No. 10-72

In the
Supreme Court of the United States

MADISON COUNTY AND ONEIDA COUNTY, NEW YORK,
PETITIONERS,

v.

ONEIDA INDIAN NATION OF NEW YORK,
RESPONDENT,

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,
PUTATIVE INTERVENOR.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF *AMICI CURIAE* TOWN OF VERONA AND TOWN OF VERNON, NEW YORK IN SUPPORT OF PETITIONERS MADISON COUNTY AND ONEIDA COUNTY, NEW YORK

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PRELIMINARY STATEMENT

The Towns of Verona and Vernon, New York (the "Towns"), respectfully submit this *amicus curiae* brief in support of the Petition for a Writ of Certiorari to the United States Second Circuit Court of Appeals submitted by the Counties of Madison and Oneida, New York, with respect to *Oneida Indian Nation of New York v. Madison County & Oneida County, New York*, 605 F.3d 149 (2d Cir. 2010) ("Pet. App.").[1]

INTERESTS OF AMICI

In *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005), this Court held that the Oneida Indian Nation of New York ("OIN"), the Indian tribe at issue here, could not through open-market purchases of land revive its former sovereignty over such land so as to exempt it from the payment of *ad valorem* property taxes. In part, the Court premised this conclusion on the disruptive practical consequences to the governance of central New York's counties and towns that would result from the OIN's unilateral reestablishment of sovereign control. In view of those consequences, this Court held, "standards of federal Indian law and federal equity practice" precluded the OIN from rekindling "embers of sovereignty that long ago grew cold." *Id.* at 214.

In recent years, the OIN has acquired fee title to over 17,000 acres of land scattered over 13 towns, three villages and two cities in the Counties of Madison and Oneida, New York.[2] Verona and Vernon are two of those towns.[3] In

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[1] Pursuant to S. Ct. Rule 37.2, counsel of record for all parties received notice at least ten days prior to the due date of the Towns' intention to file this brief. Pursuant to Rule 37.4, the authorized law officer of the Towns appears as co-counsel.

[2] O'BRIEN & GERE, COMMENTS ON THE ONEIDA INDIAN NATION'S LAND IN TRUST APPLICATION (GROUP 3 PARCELS) ONEIDA AND MADISON COUNTIES, NY, STATE OF NEW YORK EXECUTIVE CHAMBER, ALBANY,

Verona, the OIN purchased 224 separate parcels, totaling 8,565 acres, or about 19% of the Town's total acreage.[4] The Turning Stone Casino Resort, by far the most valuable of the OIN's properties, is located in Verona. In Vernon, the OIN purchased 37 separate parcels, totaling 1,919 acres or about 8% of the Town's acreage.[5] The Atunyote Golf Club, the OIN's newly constructed PGA-championship golf course, is in Vernon.

Under this Court's opinion in *Sherrill*, these parcels fall within the sovereign jurisdiction of the State of New York and its municipalities, including the *amici* Towns, and the OIN lacks authority to allege and invoke sovereignty over the land. Nevertheless, the OIN continues to assert sovereign immunity over its landholdings to shield them from local taxation, zoning, environmental and all other regulatory oversight. As a result, the Towns and their residents suffer first-hand the practical difficulties of checkerboard jurisdiction that this Court recognized in *Sherrill*.

The "embers of sovereignty" that this Court found extinguished in *Sherrill* continue to smolder in the Towns of Verona and Vernon. The *amici* therefore have a significant interest in a definitive resolution of the questions presented in this case.

NEW YORK 1 (2006) [hereinafter "O'Brien & Gere Group 3 Report"], *available at* http://www.dec.ny.gov/docs/legal_protection_pdf/oingrp3rprt.pdf.

[3] Verona, founded in 1802, occupies 69.7 square miles in central New York and in 2000 had a population of 6,425 persons. Vernon, also founded in 1802, occupies 38.1 square miles and had a population in 2000 of 5,335 persons.

[4] O'Brien & Gere Group 3 Report, *supra* note 2, at 54.

