No. 10-72

# In the Supreme Court of the United States

MADISON COUNTY, NEW YORK, ET AL.,
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 *AMICUS CURIAE* TOWN OF LENOX, NEW YORK, IN SUPPORT OF PETITIONERS MADISON COUNTY AND ONEIDA COUNTY, NEW YORK


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## INTEREST OF *AMICUS CURIAE*[1]

The Town of Lenox is located in Madison County and lies within the footprint of the Oneidas' 18th-century reservation.[2] As in other neighboring communities, the Oneida Indian Nation of New York ["OIN"] has purchased a checkerboard of commercially desirable lands within Lenox, refused to pay taxes on these lands, and refused to comply with numerous zoning, land-use, health and safety, and other "local regulatory controls." *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 220 n.13 (2005). None of these tribally purchased lands in Lenox is included within the acreage that the U.S. Department of the Interior is seeking to place into federal trust pursuant to 25 U.S.C. § 465, and thus none will be exempt from state and local taxation if Interior's decision is upheld.

This Court's landmark decision in *Sherrill*—in which Lenox participated as an *amicus*[3]—was supposed to have resolved the sovereignty dispute that is now back before the Court. *Sherrill* rejected OIN's theory that "sovereign dominion" had somehow been "unified" with title when the tribe reacquired these parcels. *Id.* at 213-14; *see id.* at 221 (rejecting "the piecemeal shift in governance this suit seeks unilaterally to initiate"). OIN cannot "unilaterally revive its ancient sovereignty, in whole or in part," over aboriginal tribal lands that it reacquires "through open-market purchases from current titleholders." *Id.* at 203, 220-21

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[1] This brief is presented pursuant to Sup. Ct. R. 37.4. The Town's authorized law officer appears as co-counsel.

[2] Lenox was founded in 1809, occupies 36.4 square miles, and had a population of 8,665 as of the 2000 census.

[3] *See* Brief of Amici Curiae Town of Lenox et al. in Support of Petitioner City of Sherrill, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (No. 03-855), 2004 WL 1835370.

(citations omitted). "Sovereign dominion" and "authority" therefore remain vested with New York and its county and local governments. *Id.* at 213, 221.

For well over five years, however, OIN has refused to comply with *Sherrill*'s mandate. It continues to flout the property tax obligations that *Sherrill* upheld, thereby continuing to deny critically needed revenues to local governments and school districts. Just as seriously, OIN also continues to refuse to submit to a variety of local zoning, land-use, health and safety, and other "local regulatory controls" in Lenox and elsewhere that, under *Sherrill*, govern OIN's newly purchased non-trust lands. *Id.* at 220 n.13. Many of these parcels are surrounded by non-Indian properties and occupy strategic locations throughout the original reservation area. OIN has cherry picked these lands—including gas stations, convenience stores, shopping centers, marinas, prime highway billboard locations, manufacturing facilities, and other key commercial properties—and then unilaterally declared them off-limits to state and local taxation, zoning and land-use controls, and other *in rem* regulatory authority. Thus the *very* chaos and uncertainty, "disruptive practical consequences," and "serious burdens" on local governments that this Court's decision in *Sherrill* was intended to avoid have only grown worse in recent years. *Id.* at 219-20.

## SUMMARY OF THE ARGUMENT

The Counties' opening brief ably demonstrates the many ways in which the decision below is in irreconcilable conflict with *Sherrill* and the bedrock distinction between *in personam* and *in rem* jurisdiction drawn in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 263-65 (1992). This brief focuses on how the decision below *also* is in fundamental conflict with this Court's tribal sovereign immunity jurisprudence, with this Court's treatment of foreign and state sovereigns in

analogous circumstances, and with this Court's decisions authorizing States to take *in rem* enforcement action against other types of tribal property outside tribal jurisdiction.

This Court developed the doctrine of tribal sovereign immunity in order to extend to Native American tribes "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). But tribes do not retain the full sovereignty of foreign nations or the fifty States. Instead, they are "domestic dependent nations" that are "completely under the sovereignty and dominion of the United States." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *see also United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character."). The "limited character" of tribal sovereignty necessarily restricts the scope of tribal sovereign *immunity* as well. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890 (1986) ("Of course, because of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy.").

Yet the decision below allows OIN to do what no foreign nation or domestic State could get away with: purchase lands outside its "sovereign dominion"; put those lands to a variety of commercial uses; refuse to comply with valid tax, zoning, land-use, and other "local regulatory controls" governing those lands; then avoid any *in rem* enforcement measures by invoking its "sovereign immunity" from suit. As demonstrated in Part I, traditional principles of both foreign and state sovereign immunity have long recognized an "immovable property" exception for lands purchased *outside* a sovereign's jurisdiction and "dominion." This Court repeatedly has emphasized that tribes do not have "supersovereign authority to interfere with another jurisdiction's sovereign right[s] . . . within that jurisdiction's

limits." *Okla. Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 466 (1995); *see also Rice v. Rehner*, 463 U.S. 713, 734 (1983) (tribal members are not "super citizens"). The decision below flouts these principles by recognizing a tribal "supersovereign" immunity not enjoyed by any foreign or state sovereign.

Neither *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), nor *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), supports the decision below. Neither involved an *in rem* action against immovable property located *outside* the tribe's "sovereign dominion"; neither implicated *another* sovereign's jurisdiction and *in rem* enforcement authority over lands within *its* "sovereign dominion"; both left the non-tribal parties with meaningful alternative remedies.

As demonstrated in Part II, OIN has failed to moot the first Question Presented through its November 29, 2010 "declaration and ordinance" purporting to waive its "sovereign immunity to enforcement of real property taxation through foreclosure." The waiver's scope is far too narrow, and its consequences far too uncertain, to moot the immunity issue either in the context of the specific foreclosure actions here or in the variety of other contexts in which OIN and other tribes continue to claim sovereign immunity from *in rem* actions to enforce zoning, land-use, health and safety, and other "local regulatory controls" over tribally purchased non-trust lands. *Sherrill*, 544 U.S. at 220 n.13. Because it is far from "*absolutely clear*" that the Counties "no longer ha[ve] any need of the judicial protection that [they have] sought," the issue of tribal sovereign immunity from *in rem* enforcement is not moot. *Adarand Constructors, Inc. v. Slater*, 528 U.S. 216, 224 (2000) (per curiam) (emphasis added).

