No. 10-72

In the Supreme Court of the United States

MADISON COUNTY, NEW YORK, ET AL.,
PETITIONERS,

v.

ONEIDA INDIAN NATION OF NEW YORK,
RESPONDENT.

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

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

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INTEREST OF *AMICUS CURIAE*[1]

The Town of Lenox is located in Madison County, New York, and lies within the footprint of the Oneida land claim area.[2] As in other neighboring communities, the Oneida Indian Nation of New York ["OIN"] has purchased a checkerboard of desirable lands within Lenox, refused to pay its property taxes, and refused to comply with numerous zoning, land use, health and safety, and other regulations.

This Court's landmark decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) — in which Lenox participated as an *amicus*[3] — was supposed to have resolved this sovereignty dispute. *Sherrill* rejected OIN's theory that "sovereign dominion" had somehow been "unified" with title when the tribe reacquired the parcels. *Id.* at 213-14; *see id.* at 221 (rejecting "the piecemeal shift in governance this suit seeks unilaterally to initiate"). OIN cannot "unilaterally revive its ancient sovereignty, in whole or in part," over aboriginal tribal lands that it reacquires "through open-market purchases from current titleholders." *Id.* at 203, 220-21 (citations omitted). "Sovereign dominion"

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[1] This brief is presented pursuant to Sup. Ct. R. 37.4; the Town's authorized law officer appears as co-counsel. Pursuant to Sup. Ct. R. 37.2, counsel of record for all parties were notified on August 2, 2010 of the Town's intention to file this brief.

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

[3] This Court drew extensively on arguments developed in Lenox's brief — including the federal government's shared culpability for the Oneida's historic losses and the application of the doctrines of "impossibility" and "acquiescence" in determining present-day sovereignty. *Compare* 544 U.S. at 205-08, 214 & n.8, 218-20 *with* Brief of Amici Curiae Town of Lenox et al. in Support of Petitioner City of Sherrill, at 4, 7-10, 12, 19-30, *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) (No. 03-855), 2004 WL 1835370.

and "authority" therefore remain vested with New York and its county and local governments. *Id.* at 213, 221.

For over five years, however, OIN has refused to comply with *Sherrill*'s mandate. It continues to flout the property tax obligations that *Sherrill* upheld, thereby continuing to deny critically needed revenues to local governments and school districts. OIN also continues to refuse to submit to a variety of local zoning, land use, and health and safety laws in Lenox and elsewhere that, under *Sherrill*, govern OIN's newly purchased non-trust lands. Many of these parcels are surrounded by non-Indian properties and occupy strategic locations throughout the land claim area. OIN has cherry picked these lands — including gas stations, convenience stores, shopping centers, marinas, prime highway billboard locations, manufacturing facilities, and other key commercial properties — and then unilaterally declared them off-limits to state and local taxation, zoning and land use, and other regulatory authority. Thus the *very* chaos and uncertainty, "disruptive practical consequences," and "serious burdens" on local governments that this Court's decision in *Sherrill* was intended to avoid have only grown worse in recent years. *Id.* at 219-20. Lenox cannot effectively carry out its home rule powers and statutory mandates if *Sherrill* is, in the Second Circuit's words, "meaningless" and "eviscerate[d]" by common law tribal sovereign immunity. Pet. App. 21a (quoting Counties' brief).

SUMMARY OF THE ARGUMENT

> "Land is either exempt from state law, or it is not. . . . Unless a state or local government is able to foreclose on Indian property for nonpayment of taxes, the authority to tax such property is meaningless, and the Court's analysis in *Yakima*, *Cass County* and *Sherrill* amounts to nothing more than an elaborate academic parlor game." *Oneida Tribe of Indians of Wis. v. Vill. of Hobart*, 542 F. Supp. 2d 908, 921 (E.D. Wis. 2008).