[5] *Id.*

SUMMARY OF THE ARGUMENT

The Court should grant *certiorari* because this case presents a matter of substantial importance appropriate for review under Rule 10 of the Rules of the United States Supreme Court. Despite this Court's opinion in *Sherrill*, the OIN continues to assert sovereignty over its fee lands in central New York and to resist the lawful authority of the State of New York and its municipalities. Local communities cannot self-govern and cannot maintain their essential character, because land use, environmental and other laws are effective only if they apply uniformly and equitably over an extended geographic area. This is a matter of national concern, as tribes across the nation purchase lands and raise tribal sovereignty to shield their landholdings from state and local laws and regulations.

The Court should grant the Petition because the lower court decided an important question of federal law in a way that conflicts with relevant decisions of this Court. U.S. Sup. Ct. R. 10(c). The lower court barred Petitioners, on tribal sovereignty grounds, from foreclosing on the OIN's fee lands for non-payment of property taxes. This is irreconcilable with this Court's conclusion in *Sherrill*, that the OIN cannot assert sovereignty, either affirmatively or defensively, to immunize its fee lands from the imposition and collection of property taxes. If the tribe can invoke sovereignty to prevent foreclosure, this will vitiate the Court's holding in *Sherrill*. The lower court's decision also conflicts with *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251 (1992), which draws a distinction between *in rem* and *in personam* proceedings in the context of an assertion of tribal immunity, and affirms the power of state and local taxing authorities to bring an *in rem* foreclosure proceedings against a tribe's fee lands to collect lawfully imposed property taxes. This Court's review is necessary to correct the lower court's error.

The Court should also grant the Petition because the court below decided an important federal question in a way that conflicts with the decisions of two state courts of last resort. U.S. Sup. Ct. R. 10(a). Specifically, the decision below conflicts with the Supreme Court of the State of North Dakota in *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 2002 ND 83, 643 N.W.2d 685 (2002), which allowed a state court to exercise *in rem* jurisdiction in a proceeding to condemn land held in fee by an Indian tribe, notwithstanding the assertion of tribal sovereign immunity. It also conflicts with the Supreme Court of the State of Washington in *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 869-872, 929 P.2d 379, 383-384 (1996), which allowed a state court to assert jurisdiction over land transferred to an Indian tribe, despite a claim of sovereign immunity, because the land was alienable and encumberable under a federally issued fee patent, and the action ran against the property *in rem* and not against the tribe *in personam*. This Court's review is necessary to resolve the conflict.

ARGUMENT

POINT I

THIS CASE PRESENTS A MATTER OF SUBSTANTIAL IMPORTANCE WITH RECURRING PRACTICAL SIGNIFICANCE

The OIN's landholdings in Verona and Vernon are part of the fabric of the community, Indian and non-Indian parcels woven together through roads, bridges, water, sewers, schools, and other community resources. Post-*Sherrill*, the OIN has continued to act with respect to its lands as if it is a sovereign nation, independent and completely immune from the reach of state and local laws and regulations. The OIN's assertion of sovereignty raises a host of issues expanding far beyond the property taxes at issue here, to critical issues regarding land use, code

enforcement, environmental protection and other public health, safety and welfare concerns.

The economic impact of the OIN's refusal to pay taxes is significant. In Verona, where the Turning Stone Casino is located, the OIN's annual property tax liability in 2006 (county and town combined) was $3.8 million. This represented 98% of the total county and town property taxes (excluding school taxes) on all other taxable land in Verona combined.[6] To put this into a local perspective, in 2006, the loss of $445,665 in real property tax revenue represented about 20% of Verona's total 2006 budget. In Vernon, the loss of $7,089 in property tax revenue was equivalent to 263% of the Town's annual public safety spending in 2006, or 23% of its annual contracted utility services spending.[7] In 2010, the shortfall increased to $22,292, or 10% of Vernon's total tax levy. The loss of tax revenues strains the resources of local government and places a disproportionate burden upon taxpaying landowners.

The OIN's explosive growth and development has significantly increased the demand for municipal services to the OIN-owned land. The OIN's consumption of water is illustrative. The Turning Stone complex draws its water from the Town of Verona, which in turn relies upon the City of Oneida for its supply. The OIN's ever-increasing demand for water at Turning Stone, an estimated 600,000 gallons per day, far exceeds the tribe's permitted capacity of 150,000 gallons per day.[8] Ongoing unrestrained development, including the recent addition of the Atunyote Golf Club in Vernon, further strains limited resources. Verona bills the

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[6] O'Brien & Gere Group 3 Report, *supra* note 2, at 56.