As demonstrated in Part III, this Court also should reach the second Question Presented and hold that the boundaries of the Oneidas' original 18th-century reservation have either been disestablished or diminished.

## ARGUMENT

### I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S TREATMENT OF FOREIGN AND STATE SOVEREIGN IMMUNITY, AND IMPERMISSIBLY GIVES "SUPERSOVEREIGN AUTHORITY" TO TRIBES.

#### A. The Decision Below Conflicts With Principles of Foreign Sovereign Immunity.

Under "primeval" principles, the People's Republic of China could not purchase property in Madison County, put it to commercial use, refuse to pay its property taxes or comply with zoning and other "local regulatory controls," and then defeat the County's *in rem* enforcement actions against the property by invoking sovereign immunity. *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (CADC 1984). That should be the end of the analysis here. This Court repeatedly has looked to the limits on *foreign* sovereign immunity as "instructive" in defining the limits on *tribal* sovereign immunity. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001); *Kiowa*, 523 U.S. at 759; *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832) (defining tribal sovereignty in reference to the "settled doctrine of the law of nations"). Indeed, the immunity of a *foreign* nation necessarily marks the outer boundary of any legitimate claim of immunity by a *domestic dependent* nation; far from being "supersovereign[s]" with *greater* immunity than foreign nations, tribes enjoy less sovereignty and fewer immunities given their "dependent" status. *Chickasaw Nation*, 515 U.S. at 466.

The federal common law of *foreign* sovereign immunity, which "long predated" the enactment of the Foreign Sovereign Immunities Act of 1976 ["FSIA"], 28 U.S.C. § 1602 *et seq.*, is that, as a general matter, "when owning property here, a foreign state must follow the same rules as everyone else." *City of New York v. Permanent Mission of India to the U.N.*, 446 F.3d 365, 374 (CA2 2006), *aff'd*, 551 U.S. 193 (2007). This Court first embraced that rule nearly two centuries ago, observing that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction [of the foreign country]; he may be considered as so far laying down the prince, and assuming the character of a private individual." *The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 145 (1812). The reason for exempting "immovable property" within U.S. jurisdiction from the scope of foreign sovereign immunity is "self evident":

> "A territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain. As romantically expressed in an early treatise: 'A sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each state has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated with its institutions, suitable to its soil.'" *Reclamantes*, 735 F.2d at 1521 (quoting 1 F. Wharton, *Conflict of Laws* § 278, at 636 (3d ed. 1905)).

These identical considerations drove this Court's sovereignty determination in *Sherrill*. *See* 544 U.S. at 202, 211, 215-16, 219-20 ("character of the area," history of "regulatory authority" and "jurisdiction," current demographics, "justifiable expectations" of current residents, and potentially

"disruptive practical consequences" of accentuating "checkerboard" allocation of sovereignty).[4]

"Under international law, a [foreign] state is not immune from the jurisdiction of the courts of another state with respect to claims . . . to immovable property in the state of the forum." *Restatement (Third) of Foreign Relations Law* § 455(1)(c) (1987). This lack of immunity extends to the *enforcement*, not simply the rendition, of judgments. "Immovable property" owned by foreign states is "subject to execution" if "the judgment relates to that property" and the property is "used for commercial activity" rather than "a diplomatic or consular mission or for the residence of the chief of such mission." *Id.* § 460(2)(e). *See also Restatement (Second) of Foreign Relations Law* § 68(b) (1965) ("The immunity of a foreign state . . . does not extend to . . . an action to obtain possession of or establish a property interest in immovable property located in the territory of the State exercising jurisdiction.");[5] United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc.

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[4] *See also* Charles Fairman, *Some Disputed Applications of the Principle of State Immunity*, 22 Am. J. Int'l L. 566, 567 (1928) ("The writers of authority are of [the] opinion that rights to real property are a matter so intimately connected with the very independence of the state that none other than the local courts could be permitted to pass upon them."); *Draft Convention of the Competence of Courts in Regard to Foreign States*, 26 Am. J. Int'l L. Supp. 451, 578 (1932) ("[L]and is so indissolubly connected with the territory of a State that the State of the situs cannot permit the exercise of any other jurisdiction in respect thereof, saving always the special consideration necessitated by diplomatic intercourse.") ["*Draft Convention*"].

[5] The *Restatement (Second)* offers this example: "State A brings proceedings in eminent domain in its courts to condemn real property owned by state B in A. B is not entitled to immunity from such a suit." Section 68(b) cmt. d, illus. 6.

A/RES/59/38, Art. 13(a) (foreign State not entitled to immunity "in a proceeding which relates to the determination of . . . any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum"); Letter from Jack B. Tate of May 19, 1952, 26 Dep't of State Bull. 984 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976) (despite conflicts between the "classical or absolute theory" and the "newer or restrictive theory," "[t]here is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be claimed or granted in actions with respect to real property (diplomatic and perhaps consular property exempted)").

Congress codified the "immovable property" exception in the FSIA. That Act provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which . . . rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). Moreover, any such property "used for a commercial activity" is subject to execution if "the execution relates to a judgment establishing rights in [the] property" and the property "is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission[.]" *Id.* § 1610(a)(4)(B). These provisions were intended to *codify*, not alter, "the pre-existing real property exception to sovereign immunity recognized by international practice." *Reclamantes*, 735 F.2d at 1521; *see also Permanent Mission of India to the U.N. v. City of New York*, 551 U.S. 193, 199-201 (2007); H.R. Rep. No. 94-1487, at 20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618-19.

OIN claims these FSIA provisions *departed* from the traditional "background rule" that supposedly recognized "sovereign immunity against foreclosure" of tax-delinquent

real property held by a foreign government for *any* purpose, even commercial and investment activities. Opp. at 16, 19, 21. But OIN has failed to cite a single case in which such a sweeping "background rule" was ever recognized or applied. To the contrary, many of the cases cited in its Brief in Opposition involved maritime vessels, bank accounts, and other forms of *personal* property, *see id.* at 16-18 & n.9—not *real* property, which always has been subject to different rules given its "primeval" importance. *See supra* pp.6-8; *see also Draft Convention*, *supra* n.4, at 590 ("[S]pecial considerations are generally deemed applicable to immovable property, which do not extend to movable property.").

