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Honorable William K. Suter
Clerk
Supreme Court of the United States
One First Street N.E.
Washington, D.C. 20543

Re: *Madison County and Oneida County, New York v. Oneida Indian Nation of New York*, No. 10-72

Dear General Suter:

I am writing in response to petitioners' December 1, 2010, letter regarding respondent Oneida Indian Nation's waiver of sovereign immunity, as set forth in my letter of November 30, 2010. Petitioners raise a number of objections, which are addressed in turn below.

1. The Nation recognizes that its waiver of sovereign immunity at this stage of the litigation is unusual. The waiver, however, must be understood in context. In the decisions below, the district court held, *inter alia*, that the subject properties are immune from taxation *as a matter of New York state law*. Pet. App. 44a-45a, 73a-74a. Accordingly, in October 2005 and June 2006, it permanently enjoined petitioners from imposing penalties and interest on unpaid taxes and from enforcing their respective taxes on the Nation's land through foreclosure. *Id.* at 50a, 78a. Petitioners appealed those judgments to the Second Circuit, which heard oral argument in November 2007.

In 2008, while the case was under submission to the court of appeals, the Nation posted irrevocable letters of credit at the direction of the Department of the Interior to ensure payment of taxes, penalties, and interest to petitioners on the Nation's fee lands in the event they are held to be due. The Department "considered the letters of credit and the Nation's commitments, and determined that they will be adequate to satisfy tax liens for purposes of acquiring the Subject Lands into trust."[1] Petitioners, however, questioned the sufficiency of those letters in their briefing to this Court. Cert. Reply Br. 6-7 & n.2. The Nation's waiver of sovereign immunity responds to petitioners' stated concerns and is intended to remove any doubt that the Nation will pay the amounts ultimately held to be due.

The parties continue to dispute whether and how much tax is due on multiple grounds, including grounds that were not addressed by the Second Circuit and were not presented in the petition for certiorari. Thus, for example, the Second Circuit did not address the taxability of the

[1] *See* U.S. Department of the Interior, Bureau of Indian Affairs, Record of Decision: Oneida Indian Nation of New York Fee-to-Trust Request, 53 (May 2008). A copy of the Record of Decision was submitted to the Second Circuit below and is available at www.oneidanationlegal.com/images/news/7.pdf.

Nation's land under state law (N.Y. Indian Law § 6 and N.Y. Real Prop. Tax Law § 454), and the New York Court of Appeals reserved the issue earlier this year in *Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233 (N.Y. 2010). The parties also continue to dispute the proper assessment of the Nation's land as a matter of both state and federal law, and whether penalties and interest may be imposed for periods in which the lands were held to be tax-exempt. Those issues also are not before this Court and remain to be litigated. Under the circumstances, the Nation respectfully submits that the letters of credit and waiver of sovereign immunity should be understood as good-faith efforts to provide petitioners with the necessary assurances that any amounts due will be paid once they are judicially determined.

2. The Counties question the sufficiency and scope of the Nation's declaration and ordinance. As to sufficiency, they suggest that the Nation's waiver of its sovereign immunity represents no more of a commitment than the letters of credit themselves. The Counties misread the waiver and my letter. The Nation's declaration and ordinance were passed with the express intent of addressing the very concerns about the letters of credit that the Counties raised in their reply brief. There, the Counties argued that the letters did not assure payment of the disputed taxes because they were "subject to conditions and limitations that materially impair their value," and they "impose various risks on the Counties." Cert. Reply Br. 6 n.2. While the Nation disputes that characterization, the waiver addresses it, for it assures the Counties payment of any taxes that are lawfully due, under penalty of foreclosure.

The Counties' concern about the scope of the Nation's waiver is likewise misplaced. Petitioners question whether the waiver guarantees payment not only of the taxes that are lawfully due, but also "additional interest and penalties that have piled up over the past decade while the underlying taxes have gone unpaid." Ltr. 2. First, it must be noted that the penalties and interest covered by the injunctions are for the period prior to this Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), during which it was the law of the Second Circuit that the lands were exempt from taxation. The district court found that imposition of such penalties and interest would be inequitable, Pet. App. 45a-46a, a conclusion the Second Circuit did not disturb. In any event, the Nation believes that any interest and penalties that are lawfully due are fairly encompassed by the ordinance, and it hereby represents to this Court that it will not raise its sovereign immunity as a barrier to their enforcement through foreclosure.