[7] *Id*. at 57.

[8] Kent Gardner, CENTER FOR GOVERNMENTAL RESEARCH, INC., JURISDICTIONAL AND ECONOMIC IMPACTS OF GRANTING THE ONEIDA INDIAN NATION'S APPLICATION TO TAKE LANDS INTO TRUST IN ONEIDA AND MADISON COUNTIES 20, 31 (2006) [hereinafter "CGR REPORT"], *available at* http://www.madisoncounty.org/motf/judicial_eco.pdf.

OIN for water the same way that it bills its other water customers. Unlike other customers, however, if the OIN does not pay its bills, the Town cannot compel payment through an assessment on real property. Because the OIN claims sovereignty and refuses to participate in the permitting process, local government had no opportunity to plan for increases in system demand, to reconcile the needs of the OIN properties and the rest of the community, or to distribute the cost of necessary system upgrades. Having had no role at the planning stages, the Towns and other local municipalities now shoulder the burden of managing resources for the entire community.

Highway maintenance is another example. In 2006, the Turning Stone complex received more than 4.5 million visitors,[9] up from 3.5 million in 2000 and about 2.1 million in 1995.[10] Attendance during the week averages 3,000-5,000 visitors and grows to as many as 8,000 on weekends.[11] The increased traffic from the highway to the various OIN properties and enterprises, including the Turning Stone Casino, two hotels, 12 SavOn gas stations and convenience stores, golf courses and other businesses, burdens the transportation infrastructure and requires additional expenditures for maintenance. With the constant flow of traffic into the casino, night and day, it costs the Towns more to plow, sand and salt roads and bridges than before the OIN's commercial expansion. The increased costs arrive without a compensating increase in tax revenues.

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[9] Turning Stone Resort & Casino Media Club, http://www.turningstone.com/pressclub/ (follow "Press Kits: Turning Stone Overview" hyperlink).

[10] Traci Gregory, *Turning Stone Attendance Grows Amid Some Losses*, ALLBUSINESS, Dec. 8, 2006, http://www.allbusiness.com/accommodation-food-services/accommodation/4062344-1.html.

[11] CGR REPORT, *supra* note 8, at 31.

The OIN does not have a fire department. Instead, the Verona volunteer fire district provides fire protection and rescue services to the Turning Stone Casino and other OIN properties.[12] In 1997, the OIN built the 20-story Tower Hotel, the tallest building in the 143-mile corridor between Albany and Syracuse,[13] without complying with the New York State Environmental Quality Review Act or the local permitting process. To service the building, the Verona volunteer fire district incurs additional expenses to train firefighters in high-rise firefighting techniques, and for increased insurance expenses due to the heightened risks.[14] Local volunteer fire districts rely on local property tax revenues to purchase equipment, build facilities and pay operating expenses. The OIN, however, refuses to pay its property taxes.

In 1993, the OIN and the Verona fire district negotiated an agreement for fire protection services based on the square footage of the buildings serviced. As the OIN acquired more property within the fire district and grew its casino enterprise, the parties renegotiated the contract annually, often with disagreements on the appropriate payment rate. In 2004, the OIN unilaterally canceled the "square foot basis" rate and capped the payments at a fixed dollar amount, representing but a fraction of the amount that the former compensation formula would have yielded on the expanded casino-resort complex. Moreover, as the payments are voluntary, the OIN can discontinue them at any time.[15]

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[12] *Quarterly Check Presented to Verona FD*, OneidaIndianNation.com, May 3, 2010, http://www.oneidaindiannation.com/inthecommunity/92691064.html.

[13] *See* Turning Stone Resort & Casino Media Club, *supra* note 9.

[14] Aaron Gifford, *Experts: High-Rise Fires Need Massive, Immediate Response*, SYRACUSE POST-STANDARD, Feb. 26, 2006, at A-1; CGR REPORT, *supra* note 8, at 33.