Those cases cited by OIN that did pertain to real property all involved the special prohibition against executing against *diplomatic and consular property*.[6] These situations are governed by special rules that do not apply to foreign-owned real property used for commercial and other non-governmental purposes. The diplomatic real property immunity from execution is the *exception* to the rule, not the rule itself. *See, e.g.*, Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 Brit. Y.B. Int'l L. 220, 244 n.3 (1951) ("The complete subjection of immovable property to the jurisdiction of the state has been regarded subject to one limitation, namely, when the action concerns immovable property actually used for the purposes of the diplomatic mission."); *Draft Convention*, Art. 23(a),

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[6] Those off-point cases (*see* Opp. at 16-17 & n.8) include *Permanent Mission*, 551 U.S. at 195-96 & n.1; *City of Englewood v. Socialist People's Libyan Arab Jamahiriya,* 773 F.2d 31, 32, 36 (CA3 1985); *In re Foreclosure of Tax Liens*, 255 N.Y.S.2d 178, 179 (Westchester Cty. Ct. 1964); and *Knocklong Corp. v. Kingdom of Afghanistan*, 167 N.Y.S.2d 285, 286 (Nassau Cty. Ct. 1957), all involving real property used for diplomatic offices and residences.

*supra* n.4, at 700 ("A State may permit orders or judgments of its courts to be enforced against the property of another State not used for diplomatic or consular purposes: . . . [w]hen the property is immovable property[.]").[7]

Although OIN is unable to cite any authority in support of its supposed "background rule" prohibiting *any* execution against *any* real property owned by foreign states, it claims there are no decisions going the other way. Opp. at 17. But as Professor Fairman observed long ago, the relative dearth of cases "where a state has presumed to claim immunity from judicial process in actions incident to real estate owned abroad . . . probably means that there is a realization that no such pretension would be admitted." Fairman, *supra* n.4, at 567 (discussing cases allowing "execution of the judgment" against foreign-owned real property). Moreover, the strong weight of judicial, diplomatic, and academic authority is against a general immunity from execution. As one commentary noted long before FSIA's enactment, "though definitive decisions are few, it may be taken as established that orders of a court are enforceable against immovable property of a foreign state in suits concerning this property." Note, *Execution of Judgments Against the Property of Foreign States*, 44 Harv. L. Rev. 963, 965 (1931) (collecting authorities). A sovereign's "primeval" interests in controlling real property within its jurisdiction require not only the authority to *render* judgments affecting that property, but to *enforce* and *execute upon* those judgments as well. "[T]he reasons . . . for permitting the institution of a proceeding against a State in

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[7] *See generally* William W. Bishop, Jr., *Immunity from Taxation of Foreign State-Owned Property*, 46 Am. J. Int'l L. 239, 247-56 (1952); *Restatement (Second)* § 68 cmt. f ("Diplomatic immunity distinguished"); *Draft Convention*, *supra* n.4, at 578 (discussing "well-established immunities protecting immovable property used for diplomatic missions").

respect of its immovable property, are . . . applicable to explain the justification for permitting enforcement of orders or judgments against such property." *Draft Convention*, *supra* n.4, at 702.[8]

OIN relies heavily on the "General Rule" set forth in *Restatement (Second)* § 65 & cmt. d, which "prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial state." *See* Opp. at 16 n.8, 18-19. But that "General Rule" applies to all forms of property, and is expressly made subject to the "except[ion]" in § 68(b) for "an action to *obtain possession* of . . . immovable property" (emphasis added), which clearly *is* subject to *in rem* execution. Moreover, the *Restatement (Third)* unambiguously allows "execution" against real property owned by foreign nations "used for commercial activity" rather than diplomatic purposes. *See supra* p.7.

### B. The Decision Below Conflicts With Principles of State Sovereign Immunity.

This Court long ago held that the "immovable property" exception also limits the scope of a State's sovereign immunity. In *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), the State of Georgia purchased eleven acres in Chattanooga, Tennessee for use as a railroad yard. Later, Georgia brought an original action claiming the City could

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[8] *See also Draft Convention, supra* n.4, at 577-90 (collecting authorities); Fairman, *supra* n.4, at 567 & nn.4-6 (collecting authorities recognizing sovereign's right to exercise "territorial jurisdiction," including to execute upon judgments, over real property owned by other nations); Lauterpacht, *supra*, at 244 (noting "uniform authority in support" and "undoubted acceptance" of the rule that "there is no immunity from jurisdiction with respect to actions relating to immovable property").

not condemn the property because of Georgia's sovereign immunity. This Court unanimously rejected that claim:

> "The power of Tennessee, or of Chattanooga as its grantee, to take land for a street, is not impaired by the fact that a sister state owns the land . . . . *Land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership.* . . . The sovereignty of Georgia was not extended into Tennessee. . . . [Georgia] cannot claim sovereign privilege or immunity. . . . [Georgia's] property [in Tennessee] is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee. *The power of the city to condemn does not depend upon the consent or suability of the owner.*" *Id.* at 479-82 (emphasis added, citations and paragraph breaks omitted).

The rule of *Georgia v. Chattanooga* has been invoked in many *in rem* enforcement contexts. It is "elementary" that "a state acquiring ownership of property in another state does not thereby project its sovereignty into the state where the property is situated. The public and sovereign character of the state owning property in another state ceases at the state line[.]" *State v. City of Hudson*, 231 Minn. 127, 130, 42 N.W.2d 546, 548 (1950) (*re* proceedings to enforce property taxes on portion of bridge owned by Wisconsin city but located in Minnesota). "If it were otherwise, the acquisition of land in [one State] by another State would effect a separate island of sovereignty within [the home State's] boundaries. Such possibility can find no support in the law or reason." *People ex rel. Hoagland v. Streeper*, 12 Ill. 2d 204, 213, 145 N.E.2d 625, 630 (1957) (*re*

court-imposed receivership over portion of bridge owned by Missouri county but located in Illinois).[9]