The Counties' petition ably demonstrates the many ways in which the decision below is in irreconcilable conflict with *Sherrill* and the bedrock distinction between *in personam* and *in rem* jurisdiction drawn in *County of Yakima v. Confederated Tribes & Bands of the Yakima Indian Nation*, 502 U.S. 251, 263-65 (1992). This brief will avoid repeating those arguments. Rather, *amicus* demonstrates that the decision below *also* is in fundamental conflict with this Court's tribal sovereign immunity jurisprudence, with this Court's treatment of foreign and state sovereigns in analogous circumstances, and with decisions by state courts of last resort on the identical question presented here — whether there is an *in rem* exception to tribal sovereign immunity for non-trust lands purchased by a tribe outside the territorial scope of its sovereignty, jurisdiction, and regulatory authority.[4]

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[4] The second Question Presented also warrants plenary review. Continuing uncertainty over the post-*Sherrill* rules regarding reservation disestablishment and diminishment has led to decisions like *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 638-43, 930 N.E.2d 233 (2010), in which New York's highest court recently concluded that, under federal law,

This Court developed the doctrine of tribal sovereign immunity in order to extend to Native American tribes "the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). But tribes do not retain the full sovereignty of foreign nations or the fifty States; they are "domestic dependent nations" that are "completely under the sovereignty and dominion of the United States." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831); *see also United States v. Wheeler*, 435 U.S. 313, 323 (1978) ("The sovereignty that the Indian tribes retain is of a unique and limited character."). The "limited character" of tribal sovereignty necessarily restricts the scope of tribal sovereign *immunity* as well. *See Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g*, 476 U.S. 877, 890-91 (1986) ("Of course, because of the peculiar 'quasi-sovereign' status of the Indian tribes, the Tribe's immunity is not congruent with that which the Federal Government, or the States, enjoy.").

Notwithstanding the "unique and limited character" of tribal sovereignty and its corollary, tribal sovereign immunity, the Second Circuit's decision below allows OIN to do what no foreign nation or domestic State could get away with: purchase lands in its private capacity outside its "sovereign dominion," refuse to comply with valid tax laws governing those lands and Supreme Court judgments ordering that the taxes be paid, then avoid foreclosure on the tax-delinquent lands by raising its sovereign immunity. This Court repeatedly has emphasized that Native American tribes do not have "supersovereign authority to interfere with another jurisdiction's sovereign right[s] . . . within that jurisdiction's limits." *Okla. Tax Comm'n v. Chickasaw*

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the Cayuga Nation's 18th-century reservation remains intact even though the tribe has held *no* trust lands *anywhere* within that 64,000-acre area since the Jefferson Administration (1807).

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

First, it has been blackletter federal common law for nearly 200 years that a foreign country does not have immunity with respect to land it acquires in this country, including immunity from execution (diplomatic and consular property excepted). *See The Schooner Exch. v. McFaddon*, 11 U.S. (7 Cranch) 116, 145 (1812). The so-called "immovable property" exception to foreign sovereign immunity is reflected in the federal common law, followed by the State Department, embraced in international agreements, and codified in the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1605(a)(4), 1610(a)(4)(B). The decision below gives a *domestic dependent* nation immunity exceeding that of a *foreign* nation.

Second, the decision below conflicts with this Court's *state* sovereign immunity decisions, which also recognize an "immovable property" exception to the rules of immunity. *See Georgia v. City of Chattanooga*, 264 U.S. 472, 480-82 (1924) ("Land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership. . . . The power of the [sovereign] to condemn does not depend upon the consent or suability of the [other sovereign]."). Here again, the decision below confers "supersovereign authority" on a tribe to interfere with the taxation, zoning, land use, and other regulatory authority of another sovereign with respect to lands located in *that* sovereign's territory — a power denied to other sovereigns.

Third, the decision below squarely conflicts with the decisions of at least two state courts of last resort on the first

Question Presented. *See, e.g., Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land*, 2002 ND 83, ¶ 21, 643 N.W.2d 685, 697 (2002); *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 873, 929 P.2d 379, 388 (1996). The conflict could not be more stark. Either there is an *in rem* exception to the doctrine of tribal sovereign immunity (as with foreign and state immunity) or there is not and tribes instead can play by "supersovereign" rules.