[15] CGR REPORT, *supra* note 8, at 33.

Many residents in the Towns of Vernon and Verona and the City of Sherrill, OIN and non-Indian alike, send their children to the Vernon-Verona-Sherrill ("VVS") school district. The school district depends on two major sources of revenue to fund educational services: local property taxes and state educational aid. As of September 2005, the assessed value of OIN-owned property was $404,177,300, or about 48% of the total assessed property value in the VVS district.[16] On an annual basis, these parcels represent about $10.2 million in school district revenue, or 36.7% of the district's overall 2006 budget of $27.8 million. When the OIN refuses to pay its property taxes, this affects the district's ability to provide educational services to children, including the OIN's children, and triggers tax increases to non-Indian property taxpayers.[17] As the OIN purchases additional lands, the potential that the property tax revenue associated with the newly acquired lands will go unpaid increases.

The loss of taxes on the OIN properties means that other property owners, largely individual homeowners, farmers and small businesses, will shoulder a greater portion of the cost of municipal services. The OIN enjoys the benefits, in that tribal members consume water, travel on roads and bridges, receive fire protection and send their children to local schools, but it is the wider community, which is 99% non-Indian,[18] that foots the bill. This is a real and ongoing hardship to the residents, who are older and

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[16] O'Brien & Gere Group 3 Report, *supra* note 2, at 60-61.

[17] The taxpayers of Oneida County pay increased taxes on their county tax bills to satisfy the shortfall on the OIN properties and to make the towns and schools whole. Under the lower court's opinion, however, the Counties cannot take action to recoup those funds, as they could on other tax-delinquent lands, through foreclosure proceedings.

[18] U.S. Dept. of Commerce, Census Bureau, Census of Population and Housing, Summary Population and Housing Characteristics: New York, 2000 PHC-1-34, Table 3, pp. 119, 124 (July 2002), *available at* http://www.census.gov/prod/cen2000/phc-1-34.pdf.

poorer on average than the nation at large.[19] To make matters worse, the OIN's claimed immunity from and refusal to pay taxes gives OIN-owned businesses (hotels, restaurants, gas stations, convenience stores and other enterprises) an unfair competitive advantage over all the local businesses that do pay their taxes.

In addition to the burdens resulting from the loss of tax revenue, the inability to enforce land use and environmental laws and regulations has a profound impact on the administration of government. One of the central features that draws residents to Verona and Vernon is the character of these communities. Through comprehensive planning and zoning, local governments enact and implement laws, regulations and processes to protect community character and to provide a basis for future development. The Town of Vernon, for example, has a rich agricultural heritage. Through the comprehensive planning process, Vernon encourages an economic climate that supports and promotes the development of agribusiness.[20] The Town of Verona is characterized by rural land uses with residential homes spread sparsely throughout the town.[21] Verona uses its zoning ordinance to preserve its community's rural nature. In recent years, the OIN has undertaken its construction projects -- the casino, hotels, restaurants, golf courses, gas stations, convenience stores, and campgrounds -- without participating in the local planning, permitting and zoning processes.[22] Where, as here,

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[19] CGR REPORT, *supra* note 8, at 35; *see also* U.S. Dept. of Commerce, Census Bureau, Census of Population and Housing, Summary Population and Housing Characteristics: New York, 2000 PHC-1-34, Table 1, p. 24-25 (July 2002), *available at* http://www.census.gov/prod/cen2000/phc-1-34.pdf.

[20] O'Brien & Gere Group 3 Report, *supra* note 2, at 64, *citing* BARTON & LOGUIDICE, TOWN OF VERNON, COMMUNITY COMPREHENSIVE PLAN (Sept. 2005).

[21] *Id*. at 65.

[22] CGR REPORT, *supra* note 8, at 11.

a group claims exemption from planning and zoning requirements, it undermines the local government's ability to manage shared resources, to preserve the character of the community and to protect the land from environmental harm, governmental prerogatives for which the residents have justified expectations.

