Appeal No. 23-1261

In the United States Court of Appeals for the Eighth Circuit

Mille Lacs Band of Ojibwe, *et al.*,

Plaintiffs-Appellees,

v.

County of Mille Lacs, Minnesota

Defendant-Appellant,

Erica Madore, in her official capacity as Mille Lacs County Attorney;
Kyle Burton, in his official capacity as Mille Lacs County Sheriff,

Defendants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
CIVIL NO. 17-cv-05155-SRN-LIB

BRIEF OF AMICUS CURIAE CITY OF WAHKON, KATHIO TOWNSHIP, SOUTH HARBOR TOWNSHIP, and ISLE HARBOR TOWNSHIP IN SUPPORT OF APPELLANT COUNTY OF MILLE LACS, MINNESOTA AND IN SUPPORT OF REVERSAL OF THE DECISION BELOW

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Appellate Case: 23-1261 Page: 1 Date Filed: 05/17/2023 Entry ID: 5277996

TABLE OF CONTENTS

STATEMENT OF INTEREST 5
SUMMARY OF ARGUMENT 6
ARGUMENT 7
I. *City of Sherrill* and Subsequent Supreme Court Precedent 7
II. Application of *City of Sherrill* to the Facts at Bar 17
III. Affirmance of the Decision Below Will Result in Significant and Disruptive Consequences for Amici 22
A. The Band's Claims are Inherently Disruptive 23
B. Reestablishment of Tribal Sovereignty Over Former Reservation Land Will Result in Varied Losses of Amici's Jurisdiction 25
CONCLUSION 29

TABLE OF AUTHORITIES

CASES

California v. Cabazon Band of Mission Indians,
480 U.S. 202 (1987) 24

Cayuga Indian Nation of New York v. Pataki,
413 F.3d 266 (2d Cir. 2005) 10

Cayuga Indian Nation of New York v. Village of Union Springs,
390 F. Supp. 2d 203 (N.D.N.Y. 2005) 23, 24

City of Sherrill, New York v. Oneida Indian Nation of New York,
544 U.S. 197 (2005) .... passim

Hagen v. Utah,
510 U.S. 399 (1994) 13

McGirt v. Oklahoma,
140 S. Ct. 2452 (2020) 6, 7, 12, 16, 17

Mille Lacs Band of Ojibwe v. Cnty. of Mille Lacs, MN,
589 F. Supp. 3d 1042, (D. Minn. 2022) 20, 23

Nebraska v. Parker,
577 U.S. 481 (2016) 14, 15, 16, 17, 21, 22

Oklahoma v. United States Dept. of the Interior,
577 F. Supp. 3d 1266 (W.D. Okla. 2021) 12

Oneida Indian Nation of New York v. Cnty. of Oneida,
617 F.3d 114 (2d Cir. 2010) 10, 11, 12

Ramos v. Louisiana,
140 S. Ct. 1390 (2020) 17

Solem v. Bartlett,
465 U.S. 463 (1984) 13

South Dakota v. Yankton Sioux Tribe,
522 U.S. 329 (1998) 13

Stockbridge-Munsee Cmty. v. State of New York, et al.,
756 F.3d 163 (2d Cir. 2014) 10, 23, 24

United States v. Mille Lac Band of Chippewa Indians,
229 U.S. 498 (1913) 8

United States v. Minnesota,
270 U.S. 181 (1926) 8

Wolfchild v. Redwood Cnty.,
91 F. Supp. 3d 1093 (D. Minn. 2015) 12

Appellate Case: 23-1261 Page: 3 Date Filed: 05/17/2023 Entry ID: 5277996

STATUTES

33 U.S.C. § 1256 26
42 U.S.C. § 7405 26
42 U.S.C. § 7661d(a)(2) 26
54 U.S.C. § 306108 27
Dawes Severalty Act of 1887, 24 Stat. 388 13

OTHER AUTHORITIES

American Indians, Indian Tribes, and State Government, MN House Research (February 2023), available at https://www.house.mn.gov/hrd/pubs/indiangb.pdf 26, 27
Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 428 (1934) 13
Transcript of Oral Argument in *Nebraska v. Parker*, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-1406_22p6.pdf 15, 16

RULES

Federal Rule of Appellate Procedure 29(a)(4)(E)..5
Federal Rule of Appellate Procedure 29(a)(2)..5

STATEMENT OF INTEREST[1]

The City of Wahkon, Kathio Township, South Harbor Township, and Isle Harbor Township, are all political subdivisions of the State of Minnesota located in Mille Lacs County and lie wholly within land claimed to be part of the Mille Lacs Band of Ojibwe's reservation. In fact, the boundaries of the three Townships equal the boundaries of the former Reservation itself, because the Towns were created in recognition of the fact the Reservation no longer existed. The amici all share a key common interest in this matter: the potential loss of jurisdiction over their own land. For over a century, and until recently without tribal or federal interference, amici have exercised jurisdiction over their land by regulating the conduct of their citizens, providing valuable public services, and enforcing ordinances for the common good. They did, and continue, to do so on the shared and justifiable understanding that the land on which they operate is not part of a reservation. Should this Court affirm the decision below and allow for the judicial recreation of a congressionally disestablished reservation, amici will be stripped of a significant amount of their jurisdiction and will experience a dramatic disruption of long-standing, well-settled