Likewise, because States are not allowed to create "separate island[s] of sovereignty" by purchasing land within another sovereign's jurisdiction, *id.*, neither may tribes. *See especially Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land*, 2002 ND 83, ¶¶ 4, 12, 21, 643 N.W.2d 685, 688, 691, 694 (2002) (relying on *Georgia v. Chattanooga* in holding that tribal sovereign immunity does not bar a "purely in rem action against land held by the Tribe in fee" that is "not held in trust by, or otherwise under the superintendence of, the federal government"; such land "is essentially private land," "the State may exercise territorial jurisdiction" over it, "and the Tribe's sovereign immunity is not implicated").[10]

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[9] *See also City of Augusta v. Timmerman*, 233 F. 216, 217, 219 (CA4 1916) (*re* forced tax sale of South Carolina land owned by Georgia; recognizing Georgia's immunity claim would be "anomalous and contrary to legislative history and governmental policy"); *State ex rel. Taggart v. Holcomb*, 85 Kan. 178, 184-85, 116 P. 251, 253 (1911) (Missouri city's waterworks plant in Kansas "has no other or greater rights than a private corporation engaged in the same business. It is part of a sovereignty, it is true; but its powers cannot be exercised in Kansas. . . . [A] state of the Union is only sovereign in its own territory."); *City of Cincinnati v. Commonwealth ex rel. Reeves*, 292 Ky. 597, 167 S.W.2d 709, 714 (Ct. App. 1942) ("A municipality operating beyond the boundaries of the sovereignty creating it, is universally regarded as a private corporation with respect to such operations.").

[10] At issue in *Cass County* was a parcel of land that would be flooded by a proposed dam. A project opponent sold the parcel to the Turtle Mountain Band of Chippewa Indians; the land allegedly had been aboriginally occupied by the Band's ancestors and "contain[ed] a culturally significant village site and burial site." 2002 ND 83, ¶¶ 2-4, 643 N.W.2d at 688. The Band claimed that its newly acquired parcel could not be condemned because, among other reasons, of its "tribal sovereign immunity" under *Kiowa*.

OIN seeks to distinguish *Georgia v. Chattanooga* on the supposedly "decisive[]" ground that a State's immunity in another State's courts is a matter of interstate comity rather than Eleventh Amendment command. Opp. at 20 (citing *Nevada v. Hall*, 440 U.S. 410, 426 n.29 (1979)). But this Court framed its decision in *Georgia v. Chattanooga* as an exception to the usual rules of "sovereign privilege or immunity" from suit. 264 U.S. at 480-81. That those rules result from "comity" is immaterial. "*[F]oreign* sovereign immunity is a matter of grace and comity," yet those comity-based rules are clearly "instructive" in defining the scope of tribal sovereign immunity. *Verlinden B.V. v. Cent. Bank of Nigeria*, 461 U.S. 480, 486 (1983) (emphasis added); *see supra* p.5. Moreover, as *Sherrill* emphasized, rules of state sovereignty "provide a helpful point of reference" in tribal sovereignty cases even where they "do not dictate a result." 544 U.S. at 218.

OIN offers no explanation *why* it should enjoy "supersovereign" immunity greater than that of a State holding immovable property in another sovereign's jurisdiction. *Chickasaw Nation*, 515 U.S. at 450. Indeed, this Court has emphasized that tribal sovereign immunity "[o]f course" is *narrower* than, "not congruent with," state sovereign immunity. *Three Affiliated Tribes*, 476 U.S. at

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*See id.* ¶ 12, 643 N.W.2d at 690-91. The North Dakota Supreme Court unanimously rejected this claim given the fundamental distinction between *in personam* and *in rem* jurisdiction. *See id.* ¶¶ 13-15, 19-20, 643 N.W.2d at 691-94. Failing to honor this distinction "would have far-reaching effects on the eminent domain authority of states and all other political subdivisions. Indian tribes would effectively acquire veto power over any public works project . . . merely by purchasing a small tract of land within the project," and "all public works projects [would] be subject to uncertainty." *Id.* ¶¶ 24-25, 643 N.W.2d at 694-95.

890-91. The decision below turns this lack of "congruence" on its head.[11]

### C. Cases Prohibiting Execution Against a Sovereign's Real Property Within Its Own Jurisdiction Are Inapposite.

OIN cites several other lines of cases in support of its supposed "background rule" that a sovereign may *never* execute against real property within its jurisdiction that is owned by another sovereign. *See* Opp. at 15-16 & n.7. Most involved suits against federal property located in the United States, which obviously is not subject to the "immovable property" exception because it is located *within* rather than *without* the owning sovereign's jurisdiction. And given the federal government's supremacy over all other sovereigns within its borders, it is hardly surprising that state, local, and tribal sovereigns may not foreclose on federally owned property of any kind without the federal government's permission. *See, e.g.*, *United States v. Alabama*, 313 U.S. 274, 281 (1941). Tribes, of course, are lesser, "dependent" sovereigns. *See supra* p.3. That the federal government's immunity prevents suit against its property *within* its "sovereign dominion" says nothing about a tribe's immunity with respect to property it owns *outside* its dominion.

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[11] There is certainly no basis for treating the sovereign authority to enforce tax obligations as any less important than the power of eminent domain. Because "taxes are the lifeblood of government, and their prompt and certain availability an imperious need," sovereigns "[t]ime out of mind" have been permitted to seize and execute upon property for the nonpayment of taxes. *Bull v. United States*, 295 U.S. 247, 259-60 (1935); *see also Shaffer v. Carter*, 252 U.S. 37, 52 (1920) (sovereign power includes not only levying taxes, but "enforcing payment . . . by the exercise of a just control over persons and property within its borders"). OIN's condition-laden "letters of credit" are hardly an adequate substitute for the "lifeblood" of prompt and reliable payment of taxes.

OIN also relies on *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997), which held that the Eleventh Amendment bars a quiet-title action against a State seeking to determine ownership of lakebeds *within* the State's jurisdiction because, under the Equal Footing Doctrine, those beds presumptively are state property under state dominion (and thus subject to state sovereign immunity). *See* Opp. at 15. That again is readily distinguishable from property owned by one government that is located in *another* government's "sovereign dominion." Similarly inapposite is *California v. Deep Sea Research, Inc.*, 523 U.S. 491, 495 (1998) (*see* Opp. at 15), which involved the exercise of federal *in rem* admiralty jurisdiction against a res "not within the State's possession." That decision turned on "the special characteristics of *in rem* admiralty actions," *id.* at 510 (Stevens, J., concurring), which do not apply to *in rem* actions against immovable property held outside the owning sovereign's territorial jurisdiction.

