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 Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENT'S BRIEF IN OPPOSITION

RICHARD G. TARANTO
FARR & TARANTO
1150 18th Street, N.W.
Washington, DC 20036
(202) 775-0184

PETER D. CARMEN
MEGHAN MURPHY BEAKMAN
ONEIDA NATION
LEGAL DEPARTMENT
5218 Patrick Road
Verona, NY 13478
(315) 361-8687

MICHAEL R. SMITH
Counsel of Record
DAVID A. REISER
ZUCKERMAN SPAEDER LLP
1800 M Street, N.W.
Washington, DC 20036
(202) 778-1800
msmith@zuckerman.com

Counsel for Respondent

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

TREATIES

REGULATIONS

OTHER AUTHORITIES

INTRODUCTION

This case involves the fundamental distinction between a Tribe's sovereign authority to govern land—which was at issue in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005)—and a Tribe's sovereign immunity from suit—which was not at issue in *Sherrill*. The Second Circuit in this case applied that basic distinction, following the decisions of this Court including *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998), and *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe*, 498 U.S. 505 (1991). The United States as invited *amicus curiae* supported the Tribe's immunity from foreclosure, recognizing that the distinction between a sovereign's governance authority (over specific territory) and a sovereign's immunity from enforcement proceedings (an immunity not tied to particular territory) is well established and important outside as well as within Indian law. Neither this Court nor Congress has curtailed tribal sovereign immunity for tax foreclosures, and the Court has stressed that it is for Congress to make the policy judgments about any new limits on tribal sovereign immunity. The Second Circuit thus correctly upheld the Tribe's immunity from foreclosure proceedings that petitioners initiated to preempt the very process of placing land in federal trust that this Court pointed to in *Sherrill*.

No ground for certiorari is present here. Neither petitioners nor *amici* have cited a single other case that has even presented the question whether sovereign immunity protects tribal land from tax foreclosure, let alone resolved it in conflict with the Second Circuit. Nor is the issue of national

significance: petitioners and *amici* rely only on hypotheticals, not any actual tax foreclosure case involving tribal land.

This unique case—involving the immediate post-*Sherrill* transition and an attempt to preempt the federal-agency trust process—also is singularly undeserving of review to consider the judicial change of law petitioners seek. The United States has agreed to take most of the land at issue into federal trust, a decision pending judicial review for two years now. In connection with the trust process, the Oneida Nation has posted bank letters of credit covering all the land here at issue, not just the land approved for trust. The Counties have requested and can obtain a determination of taxes due under state law and that determination would guarantee payment (through private letters of credit) of any taxes held to be due, whether or not any trust is approved. There is, thus, no immunity impediment to petitioners' receiving all past taxes due. Prospectively, moreover, all land taken into trust will indisputably be immune from taxes. As to the remaining land, it would simply be inappropriate to presume that the traditional means of dispute resolution involving tribal sovereigns will prove unsuccessful. Indeed, the payment mechanism adopted in the trust process and the Oneida Nation's post-*Sherrill* tax agreements with localities other than petitioners, including the City of Sherrill, confirm the lack of any need suddenly to override the established sovereign immunity from enforcement actions.

The petition's immunity question thus does not merit review. Nor does the second question, which

the Second Circuit expressly declined to reach and which this Court declined to decide after full briefing in *Sherrill*.

STATEMENT

The judgments under review are permanent injunctions to prevent Petitioners Madison and Oneida Counties from foreclosing on land that the Oneida Nation applied to have taken into federal trust status following *Sherrill*. All of the land at issue is within the Oneida reservation acknowledged in the 1794 Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), Pet. App. 36a (Oneida County parcels), 55a (Madison County parcels), and was reacquired by the Oneida Nation before this Court decided *Sherrill*. Since the district court enjoined the foreclosures, the federal government has agreed to take most of the land into trust. As part of the trust process, letters of credit now readily allow the Counties to obtain past taxes ruled to be due.

a. The *Sherrill* decision. On March 29, 2005, this Court held that the Oneida Nation did not regain sovereign governance authority over land by reacquiring it after long dispossession and therefore lacked the immunity from state land taxation that arises from such governance authority. 544 U.S. at 221. The Court pointed to the federal trust statute and an implementing regulation (25 U.S.C. § 465 and 25 C.F.R. § 151.10) as creating the "proper avenue" for the Oneida Nation to regain sovereignty over a portion of its federal treaty reservation. *Id.* The trust process, the Court explained, could best address the competing interests of the Oneida Nation and the local non-Indian community. *Id.*

b. The trust application. Within days of the *Sherrill* decision, the Oneida Nation filed a trust application with the Department of the Interior. CA App. A326. Petitioners Madison and Oneida Counties immediately opposed taking any land into trust. *Id.* A362-64. After a thorough review, based on an Administrative Record comprising tens of thousands of pages, on May 20, 2008, the Department agreed to take 13,004 acres of the Oneida Nation's 17,370 acres of land into trust. Pet. App. 12a; 73 Fed. Reg. 30144-46 (notice of agency determination).

Before granting the application, the Department directed the Oneida Nation to post, and the Oneida Nation did post, bank letters of credit securing payment of all taxes, penalties, and interest determined to be due on *all* Nation-owned parcels, not just those approved for trust status. *Id.* at 13a.[1] Because a private bank is obligated on the letters of credit, enforcement of the letters of credit raises no tribal sovereign immunity issue. Petitioners and others, including New York State, have sued to challenge the Department's trust decision.[2] In the

---

[1] The Department required the letters of credit to cover only a portion of the taxes on the Oneida Nation's casino parcel because it concluded that a part of the tax violated the federal Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.* The Department's decision (the "Record of Decision"), in § 7.5.4, requires a further letter of credit if a challenge to that conclusion is still pending when the Department formally accepts the land into trust.