[1] All parties to this appeal have consented to the filing of this brief. *See* Fed. R. App. P. 29(a)(2). Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), no party's counsel has authored this brief in whole or in part; no party or party's counsel has contributed money that was intended to fund the preparation or submission of this brief; and no other person, aside from amici curiae themselves, has contributed money that was intended to fund the preparation or submission of this brief.

expectations. Similarly, their citizens will be subject to an ever-expanding series of tribal controls from a government in which non-tribal members have no representation, no access to records, and no ability whatsoever to participate.

Accordingly, amici have a significant interest in the outcome of this matter, as this Court's decision will have monumental consequences for each of them. Therefore, amici submit this brief to offer their perspectives as municipal entities that will be dramatically harmed by the re-creation of tribal jurisdiction in areas that have been exclusively under amici's jurisdiction for generations.

This brief elaborates upon the argument found in the County of Mille Lacs, Minnesota's brief related to *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), which leads to the conclusion that the Band's reservation has been disestablished, or at least that the Band is precluded from raising its claims. The brief also serves to illustrate the disruptive effect that would occur should the Band be permitted to rekindle its reservation.

SUMMARY OF ARGUMENT

While *McGirt v. Oklahoma*, 140 S. Ct. 2452 (2020), re-examined the Supreme Court's disestablishment framework, it did not mark a wholesale shift in the Supreme Court's attitude toward its federal Indian law precedents. Indeed, *McGirt* did not overrule any precedent whatsoever, but instead, placed an increased emphasis on the language that Congress used in statutes or treaties when determining

Appellate Case: 23-1261 Page: 6 Date Filed: 05/17/2023 Entry ID: 5277996

whether a reservation has been disestablished. Notably missing from *McGirt* is any citation or reference to *City of Sherrill*. This makes sense because, doctrinally, *City of Sherrill* stands apart from the Supreme Court's traditional disestablishment framework as an equitable ground on which to ascertain disestablishment or to bar any claim directly, or indirectly, seeking the revival of tribal sovereignty over land.

City of Sherrill held that "standards of federal Indian and federal equity practice preclude [Tribes] from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214 (internal quotation marks omitted). Here, the Band seeks to accomplish just that–to rekindle the embers of its sovereignty that it explicitly ceded, as is argued in Appellants' briefing, and that have long grown cold through the lapse of time and through the justifiable expectations created by amici's continuous and longstanding exercise of jurisdiction over the land. Accordingly, this Court, consistent with *City of Sherrill*, should prevent the Band from reviving its ancient and long-lost sovereignty by reversing the decision of the district court, and by concluding that the Band's reservation has been disestablished.

ARGUMENT

I. *City of Sherrill* and Subsequent Supreme Court Precedent

In *City of Sherrill*, the United States Supreme Court expressly opened the door to an equitable route that would limit tribal sovereignty over a Tribe's historic

reservation, regardless of whether the historic reservation had been disestablished.[2] There, the Supreme Court held that a "long lapse of time," during which a Tribe did not seek to revive its sovereign control over land through relief in court, along with the "attendant dramatic changes in the character of the properties," precluded the Tribe from "gaining the disruptive remedy" it sought. *Id.* at 216–17. Invoking traditional notions of equity, the Supreme Court found "the distance from 1805 to the present day, the [Tribe's] long delay in seeking equitable relief . . . and developments in the city of Sherrill spanning several generations" evoked the "doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in governance" that the lawsuit sought to unilaterally initiate. *Id.* at 221. Given that the situation evoked these doctrines, the Supreme Court held that "standards of federal Indian law and federal equity practice preclude[d] the Tribe from rekindling embers of sovereignty that long ago grew cold." *Id.* at 214 (internal quotation marks omitted).

In reaching its conclusion, the Supreme Court recognized that the "principle that the passage of time can preclude relief has deep roots in our law," and that it had "recognized this prescription in various guises." *Id.* at 217. Namely, the

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[2] The fact Congress disestablished the Band's reservation was confirmed by the Supreme Court on at least two separate occasions. *See United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913); *United States v. Minnesota*, 270 U.S. 181 (1926).

Supreme Court found it "well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims." *Id.* The Supreme Court also recognized that, "[a]s between States, long acquiescence may have controlling effect on the exercise of dominion and sovereignty over territory," and that although original-jurisdiction state-sovereignty cases did not dictate a result in the case, they nonetheless provided a helpful point of reference: "When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations." *Id.* at 218. All of this, taken together, led the Supreme Court to conclude that the "rekindling" of sovereignty sought by the Tribe would be inequitable.