Environmental laws exist to protect human health and the environment through uniform and systematic requirements designed to limit and control pollutants and hazards. The OIN claims that it is an independent sovereign, not subject to state or local environmental regulations, and therefore does not need to obtain environmental approvals or to comply with state and local environmental standards. For example, the OIN built the golf course in Vernon after clear-cutting and burning trees on the heavily forested site without regard to the impact of the spread of smoke on neighboring landowners.[23] It operates its golf courses without regulatory oversight over chemical and pesticide application or the impact of run-off on streams and wetlands. Due to the complex interrelationships in the environment, the potential for harm extends far beyond the OIN's properties and into the surrounding areas.

Environmental impacts do not respect property boundaries. The effectiveness of land use and environmental laws rests on the ability of government to enforce the laws uniformly over a broad geographic area. The inability to enforce state environmental laws with respect to the OIN lands effectively prevents local government from protecting the environment for non-Indian property owners on lands adjacent or proximate to those lands.

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[23] *See* Elizabeth Cooper, *Nation's Projects Impacted Wetlands*, UTICA OBSERVER-DISPATCH, May 10, 2008, *available at* http://www.uticaod.com/news/x2118735187/Nations-projects-impacted-wetlands.

The impact of this case is far-reaching. The OIN's sovereignty claims, which manifest themselves here through the OIN's challenge to foreclosure proceedings for the non-payment of property taxes, vitiate the ability of local governments to govern and to meet the reasonable expectations of their citizens. If counties cannot enforce the payment of property taxes, then towns will encounter similar obstacles in implementing their municipal plans, zoning ordinances, and other laws designed to protect public health, safety and welfare. And if a tribe, through unilateral open market purchases, can deprive state and local governments of the power to exercise their sovereign authority, then it would not take much to revert vast expanses to Indian jurisdiction, rendering the land-into-trust process a needless formality.

This case has national implications, as tribes across the Nation purchase historical lands and raise the shield of tribal sovereign immunity to oust the state and local governments of jurisdiction. Unless municipalities have the ability to foreclose for the non-payment of taxes, their authority to govern will be meaningless, and large stretches of land will revert to Indian control, parcel by parcel, in derogation of the legitimate interests of others with a stake in the area's governance and well-being.

POINT II

THE LOWER COURT'S DECISION CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT

The Second Circuit held that the doctrine of "tribal immunity from taxation and other powers of the State, and tribal immunity from suit," bar the Counties from collecting *ad valorem* property taxes. Pet. App. 21a. This conclusion, which is irreconcilable with the Court's holdings in *Sherrill*, 544 U.S. 197, 214 (2005), and *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251 (1992), paralyzes local municipalities and frees the

OIN to continue to flout state and local laws, to the detriment of the community at large.

A. The Decision Below Conflicts with *Sherrill* and *Yakima*

The court below erred in failing to give effect to this Court's holding in *Sherrill* that the OIN cannot raise sovereignty, either affirmatively or defensively, to immunize its fee lands from the imposition of property taxes. Importantly, *Sherrill* was an action for eviction, following the OIN's refusal to pay property taxes in the City of Sherrill. The tribe sought declaratory and injunctive relief, based on its claim of sovereign immunity from local taxation, to prevent the City from enforcing payment. This Court rejected the tribe's claim of immunity, denied its request for injunctive and declaratory relief, and upheld Sherrill's authority to evict the OIN for non-payment of taxes. 544 U.S. at 202, 214 & n.7.

In rejecting the OIN's position, this Court placed "heavy weight" on New York State's "justifiable expectations," grounded in two centuries of the exercise of state regulatory jurisdiction, which until recently the OIN had not contested. *Id.* at 215-16. The Court recognized that a "[p]arcel-by-parcel revival of the [OIN's] sovereign status" would have "disruptive practical consequences," because it would create a "checkerboard of alternating state and tribal jurisdiction in New York State," which would "'seriously burde[n] the administration of state and local governments'" and "adversely affect landowners neighboring tribal patches." *Id.* at 219-20 (citations omitted). The Court refused to allow the OIN to "unilaterally reassert sovereign control and remove these parcels from the local tax rolls." *Id.* at 220; *see also Cass County v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114 (1998) (mere purchase of land by tribe insufficient to place land back under federal protection and exempt it from state or local property taxes).