### D. The Decision Below Does Not Follow From, But Conflicts With, *Kiowa*, *Potawatomi*, and This Court's Other Tribal Sovereign Immunity Decisions.

This Court's decisions in *Kiowa* and *Potawatomi* merely reaffirmed and applied the Court's prior decisions that had extended the "traditional" federal common law immunity of "*dominant sovereignties*" like foreign nations and States to "*domestic dependent*" tribal sovereigns as well. *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (emphasis added); *see also Santa Clara*, 436 U.S. at 58; *Turner v. United States*, 248 U.S. 354, 357 (1919) (tribes should be treated "[l]ike other governments"). Nothing in *Kiowa*, *Potawatomi*, or this Court's earlier decisions suggests that the immunity of tribes is even *greater* than that enjoyed by foreign or state sovereigns.

*Kiowa* and *Potawatomi*, moreover, did not implicate another sovereign's *in rem* jurisdiction over lands within its own "dominion," and left the aggrieved parties with meaningful alternatives. *Kiowa* dealt with tribal immunity from private contract claims—claims that implicate none of the state and local sovereignty concerns presented here, and that are subject to bargaining and adjustment by the contracting parties. *See C & L Enters.*, 532 U.S. at 418-23. And *Potawatomi* merely barred claims for money damages against tribal treasuries, while emphasizing the availability of numerous "adequate alternatives" to such damage claims. 498 U.S. at 514. Although sovereign immunity prevented the State from pursuing "the most efficient remedy," there were a variety of alternative claims and enforcement actions that this Court believed could "produce the revenues to which [the States] are entitled." *Id.* There are no such "adequate alternatives" here.

Indeed, *Potawatomi* instructed that States may take off-reservation *in rem* action against tribally owned property, emphasizing that States may "*of course*" enforce their cigarette tax laws by "seizing unstamped cigarettes off the reservation" that had been purchased by tribally owned retailers and were on their way to reservation outlets. *Id.* (emphasis added). This Court pointed (*id.*) to its earlier decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, which also upheld seizures of "cigarettes in transit" where the affected tribes "have refused to fulfill collection and remittance obligations which the State has validly imposed." 447 U.S. 134, 161-62 (1980). *Colville* explained that, "[b]y seizing cigarettes en route to the reservation, the State polices against wholesale evasion

of its own valid taxes *without unnecessarily intruding on core tribal interests*." *Id.* at 162 (emphasis added).[12]

*Potawatomi* and *Colville* thus recognize that state and local governments may take *in rem* action against tribally owned *movable* property that violates applicable substantive laws. *See Keweenaw Bay Indian Cmty. v. Rising*, 477 F.3d 881, 894-95 (CA6 2007) ("[T]he Court was well aware of the issue of tribal sovereign immunity when it approved the seizures in question [in *Potawatomi* and *Colville*]. . . . [T]he Supreme Court has clearly endorsed state seizures as a remedy where sovereign immunity prevents in-court remedies.") (citations omitted).[13] If tribally owned *movable* property is not immune from *in rem* enforcement actions outside the tribe's sovereign dominion, surely tribally owned *immovable* property is not immune from such actions. That is particularly true given the unique concerns for sovereignty, jurisdiction, and regulatory authority implicated by one sovereign's ownership of immovable property in another sovereign's dominion. *See supra* Parts I-A and I-B.

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[12] In both *Colville* and *Potawatomi*, the retailers whose cigarettes were seized by the State were tribally owned and thus subject to tribal sovereign immunity. *See Colville*, 447 U.S. at 144-45; *Potawatomi*, 498 U.S. at 507.

[13] *See also Muscogee (Creek) Nation v. Okla. Tax Comm'n*, 611 F.3d 1222, 1236-37 (CA10 2010); *Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 21 (CA1 2006) (en banc); *Yakama Indian Nation v. Wash. Dept. of Revenue*, 176 F.3d 1241, 1246 (CA9 1999).

## II. OIN'S BELATED "WAIVER" OF ITS NONEXISTENT "SOVEREIGN IMMUNITY" FROM CERTAIN *IN REM* ACTIONS DOES NOT MOOT THE IMMUNITY ISSUE.

On November 30, 2010, OIN announced that it had adopted, the day before, a "tribal declaration and ordinance" purporting to "waive" its "sovereign immunity" in the specific context of "enforcement of real property taxation through foreclosure." This apparently tactical announcement, however, does not moot the recurring question whether OIN is immune from state and local *in rem* jurisdiction to enforce the substantive laws that, under *Sherrill*, govern the lands in issue here. If anything, OIN's unilateral action (announced 72 hours before the Counties' opening brief was due, after ten years of litigation and two trips to this Court) simply underscores the need for a definitive pronouncement by this Court that tribal sovereign immunity does not extend to *in rem* enforcement actions against non-trust lands purchased by a tribe on the open market.

A party seeking to moot an issue in litigation through its own "voluntary conduct" bears a "'heavy,'" "stringent," and "formidable burden of showing that it is *absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur*." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189-90 (2000) (emphasis added, citations omitted). It must also prove that "interim relief or events have *completely and irrevocably eradicated the effects* of the alleged violation"—the tribe's "violation" here being the invocation of a nonexistent immunity from *in rem* enforcement proceedings. *Cnty. of Los Angeles v. Davis*, 440 U.S. 625, 631 (1979) (emphasis added, citations omitted). These "stringent" burdens must be at their zenith where, as here, the issue the party is now attempting to moot has been litigated for a full decade, the case already has come before this Court once before, and the

Court has granted *certiorari* a second time. To allow a litigant to engineer a mootness-based dismissal at such a late date "would be justified only if it were *absolutely clear that the [opposing] 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) (emphasis added); *see also City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000) (emphasizing "[o]ur interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review" through unilateral action allegedly mooting the controversy); *Laidlaw*, 528 U.S. at 191-92 ("To abandon the case at an advanced stage may prove more wasteful than frugal."); *Honig v. Doe*, 484 U.S. 305, 332 (1988) (Rehnquist, C.J., concurring) (discussing special concerns "where the events which render the case moot have supervened since our grant of *certiorari*").