Justice Stevens' dissent in *City of Sherrill* confirms the practical effect of the majority's holding by noting: "the Court has done what only Congress may do—it has effectively proclaimed a diminishment of the Tribe's reservation and an abrogation of its elemental right to tax immunity." *Id*. at 224–25 (Stevens, J. dissenting). The majority was cognizant of Justice Stevens' dissent, and not withstanding his observations, concluded that equity provides another means to diminish a tribe's sovereign authority over ancient reservation land.

Specifically, the Supreme Court noted that it "need not decide today whether . . . the 1838 Treaty of Buffalo Creek disestablished the Oneida's reservation as

Appellate Case: 23-1261 Page: 9 Date Filed: 05/17/2023 Entry ID: 5277996

Sherrill argues . . . [t]he relief OIN seeks . . . is unavailable because of the long lapse of time, during which New York's governance remained undisturbed, and the present-day and future disruptions such relief would engender." *Id.* at 215, n.9. In other words, congressional intent was not dispositive in *City of Sherrill* because "the longstanding, distinctly non-Indian character of central New York and its inhabitants, the regulatory authority over the area constantly exercised by the State and its counties and towns for 200 years, and the Oneida's long delay in seeking judicial relief against parties other than the United States" required the equitable relief that was ultimately rendered by the Supreme Court. *Id.* at 198.

Importantly, the Supreme Court's analysis in *City of Sherrill* has subsequently been examined, and accepted, by other courts: "[I]n the wake of this trilogy – *Sherrill, Cayuga,* and *Oneida* – it is now well-established that Indian land claims asserted generations after an alleged dispossession are inherently disruptive of state and local governance and the settled expectations of current landowners, and are subject to dismissal on the basis of laches, acquiescence, and impossibility."[3] *Stockbridge-Munsee Cmty. v. State of New York, et al.,* 756 F.3d 163, 165 (2d Cir. 2014). Moreover, nothing in *City of Sherrill* indicates that its holding is confined to

[3] The Second Circuit was referring specifically to *City of Sherrill*, 544 U.S. 197; *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005); and *Oneida Indian Nation of New York v. Cnty. of Oneida*, 617 F.3d 114 (2d Cir. 2010), *cert. denied*, 565 U.S. 970, 132 S. Ct. 452 (2011).

Appellate Case: 23-1261 Page: 10 Date Filed: 05/17/2023 Entry ID: 5277996

the specific facts of the case or to the specific type of claim brought in the case. As has been noted by the Second Circuit, the broad pronouncements in *City of Sherrill* preclude limiting its application:

> The Court's characterizations of the Oneidas' attempt to regain sovereignty over their land indicate that what concerned the Court was the disruptive nature of the claim itself. *See id.* at 1483 ("[W]e decline to project redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns."); *Id.* at 1491 ("This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [the Tribe] from gaining the disruptive remedy it now seeks."); *id.* at 1491 n.11 ("[The Oneidas'] claim concerns grave, but ancient, wrongs, and the relief available must be commensurate with that historical reality."). Although we recognize that the Supreme Court did not identify a formal standard for assessing when these equitable defenses apply, the broadness of the Supreme Court's statements indicates to us that *Sherrill's* holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to "disruptive" Indian land claims more generally.

Cayuga, 413 F.3d at 274.

Five years later, the Second Circuit had another opportunity to revisit the holding of *City of Sherrill* in *Oneida Nation of New York v. County of Oneida*, 617 F.3d 114 (2d. Cir. 2010). The Second Circuit confirmed it is the disruptive nature of the claim itself that controls whether or not the claim may be barred by laches, acquiescence, or impossibility:

> The equitable defense recognized in *Sherrill* and *Cayuga* is not limited to "possessory" claims – to claims premised on the assertion of a current possessory right to tribal lands held by others on the theory that

Appellate Case: 23-1261 Page: 11 Date Filed: 05/17/2023 Entry ID: 5277996

> the original transfer of ownership of the lands was in some way flawed. Rather, the defense is properly applied to bar any ancient land claims that are disruptive of significant and justified societal expectations that have arisen as a result of a lapse of time during which the plaintiffs did not seek relief. *See Sherrill*, 544 U.S. at 215 n.9, 125 S.Ct. 1478 ("The relief [the New York Oneidas] seek [ ] … is unavailable because of the long lapse of time, during which New York's governance remained undisturbed, and the present-day and future disruption such relief would engender.").

Oneida, 617 F.3d at 135.

Of course, it is not just the Second Circuit that has embraced this interpretation of *City of Sherrill*. *See, e.g.*, *Oklahoma v. United States Dept. of the Interior*, 577 F. Supp. 3d 1266 (W.D. Okla. 2021) ("Here, like in *Sherrill*, *Cayuga*, and *Oneida*, there can be little argument that *McGirt*'s recognition of the ongoing existence of the Creek Reservation will disrupt significant and justified expectations concerning the character of the land. For that reason, *Sherrill* may well be a powerful weapon in Oklahoma's attempts to resist claims that the Creek Nation or inhabitants of the reservation enjoy broad immunity from local regulation."); *Wolfchild v. Redwood Cnty.*, 91 F. Supp. 3d 1093 (D. Minn. 2015) ("Based on the particular characteristics and history of the claims at issue here, the Court finds that Plaintiffs' claims are equitably barred. Application of the equitable bar set forth in *Sherrill* does not require a balancing of equities between the parties. Instead, the equitable bar focuses on Plaintiffs' delay in seeking relief, and the disruption that would result to settled and justified expectations regarding land ownership.").