[2] *See New York v. Salazar*, No. 08-cv-644 (N.D.N.Y., filed June 19, 2008); *Town of Verona v. Salazar*, No. 08-cv-647 (N.D.N.Y., filed June 19, 2008); *City of Oneida v. Salazar*, No. 08-cv-648 (N.D.N.Y., filed June 19, 2008); *Upstate Citizens for*

review proceeding, the Counties can obtain a determination of a critical state-tax-exemption issue (not addressed by the Second Circuit below) and hence a determination of liability for taxes, penalties, and interest, triggering the bank's payment of any amounts due—as to all the land at issue in the present case, not just the trust land, and regardless of whether the trust is approved. *See id.* at 13a; *id.* at 32a n.1 (Cabranes, J., concurring).[3]

Thus, no enforcement immunity stands in the way of the Counties' receiving any past taxes determined to be due. Prospectively, if Interior's trust decision is affirmed, most of the land (75% by acreage, 93% by assessed value) will be immune from taxation. 25 U.S.C. § 465.

c. The post-*Sherrill* tax disputes and the injunctions against foreclosure. The Oneida Nation successfully negotiated tax agreements with the Cities of Sherrill and Oneida after the Court's *Sherrill* decision.[4] Moreover, even before *Sherrill*

Equality, Inc. v. United States, No. 08-cv-633 (N.D.N.Y., filed June 16, 2008); *Central N. Y. Fair Business Ass'n v. Salazar*, No. 08-cv-660 (N.D.N.Y., filed June 21, 2008).

[3] The letters of credit were drafted prior to the trust litigation. The Oneida Nation must periodically renew the letters of credit to address taxes accruing while the trust decision is under judicial review; it has now amended the letters of credit to include the trust litigation as well.

[4] As to Sherrill, see Stipulation of Dismissal [D.E. 104], *Oneida Indian Nation v. City of Sherrill*, No. 00-cv-223 (N.D.N.Y., filed Oct. 18, 2005); CA App. A1633-37. As to the City of Oneida, see Caitlin Traynor, Oneida Nation Paid City $300,000 in 2009, Oneida Daily Dispatch (July 13, 2010) available at

held that its land was not federally immune from taxation, the Oneida Nation was paying millions of dollars in lieu of taxes to localities. CA App. A646-47 (Madison County); A788 (school districts); A1609 (localities within Oneida County); A1649-50 (general formula). In the case of Oneida County, for example, the amounts paid to government entities within the County (for which the County acts as collector) exceeded the total taxes (and penalties and interest) claimed for just such tax liabilities by the County (which, however, refused to recognize those payments and sought foreclosure for unpaid taxes anyway). *Id.* at A1971.

Unlike the Cities of Sherrill and Oneida, petitioners Madison County and Oneida County refused to negotiate with the Oneida Nation over payment of penalties and interest (*id.* at A631) and not only opposed but sought to preempt the trust process after *Sherrill*. On April 28, 2005, before Interior could act on the Oneida Nation's trust application, Madison County moved in state court to foreclose on the Oneida Nation's land. *Id.* at A373-83. To prevent a foreclosure that as a practical matter would preclude a trust transfer, the Oneida Nation requested and won a preliminary injunction against foreclosure in already-pending federal litigation against Madison County. Pet. App. 56a. When Oneida County moved to foreclose through an administrative process, the Oneida Nation filed a new action and obtained a preliminary injunction there too. *Id.* at 35a.

---

http://oneidadispatch.com/articles/2010/07/13/news/doc4c3d217fa3b47747375376.txt (renewal of agreement).

Subsequently, in both cases, the district court granted summary judgment for the Oneida Nation and permanently enjoined foreclosure based on five determinations: (a) the Oneida Nation was immune from foreclosure; (b) the land at issue was subject to federal statutory restrictions against alienation; (c) the Counties had failed to give the required notice and violated the due process clause; (d) the land was within a reservation that had not been disestablished and was therefore tax exempt under *state* statutes; and (e) the Oneida Nation was not liable for penalties and interest and was not subject to foreclosure to collect them. *Id.* at 65a-76a (Madison County); 41a-46a (Oneida County). The Counties appealed to the Second Circuit.

d. **The decision below.** After requesting briefing from the United States, the Second Circuit affirmed the injunctions on the basis of tribal sovereign immunity without reaching the other grounds relied on by the district court.[5] The court of appeals carefully analyzed, and rejected, the Counties' claim that this Court's *Sherrill* decision disposed of tribal sovereign immunity against tax enforcement in holding that the Oneida Nation lacked sovereign authority over the land, authority that (where it exists) entails immunity from taxation. "We think that this argument improperly conflates two distinct doctrines: tribal sovereign authority over reservation lands and tribal sovereign immunity from suit." Pet. App. 14a; *see id.* at 16a. Reviewing

---

[5] The United States supported the district court's ruling that the Oneida Nation's sovereign immunity barred the attempted foreclosure. U.S. *Amicus* Br. in Support of Appellee and Affirmance, No. 05-6408 (2d Cir.), 2008 WL 6086315, at *9-20.

the development of those two distinct doctrines, and the availability of sovereign immunity from suit even where underlying tax immunity is absent, as re-affirmed in both *Okla. Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla.,* 498 U.S. 505 (1991), and *Kiowa Tribe of Okla. v. Mfg. Tech., Inc.*, 523 U.S. 751 (1998), the court concluded:

> In light of this history, we do not read *Sherrill* as implicitly abrogating the OIN's immunity from suit. No such statement of abrogation was made by the *Sherrill* Court, nor does the opinion call into question the *Kiowa* Court's approach, that any abrogation should be left to Congress. *Sherrill* dealt with "the right to demand compliance with state laws." *Kiowa*, 523 U.S. at 755. It did not address "the means available to enforce" those laws." *Id.*

Pet. App. 20a.

Having ruled that *Sherrill* did not carve out a special exception to tribal sovereign immunity from suit for the Oneidas, the court pointed to *Potowatomi* as rejecting the Counties' argument that immunity against tax enforcement was inconsistent with amenability to taxation. *Id.* at 21a-22a. Two judges concurred in an opinion objecting to the outcome on policy grounds but agreeing that it was compelled by "unambiguous guidance from the Supreme Court" on tribal sovereign immunity from suit even in the absence of immunity from underlying tax liabilities. *Id.* at 32a-33a.

That determination sufficed to affirm the injunctions, regardless of whether the land in

question was still reservation land. In a footnote, the panel said that it need not revisit whether the 1838 Treaty of Buffalo Creek disestablished the Oneida reservation—while noting that its earlier holding that the reservation was not disestablished, remains the law of the Circuit. Pet. App. 16a-17a & n.6. The Second Circuit also did not decide whether (as the district court ruled) the Oneida Nation was entitled to the *state*-law tax exemptions for reservation land in tribal possession. N.Y. Indian L. § 6; N.Y. Real Property Tax L. § 454.