Finally, contrary to the Second Circuit's decision, neither *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998), nor *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505 (1991), support — let alone compel — the outcome below. Neither involved an *in rem* action against immovable property located *outside* the tribe's "sovereign dominion"; neither implicated *another* sovereign's jurisdiction and regulatory authority over lands within *its* "sovereign dominion"; both left the non-tribal parties with meaningful alternative remedies. Indeed, while holding that Oklahoma could not recover money damages from a tribal treasury, this Court in *Potawatomi* expressly authorized the off-reservation *in rem* seizure of tribal property (there, cigarettes) en route to the reservation for resale to nonmembers. *See* 498 U.S. at 514 ("States may of course" engage in such seizures). If tribal sovereign immunity does not prevent *in rem* actions against *movable* tribal property, it is difficult to fathom why it should prevent *in rem* actions against *immovable* tribal non-trust property located outside the tribe's "sovereign dominion," especially given the signal importance of a sovereign's control over lands within its jurisdiction.

REASONS FOR GRANTING THE WRIT

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

Under "primeval" principles of federal common law and international practice, the People's Republic of China could not purchase property in Madison County, refuse to pay its property taxes, and then defeat the County's action to foreclose on the tax-delinquent property by invoking its foreign sovereign immunity. *Asociacion de Reclamantes v. United Mexican States*, 735 F.2d 1517, 1521 (CADC 1984) (Scalia, J.). That should be the end of the analysis here. This Court repeatedly has looked to the rules of *foreign* sovereign immunity as "instructive" in defining the extent of *tribal* sovereign immunity. *C & L Enters., Inc. v. Citizen Band Potawatomi Indian Tribe of Okla.*, 532 U.S. 411, 421 n.3 (2001); *Kiowa*, 523 U.S. at 759; *see also Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 560-61 (1832) (defining tribal sovereignty in reference to the "settled doctrine of the law of nations"). Indeed, the immunity of a *foreign* nation necessarily marks the outer boundary of any legitimate claim of immunity by a *domestic dependent* nation; far from being "supersovereign[s]" with *greater* immunity than foreign nations, tribes enjoy less sovereignty and fewer immunities given their "dependent" status. *Chickasaw Nation*, 515 U.S. at 466; *see also Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 165 (1980) (Brennan, J., concurring in part and dissenting in part) ("While they are sovereign for some purposes, it is now clear

that Indian reservations do not partake of the full territorial sovereignty of States or foreign countries.").[5]

The federal common law of *foreign* sovereign immunity, which "long predated" the enactment of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1602 *et seq.*, is that, "when owning property here, a foreign state must follow the same rules as everyone else." *City of New York v. Permanent Mission of India to the UN*, 446 F.3d 365, 374 (CA2 2006), *aff'd*, 551 U.S. 193 (2007). This Court first embraced that rule nearly two centuries ago, observing that "[a] prince, by acquiring private property in a foreign country, may possibly be considered as subjecting that property to the territorial jurisdiction [of the foreign country]; he may be considered as so far laying down the prince, and assuming the character of a private individual." *Schooner Exch.*, 11 U.S. (7 Cranch) at 145. The reason for exempting "immovable property" within U.S. jurisdiction from the scope of foreign sovereign immunity is "self evident": "A territorial sovereign has a primeval interest in resolving all disputes over use or right to use of real property within its own domain." *Reclamantes*, 735 F.2d at 1521.[6]

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[5] *See generally Plains Commerce Bank v. Long Family Land & Cattle Co.*, 128 S. Ct. 2709, 2719 (2008); *Nevada v. Hicks*, 533 U.S. 353, 361 (2001); *Organized Vill. of Kake v. Egan*, 369 U.S. 60, 72 (1962).