Appellate Case: 23-1261 Page: 12 Date Filed: 05/17/2023 Entry ID: 5277996

In understanding why *City of Sherrill* opened the equitable door that it did, and why subsequent courts have continually applied its holding, context is important:

> Our inquiry is informed by the understanding that, at the turn of this century, Congress did not view the distinction between acquiring Indian property and assuming jurisdiction over Indian territory as a critical one, in part because "[t]he notion that reservation status of Indian lands might not be coextensive with tribal ownership was unfamiliar," *Solem*, 465 U.S. at 468, 104 S.Ct. at 1164, and in part because Congress then assumed that the reservation system would fade over time. "Given this expectation, Congress naturally failed to be meticulous in clarifying whether a particular piece of legislation formally sliced a certain parcel of land off one reservation." *Ibid.*; *see also Hagen*, 510 U.S. 399, 426, 114 S.Ct. 958, 973, 127 L.Ed.2d 252 (1994). (Blackmun, J., dissenting) ("As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen").

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329, 343–44 (1998).

> Congress retreated from the reservation concept and began to dismantle the territories that it had previously set aside as permanent and exclusive homes for Indian tribes. *See Solem v. Bartlett*, 465 U.S. 463, 466, 104 S.Ct. 1161, 1163-1164, 79 L.Ed.2d 443 (1984). The pressure from westward-bound homesteaders, and the belief that the Indians would benefit from private property ownership, prompted passage of the Dawes Act in 1887, 24 Stat. 388. The Dawes Act permitted the Federal Government to allot tracts of tribal land to individual Indians and, with tribal consent, to open the remaining holdings to non-Indian settlement. Within a generation or two, it was thought, the tribes would dissolve, their reservations would disappear, and individual Indians would be absorbed into the larger community of white settlers. See Hearings on H.R. 7902 before the House Committee on Indian Affairs, 73d Cong., 2d Sess., 428 (1934) (statement of D.S. Otis on the history of the allotment policy).

South Dakota, 522 U.S. at 325.

Appellate Case: 23-1261 Page: 13 Date Filed: 05/17/2023 Entry ID: 5277996

In other words, the application of a defense based on laches, acquiescence, or impossibility hardly works an undue hardship on a tribe, when, at the time these acts were passed, everyone, including the tribes, knew their purpose was to make the reservations "disappear" and "fade" away. The fact the economics of the situation have now changed, so that tribes currently have the ability to try to resurrect the existence of long departed reservations, cannot overcome more than a century's worth of acknowledgment that the reservation no longer exists.

Significantly, the United States Supreme Court itself has recently, and on several occasions, signaled that it is willing to consider whether *City of Sherrill* and its attendant equitable considerations may be applied to reach a finding of disestablishment, or to bar any claim that directly, or indirectly, seeks the revival of tribal sovereignty over land. For example, in *Nebraska v. Parker*, the Tribe claimed it could assert its own liquor tax on the sale of all alcoholic beverages because federal law permitted it to regulate liquor sales on its reservation. 577 U.S. 481, 486 (2016). The State claimed the Tribe could assert no such thing because it was not operating within the boundaries of a reservation, given that the Omaha Indian Reservation was diminished by an 1882 Act of Congress. *Id*. at 487. Ultimately, the Supreme Court held that an act of Congress did not diminish the Omaha Indian Reservation, but did recognize the significance of *City of Sherrill*. *Id.* at 494.

The oral argument in *Parker* confirms that the Justices were intrigued by the potential application of *City of Sherrill* to the facts of that case. Indeed, several Justices questioned whether petitioner had raised *City of Sherrill* as an argument or whether it had forfeited any such argument. *See, e.g.*, Transcript of Oral Argument at 7:5–12, 20:21–25, available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2015/14-1406_22p6.pdf. Justice Sotomayor characterized *City of Sherrill* as standing for the proposition that "if [a tribe] tri[es] to exercise their powers in a way that's harmful to settled expectations, [state entities] may have a remedy in law." *Id.* at 14:17–19. Importantly, Justice Sotomayor recognized that *City of Sherrill* "didn't say the Indians weren't sovereign. It just said they can't exercise the sovereignty." *Id.* at 14:19–22. In other words, a successful argument based on *City of Sherrill* would not serve to wholly strip away sovereignty from a tribe, but rather, would prevent the tribe from exercising such sovereignty.