REASONS FOR DENYING THE PETITION

I. THE RULING ON SOVEREIGN IMMUNITY FROM TAX FORECLOSURE PROCEEDINGS DOES NOT WARRANT REVIEW.

Petitioners and *amici* have shown no basis for review under established certiorari standards: no inconsistency with this Court's precedents, no lower court conflict, no real-world significance for practices elsewhere, not even a concrete nonspeculative harm to petitioners' interests regarding taxation of the particular land at issue. Those are reasons enough to deny review, but the unique context of this case also makes it particularly inappropriate for this Court's intervention to consider a new judicially imposed limitation on tribal sovereign immunity.

The present case arose in the special transition circumstances that followed this Court's decision in *Sherrill*. That decision reversed the lower courts' recognition of the Oneida Nation's sovereign authority over the land at issue and its concomitant immunity from state taxation, thus newly settling

that question to deny such underlying immunity. *Sherrill* also set in motion the congressionally established federal agency process for taking the land into trust, identifying it as the "proper avenue" for resolving sovereignty questions. Petitioners immediately sought to preempt that process by moving to foreclose on the land, and refused to discuss an agreement even on penalties involving the period during which the governing federal court decisions explicitly affirmed the Oneida Nation's tax immunity or credit for the Oneida Nation's payments in lieu of taxes.

These circumstances furnish no ground for speculating that the usual immunity-respecting governmental negotiations will fail once underlying governance and taxation authority is settled. They also show the falsity of the picture the petition paints of the Oneida Nation as defying this Court's *Sherrill* decision. As soon as this Court made clear that the Oneida Nation's land had no federal immunity from state taxation, the Oneida Nation promptly negotiated agreements to discharge past and future tax obligations with the local taxing jurisdictions (unlike petitioners) that were willing to do so. Although the Towns of Vernon and Verona, in their *amicus* brief, point to various disputes about local land use (at 9-10), those disputes all occurred *before* this Court resolved the sovereign-authority issue in *Sherrill*. It was not Oneida Nation post-*Sherrill* obstructionism, but petitioners' efforts to short-circuit the *Sherrill*-recommended agency trust process concerning land, all within the Oneida Nation's treaty reservation, that led to this foreclosure-immunity dispute.

As to regulatory issues not presented here, in the trust process, Interior thoroughly examined the Oneida Nation's past practices and disputes, even from before this Court's decision in *Sherrill*, and it concluded that the combination of Oneida Nation standards, government-to-government agreements, and federal oversight will ensure that local concerns are met. Record of Decision § 7.6, at 60-68; *see id.* at 46-47, 51-52, 57-58. And, as to tax payments on the land specifically at issue, the trust process has already guaranteed that there is no sovereign-immunity obstacle to the Counties' ability to receive past taxes, penalties, and interest properly due, through letters of credit described above. The circumstances of this case thus provide no warrant to consider a judicial curtailment of recognized tribal sovereign immunity that Congress has seen no reason to limit.

A. The Second Circuit Correctly Followed This Court's Decisions.

This Court has expressly recognized the fundamental distinction between a sovereign's authority to govern land (with certain implications of *substantive* immunity from other sovereigns' governance authority over that land, including their taxing authority) and a sovereign's immunity from enforcement proceedings. Unambiguous precedent establishes that the latter, which Congress has not limited for Tribes, applies here, as the Second Circuit unanimously held. *See* Pet. App. 33a (Cabranes, J., concurring) (finding "unambiguous guidance" from this Court's precedents).

1. ***Potowatomi* & *Kiowa***. In *Potowatomi*, this Court considered *both* a question of substantive

tax immunity *and* a question of sovereign immunity from enforcement, answering the former in favor of the State and the latter in favor of the Tribe. As to the former, the Court held that tribal sovereignty over its reservation did not prevent Oklahoma from requiring the Tribe to collect and remit taxes on cigarette sales to non-Indians. 498 U.S. at 512-13. Nevertheless, the Tribe's sovereign immunity from suit barred the State's action to enforce that obligation. *Id.* at 514.

Specifically rejecting the State's request to carve out tax enforcement from tribal sovereign immunity against suit, the Court recognized that "[a]lthough Congress has occasionally authorized limited classes of suits against Indian tribes, it has never authorized suits to enforce tax assessments. Instead, Congress has consistently reiterated its approval of the immunity doctrine." *Id.* at 510. Like the Counties here (Pet. 9), Oklahoma argued that the rulings were self-contradictory and nullified the Tribe's tax obligation, but the Court disagreed. It explained that the tax obligation was not actually nullified and that it was up to Congress to address any problems with respecting traditional enforcement immunity:

> In view of our conclusion with respect to sovereign immunity of the Tribe from suit by the State, Oklahoma complains that, in effect, decisions such as [*Moe v. Salish & Kootenai Tribes*, 425 U.S. 463 (1975)] and [*Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980)] give them a right without any remedy. There is no doubt that sovereign

> immunity bars the State from pursuing the most efficient remedy, but we are not persuaded that it lacks any adequate alternatives. We have never held that individual agents or officers of a tribe are not liable for damages in actions brought by the State. *See Ex parte Young*, 209 U.S. 123 (1908). And under today's decision, States may of course collect the sales tax from cigarette wholesalers, either by seizing unstamped cigarettes off the reservation, *Colville*, *supra*, at 161-162, or by assessing wholesalers who supplied unstamped cigarettes to the tribal stores, *City Vending of Muskogee, Inc. v. Oklahoma Tax Comm'n*, 898 F.2d 122 (CA10 1990). States may also enter into agreements with the tribes to adopt a mutually satisfactory regime for the collection of this sort of tax. *See* 48 Stat. 987, as amended, 25 U.S.C. 476. And if Oklahoma and other States similarly situated find that none of these alternatives produce the revenues to which they are entitled, they may of course seek appropriate legislation from Congress.