[6] "As romantically expressed in an early treatise: 'A sovereignty cannot safely permit the title to its land to be determined by a foreign power. Each state has its fundamental policy as to the tenure of land; a policy wrought up in its history, familiar to its population, incorporated with its institutions, suitable to its soil.'" *Reclamantes*, 735 F.2d at 1521 (quoting 1 F. Wharton, *Conflict of Laws* § 278 at 636 (3d ed. 1905)). These are the same considerations that drove the sovereignty determination in *Sherrill*. *See* 544 U.S. at 202, 211, 215-16, 219-20 ("character of the area," history of "regulatory authority" and "jurisdiction,"

This "immovable property" exception to foreign sovereign immunity has continued to be followed under federal common law, by the Department of State, and in international agreements. As embodied in the *Restatement (Second) of Foreign Relations Law* § 68(b) (1965), the blackletter principle is that "[t]he immunity of a foreign state . . . does not extend to . . . an action to obtain possession of or establish a property interest in immovable property located in the territory of the State exercising jurisdiction." This includes *in rem* actions against "real property located in the territory of [the] state exercising jurisdiction." *Id.* cmt. d.[7] *See also Restatement (Third) of Foreign Relations Law* §§ 455(1)(c), 460(2)(e) (1987) (readopting "immovable property" exception, including with respect to execution against such property); United Nations Convention on Jurisdictional Immunities of States and Their Property, G.A. Res. 59/38, U.N. Doc. A/RES/59/38, art. 13(a) (foreign State not entitled to immunity "in a proceeding which relates to the determination of . . . any right or interest of the State in, or its possession or use of, or any obligation of the State arising out of its interest in, or its possession or use of, immovable property situated in the State of the forum"); Letter from Jack B. Tate of May 19, 1952, 26 Dep't of State Bull. 984 (1952), *reprinted in Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682, 711 (1976) (despite conflicts between the "classical or absolute theory" and the "newer or restrictive theory" of foreign sovereign immunity, "[t]here is agreement by proponents of both theories, supported by practice, that sovereign immunity should not be

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current demographics, "justifiable expectations" of current residents, and potentially "disruptive practical consequences" of accentuating "checkerboard" allocation of sovereignty).

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

claimed or granted in actions with respect to real property (diplomatic and perhaps consular property exempted)[.]").[8]

Congress codified the "immovable property" exception in the FSIA, which provides that "[a] foreign state shall not be immune from the jurisdiction of courts of the United States . . . in any case . . . in which . . . rights in immovable property situated in the United States are in issue." 28 U.S.C. § 1605(a)(4). Moreover, such property "shall not be immune from . . . execution" if "the execution relates to a judgment establishing rights in property . . . which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission[.]" *Id.* § 1610(a)(4)(B). These provisions were enacted to codify "the pre-existing real property exception to sovereign immunity recognized by international practice." *Reclamantes*, 735 F.2d at 1521; *see also Permanent Mission of India v. City of New York*, 551 U.S. 193, 199-201 (2007); H.R. Rep. No. 94-1487, at 20 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6618-19.[9]

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[8] OIN argued below that traditional rules do not allow *execution* against such property. *See* Brief for Appellee Oneida Nation of New York at 37-39 & n.9, *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 605 F.3d 149 (CA2 2010) (No. 05-6408(L)), 2007 WL 6432641 (relying on the "General Rule" set forth in *Restatement (Second)* § 65 & cmt. d). But that "General Rule" is expressly made subject to the "except[ion]" in § 68(b) for "an action to obtain possession of . . . immovable property," which clearly *is* subject to *in rem* execution. *See* n.7 *supra.* Moreover, the pre-FSIA cases cited by OIN (*see* Br. at 39 n.9) all dealt with diplomatic and consular property, which has long been recognized as immune from execution and is not involved here. *See* n.9 *infra.*

[9] Because *Permanent Mission of India* involved tax-delinquent property that was being used at least in part "for

The Second Circuit's decision below conflicts with the "immovable property" exception that applies even to claims of sovereign immunity by foreign nations. Just as a foreign prince "lay[s] down the prince" when purchasing land in the United States, *Schooner Exch.*, 11 U.S. (7 Cranch) at 145, so OIN must "lay down" its claim to "supersovereign authority" over lands it purchases outside the territorial scope of its "sovereign dominion" as demarcated in *Sherrill*. *See* 544 U.S. at 213.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S TREATMENT OF STATE SOVEREIGN IMMUNITY.