3. The Counties suggest that the waiver cannot be relied upon because it might be revoked by the Nation or invalidated by a court. Those concerns may be put to rest. First, the Nation's intent to bind itself in perpetuity is clear from the face of the declaration and ordinance. Second, even if the Nation's "irrevocabl[e] and perpetual[]" waiver were not sufficient to protect the Counties' rights, the doctrine of judicial estoppel would be. That doctrine "prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001)

(internal quotation marks omitted); *see also Davis v. Wakelee*, 156 U.S. 680, 689 (1895) ("[W]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."). To be sure, in waiving its sovereign immunity, the Nation has not "prevail[ed]" in this litigation. Nonetheless, the Nation considers itself judicially estopped from raising sovereign immunity as a defense to foreclosure actions to enforce state, county, or local real property taxes; invites the entry of an order reflecting the irrevocability of its declaration and ordinance; and expressly disclaims any intention ever to revoke its waiver.[2]

4. The Counties suggest that the Nation's solemn and irrevocable waiver of its sovereign immunity for suit is an effort "to manipulate the Court's jurisdiction to insulate a favorable decision from review." *City of Erie v. Pap's A.M.*, 529 U.S. 277, 288 (2000). There is no basis for that accusation. In waiving its sovereign immunity, the Nation has given up something of great importance to it—an immunity from suit that was upheld by all four of the federal judges that considered the issue since this Court's decision in *Sherrill*. It has done so to eliminate any concerns that taxes ultimately found to be due will be paid.

The Nation's waiver will not operate to leave in place a ruling in the Nation's favor. First, the Nation does not claim that the waiver renders the ongoing tax controversy between the parties moot. Although the issue of sovereign immunity has been removed from the case by the Nation's waiver, it is nonetheless the case, as the Counties pointed out, that "there are many other questions to be resolved in this litigation," which were not addressed by the Second Circuit and are not presented in the petition for certiorari. Ltr. 3. Second, if this Court were to decide that those remaining issues should be decided by the Second Circuit in the first instance, the Second Circuit's judgment in the Nation's favor would not remain in place; rather, that judgment would be vacated and the case remanded for further litigation on the remaining issues. This case

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[2] The Counties point to no ground on which the waiver might be invalidated. The Counties cite *Wisconsin v. Ho-Chunk Nation*, 512 F.3d 921 (7th Cir. 2008), and in particular the Seventh Circuit's discussion of *Panzer v. Doyle*, 680 N.W.2d 666 (Wis. 2004). In *Panzer*, the Wisconsin Supreme Court considered a challenge brought by the state senate majority leader, state assembly leader, and the joint committee on legislative organization against the governor, arguing that he lacked the authority, under separation of powers principles, to waive the state's sovereign immunity in a gaming compact with an Indian tribe. In contrast, here, the Council that enacted the Nation's ordinance is its sole decisionmaking body.

therefore is entirely distinguishable from *Erie*, for petitioners will have an adequate opportunity to challenge the district court's injunctions when the remaining issues are litigated.[3]

5. The decision to waive the application of tribal sovereign immunity to property tax foreclosure required careful consideration by the Nation's newly-retained counsel and the Nation's government precisely because it was intended to be permanent and to have important legal consequences. My suggestion that the parties address the implications of the Nation's waiver in their briefs and that the briefing schedule be modified to allow them to do so was intended to ensure that the Counties have an adequate opportunity to address this development. We certainly do not object, however, to the Counties' suggestion that the parties address the matter separately. The Counties state that the tribal sovereign immunity issues presented in this case "are of national significance and recurring real world importance," Ltr. 4, but the Petition identifies no case other than this one that has presented the issue. Because the Nation's waiver makes it unnecessary to address that question in this case, the Court may wish to direct submissions from the parties to address whether the decision below should be vacated with instructions to address the other grounds for the injunctions.

Respectfully submitted,

Seth P. Waxman

Copies to: David M. Schraver, Esq.

[3] With respect to the Second Circuit's decision on sovereign immunity, the Court may simply vacate the decision below and remand for further proceedings—just as it did last Term in *Kiyemba et al. v. Obama*, 130 S. Ct. 1235 (2010), after intervening diplomatic efforts by the United States materially altered the premise of the question on which certiorari had been granted. That option was not available in *Erie* because the decision on review in that case was from the Supreme Court of Pennsylvania, not a federal court of appeals. *See Erie*, 529 U.S. at 305 (Scalia, Thomas, JJ., dissenting). On remand, the Second Circuit would be free to address the remaining bases for the district court's injunctions, which were fully briefed and argued to that court in 2007.