Disputes over the validity, scope, and consequences of tribal sovereign immunity waivers have long been a "vexing" and "fertile source of litigation." Conference of Western Attorneys General, *American Indian Law Deskbook* 302 (4th ed. 2008) ["*Deskbook*"]. Such waivers are "strictly construed" in *favor* of the waiving sovereign and *against* waiver, and in accordance with the "intent" of the waiving sovereign. *Lane v. Pena*, 518 U.S. 187, 192 (1996). Tribal immunity waivers have often been struck down for failure to comply with the waiving tribe's organic laws, and under tribal exhaustion principles some courts have held that disputes concerning the validity and scope of tribal waivers must be submitted to *tribal* courts for resolution under *tribal* laws.[14] Moreover, an immunity waiver must address "'not

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[14] *See, e.g.*, *Swanda Bros., Inc. v. Chasco Constructors, Ltd.*, No. CIV-08-199-D, 2010 WL 1372523, at *5 (W.D. Okla. Mar. 30, 2010) (dismissing dispute over tribal entity's waiver so that "the appropriate tribal court" could determine the validity and

merely *whether* [the sovereign] may be sued, but *where* it may be sued,'" and a waiver that is silent or ambiguous on the latter issue will be construed to "constitute[] a waiver of immunity (if at all) *only in the courts of the [waiving] sovereign*." *Garcia v. Akwesasne Housing Auth.*, 268 F.3d 76, 86-87 (CA2 2001) (emphasis in original) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985)).

OIN's "waiver" does not meet the "formidable" requirements for mooting this long-standing sovereign immunity dispute. To begin, the waiver extends only to foreclosures for nonpayment of "real property taxation." But the Counties' foreclosure actions arise out of OIN's nonpayment of other types of charges as well. New York law subjects the disputed lands "to real property taxation, *special ad valorem levies, and special assessments*," and the lands are subject to tax liens and foreclosures for the nonpayment of *any* of these types of charges. N.Y. Real Property Tax Law § 300; *see also id.* §§ 102(21), 1102(1)-(2). Each of these charges is a defined statutory term of art, and the terms "tax" and "taxation" generally "do[] not include a special ad valorem levy or a special assessment." *Id.* § 102(20); *see also id.* §§ 102(15)-(16). OIN has refused to pay many of these types of charges (*e.g.*, for fire, sewer, improvements, etc.), which are at issue in the foreclosure

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scope of the purported waiver) (collecting authorities); *see also Memphis Biofuels, LLC v. Chickasaw Nation Indus., Inc.*, 585 F.3d 917, 921-22 (CA6 2009) (invalidating waiver as unauthorized under governing tribal laws) (collecting authorities); *Winnebago Tribe of Neb. v. Kline*, 297 F. Supp. 2d 1291, 1303 (D. Kan. 2004) ("for a waiver of sovereign immunity to be effective, the waiver must be in compliance with the tribal law"); *World Touch Gaming, Inc. v. Massena Mgmt., LLC*, 117 F. Supp. 2d 271, 274-76 (N.D.N.Y. 2000) (invalidating waiver as unauthorized under tribal constitution and Civil Judicial Code).

proceedings but not addressed by the "waiver."[15] Nor does the "waiver" address the Counties' right to foreclose for nonpayment of the interest and penalties that have piled up over the past decade.[16]

The "waiver" falls short of mooting this case in many other respects. Beyond the statement in a letter to the Clerk that the "waiver" was "duly enacted" by the Tribal Council on November 29, 2010, OIN has not submitted the relevant tribal constitutional provisions, tribal codes, legal opinions, and other materials that courts typically scrutinize in determining whether a tendered "waiver" is valid. *See supra* n.14. Nor is there any mention of *where* and in *which courts* the waiver may be enforced. Thus it remains unknown whether the waiver extends to all courts, only to OIN's tribal courts, or to some other subset of courts. If the waiver only extends to the courts of the "state, county and local governments" referred to in the "declaration and ordinance," such a waiver would not encompass actions in *federal* court. *See Garcia*, 268 F.3d at 87 (general tribal waiver did not waive "immunity to suit in federal court" absent express mention of federal court proceedings). This hardly is sufficient protection for the Counties. Nor does the "waiver" specify which sovereign's laws will govern disputes,

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[15] *See, e.g.*, JA 285a-286a, 288a (referring to charges by "special assessment districts"); CA App. A-61, A-478 (sample foreclosure pleadings referring to "unpaid taxes and other legal charges").

[16] OIN claims in its December 2 letter to the Clerk that interest and penalties "are fairly encompassed by the ordinance," and "represents" that it "will not raise its sovereign immunity" as to these charges. We do not question the good faith of counsel's representation, but this hardly substitutes for a properly drafted and adopted tribal waiver that clarifies these and the many other issues discussed above, especially since any ambiguities will be construed *against* waiver.

disclaim tribal court jurisdiction, or waive any tribal exhaustion requirements that might apply. These elementary drafting issues are routinely addressed in tribal immunity waivers,[17] but not in OIN's "declaration and ordinance" or its counsel's correspondence to the Clerk.

Even putting all these concerns to one side, there is another fundamental reason why the "declaration and ordinance" do not moot the tribal sovereign immunity issue: OIN continues to insist that it *does* enjoy immunity from state and local *in rem* enforcement actions against the non-trust lands it has purchased on the open market. It has simply purported to "waive" that immunity in this one context—"enforcement of real property taxation through foreclosure by state, county and local governments." OIN has not changed its position on the underlying merits of its immunity claim in the least. To the contrary, it insists it is correct.[18] There is every reason to believe it will continue to invoke its supposed immunity in other *in rem* enforcement contexts, including with respect to zoning, land-use, health and safety, and other "local regulatory controls." *Sherrill*, 544 U.S. at 220 n.13; *see supra* pp.1-2. OIN has not renounced its claims to sovereign immunity with respect to these lands, nor offered to dismiss those claims *with*

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[17] *See, e.g., World Touch Gaming*, 117 F. Supp. 2d at 275 n.3 (pointing to "[a] perfect example of an express waiver of sovereign immunity," which addressed choice of forum, tribal jurisdiction, tribal exhaustion, and other issues); *Deskbook*, *supra*, at 302-06, 624-25, 640-43.