498 U.S. at 514.[6]

---

[6] *Amicus* Town of Lenox points to the *Potowatomi* Court's reference to "seizing unstamped cigarettes off the reservation" as a permissible means of enforcement. Lenox Br. 18-19 & n.14. That cannot justify the land foreclosures here. The Court was discussing such a measure against "wholesalers," not the Tribe. Moreover, the cited authority, *Colville*, 447 U.S. at 161-62, was addressing unlawfully possessed, in-transit, off-reservation "contraband." The seizure of contraband such as unstamped

In *Kiowa*, the Court once again rejected a request that it limit a Tribe's sovereign immunity from suit to proceedings involving "transactions on reservations and governmental activities." 523 U.S. at 755. The petitioner argued that the scope of tribal sovereign immunity from suit should coincide with tribal governance. The Court explained that sovereign immunity from *suit*—the doctrine at issue in *Kiowa*—was different from the substantive immunity from state *law* that attends a Tribe's governance authority over certain land, persons, or activities:

> Our cases allowing States to apply their substantive laws to tribal activities are not to the contrary. We have recognized that a State may have authority to tax or regulate tribal activities occurring within the State but outside Indian country. *See Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148-149 (1973); *see also Organized Village of Kake v. Egan,* 369 U.S. 60, 75 (1962). To say substantive state laws apply to off-reservation conduct, however, is not to say that a tribe no longer enjoys immunity from suit. In *Potawatomi*, for example, we reaffirmed that while Oklahoma may tax cigarette sales by a Tribe's store to nonmembers, the Tribe enjoys immunity from a suit to collect unpaid state taxes. 498 U.S., at 510. There is a difference between the right to demand compliance with state laws

---

cigarettes is different from proceedings to foreclose on lawfully possessed tribal land.

> and the means available to enforce them. *See id.*, at 514.

Id. at 755. And the Court reiterated that it was up to Congress to weigh the policy interests, including whether or not there was any practical need to limit the historic sovereign immunity of this Continent's first sovereigns. *Id.* at 758 ("we defer to the role Congress may wish to exercise in this important judgment").

This Court has thus repeatedly considered and rejected the very arguments petitioners make for judicial abrogation of a traditional sovereign immunity from tax enforcement even where there is no immunity from underlying state obligations.

2. There Is No Sovereign Immunity Exception for Tax Foreclosures. Contrary to the submission of petitioners and *amici*, there is no general "in rem" exception stripping away sovereign immunity in enforcement actions (as here) involving property in a sovereign's possession. To hold otherwise for Tribes would be inconsistent with, and undermine, the background principle of federal sovereign immunity that protects other sovereigns (unless changed by Congress or, in the foreign-sovereign context, the President).

For States, Eleventh Amendment immunity protects against *in rem* libel actions in federal admiralty against ships in the State's possession (*see California v. Deep Sea Research, Inc.*, 523 U.S. 491 (1998) (discussing cases, distinguishing case of ship not in State's possession)) and also protects against quiet title actions (*see Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 281-82 (1997)). For foreign

Nations, the traditional immunity protected their ships, whether warships or commercial ships, from *in rem* libel actions. *The Schooner Exchange v. McFaddon*, 11 U.S. 116 (1812); *Berizzi Bros. Co. v. The Pesaro*, 271 U.S. 562 (1926) (ship owned and possessed by a foreign government and operated commercially immune to in rem libel action); *see also Long v. The Tampico*, 16 F. 491 (S.D.N.Y. 1883); *F.W. Stone Eng'g v. Petroleos Mexicanos de Mexico, D.F.*, 352 Pa. 12 (1945) (bank account of foreign instrumentality). For the federal government, it is long settled that state foreclosures on federal property for non-payment of taxes are barred by sovereign immunity even when Congress has lifted tax immunity.[7] Likewise as to foreign sovereigns: the background rule (subject to congressional or presidential limitation) is immunity from foreclosure, even when the property is taxable.[8]

---

[7] *United States v. Lewis County*, 175 F.3d 671, 674 (9th Cir. 1998); *United States v. County of Richland*, 500 F. Supp. 312, 315-16 (D.S.C. 1980); *United States v. Davidson*, 139 F.2d 908, 911 (5th Cir. 1943); *United States v. Alabama*, 313 U.S. 274, 281-82 (1941); *BF Partners, LLC v. Estate of McSorley*, 2005 WL 1335150, at *7 n.4 (W.D. Mich. June 6, 2005) (GNMA not subject to tax foreclosure); *Detroit Leasing Co. v. Yepez*, 2005 U.S. Dist. LEXIS 20422, at *8 (E.D. Mich. 2005); *cf. Sec'y HUD v. Sky Meadow Ass'n*, 117 F. Supp. 2d 970 (C.D. Cal. 2000) (foreclosure by homeowner's association); *United States v. City of Newark*, 2009 WL 3230892 (D.N.J. Sept. 29, 2009) (foreclosure for unpaid water and sewer fees).

[8] Restatement (Second) of Foreign Relations Law of the United States, § 65, Comment d (1965); *City of Englewood v. Socialist People's Libyan Arab Jamahiriya*, 773 F.2d 31, 36 (3d Cir. 1985); *In the Matter of Foreclosure of Tax Liens*, 255 N.Y.S.2d 178 (Westchester Cty. Ct. 1964) (immunity to foreclosure of tax lien on residences for diplomats); *cf.*

Seeking to show otherwise for *foreign* sovereigns, *amicus* Town of Lenox (though not petitioners or the State *amici*) latches onto and misreads this Court's decision in *Permanent Mission of Indian v. City of New York*, 551 U.S. 193 (2007), as if it ruled that a longstanding "immovable property" exception to foreign sovereign immunity allowed a country to foreclose on another country's (non-consular) real property located in the former's territory. Lenox Br. 5 (alleging "blackletter federal common law for nearly 200 years"). That contention is wrong, about both *Permanent Mission* (which did not involve or rule on foreclosure or any form of execution) and the historical "immovable property" exception (for which Lenox cites not a single case showing its invocation to support a tax foreclosure against real property). The "immovable property" exception and foreclosure have always been separate subjects, and Lenox is fundamentally wrong in conflating them.

At common law, a foreign nation had sovereign immunity against enforcement actions involving its property. *See Kiowa*, 523 U.S. at 759 ("While the holding was narrow, '[*The Schooner Exchange*] came to be regarded as extending virtually absolute immunity to foreign sovereigns.'") (citation omitted). *The Schooner Exchange* confirmed the broad sovereign immunity from the execution of process against a foreign nation's property (in that case a ship), while noting that a "person who happens to be a prince" (11 U.S. at 145) might lack sovereign

---

Knocklong Corp. v. Kingdom of Afghanistan, 167 N.Y.S.2d 285 (Nassau Cty. Ct. 1957) (dismissing suit by private party to enforce tax deed on property acquired for diplomatic residence).

immunity against actions involving property he owns as an individual (*see id.* at 144 (same distinction)).[9] Lenox identifies no authority establishing a recognized realty exception to the absolute immunity of foreign sovereigns to execution, whether for tax collection or private suits. As late as 1965, the Restatement (Second) of Foreign Relations Law, after noting the fundamental distinction between a state's "prescriptive" jurisdiction to tax or regulate and its immunity from enforcement, stated without exception that "*no case has been found in which the property of a foreign government has been subject to foreclosure of a tax lien or a tax sale*" and that "[t]he [immunity] rule stated in this Section prevents the actual enforcement against the property of a foreign state of a tax claim of the territorial state." § 65, cmt. d (emphasis added).