Just as China could not invoke the broad sovereign immunity that OIN asserts, the Commonwealth of Pennsylvania could not buy private property in Madison County, refuse to pay its property taxes, and then avoid foreclosure by invoking principles of comity or sovereign immunity. This Court emphasized in *Sherrill* that cases construing the limits of *state* sovereignty "provide a helpful point of reference" in determining the scope of *tribal* sovereignty. 544 U.S. at 218. For example, the Court relied heavily on "[t]he acquiescence doctrine" developed in its "original-jurisdiction state-sovereignty cases" in fashioning a parallel restriction on tribal sovereignty under "standards of federal Indian law and federal equity practice." *Id.* at 214, 218.

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purposes of maintaining a diplomatic or consular mission," 28 U.S.C. § 1610(a)(4)(B), it was conceded that the usual remedies of foreclosure and execution were unavailable, and that the City of New York had to recover its back taxes through special alternative statutory procedures. *See* 551 U.S. at 196 n.1; 446 F.3d at 368, 371, 373-74. There is no similar exception to the rules of tribal sovereign immunity, and OIN in any event owns the lands in issue for a variety of commercial purposes, not for use as "a diplomatic or consular mission" to New York State or its local governments.

There is a similarly strong "point of reference" here. This Court long ago held that the "immovable property" exception also applies to a State's sovereign immunity from unconsented suit. In *Georgia v. City of Chattanooga*, 264 U.S. 472 (1924), the State of Georgia purchased eleven acres on the open market in Chattanooga, Tennessee (which abuts Georgia's border) for use as a railroad yard in support of Georgia's state railway operations. Later, Chattanooga sought to condemn Georgia's property as part of a redevelopment project, and Georgia brought an original action in this Court insisting that the City could not touch the property because of Georgia's sovereign immunity — precisely the argument OIN makes here. This Court unanimously rejected that claim:

> "The power of Tennessee, or of Chattanooga as its grantee, to take land for a street, is not impaired by the fact that a sister state owns the land . . . . *Land acquired by one state in another state is held subject to the laws of the latter and to all the incidents of private ownership.* . . . The sovereignty of Georgia was not extended into Tennessee. Its enterprise in Tennessee is a private undertaking. It occupies the same position there as does a private corporation authorized to own and operate a railroad, and, as to that property, it cannot claim sovereign privilege or immunity. *Undoubtedly Tennessee has power to open roads and streets across the railroad land owned by Georgia.* [Georgia's] property [in Tennessee] is as liable to condemnation as that of others, and it has, and is limited to, the same remedies as are other owners of like property in Tennessee. *The power of the city to condemn does not depend upon the consent or suability of the owner.*"

Id. at 479-82 (citations and paragraph breaks omitted, emphasis added).

Georgia v. Chattanooga is settled law. As the Supreme Court of Minnesota has observed, it is "elementary" that "a state acquiring ownership of property in another state does not thereby project its sovereignty into the state where the property is situated. The public and sovereign character of the state owning property in another state ceases at the state line[.]" *State v. City of Hudson*, 231 Minn. 127, 130, 42 N.W.2d 546, 548 (1950) (*re* portion of bridge owned by Wisconsin city that was located in Minnesota). The Supreme Court of Illinois has added that, "[i]f it were otherwise, the acquisition of land in Illinois by another State would effect a separate island of sovereignty within our boundaries. Such possibility can find no support in the law or reason." *People ex rel. Hoagland v. Streeper*, 12 Ill. 2d 204, 213, 145 N.E.2d 625, 630 (1957) (*re* court-imposed receivership over portion of bridge owned by Missouri county that was located in Illinois).[10]

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

Likewise, because States are not allowed to create "separate island[s] of sovereignty" by purchasing land within another sovereign's jurisdiction, *id.* at 213, 145 N.E.2d at 630, neither may tribes. Indeed, this Court has emphasized that tribal sovereignty immunity "[o]f course" is *narrower* than, "not congruent with," state sovereign immunity. *Three Affiliated Tribes*, 476 U.S. at 890-91. The decision below turns this lack of "congruence" on its head.[11]

III. THE DECISION BELOW CONFLICTS WITH DECISIONS BY STATE COURTS OF LAST RESORT ON THE SAME IMPORTANT FEDERAL QUESTION.

The Second Circuit's decision below also conflicts with decisions by state courts of last resort on the identical question presented here — whether non-trust land purchased by a tribe outside its sovereign dominion is immune from the *in rem* jurisdiction of the state and local governments where the land is located. *See* Sup. Ct. R. 10(a).

