No. 10-72

IN THE

Supreme Court of the United States

MADISON COUNTY AND
ONEIDA COUNTY, NEW YORK, PETITIONERS

v.

ONEIDA INDIAN NATION OF NEW YORK AND
STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS

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

BRIEF FOR CITIZENS EQUAL RIGHTS FOUNDATION, CITIZENS EQUAL RIGHTS ALLIANCE AND CENTRAL NEW YORK FAIR BUSINESS AS AMICI CURIAE SUPPORTING PETITIONERS

JAMES J. DEVINE, JR.
Counsel of Record

128 Main Street
Oneida, NY 13421
JDevine@centralny.twcbc.com
(315) 363-6600

CURRY & TAYLOR ♦ 202-393-4141

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE

Citizens Equal Rights Foundation (CERF) (1), Citizens Equal Rights Alliance (CERA)(2) and Central New York Fair Business (CNYFBA) (3), (collectively "the *Amici*"), by their undersigned counsel, respectfully move for leave to file the attached brief as *amici curiae* in support of the Petitioners. The *Amici* have requested and obtained the written consent to file this brief from Petitioners, Madison County and Oneida County.

Consent from Respondent, Oneida Indian Nation (OIN) of New York, was requested by letter to Attorney Michael R. Smith on October 29, 2010. No response has been received. Therefore, this brief is accompanied by a motion requesting that this *amici* brief be filed.

The Petition seeks review of the decision of the United States Court of Appeals for the Second Circuit affirming the judgment of the district court that ruled the "OIN is immune from the Counties' foreclosure actions under the principle that "(a)s a matter of federal law, an Indian tribe is subject to suit only where Congress has authorized the suit or the tribe has waived its immunity."

The subject of this litigation involves application of federal Indian common law to prevent the collection of property taxes on fee land in state courts.

Moreover, the case concerns the application of this Court's decision in *City of Sherrill v. Oneida Indian*

Nation, 544 U.S 197 (2005). CERF and CERA filed an *amici curiae* brief in the *City of Sherrill* case in support of the City of Sherrill and have continued to have a substantial interest and involvement in the proper application of the decision.

Specifically, the *Amici* have a substantial interest in this litigation for several reasons. The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights. CERF has a critical interest in this case, as the extension of the decision of the Second Circuit as precedent will affect CERA members who own various assets and pay property taxes on fee lands near tribal fee property all over the United States. Starting with the *amici curiae* briefs in *City of Sherrill* and *Carcieri v. Salazar*, 129 S.Ct 1058 (2009) (2009) CERF has maintained a consistent position on limiting the Indian Reorganization Act. See http://www.narf.org/sct/sherrill/amiciequalrightsfoundation.pdf and http://www.narf.org/sct/carcieri/merits/cerf_et_al.pdf.

This brief addresses federal Indian common law, tribal sovereign immunity and whether the land is federal Indian country.

The Central New York Fair Business, Inc., incorporated in the State of New York, is headquartered in the City of Oneida. It is the purpose of Fair Business to identify and address significant issues affecting the equality of business opportunity in central New York. Allowing the Oneida Indian Nation to assert sovereign immunity over fee lands to avoid the payment of property taxes will adversely affect all citizens of New York by creating an unequal business advantage and exempting the Oneida Indian Nation (OIN) enterprises from the laws of the State of New York and the regulatory authority of the Counties.

Members of the Central New York Fair Business, Inc., further are resident citizens of Madison and Oneida Counties. They are homeowners and business owners in the area where the parcels at suit are located. They share common roads; common underground water aquifer; and, common streams. They will be impacted as taxpayers by public costs resulting from any proposed use of the parcels made by the OIN, including the impacts of the casino or its expansion. Any proposed use of the parcels by the OIN could affect their property values, character of the community and community safety if the civil and criminal jurisdiction of New York and the Counties are not applicable to the parcels because of tribal sovereign immunity. CERA and CNYFBA are also actual parties in the litigation against the Record of Decision to take most of the parcels of land at issue in the *City of Sherrill* case into trust using 25 U.S.C. § 465 and the Part 151 regulations

Third, the *Amici* are experienced in and have been committed to furthering their interests by filing

amicus briefs in other cases that have dealt with issues similar to those raised in this litigation.

The *Amici* are very familiar with the questions involved in this litigation and have reason to believe that one significant legal question may not be fully addressed by Petitioner. Additional briefing would assist this Court in deciding this case.