The "immovable property" exception to immunity allowed local courts to decide "all disputes over use or right to use real property within its own domain" (*Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (D.C. Cir. 1984)), it did not curtail, or even address, sovereign immunity from foreclosure or other execution. Even the 1965 Restatement (updating traditional immunity law), in stating an "immovable property" exception to the general Section 65 immunity rule (*see* § 68(b) & cmt. d), expressly stated that the

---

[9] *See French Republic v. Bd. of Supervisors*, 200 Ky. 18, 21-22 (1923) (exempting French government-owned tobacco from taxation in part because sovereign immunity precludes collection); 5 Op. Atty. Gen. Mass. 445 (1920) (same as to property stored by foreign governments within the state); Wm. W. Bishop, Jr., Immunity From Taxation of Foreign State-Owned Property, 46 Am. J. Int'l L. 239, 255 (1952).

immunity rule of Section 65 governed for tax enforcement—it "prevents [tax] enforcement" (§ 65, cmt. d))—confirming that the Section 68 exception was not an exception for tax foreclosures. Similarly, when Congress in 1976 enacted the Foreign Sovereign Immunity Act (FSIA), it treated the "immovable property" exception (28 U.S.C. § 1605(a)(4)) separately from matters of execution such as foreclosure (28 U.S.C. §§ 1609-1611). These have always been distinct matters. In *Permanent Mission* itself, this Court held that the FSIA "immovable property" exception allowed a declaratory judgment action to establish the validity of a tax lien, but it did not address foreclosure, except to note the City's concession that it could *not* foreclose even once the lien was confirmed. 551 U.S. at 197 n.1 (despite inability to foreclose, confirmation of tax lien mattered because of effect on future sale, voluntary compliance, and federal government pressure).

Even in the foreign-nation setting, therefore, the background rule provided for sovereign immunity against foreclosure. Of course, in the FSIA, Congress limited that background rule for foreign sovereigns in certain respects, in the execution sections of the statute, after weighing the various policy interests involved. *Permanent Mission*, 551 U.S. at 199 (FSIA adopted restrictive theory). But Congress has not changed the rule for Tribes, and it is up to Congress to decide whether to eliminate immunity against foreclosure. *Kiowa*, 523 U.S. at 758. Leaving that judgment to Congress is particularly important for tribal *land*—here, land within the Tribe's aboriginal territory and treaty reservation—which Congress has long accorded distinctive protection, including the processes for creation of trust status involved here.

See, e.g., 25 U.S.C. § 177 (restrictions against alienation); 25 U.S.C. §§ 462, 463 (restoring tribal land rights and extending restrictions).

The Town of Lenox (like the Counties below, but not in this Court) also relies on *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), and its determination that railroad property acquired by Georgia in Tennessee was subject to Tennessee's power of eminent domain. But *City of Chattanooga* does not conflict with the Second Circuit's decision, for at least two reasons. First, and decisively, a State's recognition of any immunity of other States from suit in its own courts is a matter of state law, not of federal law. *Nevada v. Hall*, 440 U.S. 410 (1979). This Court already has indicated that *City of Chattanooga* merely exemplifies the *Hall* principle, which allows a State to make its own policy judgments about its own recognition of immunity of other States in its courts. *Id.* at 426 n.29. For tribal sovereign immunity, a matter of federal law, such judgments are up to Congress. Second, *City of Chattanooga* did not involve a tax foreclosure but an exercise of eminent domain, which presents different issues.[10]

---

[10] Eminent domain is not a form of enforcement; it involves a sovereign's need to use a particular piece of property within its territory, not an interest in mere proceeds to satisfy some obligation that could be satisfied by other means; it must protect the property owner's financial interests through just compensation; and the property owner cannot halt the proceeding by satisfying an underlying obligation. "Liens, whether equitable or legal, are merely a means of satisfying a claim for the recovery of money." *Dep't of Army v. Blue Fox, Inc.*, 525 U.S. 255, 262 (1999) (equitable lien does not avoid federal sovereign immunity). A foreclosure case is not an

Thus, in every relevant context, the federal background rule of sovereign immunity, unless altered by Congress, contains no enforcement exception allowing tax foreclosures.

B. *Sherrill* Did Not Involve, or Alter the Law on, Sovereign Immunity from Suit.

Contrary to the primary submission of the petition, the Second Circuit's ruling is perfectly consistent with this Court's *Sherrill* decision. The issues presented to and decided by this Court were entirely about governance (including taxation) authority over particular land. There was no issue of immunity from suit, and the Court did not silently alter the longstanding separate doctrine of tribal sovereign immunity from suit. The petition, in relying on *Sherrill*, ignores the well-established distinction between the two topics.

The Oneida Nation in *Sherrill* had argued that, when it reacquired reservation land that had been alienated from its possession contrary to federal law, the land reverted to sovereign Indian land with concomitant immunity from state property taxation. When the Second Circuit agreed, the petition presented four questions for review, all concerning governance authority over that land. 03-855 Pet. *i.* This Court rejected that theory and held, as the Oneida Nation acknowledged in the Second Circuit below, "that equity has stripped away the Oneidas' federal tax immunity and sovereignty over reacquired lands." Oneida Nation CA Br. 1. The

---

appropriate vehicle for addressing distinctive aspects of eminent domain.

ruling, resting on "equitable considerations" (544 U.S. at 214), was entirely about governance authority over land, as the Court's repeated statements of the issue and its holding confirm. 544 U.S. at 221 (history "render[ed] inequitable the piecemeal shift in *governance* this suit seeks unilaterally to initiate"), 202 ("governance"; "regulatory authority"), 202-03 ("We hold that the Tribe cannot unilaterally revive its ancient *sovereignty*, in whole or in part, *over the parcels at issue*."), 212 ("the imposition of property taxes"; "tax exempt"), 213 ("*sovereign dominion over the parcels*"), 214 ("sovereign immunity *from local taxation on parcels of land*"; "governance"), 215 ("*sovereignty over land*"), 215-16 ("regulatory jurisdiction"), 218 ("*dominion and sovereignty over territory*"; "*sovereign control over territory*"), 219 ("*sovereign control over land*"), 220 ("sovereign control" by Tribe would "free the parcels from local zoning or other regulatory controls"), 220-21 ("*sovereign control over territory*"), 221 ("*sovereign authority over territory*"; "piecemeal *shift in governance*"). (All emphases added).