Likewise, Justice Scalia also found *City of Sherill* to be of interest. He noted that he thought *City of Sherrill* was a "big deal," and that it's holding "said the Tribe had no jurisdiction. It said it had no sovereignty over the area anymore." *Id.* at 27:19–20, 46:4–7. Justice Kagan also inquired about the argument, and specifically asked whether petitioner was relying upon *City of Sherrill* as a "independent ground" for a finding of diminishment. *Id.* at 21:7–11. Finally, Justice Breyer also inquired

about *City of Sherrill*'s application, but ultimately retracted his question and stated that it should be left for another day because no one had argued it. *Id.* at 53:4–18.

Citing to *City of Sherrill*, the *Parker* court ultimately held that, despite the fact Congress did not diminish the reservation, it "express[ed] no view about whether equitable considerations of laches and acquiescence may curtail the Tribe's power to tax the retailers of Pender in light of the Tribe's century-long absence from the disputed lands." *Parker*, 577 U.S. at 494. The obvious implication of the Supreme Court's conclusion is this: perhaps an act of Congress did not disestablish the reservation, but, there is a distinct possibility that the application of equitable considerations would preclude the Tribe from exercising the authority that it otherwise derived from the land's status as a reservation. Of course, the fact that the Supreme Court went out of its way to indicate that it was not addressing *City of Sherrill* confirms it saw a real possibility that equitable considerations may have barred the Tribe's taxing authority.

Perhaps somewhat surprisingly, the Supreme Court was even more clear that it was open to the possibility of applying equitable doctrines to claims such as these in *McGirt*. Addressing the dissent's concerns for reliance interests, it wrote:

> Still, we do not disregard the dissent's concern for reliance interests. It only seems to us that the concern is misplaced. Many other legal doctrines—procedural bars, res judicata, statutes of repose, and laches, to name a few—are designed to protect those who have reasonably labored under a mistaken understanding of the law. And it is precisely because those doctrines exist that we are "fre[e] to say what we know

Appellate Case: 23-1261 Page: 16 Date Filed: 05/17/2023 Entry ID: 5277996

to be true . . . today, while leaving questions about . . . reliance interest[s] for later proceedings crafted to account for them."

McGirt, 140 S. Ct. at 2481 (quoting *Ramos v. Louisiana*, 140 S. Ct. 1390, 1407 (2020)). Paraphrased, the message is simple: the United States Supreme Court is willing to consider a case that is well-positioned for a ruling on whether the application of *City of Sherrill*, or the doctrine of laches, may serve to deem a reservation disestablished or to otherwise bar a claim in which a Tribe directly, or indirectly, attempts to reassert sovereignty over land that long-ago lost any semblance of Tribal sovereignty. The case at bar is just that case.

II. Application of *City of Sherrill* to the Facts at Bar

Here, the Band seeks to reassert its sovereignty over the land, particularly by (a) seeking a declaration that certain Appellants interfered with the Band's inherent tribal law enforcement authority and federally-delegated authority; and (b) seeking a declaration that the Band retained its former reservation provided for by an 1855 treaty. *See* Brief of Appellants Erica Madore and Kyle Burton at 16. For all of the reasons expounded in *City of Sherrill*, and referred to in both *Parker* and *McGirt*, this Court should reject the Band's claims and conclude that the Band's reservation has been disestablished, or in any event, that the Band is barred from reasserting

sovereignty over the land after over a century has passed since it explicitly ceded its reservation.[4]

City of Sherill has warned of, and counseled against, this exact type of litigation. 544 U.S. at 220 ("If OIN may unilaterally reassert sovereign control and remove these parcels from local tax rolls, little would prevent the Tribe from *initiating a new generation of litigation* to free the parcels from local zoning or other regulatory controls that protect all landowners in the area." (emphasis added)). This time, the Band raises the issue of its law enforcement authority and the existence of its reservation. But next time, it will be taxes. And the time after that, it will be zoning. And time after time again, the Band will continue to assert new claims that it could have asserted long ago. In essence, should the Band be permitted to continue with the disruptive claims brought in this case, the Court will have given the green light for a "new generation of litigation" that will seek to completely upend the justified and settled expectations of those currently living and working on the disputed land. For the reasons set forth below, *City of Sherrill* counsels that this Court should equitably bar the Band from bringing such claims.

First, the Band has simply waited too long to reassert its sovereignty over the land. As is argued in Appellants' briefing, the Band explicitly ceded its reservations

[4] It does appear, however, that an extremely nominal portion of the disestablished Reservation remained held in trust by the United States.

Appellate Case: 23-1261 Page: 18 Date Filed: 05/17/2023 Entry ID: 5277996

to the United States on several occasions throughout the mid to late 1800s. Accordingly, Congress, the State of Minnesota, the United States Supreme Court, and the Band itself, all recognized that the reservation was ceded and disestablished at various stages of the 1800s and early 1900s. Brief of Appellant Mille Lacs County, Minnesota at 29–50. Yet, the Band chose to wait until 2017, via the unilateral filing of an action against Mille Lacs County and various officials, to reassert its sovereignty over the land and to seek a declaration that the reservation still exists. Simply put, the Band's decision and attempt to wait over a century before reasserting its sovereignty over the land at issue is squarely foreclosed by *City of Sherrill*. 544 U.S. at 216–17 ("This long lapse of time, during which the [Tribe] did not seek to revive their sovereign control through equitable relief in court . . . preclude [the Tribe] from gaining the disruptive remedy it now seeks.").