The *Amici* have a longstanding commitment to safeguarding the civil rights of all Americans, and have an abiding interest in the welfare of all Americans, including the Oneida Indians of New York. For these reasons, and those set forth in the attached brief, the *Amici* respectfully request leave to file a brief *amici curiae.*

Respectfully submitted,

James J. Devine, Jr.
128 Main Street
Oneida, New York 13421
(315) 363-6600
jdevine@centralny.twcvc.com

Attorney for Amici

12/10/10

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

Interest of the Amici Curiae

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, both Indian and non-Indian, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights. CERF has a critical interest in this case, as the extension of the decision of the Second Circuit as precedent will affect CERA members who own various assets and pay property taxes on fee lands near tribal fee property all over the United States. Starting with the amicus curiae briefs in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) and *Carcieri v. Salazar*, 129 S.Ct 1058 (2009) CERF has maintained a consistent position on limiting the Indian Reorganization Act (IRA) to only those tribes occupying actual federal Indian reservations in the Western United States. This brief continues the discussion by confronting this Court's creation and use of federal Indian common law to expand the authority of federally recognized Indian tribes.

The Central New York Fair Business Association, Inc., is incorporated in the State of New York and headquartered in the City of Oneida. It is the purpose of Fair Business to identify and address significant issues affecting the equality of business opportunity in central New York. Allowing the Oneida Indian Nation to assert sovereign immunity over fee lands to avoid the payment of property taxes will adversely affect all citizens of New York by creating an unequal business advantage and exempting the Oneida

Indian Nation (OIN) enterprises from the laws of the State of New York and the regulatory authority of the Counties.

Members of the Central New York Fair Business Association, (CNYFBA), further are resident citizens of Madison and Oneida Counties. They are homeowners and business owners in the area where the parcels at suit are located. They share common roads, common underground water aquifer and common streams. They will be impacted as taxpayers by public costs resulting from any proposed use of the parcels made by the OIN, including the impacts of the casino or its expansion. Any proposed use of the parcels by the OIN could affect their property values, character of the community and community safety if the civil and criminal jurisdiction of New York and the Counties are not applicable to the parcels because of tribal sovereign immunity. CERA and CNYFBA are also actual parties in the litigation against the Record of Decision to take most of the parcels of land at issue in the City of Sherrill case into trust using 25 U.S.C. § 465 and the Part 151 regulations.

Madison and Oneida Counties have consented by letter of November 2, 2010 to the filing of this *amici curiae* brief.[1] Consent for filing this *amici* brief by the Oneida Indian Nation was requested in writing on October 29, 2010 from Attorney Michael R. Smith. No response has been received. Therefore, this brief is

---

[1] Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amici curiae*, CERF and CNYFBA, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

accompanied by a motion requesting that this *amici* brief be filed.

Summary of the Argument

This brief confronts the authority of this Court to continue to create or discover law in regards to Indian tribes. This Court rejected the premise that the federal courts could or should "discover" national or general common law in diversity of citizenship cases in *Erie Railroad v. Tompkins*, 304 U.S. 64 (1938). Yet 36 years later in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)(*Oneida I*) this Court through federal Indian common law changed the settled law in regards to the state's authority under the doctrine of preemption as defined in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810) where no federal Indian reservation ever existed. This rewriting of the historical development of the law left the State of New York and the Counties of Madison and Oneida virtually defenseless until the doctrine of laches was applied in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). Even after *Sherrill*, the lower courts have continued to use their authority under "federal Indian common law" to reach the erroneous conclusion that the former Oneida reservation is "Indian country." This has reached now all the way into the recent decision of the New York Court of Appeals that applied federal law to determine whether the Cayuga tribe has a reservation as a matter of state law. *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010). Now, with the recent manipulations of counsel for the OIN regarding the ordinance of November 29, 2010 partially waiving sovereign immunity to attempt to divest this Court of jurisdiction over this case, this territorial tribal

government is threatening to disrupt the actual precept of the rule of law that is the basis of our Constitutional government. The assumption that the historical racial classifications of "Indian" and "Indian tribe" can become an integrated part of our law instead of an application of a completely separate territorial law is erroneous. The special status created through federal treaties and statutes of Indians and Indian tribes does separate the "Indians" and "Indian tribes" from the rest of the state citizenry. This fact has created real discrimination in the enforcement of "Indian" rights against all other property interests of ordinary state citizens and has damaged state sovereignty. This Court made such a decision in *Erie Railroad* in 1938 to protect state sovereignty and equal protection of the law for all individual Americans. This Court needs to do so again by extending the Erie Doctrine into federal Indian law by admitting that their special status creates discrimination against state citizens.