There was no issue of sovereign immunity *from suit* (enforcement), which is not territory-dependent but only party-status-based, in this Court in *Sherrill*. Although the lower courts addressed one issue of sovereign immunity from suit, that issue was not presented to or addressed by this Court.[11] When

---

[11] The City of Sherrill had sued tribal officials for, *inter alia*, failing to remit sales taxes. The Second Circuit held that claim to be "no different from a claim against the tribe itself for non-payment of sales taxes," and concluded: "since the District Court correctly concluded that these officers were immune from suit on the claims related to collection of sales taxes, we affirm the dismissal of" the claim against the officials. 337 F.3d at

this Court, in footnote 7, stated that "tax immunity" was not a defense to eviction, it was not discussing sovereign immunity from suit, but the unavailability of immunity from the underlying taxation, whether asserted affirmatively or defensively. 544 U.S. at 214 n.7 (responding to 544 U.S. at 225-26 (Stevens, J., dissenting)). *See* CA App. 864 (State's concession). And when the Court used the phrase "sovereign immunity," it did not use the phrase alone, but as part of "sovereign immunity *from local taxation*" (544 U.S. at 214 (emphasis added)), again referring to the underlying legal obligation, not the distinct immunity from suit.

The Second Circuit thus correctly understood that *Sherrill* addressed a different issue from the issue here and left the doctrine of tribal sovereign immunity from suit untouched. [12]

---

169. The City did not petition from, and this Court nowhere discussed, that ruling. (New York had followed and continues to follow a policy of sales tax forbearance for tribes. *See N.Y. Ass'n of Convenience Stores v. Urbach*, 712 N.Y.S.2d 220 (N.Y. App. 2000), *lv. to appeal den.*, 96 N.Y. 2d 717 (2001)).

[12] In *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 273 (2d Cir. 2005), the Second Circuit, speaking through Judge Cabranes (who concurred here), relied on *Sherrill* to bar a tribal suit for rental damages. More recently, the Second Circuit construed *Sherrill* (and *Cayuga*) to require dismissal of the Oneida Nation's and United States' claims for disgorgement of the State's profits from the purchase of Oneida land in violation of federal law. *Oneida Indian Nation v. New York*, ___F.3d___, 2010 WL 3078266 (2d Cir. Aug. 9, 2010).

C. *Yakima* Did Not Involve, or Alter the Law on, Sovereign Immunity from Suit.

Petitioners and *amici* are incorrect in claiming that the Court decided that tribal sovereign immunity allows tax foreclosures of tribally owned land in *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251 (1992). Pet. 10. Quite simply, there was no tribal sovereign immunity issue presented in that case and no issue of foreclosure of tribally owned land. Rather, as the Court made explicit, the case presented and the Court decided only questions of state taxing authority, not tax enforcement. *Id.* at 253 ("The question presented by these consolidated cases is whether the County of Yakima may impose an ad valorem tax on so-called 'fee-patented' land located within the Yakima Indian Reservation, and an excise tax on sales of such land."); *id.* at 270 ("We hold that the General Allotment Act permits Yakima County to impose an ad valorem tax on reservation land patented in fee pursuant to the Act"); *see also id.* at 270 (Blackmun, J., dissenting in part) ("I dissent from [the Court's] conclusion that the county may impose ad valorem taxes on Indian-owned fee-patented lands.").

The parties presented contentions only about the State's imposition of legal obligations (tax liability). They did not ask for a ruling on any foreclosure against Tribe-owned property. That was no accident: the case was prompted by foreclosure proceedings against *members* (who could not claim sovereign immunity from suit); and the Tribe presented only arguments that applied equally to its

property and that of its members.[13] *Yakima* thus did not alter the uniform background law of tribal sovereign immunity that bars foreclosure.

D. There Is No Basis for Revisiting the Issue to Consider Judicially Imposing a New Limit on Immunity.

Petitioners and *amici* demonstrate no lower-court conflict or other reason for this Court to revisit tribal sovereign immunity from suit, with its established application to foreclosure actions. Any revision of immunity should be left to Congress, which can readily balance competing interests. There is no justification for this Court's intervention, certainly not at this time.

1. There Is No Lower Court Conflict Or Real-World Problem. Neither petitioners nor *amici* identify a single other federal-law case involving or approving a tax foreclosure against a Tribe—to which the relevant question presented is

---

[13] The petitions in *Yakima* presented questions about state tax authority on tribal land, none involving tax foreclosure or other enforcement. Pet. Br., 1991 WL 521727, at **i*; Resp. Br., 1991 WL 521292, at **i*. The parties nowhere sought a ruling on enforcement immunity. The United States has explained that, in *Yakima*, "[t]he Tribe did not urge any distinction in the analysis to be applied to the two categories of land," Tribe-owned and member-owned, partly because the underlying foreclosures triggering the federal case were against members. *See* U.S. Amicus Br., *Cass County, Minnesota v. Leech Lake Band of Chippewa Indians*, 1998 WL 25517, at 11 n.2 . *See* Tr. of Oral Argument in *Yakima*, 1991 WL 636297, at *27 ("This action was instituted by the Yakima Nation in response to the foreclosure and the pending tax sales of the lands and homes of 31 members of the tribe."); U.S. Amicus Br. in *Yakima*, 1991 WL 11009207, at *2 (same); Resp. Br., 1991 WL 521292, at *9 (same).

limited (Pet. *i*). That means, first, that there is no decisional conflict warranting this Court's attention and, second, that there is no real-world problem involving tribal sovereign immunity and tax foreclosures.

No other federal court of appeals has disagreed with the Second Circuit or even addressed the issue here. The petition nowhere alleges an intercircuit conflict. It cites only two federal-court decisions, both by district courts (one from the Second Circuit). Neither involved sovereign immunity from foreclosure to enforce a tax obligation.

New York v. Shinnecock Indian Nation, 523 F. Supp. 2d 185 (E.D.N.Y. 2007), is far afield. It did not involve an "in rem" proceeding at all, or taxation or foreclosure. It involved suits, against a Tribe and its officials, seeking personal injunctions to enforce certain land use regulations involving a construction project. The district court's clearly overbroad statement about *Sherrill* (*id.* at 298) was triply unnecessary to the decision where the Tribe was (and is) not yet federally recognized, and where the court held that the Tribe had waived any sovereign immunity from suit (*id.* at 297-98) and that the Tribe's presence was immaterial because sovereign immunity was no barrier to prospectively enjoining the co-defendant tribal *officials* (*id.* at 298-99). That misreading has been corrected by the Second Circuit's decision below, and would not, in any event, justify review of the quite different foreclosure issue here. Unlike *Shinnecock*, this case presents no regulatory enforcement issue.

