Fed. Regs. §§ 151.10, subd. (e), (f), 151.11(a). Local governments have the opportunity to provide written comments "as to the acquisition's potential impacts on regulatory jurisdiction, real property taxes and special assessments." 25 Code Fed. Regs. § 151.11, subd. (d). As the distance between the tribe's reservation and the land to be acquired

increases, the Secretary "shall give greater weight" to the local governments' concerns. 25 Code Fed. Regs. § 151.11, subd. (b).

Yet the Second Circuit's decision essentially bypasses these safeguards of local governments' concerns by providing the same protection to tribally-owned fee land as to the trust land that has gone through the fee-to-trust procedure. If the fee-to-trust procedure can be avoided simply by the assertion of sovereign immunity on fee land, there need be no consideration of the potential impact on local governments. Mere purchase of property in fee would be sufficient to obviate taxes and land use regulations.

Environmental factors might also be ignored. The National Environmental Policy Act (NEPA) directs federal agencies to consider the environmental impacts of their decisions. 42 U.S.C. §§ 4321 *et seq*. NEPA applies to decisions to take property into trust under section 465. *Michigan Gambling Opposition v. Kempthorne*, 525 F.3d 23, 27-28 (D.C. Cir. 2008) (Bureau of Indian Affairs prepared an environmental assessment which "analyzed the effects the proposed casino would have on area wildlife, air and water; farming in the vicinity; and nearby communities"). An environmental analysis under NEPA may lead to mitigation of adverse environmental impacts. *Id*. (proposed mitigation measures sufficient to allow a finding of no significant impact).

By entrusting the fee-to-trust decision to the Secretary, Congress expressed its intent to require

informed oversight of not just the process, but the wisdom of the decision itself. This oversight would be eliminated if the Second Circuit's decision were to stand.

IV. THE SECOND CIRCUIT'S DECISION IGNORES ESTABLISHED LIMITS ON TRIBAL JURISDICTION

If allowed to stand, the decision below would indirectly empower tribes to exercise land use authority they cannot exercise directly. The scope of the power of an Indian tribe to regulate property within a reservation owned in fee by a non-Indian was addressed in *Montana v. United States*, 450 U.S. 544 (1981). In that case, the Crow Tribe of Montana claimed to have authority to prohibit hunting and fishing by nonmembers on property inside the reservation boundaries owned in fee by non-Indians. *Id*. at 547. The Court rejected the argument that the tribe's inherent sovereignty conferred such authority even within the reservation. *Id*. at 563-64.

Relying on earlier decisions, including *United States v. Wheeler*, 435 U.S. 313 (1978), the Court described the limitations on a tribe's sovereignty. *Montana v. United States*, 450 U.S. at 564. The Court concluded: "exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation." *Id.* There

has been no congressional delegation to exempt fee-owned land outside a reservation from state or local jurisdiction. Instead, Congress, through section 465, expressed its intent that the decision to exempt property owned by a tribe from state and local jurisdiction would be made by the Secretary. Permitting an end run around the fee-to-trust decision process would effectively extend tribal power beyond the limits described in *Montana*.

The two exceptions to *Montana*'s general principle – that tribal sovereignty over external relations was divested – were the subject of *Brendale v. Confederated Tribes and Bands of the Yakima Indian Nation*, 492 U.S. 408 (1989). Neither exception applies here. The first exception, which allows tribal regulation of activities of nonmembers who enter into consensual relationships with the tribe, is not relevant. *Id*. at 428. The Court's discussion of the second exception provides guidance in this case.

Under the second *Montana* exception, a tribe "'may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe.'" *Id*. The Ninth Circuit had premised its decision, upholding tribal zoning authority over land within the reservation, on the second exception. The Court rejected the Ninth Circuit's approach, which "equated an Indian tribe's retained sovereignty with a local government's police power"

as being "contrary to *Montana* itself." *Id*. at 28-29. It would, therefore, be illogical and a perversion of *Montana* to impliedly confer police power on a tribe outside its reservation.

The *Brendale* Court also noted the potential chaos that would result if regulatory authority fluctuated with the owner's use of the land. *Id*. at 429-30. The same threat would exist if regulatory authority were dependent upon the identity of the land owner. A municipality would lose its authority to regulate use of a parcel within its jurisdiction simply by virtue of purchase by a tribe. If the tribe subsequently sold the property, authority would revert back to the local government.

In *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 478 (1976), this Court restated its opposition to an "'impractical pattern of checkerboard jurisdiction'" that would occur if regulatory authority were determined on a parcel-by-parcel basis, depending on property ownership. In *Moe*, the question was the state's authority to tax sales transactions and motor vehicle ownership within a reservation. *Id*. at 468-69. The Court rejected the state's assertion of jurisdiction based upon fee ownership of particular parcels of land, noting that Congress had "evinced a clear intent to eschew any such 'checkerboard' approach within an existing Indian reservation." *Id.* at 478-79.

The reasoning of *Moe* applies here. If any tribe's decision to purchase off-reservation property is sufficient to exempt the property from state or local taxation and regulation, the consequence would be much more chaotic than the *Moe*-condemned checkerboard.

CONCLUSION

The court of appeals' decision is irrational and unworkable. The potential consequences threaten vital aspects of state and local jurisdiction. The Court should reverse the decision that sovereign immunity prevents the enforcement of property tax on non-trust land.

Respectfully submitted,

JOHN J. SANSONE, County Counsel

C. ELLEN PILSECKER, Senior Deputy
Counsel of Record
OFFICE OF COUNTY COUNSEL
1600 Pacific Hwy., Rm. 355
San Diego, CA 92101
Telephone: 619 531-4860
Ellen.Pilsecker@sdcounty.ca.gov

JENNIFER B. HENNING, Litigation Counsel
CALIFORNIA STATE ASSOCIATION OF COUNTIES
1100 K St., Ste. 101
Sacramento, CA 95814
Telephone: 916 327-7500
jhenning@coconet.org

Counsel for Amicus Curiae