This case is *déjà vu* all over again.[24] To conclude, as did the court below, that *Sherrill* allowed for the imposition but not the collection of taxes is to ignore the equitable basis for and the effect of this Court's opinion. *Sherrill* makes no distinction between a right and a remedy in rejecting the OIN's effort to rekindle the "embers of sovereignty." Equitable considerations of laches, acquiescence, and impossibility barred the tribe from invoking sovereign immunity, and the majority made clear that the equitable nature of the requested relief "remains the same whether asserted affirmatively or defensively." 544 U.S. at 214 n.7. These same equitable considerations apply, whether the OIN characterizes its challenge in terms of "land-based 'Indian sovereignty'" or "tribal immunity from suit." *See* Pet. App. 16a-17a. *Sherrill* is indistinguishable, and the court below erred in failing to adhere to this Court's binding precedent. The Court should grant *certiorari* to tie up the "loose ends" that *Sherrill* left hanging and which the OIN is now using to tie up and frustrate local government from exercising its legitimate and necessary powers to govern.

The lower court also erred in ignoring the significance of the *in rem* nature of property taxes, which run with the land and create a burden on the OIN's fee properties alone, without implicating tribal sovereign immunity. In *County of Yakima v. Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 266 (1992), the Court drew a bright-line distinction between the *ad valorem* tax at issue there, which "flow[ed] exclusively from ownership of realty" and thus qualified as taxation of land, and an excise tax, which taxed the transaction of selling land, but not the land itself. The *ad valorem* was permissible, the Court held, because it implicated *in rem* jurisdiction over the alienable lands, not *in personam* jurisdiction over the Indian owners. 502 U.S. at 265; *cf. Tennessee Student Assistance Corp. v.*

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[24] YOGI BERRA, THE YOGI BOOK 48 (Workman Publishing 1998).

Hood, 541 U.S. 440, 453 (2004) (noting distinction between *in rem* and *in personam* jurisdiction in state sovereign immunity context). This type of tax would not create the "checkerboard" effect condemned in *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976), the Court reasoned, because it involved the same types of determinations that the tax assessor was accustomed to making on non-reservation land and would not significantly disrupt tribal self-government. 502 U.S. at 265. The excise tax, in contrast, was not taxation of a *res* and thus was not permissible.

By depriving Petitioners of the right to enforce the property tax obligation, the court below renders this Court's analysis in *Sherrill* meaningless and strips local municipalities of the ability to govern. *See Brendale v. Confederated Tribes & Bands of the Yakima Indian Nations*, 492 U.S. 408 (1989) (recognizing limits on concept of tribal sovereignty); *Oneida Tribe of Indians of Wisconsin v. Village of Hobart*, 542 F.Supp.2d 908, 921 (E.D. Wisc. 2008) (unless the government can foreclose, "the Court's analysis in *Yakima*, *Cass County* and *Sherrill* amounts to nothing more than an elaborate academic parlor game."). The effect is to allow the tribe to oust the state and its municipalities from their exclusive prerogative, as the lawful taxing sovereigns, to collect *ad valorem* property taxes on fee lands within their boundaries. As this Court observed in *Sherrill*, 544 U.S. at 220, if the OIN can raise tribal sovereign immunity as a defense to the payment of lawfully imposed property taxes, there is nothing to prevent it from ignoring local zoning and other regulatory controls protecting all landowners in the area. Unless this Court grants review and reverses, it is clear that this is exactly what the OIN will continue to do.

B. *Potawatomi* and *Kiowa* Do Not Support the Decision Below

The lower court's reliance on two pre-*Sherrill* cases, *Oklahoma Tax Com'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), and *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), was completely misplaced. In *Potawatomi*, the issue was whether a state may assess and collect a tax on cigarettes to tribal members and non-members occurring on land held in trust for the tribe. This Court held that tribal immunity does not bar a state from taxing sales of cigarettes to nonmembers at the tribe's convenience store, but accepted that under *Moe v. Confederated Salish & Kootenai Tribes of Flathead Reservation*, 425 U.S. 463 (1976), the state could not enforce this personal tax for sales made in the past against Indian-owned property located within the trust land. 498 U.S. at 512-13. *Potawatomi* is distinguishable both because it involved activities on tribal trust lands that were "set apart for use of Indians," *id.* at 511, not fee land as in this case, *see Sherrill*, 544 U.S. at 214, and because it involved the imposition of personal liability upon an Indian tribe for the sale of cigarettes sold during a prior period without collecting the cigarette tax. Here, in contrast, the foreclosure proceeding runs with the land, not against the tribe, and thus does not implicate tribal immunity.