Second, there can be no doubt that the Band acquiesced to the exercise of dominion and sovereignty over the land at issue by the State of Minnesota and local governments, such as amici. Indeed, as Appellants note, the Band has repeatedly recognized that the reservation had been extinguished and ceded to the United States. Brief of Appellant Mille Lacs County, Minnesota at 47–50. And of course, amici have continuously exercised jurisdiction over the land at issue since their incorporation. The Band's acknowledgement that its reservation has been disestablished, combined with its acquiescence to amici's and the State of

Minnesota's exercise of sovereignty over the land provides further support for the application of *City of Sherrill* to this case.

Third, *City of Sherrill* counsels that, "[w]hen a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled-expectations are prime considerations." 544 U.S. at 218. Here, the longstanding observances provide further support for the application of *City of Sherrill*. All involved have long shared the understanding that the reservation had been disestablished. Of course, amici still share that belief. The United States did not consistently take the position that the reservation still existed until 1991, and the State of Minnesota did not officially reverse its century-long belief that the reservation did not exist until mere years ago, when it filed documents in Minnesota state court. *See Mille Lacs Band of Ojibwe et al. v. County of Mille Lacs, Minnesota et al.*, No. 0:17-cv-05155-SRN-LIB, Amicus Curiae Brief of the United States, Dkt. No. 265-1 at 19; Amicus Curiae Brief of the State of Minnesota, Dkt. No. 250 at 10.

If longstanding observances are not enough, then the "settled-expectations" of those involved should be more than enough to nudge this case across the line. *City of Sherrill*, 544 U.S. at 217. As will be described more thoroughly below, amici have long exercised jurisdiction over the land at issue, and have long come to expect that their jurisdiction could not, and would not, be supplanted by the Band's tribal sovereignty some one-hundred years later. This belief, of course, is bolstered by the

Appellate Case: 23-1261 Page: 20 Date Filed: 05/17/2023 Entry ID: 5277996

fact that the State of Minnesota had repeatedly taken the same position, giving amici no reason to suspect that the State would suddenly change its position on the matter. Any decision providing that the reservation still exists, or that the Band is able to pursue a claim seeking to reassert sovereignty over the land, would destabilize the land and shatter amici's well-settled expectations.

Finally, there can be no doubt that the Band's claim in this matter is "disruptive."[5] *Id.* at 217. By bringing this suit, the Band is seeking to reassert sovereignty after a "century-long absence" from the disputed lands. *Parker*, 577 U.S. at 494. The Band's action would alter the character of law enforcement on the disputed lands, strip amici of their jurisdiction, and revert the character of the land to its state in the early 1800s, despite the longstanding observances, well-settled expectations, and change in the character of the land that has occurred over the last century. In effect, the Band seeks the same "piecemeal shift in governance" that was sought in *City of Sherrill*. 544 U.S. at 221. But as was the case there, the distance

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[5] The district court concluded that "a decision recognizing the reservation's continued existence would not upset any settled expectations," and that "both the United States and Minnesota have recognized the reservation's continued existence." *Mille Lacs Band of Ojibwe v. Cnty. of Mille Lacs, MN*, 589 F. Supp. 3d 1042, 1079 (D. Minn. 2022). The district court, however, wholly failed to analyze what settled expectations exist and why those settled expectations would not be disturbed. Moreover, the district court also failed to acknowledge that the positions of the United States and Minnesota on the existence of the reservation are relatively recent reversals of previously well-established policy. These reversals alone have upset settled expectations.

from the mid-1800s to the present day, the Band's long delay in seeking relief, and the developments of the disputed land spanning several generations "render inequitable" the action that the Band has unilaterally initiated. *Id.* Accordingly, applying *City of Sherrill* and its attendant equitable considerations, primarily laches and acquiescence, this Court should conclude that the Band's reservation has been disestablished, or, in the alternative, that the Band is barred from asserting its claims because such claims seek to reassert sovereignty over land that long ago lost any semblance of Tribal character. *Cf. Parker*, 577 U.S. at 494 ("[W]e express no view about whether equitable considerations of laches and acquiescence may curtail the Tribe's power to tax the retailers of Pender in light of the Tribe's century-long absence from the disputed lands.").

III. Affirmance of the Decision Below Will Result in Significant and Disruptive Consequences for Amici

This case is not just about the Band's law enforcement authority within the purported reservation. It's about the wisdom of reviving tribal sovereignty over former reservation land that has been under the exclusive jurisdiction of state and

local government for over a century.[6] It is also about the federal executive branch's continued attempts to usurp state and local authority. And it is also about the significant disruptions to the well-settled and justifiable expectations developed by all who have decided to live and establish businesses on land governed by a set of well-known rules. Any decision that would deem the Band's reservation to be in existence, or that would allow the Band to reassert sovereignty over the land, would decimate the status-quo and result in disruptive consequences for amici.