[18] *See, e.g., Honig*, 484 U.S. at 319 (case not mooted through unilateral action given party's "insistence" that it has the authority it claims); *United States v. Gov't of V.I.*, 363 F.3d 276, 286 (CA3 2004) (case not mooted through unilateral action "when a party does not change its 'substantive stance' as to the validity" of its position, but simply acts for "purely practical reasons (such as avoiding litigation)") (citation omitted).

*prejudice*. *Cf. Deakins v. Monaghan*, 484 U.S. 193, 200 (1988) (insufficient to vacate decisions below; relevant portions of the mooting party's underlying pleadings must be dismissed "with prejudice"). Even assuming that OIN has truly and "irrevocabl[y]" waived its claimed immunity from *in rem* enforcement action in the specific context of "real property taxation through foreclosure," OIN remains free to continue to invoke that claimed immunity in all other *in rem* enforcement situations.

Claims of tribal immunity from *in rem* proceedings are made in a variety of contexts, not only by OIN within the original boundaries of the ancient Oneida reservation, but by other tribes throughout the country. *See, e.g.*, *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008) (rejecting Wisconsin tribe's immunity claim in the context of condemnation of non-trust lands and "assess[ment of] such property for the cost of improvements that specially benefit the property"); *New York v. Shinnecock Indian Nation*, 523 F. Supp. 2d 185, 298 (E.D.N.Y. 2007) (rejecting New York tribe's immunity claim in suit to enjoin violations of state and local zoning, environmental, and anti-gaming laws on non-trust lands; "*Sherrill* allows a tribe to be sued by a state or town . . . to enforce its laws with respect to a parcel of [non-trust] land"); *Cass Cnty. Joint Water Res. Dist.*, 2002 ND 83, ¶¶ 8-25, 643 N.W.2d at 688-95 (rejecting North Dakota tribe's immunity claim in condemnation action against non-trust land); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 873, 929 P.2d 379, 385 (1996) (rejecting Washington tribe's immunity claim in quiet title and partition action involving non-trust land "because the trial court's assertion of jurisdiction is not over the entity *in personam*, but over the property or the 'res' *in rem*").

As these decisions demonstrate, the underlying tribal sovereign immunity issue is identical in all material respects whether a particular *in rem* proceeding involves foreclosure,

condemnation, or other enforcement action. *See Hobart*, 542 F. Supp. 2d at 921. Indeed, this Court in *Sherrill* emphasized the linkage between taxation and zoning, land-use, and other local "regulatory controls that protect all landowners in the area," and cautioned that immunity in the tax context would spark "a new generation of litigation" in these other *in rem* enforcement contexts. 544 U.S. at 219-20; *see also id.* at 202-03, 213-14.

Thus, even assuming *arguendo* that OIN's "waiver" mooted the immunity issue in the specific context of "enforcement of real property taxation through foreclosure," that leaves the immunity issue in other *in rem* contexts wholly unresolved. A dismissal now would only further exacerbate the "disruptive practical consequences" this Court sought to prevent in *Sherrill* and invite yet another "new generation of litigation." *Id.* at 220 n.13. At the very least, it is far from "absolutely clear" that OIN will not claim immunity from future *in rem* enforcement actions. *Laidlaw*, 528 U.S. at 190. Nor is it "absolutely clear" that the Counties and other local governments "no longer ha[ve] any need" for a judgment holding that tribal sovereign immunity does not extend to *in rem* enforcement actions against non-trust lands. *Adarand*, 518 U.S. at 223-24 ("it is far from clear that these possibilities will not become reality"). OIN has not succeeded in its eleventh-hour attempt to moot the immunity issue.

## III. THE ORIGINAL ONEIDA RESERVATION WAS DISESTABLISHED OR DIMINISHED.

As in *Sherrill*, OIN's sovereign immunity claim must be rejected whether or not the boundaries of the original 1788 state reservation "acknowledge[d]" by the United States in the Treaty of Canandaigua of November 11, 1794, 7 Stat. 44, remain in force today or instead were "disestablished" or "diminished" at some point over the past two centuries. *See* 544 U.S. at 215 n.9. However, many of

OIN's immunity claims turn in part on the argument that those ancient reservation boundaries remain undiminished in any way today. *See* Opp. at 19 (it is "particularly important" that the disputed lands are within OIN's "treaty reservation"); *see also id.* at 3, 7, 9-10.

Moreover, the diminishment issue inevitably will arise once again on remand unless this Court resolves it now. The District Court below held in the alternative that the disputed lands are immune from taxation under *state* statutes conferring immunity on any tribally owned real property "in [an] Indian reservation," and that the original reservation boundaries had never been disestablished or diminished to the slightest extent. *See Oneida Indian Nation of N.Y. v. Madison Cnty.*, 401 F. Supp. 2d 219, 231 (N.D.N.Y. 2005) (applying N.Y. Real Prop. Tax Law § 454 and N.Y. Indian Law § 6). Thus, even if this Court denies tribal sovereign immunity, reverses the judgment below, and remands for further proceedings, the diminishment issue must be resolved.

There is every reason to resolve it now. The issue has now twice been fully briefed to this Court. The Second Circuit decided the issue in *Sherrill* and reaffirmed its decision in this case. *See Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 159-65 (CA2 2003), *rev'd on other grounds*, 544 U.S. 197 (2005); *Oneida Indian Nation of N.Y. v. Madison Cnty*, 605 F.3d 149, 157 n.6 (CA2 2010) (continuing recognition of 1794 reservation boundaries "remains the controlling law of this circuit"). Because the application of so many federal and state laws turns on the existence and location of reservation boundaries—including the definition of "Indian country" itself[19]—the issue should

[19] 18 U.S.C. § 1151(a) ("Indian country" includes "all land within the limits of any Indian reservation" under federal jurisdiction); *see also Cayuga Indian Nation of N.Y. v. Gould*, 14 N.Y.3d 614, 638-43, 930 N.E.2d 233, 246-50 (holding that 18th-

be decided once and for all to put an end to continuing jurisdictional chaos and conflict. *See, e.g.*, *Polar Tankers, Inc. v. City of Valdez*, 129 S. Ct. 2277, 2286 (2009) (reaching issue because "deciding the matter now will reduce the likelihood of further litigation"); *Quinn v. Millsap*, 491 U.S. 95, 106 (1989) (deciding rather than remanding issue because "there is no good reason to delay the resolution of this issue any further").