The other district court decision cited by petitioners (in a footnote, Pet. 18 n.11), *Oneida Tribe*

of Indians of Wisconsin v. Village of Hobart, 542 F. Supp. 2d 908 (E.D. Wis. 2008), involved neither foreclosure nor, indeed, tribal sovereign immunity. Rather, it involved condemnation of land for a road, and the Tribe did not raise a sovereign immunity defense at all, relying instead on federal restrictions against alienation. The district court concluded that Congress had authorized state condemnation of land that had previously been allotted. *See* 25 U.S.C. § 357. Its discussion of tax foreclosure and sovereign immunity is pure *dicta*.

Amici Town of Lenox (at 16) and Towns of Verona and Vernon (at 17-18) cite two decisions of state supreme courts. Neither involved tax foreclosure. Both also involved eleventh-hour transfers of land owned by non-Indians to a Tribe for the specific purpose of trying to thwart certain adjudications by means of tribal sovereign immunity.

Anderson & Middleton Lumber Co. v. Quinault Indian Nation, 929 P.2d 379 (Wash. 1996), involved a pending quiet-title and partition action. In allowing it to proceed, the court noted not only that the interests at issue had been transferred to the Tribe after the suit commenced (*id.* at 381) but that the Tribe "would lose no property or interest for which it holds legal title" in the case (*id.* at 385). And *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land*, 643 N.W.2d 685 (N.D. 2002), involved an eminent domain proceeding. The court stressed that the Tribe had acquired its interest on the eve of the long-planned action and was not even a necessary party to a proceeding that, after all, the Tribe could not stop by satisfying any underlying liability (which was not at issue). *Id.* at 688-90. Despite some broad

language in both opinions, both cases are plainly different from the present case.

Petitioners and *amici*, including the States (Pet. 15-18; State Br. 13), cannot point to any lower court conflict on the tax foreclosure issue presented. They therefore must resort to positing a hypothetical problem of widespread tribal acquisition of non-reservation land, refusal to pay property taxes, and invocation of sovereign immunity from suit. But that suggestion—even apart from its inapplicability to the land at issue here, all within the Tribe's aboriginal territory and treaty reservation—is entirely hypothetical.

There is no real-world problem of this sort. There are good reasons that no such problem exists or is likely to develop, including 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. Those are reasons not to expect the posited hypothetical to materialize now any more than it did after *Potowatomi* or *Kiowa*. In any event, the plain fact is that no such problem exists now to warrant intervention.

2. Any New Limitations On Immunity From Suit Should Be Left To Congress. *Kiowa* and *Potowatomi* reaffirmed tribal sovereign immunity, which, as shown above, includes immunity against tax enforcement. The petition nowhere directly asks this Court to overrule precedent, saying only that *Kiowa* and *Potowatomi* are "inapposite" (Pet. 13, 15) and vaguely urging the Court to "revisit"

tribal sovereign immunity generally (Pet. 15-19). Absent a direct request to overrule existing precedent, the Court generally declines to do so.

In any event, whether viewed as a request for overruling or as a request for a dramatic new judicial limitation, petitioners' arguments cannot justify reversal of the Second Circuit's recognition of immunity here. Both as a matter of *stare decisis* and independently of that doctrine, there are especially strong reasons to respect the immunity principle until Congress decides to limit it.

Stare decisis is particularly strong where Congress can act but has not. *See Watson v. United States*, 552 U.S. 74, 83 (2007) (congressional inaction for 14 years increases the precedential force of earlier decision); *IBP, Inc. v. Alvarez*, 546 U.S. 21, 32 (2005). More particularly, this Court in both *Kiowa* and *Potowatomi* noted that revision of tribal sovereign immunity is for Congress—a principle of deference having particularly strong application when the congressionally established trust process and historical tribal land are at stake. Congress is fully aware of tribal sovereign immunity. But, even while acting in the area, Congress has not curtailed that immunity since *Kiowa* or *Potowatomi*, and there is no reason to think the political process in any way inadequate or unresponsive to concrete state concerns.[14] *Cf.* S. Rep. 100-446, at 3-4 (1988)

---

[14] In the 105th Congress, shortly after *Kiowa*, Senator Gorton introduced the American Indian Contract Enforcement Act (S.2299) and the American Indian Tort Liability Insurance Act (S.2302). Referring to the Court's decision, the bills would have substantially limited tribal sovereign immunity, but they were not reported out of committee. In 2000, after hearings,

(congressional response to *Cabazon* decision on tribal gaming).

In both *Kiowa* (523 U.S. at 758), and *Potowatomi* (498 U.S. at 510), the Court rejected arguments to restrict tribal sovereign immunity based on the expansion of tribal business activity on and off reservations, much like the Counties' argument here. Pet. 15-17. Instead, the Court in both cases deferred to Congress to make the policy judgment about the interests of non-Indian governments and the important sovereign character of Tribes. Any curtailment of the latter would affect more than 500 federally recognized Tribes. It would therefore require, at the very least, significant real-world harm to the former. Only Congress can make that judgment, and the plain fact is that the predictions of extreme abuses in *Potowatomi* and *Kiowa* have proved false—as the absence of congressional action in the years since *Potowatomi* and *Kiowa* confirms.

As to this case particularly, the specific circumstances and consequences undermine, rather than bolster, the argument for review. In addition, the district court relied on several alternative grounds to enjoin foreclosure in this case. Pet. App. 23a (state tax exemptions, due process, and federal restrictions against alienation of tribal land); Pet.

Congress enacted the Indian Tribal Economic Development and Contract Encouragement Act of 2000, Pub. L. 106-179, 114 Stat. 46, which required only disclosure or waiver of sovereign immunity in certain contracts requiring federal approval. In the 108th Congress, S.521 would have required certain disclosures related to tribal sovereign immunity in leases, but it was amended to eliminate that requirement and never enacted.

App. 65a-68a (restrictions); 72a-73a (due process); 73a-74a (state tax exemptions). The Second Circuit did not reach those grounds. The strength of those alternative grounds to reach the same result, while not precluding review on the ground adopted by the Second Circuit, further weakens any argument for review of this particular case.