Notably, while barring the claim against the tribe, the Court in *Potawatomi* recognized that states may "of course" collect the cigarette tax from wholesalers by seizing unstamped cigarettes while the goods are en route to the reservation. *Id.* at 514 (citing *Washington v. Confederated Tribes of Colville Indian Reservation*, 447 U.S. 134, 161-62 (1980)). This observation highlights the essential distinction, for sovereign immunity purposes, between a claim against the person (*in personam*) and a claim against the property (*in rem*). The lower court erred in failing to discern and give to effect to that distinction.

For similar reasons, the court below erred in concluding that "[w]e are left then with the rule stated in *Kiowa*," that "[a]s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity." Pet. App. 20a (citing *Kiowa*, 523 U.S. at 754). In *Kiowa*, the issue was whether a court has jurisdiction over the person to enforce a promissory note between a corporation and an Indian tribe. The corporation argued that sovereign immunity should not apply because the liability arose from off-reservation activities and involved commercial, not governmental, activities, an argument the Court found unpersuasive. *Kiowa* stands for the proposition that a tribe enjoys sovereign immunity from contract claims arising from its commercial conduct, regardless of whether that conduct occurs on or off the reservation. 523 U.S. 755-56. That principle is inapplicable to this case involving the power of local government to enforce payment of lawful property taxes.

In view of these distinctions, it was the court below, not Petitioners, that improperly conflated the doctrines of tribal sovereign authority over reservation lands and tribal sovereign immunity from suit. *See* Pet. App. 14a-21a. Here, as the Court held in *Sherrill*, 544 U.S. at 214, the lands at issue are not sovereign Indian land. Thus, the foreclosure proceeding did not implicate the doctrine of sovereign authority over reservation lands. Further, as in *Yakima*, the tax foreclosure proceeding here runs with the land and not against the tribe. Thus, it does not implicate tribal sovereign immunity from suit. *Sherrill* and *Yakima* control, and *Potawatomi* and *Kiowa* do not warrant a different result. The Court should grant review to correct the error below.

POINT III

THE LOWER COURT'S DECISION CONFLICTS WITH TWO STATE COURTS OF LAST RESORT

The Second Circuit's decision cannot be reconciled with decisions by the Supreme Courts of Washington and North Dakota. Those decisions, which rely heavily on *Yakima*, recognized the distinction between *in rem* and *in personam* actions in rejecting tribal sovereign immunity defenses to condemnation and partition proceedings. In *Cass County Joint Water Res. Dist. v. 1.43 Acres of Land in Highland Twp.*, 2002 ND 83, 643 N.W.2d 685 (2002), a county water district brought a condemnation action to acquire land which an Indian tribe had recently acquired. The North Dakota Supreme Court held that the state could exercise *in rem* jurisdiction in a proceeding to condemn land held in fee by Indian tribe, despite a claim of sovereign immunity. A condemnation action is strictly *in rem*, the North Dakota court reasoned, and thus runs against the property itself, not against the individual.

> A proceeding in rem is essentially a proceeding to determine rights in a specific thing or in specific property, against all the world, equally binding on everyone. It is a proceeding that takes no cognizance of an owner or person with a beneficial interest, but is against the thing or property itself directly, and has for its object the disposition of the property, without reference to the title of individual claimants.

Id. at 689 (citation omitted). Therefore, *in personam* jurisdiction is not required, and the proceeding did not implicate the doctrine of tribal sovereign immunity.