A. The Band's Claims are Inherently Disruptive

As an initial matter, courts have uniformly concluded that claims such as the Band's are "inherently disruptive." *Stockbridge-Munsee Comm.*, 756 F.3d at 165. And while *City of Sherrill* primarily took issue with the removing of parcels from local tax rolls, other courts have recognized that the reassertion of sovereignty over former reservation land *necessarily* has other significant impacts. For example, in *Cayuga Indian Nation of New York v. Village of Union Springs*, the United States District Court for the Northern District of New York noted that taxation is but one

[6] That treatment began to slowly erode only after the Field Solicitor wrote a 1991 Opinion, extremely difficult to reconcile with previous U.S. Supreme Court precedent, that opined the Reservation was not totally disestablished. *See Mille Lacs Band of Ojibwe et al. v. County of Mille Lacs, Minnesota et al.*, No. 0:17-cv-05155-SRN-LIB, Amicus Curiae Brief of the United States, Dkt. No. 265-1 at 19; Amicus Curiae Brief of the State of Minnesota, Dkt. No. 250 at 10.

Appellate Case: 23-1261 Page: 23 Date Filed: 05/17/2023 Entry ID: 5277996

of the impacts caused by the reassertion of long-dormant claims to Tribal sovereignty. 390 F. Supp. 2d 203 (N.D.N.Y. 2005). Indeed, the court there stated:

> If avoidance of taxation is disruptive, avoidance of complying with local zoning and land use laws is no less disruptive. In fact, it is even more disruptive. The Supreme Court clearly expressed its concern about the disruptive effects of immunity from state and local zoning laws, even to the point of citing to this case as an example. *See City of Sherrill*, 125 S. Ct. at 1493 n. 13. Even the lone dissenter, Justice John Paul Stevens, opined that local taxation was the "least disruptive to other sovereigns," and noted that "[g]iven the State's strong interest in zoning its land without exception for a small number of Indian-held properties arranged in checkerboard fashion, the balance of interests obviously supports the retention of state jurisdiction in this sphere." *Id.* at 1497 n. 6, 161 L.Ed.2d 386 (Stevens, J., dissenting) (citing *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215, 107 S. Ct. 1083, 94 L.Ed.2d 244 (1987)).

Id. at 206.

With this in mind, the Northern District of New York concluded that the "Nation [was] seeking relief that is even more disruptive than the non payment of taxes" and that the "Supreme Court's strong language in *City of Sherrill* regarding the disruptive effect on the every day administration of state and local governments bars the Nation from asserting immunity from state and local zoning laws and regulations." *Id.* In short, *City of Sherrill*, *Stockbridge-Munsee*, and *Village of Union Springs* all demonstrate that the belated assertion of Tribal sovereignty over former reservation land inherently carry disruptive effects that counsel courts to bar Tribes from asserting such claims.

Appellate Case: 23-1261 Page: 24 Date Filed: 05/17/2023 Entry ID: 5277996

B. Reestablishment of Tribal Sovereignty Over Former Reservation Land Will Result in Varied Losses of Amici's Jurisdiction

First, and if the Court wholly affirms the decision below, amici and their citizens will be subject to new and burdensome law enforcement scenarios. Indeed, as Appellants note, the district court's ruling declared that the Band has "inherent authority to investigate violations of federal, state, and tribal law within the boundaries of the reservation created in the 1855 treaty, even investigating non-Indians on non-Band-owned fee land." Brief of Appellants Erica Madore and Kyle Burton at 17–18. If the district court's decision stands, amici will face an entirely new law enforcement landscape. Entirely new relationships will need to be built, public trust will need to be fostered, and amici will spend a considerable amount of time and effort coordinating with a new law enforcement agency, despite the fact that there was nothing wrong with the past arrangement.

Second, and as was alluded to above, a decision determining that the Band's reservation still exists, or that it may exercise dominion and jurisdiction over the land, would lead to drastic consequences for amici with respect to taxation and zoning. With respect to taxation, amici will be significantly limited in their ability to impose taxes on the Band and its members. And with respect to zoning, there is the potential that the Band could assert that it is exempt from amici's zoning

regulations, depriving amici and its citizens of one of their key tools in protecting and regulating the community.

Third, amici will be subject to burdensome and inefficient oversight from the Band and the federal government. For example, with respect to environmental regulation, where the State of Minnesota would typically handle any such inquiries, such inquiries are now handled by the EPA, or via delegation from the EPA, the Band. Indeed, the Band has already been given "Treatment as a State" status for purposes of administering § 106 of the Clean Water Act (33 U.S.C. § 1256), and §§ 105 and 505(a)(2) of the Clean Air Act (42 U.S.C. §§ 7405, 7661d(a)(2)). *See* American Indians, Indian Tribes, and State Government at 71, MN House Research (February 2023), available at https://www.house.mn.gov/hrd/pubs/indiangb.pdf. And to the extent the Band has not been delegated authority for any remaining environmental laws, amici will instead need to work with the EPA in Chicago, rather than working with the State of Minnesota.[7]

One clear example of how burdensome and painstaking this Federal and Tribal oversight can be is neatly illustrated by amicus City of Wahkon's efforts in

[7] There are a variety of other laws that would be enforced by the EPA and other federal agencies, as opposed to the State of Minnesota, should the reservation deemed to be in existence, such as the Safe Drinking Water Act, the Comprehensive Environmental Response, Compensation and Liability Act, the Federal Insecticide, Fungicide and Rodenticide Act, and the Toxic Substances Control Act. *See* American Indians, Indian Tribes, and State Government at 68–75, MN House Research (February 2023).