II. THE DISESTABLISHMENT QUESTION WAS NOT DECIDED BELOW AND DOES NOT WARRANT REVIEW.

The question whether the 1838 Treaty of Buffalo Creek, 7 Stat. 550 (Jan. 15, 1838), *amended* 7 Stat. 586 (May 20, 1842), disestablished the Oneida reservation is not worthy of this Court's review, either independently or in conjunction with the sovereign immunity issue. The Second Circuit below did not decide it. Resolution of that fact-intensive question affects only the Oneida Nation, because the controlling treaty language and negotiating history are specific to the Oneidas. The disestablishment question was fully briefed in *Sherrill*, but the Court declined to decide it. 544 U.S. at 215 n.9. There is no reason to do so in this case.

The petition argues for review based on the potential effect of the decision in other cases (Pet. 22), but if the question matters in those cases, it can be decided if properly raised there (rather than in this case, where the Second Circuit found it unnecessary to decide the question and the Counties raised it only in passing (Counties CA Br. 99-103; Counties CA Reply Br. 34)). Moreover, the only such case the petition identifies is *Cayuga Indian Nation v. Gould*, 14 N.Y.3d 614 (2010), which could not

justify review here—even aside from the fact that the State has promulgated new regulations to supersede the law at issue in *Gould*. 14 N.Y.3d at 629 n.6 (noting proposed regulations). *Gould* involves a different Tribe (the Cayugas) with rights governed by different treaty language and a different treaty history—as illustrated by the fact that the *amicus* brief filed by Cayuga and Seneca Counties in the present matter dwells on Cayuga history (such as an arbitral award having nothing to do with the Oneida Nation) without even analyzing the distinct Oneida history. Cayuga Br. 10.[15]

---

[15] In *Gould*, the court held that land that the Cayugas had reacquired within their federal reservation boundary was a "qualified reservation" entitled to special treatment under state tax law, notwithstanding the conceded absence of any tribal sovereignty over the land, because the Cayuga reservation was still federally recognized. 14 N.Y.3d at 635-45. The court cited the Second Circuit's opinion below (noting the earlier ruling that the Oneida reservation was still recognized) merely as confirming that loss of tribal sovereign authority because of *Sherrill* does not eliminate federal recognition of the reservation. *Id.* at 642. The three dissenters in *Gould* did not question the reservation-status conclusion. *Id.* at 654-55. The court explicitly reserved the state-law question of reservation status for purposes of the state property-tax exemption. *Id.* at 646.

The petition for certiorari, *Gould v. Cayuga Indian Nation*, No. 10-206 (filed Aug. 9, 2010), insofar as it discusses federal treaties, makes arguments specific to the Cayugas. The argument that the Cayuga reservation lacked federal treaty protection is inapplicable to the Oneida Nation, whose land had been indisputably protected (before the first land sale at issue) by a separate federal treaty provision not applicable to the Cayugas. *See* Treaty with the Six Nations (Ft. Stanwix), 7 Stat. 15 (Oct. 22, 1784) ("The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are

The Second Circuit observed that its holding in the *Sherrill* case that the Oneida reservation was *not* disestablished—a conclusion this Court expressly left undisturbed in *Sherrill* (544 U.S. at 215 n.9)—"remains the controlling law of this circuit" (Pet. App. 16a-17a n.6). That observation does not warrant review. It is indisputably true, and it does not alter the fact that the court did not rely on any conclusion about disestablishment in its judgment here. The judgment in this case rests solely on the court's resolution of the tribal sovereign immunity issue, regardless of reservation status. *See Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 723 n.7 (1982) (declining to reach claims of discrimination addressed in court of appeals' opinion but not involved in the judgment); *FCC v. Pacifica Foundation*, 438 U.S. 726, 734 (1978) (declining to reach constitutionality of speech addressed by FCC ruling but outside the factual context of the case).

The Second Circuit was also correct in its *Sherrill* opinion that the reservation was not disestablished. 337 F.3d at 158-65. The petition principally argues (Pet. 20, 22-23) for a kind of equitable disestablishment, but this Court already rejected such a notion in *Sherrill*, reaffirming that only Congress can disestablish a reservation. 544 U.S. at 215 n.9. The full merits briefing in *Sherrill* by the Oneida Nation (03-855 Resp. Br. 29-42) and the United States (03-855 U.S. Amicus Br. 16-24) showed that the Treaty of Buffalo Creek did not

---

settled."). The argument that the Treaty of Buffalo Creek disestablished the Cayuga reservation depends on specific treaty language and negotiating history different from the Oneidas'.

disestablish the Oneida reservation because the treaty did not address the land illegally alienated before the treaty and because the federal commissioner assured the Oneidas that they were not required to move or to sell the land they still possessed. *See Minnesota v. Mille Lacs Band*, 526 U.S. 172 (1999) (treaty does not cede tribal rights not referred to); *City of Sherrill v. Oneida Indian Nation*, 337 F.3d at 161-62 (federal treaty commissioner assured the Oneidas they need not sell land or move).[16]

[16] Petitioners' unsupported assertion that the Oneida reservation had "no physical existence in New York for approximately 200 years" (Pet. 22) is false. Judicial rulings and governmental determinations are to the contrary. *See* F. Hugo, Manual for Use of the Legislature of the State of New York 270 (1918) (listing Oneida reservation among "Indian reservations in New York" in 1855, 1865, 1875, 1892, 1910, and 1915); *United States v. Boylan*, 265 F. 165 (2d Cir. 1920) (upholding finding of continuous tribal possession); Compilation of Material Relating to the Indians of the United States, H.R. Rep. No. 81-30, at 80 (1950) (listing Oneida reservation in New York); *Waterman v. Mayor*, 280 N.Y.S.2d 927, 930 (Sup. Ct. 1967) ("the Oneida Indian Reservation does now exist"). Maps prepared for the Commissioner of Indian Affairs between 1883 and 1917 and lodged with the Court in *Sherrill* show the Oneida reservation in New York.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

Richard G. Taranto
Farr & Taranto
1150 18th Street, N.W.
Washington, DC 20036
(202) 775-0184

Michael R. Smith
Counsel of Record
David A. Reiser
Zuckerman Spaeder LLP
1800 M Street, N.W.
Washington, DC 20036
(202) 778-1800

Peter D. Carmen
Meghan Murphy Beakman
Oneida Nation Legal Department
5218 Patrick Road
Verona, New York 13478
(315) 361-8687

Counsel for Respondent