In *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 869-72, 929 P.2d 379, 383-384 (1996) (*en banc*), the Supreme Court of Washington

similarly held that a state court retained jurisdiction over an action to partition and quiet title to fee-patented lands located within a reservation. The property in question was formerly tribal land, held in trust by the United States with federal restrictions on alienation, which had acquired its fee simple status in 1958 when the United States issued a "fee patent" conveying ownership to specified persons and removing all restrictions on conveyance or encumbrance. The Supreme Court of Washington relied heavily upon *Yakima* in reaching its conclusion that a Washington state court could exercise *in rem* jurisdiction over the parcel. "A broad *in rem* state jurisdiction over fee patented lands can be concluded from the Supreme Court decision in County of Yakima," the court held. *Id.* at 875, 929 P.2d at 386.

The decision below clashes with *1.43 Acres of Land* and *Anderson*. Instead of recognizing the difference between *in rem* and *in personam* jurisdiction, the court below confused the two doctrines and incorrectly concluded that the OIN's "freedom from state taxation . . . arises from a tribe's sovereign authority over its reservation lands." Pet. App. 14a. In contrast, the North Dakota Supreme Court held in *1.43 Acres of Land* that "the State may exercise territorial jurisdiction over the land, including an *in rem* condemnation action, and the Tribe's sovereign immunity is not implicated." *1.43 Acres of Land*, 643 N.W.2d at 694. Likewise, the Washington Supreme Court concluded in *Anderson* that "[t]he subsequent sale of an interest in the property to an entity enjoying sovereign immunity (Quinault Nation) is of no consequence in this case because the trial court's assertion of jurisdiction is not over the entity *in personam*, but over the property or the 'res' *in rem*." *Anderson*, 130 Wash. 2d at 873, 929 P.2d at 385. The conflict between the decision below and these two state courts of last resort provides an additional reason to grant the Petition.

POINT IV

THE COURT SHOULD ACCEPT THE INVITATION TO REDEFINE THE DOCTRINE OF TRIBAL SOVEREIGN IMMUNITY AND CLARIFY THE DISESTABLISHMENT OF THE ANCIENT ONEIDA RESERVATION

The Towns further support Petitioners' suggestion that the Court redefine the doctrine of tribal sovereign immunity. As described above, the OIN wields the doctrine of sovereign immunity in a way that excessively burdens the administration of local government. This harms the Towns and their predominantly non-Indian residents, many of whom owned their land before the OIN's recent purchases and have no recourse against the invasion of their legal rights. In *Potawatomi*, 498 U.S. at 514-15, Justice Stevens, concurring, criticized tribal immunity as "founded upon an anachronistic fiction" and suggested that it might not extend to off-reservation commercial activity. This Court retained the doctrine on the theory that Congress had failed to abrogate it in order to promote economic development and tribal self-sufficiency. *Id.* at 510. In *Kiowa*, the Court recognized that there may be "reasons to doubt the wisdom of perpetuating the doctrine," 523 U.S. at 758, but felt compelled to adhere to it because Congress had not dispensed with it. *Id.* at 759-760. State and local municipalities have a strong, indeed overriding interest in enforcing their laws on non-Indian lands and protecting their citizenry. Sovereign immunity, as applied in this case, encroaches on the authority of local government to administer its laws. The time has come to reconsider the doctrine, and this Court, having developed the doctrine, is best positioned to redefine it. The time is ripe to do so.

Finally, the Towns join in the Petitioners' request to clarify the status of the ancient Oneida reservation. In *Sherrill*, after rejecting the OIN's unification theory and

ruling that the tribe could not exercise sovereignty over the purchased lands, this Court declined to decide whether the Oneidas' historic reservation had been disestablished. 544 U.S.at 215 n.9. In the years since *Sherrill*, the lower courts and the tribe have seized upon this language to maintain that the historic reservation remains in place. The same considerations that led this Court in *Sherrill* to hold that the OIN cannot exercise sovereignty over the land also support the conclusion that the land in question is not an Indian reservation. *Cf. Osage Nation v. Irby*, 597 F.3d 1117 (10th Cir. 2010) (state's unquestioned exertion of jurisdiction over area and predominantly non-Indian population and land use supports conclusion of reservation disestablishment).

In Verona and Vernon today, the uncertainties surrounding the current status of the OIN's fee lands foment continuing controversy and threaten to reignite embers that long ago grew cold. Clarity on the issue is both desirable and necessary.

CONCLUSION

For all the foregoing reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted.

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