The Supreme Court of North Dakota, for example, has held that tribal sovereign immunity does not extend to *in rem* actions against such tribally purchased land, which "is essentially private land" and subject to the State's "territorial

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[11] OIN argued below that *Georgia v. Chattanooga* was an "unusual" case, and in any event irrelevant because States do not have Eleventh Amendment immunity from suit in the courts of other States. *Brief for Appellee*, *supra* n.8, at 36 n.8 (citing *Nevada v. Hall*, 440 U.S. 410, 426 n.29 (1979)). But the challenges presented by one sovereign holding property in another's dominion are hardly "unusual." Moreover, this Court framed its decision in *Georgia v. Chattanooga* as an *exception* to rules of "sovereign privilege or immunity" from suit. 264 U.S. at 480-81. Whether state sovereign immunity rules are based on the Constitution, common law, or comity, what is relevant here is that OIN is asking for a "supersovereign" immunity that is not recognized for either state or foreign sovereigns.

jurisdiction," including its condemnation authority. *Cass Cnty. Joint Water Res. Dist. v. 1.43 Acres of Land*, 2002 ND 83 ¶ 21, 643 N.W.2d 685, 694 (2002). At issue in *Cass County* was a 1.43 acre parcel of land that lay within the area that would be flooded by a proposed dam. An opponent of the proposed dam sold the parcel to the Turtle Mountain Band of Chippewa Indians by warranty deed for $500; the land allegedly had been aboriginally occupied by the Band's ancestors and "contain[ed] a culturally significant village site and burial site." *Id.* ¶¶ 2-4, 643 N.W.2d at 688. The Band claimed that that its newly acquired parcel could not be condemned because, among other reasons, of its "tribal sovereign immunity" under *Kiowa*. *See id.* ¶ 12, 643 N.W.2d at 690-91.

North Dakota's highest court unanimously rejected the tribe's claim and held that tribal sovereign immunity does not bar a "purely in rem action against land held by the Tribe in fee" that is "not held in trust by, or otherwise under the superintendence of, the federal government." *Id.* ¶¶ 4, 12, 643 N.W.2d at 688, 691. The court relied heavily on *County of Yakima* and *Georgia v. Chattanooga* in emphasizing the fundamental distinctions between *in personam* jurisdiction — as to which sovereign immunity applies — and *in rem* jurisdiction over property held outside the sovereign's domain — as to which sovereign immunity does not attach. *See id.* ¶¶ 13-15, 19-20, 643 N.W.2d at 691-94. "Under these circumstances, the State may exercise territorial jurisdiction over the [tribally purchased] land, including an in rem condemnation action, and the Tribe's sovereign immunity is not implicated." *Id.* ¶ 21, 643 N.W.2d at 694. A contrary rule "would have far-reaching effects on the eminent domain authority of states and all other political subdivisions. Indian tribes would effectively acquire veto power over any public works project attempted by any state or local government merely by purchasing a small tract of land within the project," and "all public works projects

[would] be subject to uncertainty." *Id.* ¶¶ 24-25, 643 N.W.2d at 694-95.[12]

The Supreme Court of Washington reached a similar conclusion in *Anderson & Middleton Lumber Co. v. Quinault Indian Nation*, 130 Wash. 2d 862, 929 P.2d 379 (1996). There, a lumber company brought an action to partition and quiet title to fee-patented private lands within the Quinault Indian Reservation. A month later, the owners of an undivided one-sixth interest in the lands sold their interest to the Quinault Indian Nation, which was seeking to preserve its "tribal integrity and land base." *Id.* at 878, 929 P.2d at 387. The Nation then moved to dismiss based on its sovereign immunity.