Appellate Case: 23-1261 Page: 26 Date Filed: 05/17/2023 Entry ID: 5277996

its sanitary sewer improvements project. Because City of Wahkon planned on requesting financial assistance from the Rural Utilities Service, one of the agencies comprising USDA Rural Development, and because the project would be located on purported tribal lands, the USDA was required to notify *eighteen* potentially interested tribes of the project and give them the opportunity to participate in review of the project pursuant to Section 106 of the National Historic Preservation Act (54 U.S.C. § 306108).[8] Notably, out of the eighteen tribes notified, only *seven* of the tribes were located in Minnesota. This is but one example that demonstrates how reservation status can transform what should be a relatively simply approval process into a labyrinthian nightmare for a small town that is simply seeking to provide critical services to its populace.

Even the seemingly mundane items will become significantly complicated should the reservation be deemed to exist. Take, for example, alcoholic beverage licenses issued by cities and counties. Minnesota's own legislative research body highlights the absurdities that may occur in this area. *See* American Indians, Indian Tribes, and State Government at 62–63, MN House Research (February 2023). As is noted by the report, "Minnesota law on alcoholic beverages in Indian country

[8] Extensive historical preservation inquiries extend beyond the environmental sphere; indeed, the City of Wahkon, in preparing to develop a new Main Street, has already received indications that the Minnesota Department of Transportation is concerned with the potential preservation requirements that may be instituted by the Tribal Historical Preservation Office.

Appellate Case: 23-1261 Page: 27 Date Filed: 05/17/2023 Entry ID: 5277996

represents a 'live and let live' approach." *Id.* at 62. In other words, Minnesota law "provides for the mutual recognition of authority" in the alcoholic beverage space. *Id.* Accordingly, Minnesota law recognizes the validity of liquor licenses issued by an Indian Tribe to a Tribal member or Tribal entity for establishments located in Indian country, and cities and counties may also issue retail alcoholic beverage licenses to establishments that are in Indian country and also within the city or county. *Id.*

At first glance, it would appear that this would pose no problems. However, look closer, and you'll discover that "neither the state nor a local unit of government has the authority to suspend or revoke a Tribal [liquor] license for a violation of any law or regulation." *Id.* at 63. In practice, this means that the Band could issue a liquor license to a member or entity and allow that individual or entity to violate Minnesota's liquor laws with impunity. The license-holder could sell to minors and operate at all hours of the day, yet the state and local governments would be powerless to revoke the license. In effect, cities and counties would be stripped of their ability to regulate the sale of liquor in their jurisdiction, no matter how egregious the practice may be.

In sum, the Court's decision on whether the Band's reservation continues to exist is not a hallow one. Instead, it will have significant and disruptive impacts on amici and those similarly situated. Amici will see their policy authority curtailed,

Appellate Case: 23-1261 Page: 28 Date Filed: 05/17/2023 Entry ID: 5277996

their tax bases shrink, their zoning ordinances shirked, and their independence stripped, should the reservation be deemed to exist.

CONCLUSION

For all the reasons set forth above, this Court should apply *City of Sherrill* and conclude that the Band's reservation has been disestablished, or in the alternative, that the Band is barred from asserting its claims because they seek to do nothing more than revive Tribal sovereignty over land that long ago lost any semblance of being a reservation. The Band's belated attempt to rekindle the embers of its sovereignty and engage in a piecemeal shift in governance must be rejected, especially in light of the fact that it plainly acquiesced to the disestablishment of the reservation and that the United States Supreme Court has already ruled accordingly. The Band's attempt to reassert sovereignty over the land would be highly-disruptive to the settled-expectations of amici and its populace. Accordingly, amici requests that this Court reverse the decision of the district court.

Respectfully submitted,

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Appellate Case: 23-1261 Page: 30 Date Filed: 05/17/2023 Entry ID: 5277996

CERTIFICATE OF COMPLIANCE

The undersigned counsel for Amicus Curiae certifies that this brief complies with the requirements of Fed. R. App. P. 32(a) in that it is printed in 14 point, proportionately spaced typeface utilizing Microsoft Word 2016 and contains 6,445 words, including headings, footnotes and quotations and that the brief has been scanned for viruses and is virus-free.

Dated: May 16, 2023

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CERTIFICATE OF SERVICE

I hereby certify that on May 16, 2023, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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