There is a "glaring inconsistency," *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 346 (1998), between the 1794 treaty, which "acknowledge[d]" the boundaries of the Oneidas' 1788 state reservation, and the Treaty of Buffalo Creek of January 15, 1838, in which the Oneidas agreed to "remove" to the western "Indian Territory" and to establish their new "home," "government," and "laws" out there. Arts. 2, 4-5, & 13, 7 Stat. 550, 551-52, 554. If the dry real estate language contained in various allotment-era statutes was "precisely suited" to terminating old reservation boundaries, *see DeCoteau v. Dist. Cnty. Ct. for the Tenth Jud. Dist.*, 420 U.S. 425, 445 (1975), so much more the case for treaty language in which the United States and the Oneidas "agreed," "intended," and "understood" that the tribe would "remove" to a new "home" far away, and would practice its "government" and "laws" there, in the western "Indian Territory" rather than in Central New York. Arts. 2, 4-5, & 13, 7 Stat. 550, 551-52, 554. The Oneidas could not reasonably have expected to continue to exercise sovereignty, jurisdiction, and regulatory authority over lands they already had left and were now leaving. *See Menominee Indian Tribe of Wis. v. Thompson*, 161 F.3d 449, 458 (CA7 1998) (tribe "could not reasonably have expected to

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century Cayuga Reservation's boundaries remain intact even though the tribe has held *no* trust lands within that area since the Jefferson Administration (1807)), *cert. denied*, 131 S. Ct. 353 (2010).

continue" exercising previously reserved hunting and fishing rights following its agreement in a new treaty to remove to a new reservation 300 miles away).

The 1838 treaty accelerated a federally promoted removal process that had already been underway for a generation, pursuant to which 95% of the Oneidas now live outside of New York and the tribe's original reservation of 300,000 acres has dwindled down to a mere 32—a loss of all but one ten-thousandths (0.0001%) of the original reservation land base. *See generally Sherrill*, 544 U.S. at 205-07. To indulge in the fiction that the original reservation boundaries somehow survived intact is to ignore the 1838 treaty's plain language, purpose, context, and implementation, as well as the subsequent treatment of the area over the past 172 years by all affected governments (federal, state, local, and tribal), the dramatic demographic changes, and the numerous other factors discussed in the Counties' opening brief. *See* Brief for Petitioners at 41-56.

OIN places great reliance on the August 9, 1838 statement by Agent Ransom H. Gillet assuring the Oneidas that they would not be removed against their will and could remain on "their lands *where they reside*" and "*where they are* forever." JA 196a (emphasis added). Even giving the most generous construction to this statement, the Oneidas who still remained in New York in 1838 clearly agreed that they *either* had to leave the eastern United States or remain "*where they reside*" and "*where they are*." At the time of this agreement, the remaining Oneidas still possessed and "reside[d]" on only 5,000 acres of their original reservation—less than 2% of the lands encompassed by the original reservation boundaries. *See Sherrill*, 544 U.S. at 206. It is legally and historically spurious to construe Agent Gillet's words as extending not only to the lands where the Oneida actually resided in 1838, but to the entire area that had been included in the original reservation a half century earlier.

OIN argues that the 1838 treaty did not specifically address the lands that *previously* had been conveyed to New York, so that most of the original reservation remained entirely unaffected by this pivotal treaty in the history of U.S.-Iroquois relations. Opp. at 34. This Court specifically has held, however, that federal law can operate to extinguish reservation boundaries not only over lands conveyed pursuant to that law, but over lands *previously* disposed of as well. *See, e.g.*, *DeCoteau*, 420 U.S. at 446-47 (1891 cession act terminated reservation status, including with respect to previously allotted lands); *see also Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1420-21 (CA10 1990) (federal law "cancelled reservation boundaries" over previously allotted lands); *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1028 (CA8 1999) (same).

That is precisely what happened here. The express purpose of the federal law in issue—the 1838 treaty—was to relocate the Oneidas' "permanent home," "government," and "laws" outside of New York, with the possible exception of those individual tribal members who chose to remain "where they reside" and "are." This purpose is at irreconcilable odds with a claim to *expanded* territorial sovereignty in New York and a *restoration* of tribal jurisdiction over lands that had been conveyed (legally or not) by prior generations. The subsequent "jurisdictional history," *Hagen v. Utah*, 510 U.S. 399, 421 (1994), reconfirms the disestablishment or diminishment of the original reservation boundaries. Since the 1838 treaty, state and local governments have exercised unquestioned sovereignty, jurisdiction, and regulatory authority over the lands OIN now claims to have been "Indian country" for all these generations. *See Sherrill*, 544 U.S. at 211, 215-17, 219-20. The same "justifiable

expectations," *id.* at 215, that drove the result in *Sherrill* compel a finding of disestablishment or diminishment here.[20]

## CONCLUSION

OIN's sovereign immunity defense is defined by, and subject to, "standards of federal Indian law and federal equity practice." *Sherrill*, 544 U.S. at 214. There is nothing in those standards that supports OIN's studied refusal to obey this Court's judgment in *Sherrill*, or its claim of a tribal "supersovereign" immunity exceeding that of any foreign or state sovereign. It is time for OIN to "lay[] down the prince." *Schooner Exch.*, 11 U.S. (7 Cranch) at 145. This Court should reverse the judgment below and hold that tribal sovereign immunity does not extend to *in rem* actions against tribally purchased immovable property that is not held in federal trust or otherwise under federal superintendence.

Respectfully submitted,

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[20] Lenox briefed the disestablishment and diminishment issues at much greater length on pp. 13-30 of its *amicus* brief in *Sherrill*, cited *supra* n.3 (drawing further on the federal Indian law doctrines of acquiescence, abandonment, extinguishment, release, and relinquishment in arguing that OIN's reservation boundaries have been disestablished or diminished).