The Washington high court rejected this defense based on the distinction between *in rem* jurisdiction over property that has passed out of tribal sovereignty and *in personam* jurisdiction over the tribe itself or lands subject to tribal sovereignty. Drawing heavily on *County of Yakima*, the court explained 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*." *Id.* at 873, 929 P.2d at 385.

The Second Circuit's approach to tribal sovereign immunity is fundamentally at odds with these decisions recognizing the distinction between *in personam* and *in rem* jurisdiction. Indeed, despite extensive briefing and argument, that fundamental distinction was not even

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[12] Although *Cass County* dealt with a tribe's purchase of land outside its historic reservation boundaries, *Sherrill* and other recent decisions demonstrate that the governing principle also applies to former tribal lands *within* a tribe's historic reservation that are repurchased by the tribe on the open market.

acknowledged by the decision below; the words "*in rem*" do not even appear in the panel or concurring opinions.[13]

IV. THE DECISION BELOW DOES NOT FOLLOW FROM, BUT CONFLICTS WITH, *KIOWA*, *POTAWATOMI*, AND THIS COURT'S OTHER TRIBAL SOVEREIGN IMMUNITY DECISIONS.

The Second Circuit felt constrained to recognize tribal sovereign immunity, even with respect to *in rem* actions against non-trust lands outside OIN's "sovereign dominion," pursuant to this Court's decisions in *Kiowa* and *Potawatomi*. Pet. App. 16a-23a; *see id.* 33a (Cabranes, J., concurring). But those decisions merely reaffirmed and applied this Court's prior decisions extending the "traditional" federal common law immunity of "*dominant sovereignties*" like foreign nations and States to "*domestic dependent*" tribal sovereigns as well. *United States v. U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512 (1940) (emphasis added); *see also Santa Clara*, 436 U.S. at 58; *Turner v. United States*, 248 U.S. 354, 357 (1919) (tribes should be treated "[l]ike other governments"). Nothing in *Kiowa*, *Potawatomi*, or this Court's earlier decisions suggests that the immunity of tribes from suit is even *greater* than that enjoyed by foreign or state sovereigns. Indeed, *Kiowa* reiterated that "the problems of sovereign immunity for foreign countries" are "instructive" in defining the scope of tribal sovereign immunity. 523 U.S. at 759.

Kiowa and *Potawatomi*, moreover, did not implicate another sovereign's *in rem* jurisdiction over lands within its

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[13] The panel opinion cited just once to *County of Yakima*, and only for the general proposition that, "[a]bsent cession of jurisdiction or other federal statutes permitting it, . . . a State is without power to tax reservation lands and reservation Indians." Pet. App. 15a. Under *Sherrill*, of course, that general principle does not apply to the lands in issue here.

own "sovereign dominion," and left the aggrieved parties with meaningful alternatives. *Kiowa* dealt with tribal immunity from private contract claims — claims that implicate none of the state and local sovereignty concerns presented here, and that are subject to bargaining and adjustment by the contracting parties. *See C & L Enters.*, 532 U.S. at 418-23. And *Potawatomi* merely barred claims for money damages against tribal treasuries, while emphasizing the availability of numerous "adequate alternatives" to such damage claims. 498 U.S. at 514. Although sovereign immunity prevented the State from pursuing "the *most* efficient remedy," there were a variety of alternative claims and enforcement actions that this Court believed could "produce the revenues to which [the States] are entitled." *Id.* (emphasis added). It is uncertain at best whether there are any such "adequate alternatives" here.

Indeed, *Potawatomi* instructed that States may pursue off-reservation *in rem* remedies against tribally owned property, emphasizing that States may "*of course*" enforce their cigarette tax laws by "seizing unstamped cigarettes off the reservation" that had been purchased by tribally owned retailers and were on their way to reservation outlets. *Id.* (emphasis added). This Court pointed to its earlier decision in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 161-62 (1980), which also upheld seizures of "cigarettes in transit" where the affected tribes "have refused to fulfill collection and remittance obligations which the State has validly imposed. . . . By seizing cigarettes en route to the reservation, the State polices against wholesale evasion of its own valid taxes *without unnecessarily intruding on core tribal interests*." *Id.* at 162 (emphasis added, citations omitted).[14]

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[14] In both *Colville* and *Potawatomi*, the tribal retailers whose cigarettes were seized by the State were owned and operated by

Potawatomi and *Colville* expressly authorize state and local governments to take *in rem* action against tribally owned *movable* property. *See Keweenaw Bay Indian Community v. Rising*, 477 F.3d 881, 894-95 (CA6 2007) ("[W]hether or not the litigants in *Citizen Band* and *Colville* expressly argued that sovereign immunity prevented the seizures, the Court was well aware of the issue of tribal sovereign immunity when it approved the seizures in question. . . . [T]he Supreme Court has clearly endorsed state seizures as a remedy where sovereign immunity prevents in-court remedies.") (citations omitted). If tribally owned *movable* property is not immune from *in rem* action outside the tribe's sovereign dominion, surely tribally owned *immovable* property is not immune from such action — particularly given the unique concerns for sovereignty, jurisdiction, and regulatory authority implicated by one sovereign's ownership of immovable property in another sovereign's dominion. *See* Points I-III *supra*.[15]

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the tribes themselves, and thus shielded by tribal sovereign immunity. *See Colville*, 447 U.S. at 144-45; *Potawatomi*, 498 U.S. at 507. Curiously, although the Second Circuit quoted at length from the discussion of "adequate alternatives" in *Potawatomi*, it omitted the one sentence that discussed the alternative of "seizing unstamped cigarettes off the reservation" and the citation to *Colville* supporting such *in rem* seizures. *Compare* Pet. App. 22a-23a *with* 498 U.S. at 514.

[15] The United States argued as *amicus* below that "the distinction between *in personam* and *in rem* jurisdiction is meaningless with regard to sovereign immunity." Brief of United States as Amicus Curiae in Support of Appellee, at 9-10 & n.4, *Oneida Indian Nation of N.Y. v. Madison Cnty.*, 605 F.3d 149 (CA2 2010) (No. 05-6408(L)), 2008 WL 6086315. But the cases cited by the United States for this proposition (*see id.* at 9-11) are readily distinguishable. Most involved suits against federal property, which obviously is not subject to the "immovable property" exception because it is located *within* the owning

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OIN continues to refuse to abide by this Court's central holding in *Sherrill* — that the non-trust lands it buys on the open market are subject to state and local tax, zoning, and other regulatory authority. This of course is not the first time a disappointed litigant has refused to comply with a judgment of this Court. But as this Court has emphasized, the "obedience" by all parties to this Court's decisions is "indispensable for the protection of the freedom guaranteed by our fundamental charter for all of us." *Cooper v. Aaron*, 358 U.S. 1, 19-20 (1958). OIN's sovereign immunity defense is defined by, and subject to, "standards of federal Indian law and federal equity practice." *Sherrill*, 544 U.S. at 214. There is nothing in those standards that supports OIN's studied refusal to obey this Court's judgments, or its claim of a tribal "supersovereign" immunity exceeding that of any foreign or state sovereign. It is time for OIN to "lay[] down the prince." *Schooner Exch.*, 11 U.S. (7 Cranch) at 145.

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sovereign's jurisdiction. That the federal government's sovereign immunity prevents suit against its property within its "sovereign dominion" says *nothing* about a tribe's immunity with respect to property it owns *outside* its dominion. The U.S. brief also relied on *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997), which held that, absent a State's consent, *Ex parte Young* cannot be used to litigate title to the beds of navigable waters inside the State's boundaries because, under the Equal Footing Doctrine, those beds presumptively are state property under state dominion (and thus subject to state sovereign immunity). That again is readily distinguishable from property owned by one government that is located in *another* government's "sovereign dominion."

CONCLUSION

The petition for a writ of *certiorari* should be granted.

Respectfully submitted,

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