The second section of this brief discusses tribal sovereign immunity and how it was created by federal Indian common law. The final section of this brief expands on the previous amici brief of CERF and CNYFBA in support of the petition for certiorari in this case that explained that the Indian Reorganization Act (IRA), 25 U.S.C. §§ 415 et seq., made the tribal governments into Article I territorial governments as a matter of federal law. It concludes by explaining how this Court through federal Indian common law expanded the authority of these territorial tribal governments beyond what Congress itself could have legislated to the detriment of state citizens and state sovereignty.

Argument

What legal points to emphasize before this Court has been confused by the ploy made by the Oneida Indian Nation (OIN) on November 29, 2010 in adopting a tribal ordinance to partially waive their sovereign immunity for the payment of property taxes. The subsequent letters filed by OIN Counsel of Record to the Clerk of this Court go even further in describing the change of the legal position of the OIN. *Amici curiae* CERF and CNYFBA address this case in a manner that allows the Court to determine for itself whether the OIN may waive its "sovereign immunity" that was created as a matter of federal Indian common law. The Second Circuit concluded that since the land parcels owned in fee are still "Indian country," originally another creation of federal Indian common law, the Oneida tribe enjoys sovereign immunity from the counterclaims brought by Madison and Oneida Counties (Counties) for unpaid property taxes. The Second Circuit made this conclusion while agreeing that in *City of Sherrill* this Court held that a state reservation was created by the Treaty of Fort Schuyler in 1788 before the Constitution of the United States took effect. The Second Circuit also concluded that even though the former reservation had been under the continual jurisdiction of the state of New York it was still federal "Indian country." While the *Sherrill* ruling calls into question the equity of reestablishing long extinguished rights of tribal sovereignty, it did not expressly reach the issue of whether the former state reservation of land is or is not presently federal "Indian country." Applying the doctrine of laches 35 years after unleashing the special trust relationship of the United States for the OIN against all other citizens of New

York did not stop the state jurisdiction issues that are presented in this case and cannot by itself resolve the lower federal courts from continuing to apply federal Indian common law to keep the claims of the OIN viable.

I. THE SPECIAL FEDERAL STATUS OF INDIANS AND INDIAN TRIBES SHOULD BE TREATED AS DIVERSITY OF CITIZENSHIP TO STOP ACTUAL DISCRIMINATION AGAINST STATE CITIZENS AND THE COUNTIES

a. A Short History of Federal Territorial Policy

Today we forget that this nation started as 13 small colonies greatly outnumbered in population by the Native Americans. In the 1790's and beyond, no single State could defeat a confederation of Indian tribes. The early United States had its sights set upon controlling and expanding its land holdings no matter what the effect on Native Americans, just like the prior European sovereigns. The main policy and purpose of the United States toward Native Americans was the acquisition and domestication of territorial land. The Indian Commerce Clause, Art. I, Sec. 8, Cl. 3, and early federal Indian policy were all developed as a defensive position of avoiding military conflict in the territorial lands to allow continued settlement and expansion of civilization as the European descendants envisioned. Before the Revolution the French and Indian Wars convinced the colonists that it was critical to their success of maintaining and growing European settlement to be able to defend themselves against

Indian tribes. The British used the Indian tribes against the colonists during the Revolutionary War and continued to provoke conflicts until after the conclusion of the War of 1812. Nowhere was this more apparent than in the nascent New York State with the split of the Iroquois Confederacy and the ensuing wars with the Seneca and Cayuga that required the national army to suppress the uprising. *Amici* recognize that the historical OIN allied with the future United States and appreciate the contributions made by them during and after the American Revolution. But the fact they were allies did not change the overall defensive posture or harshness of the early federal policy toward native cultures embodied in the Constitution.

This harsh history was rewritten by Felix S. Cohen as part of the implementation of the Indian Reorganization Act of 1934 as the Federal Handbook of Indian Law.[2] This book like the War Powers compendium of Solicitor William Whiting is a written attempt to justify a federal policy. See W. Whiting, War Powers Under the Constitution of the United States, (War Powers), (43d ed. 1871). Like all pieces of propaganda produced by government for a purpose, it deliberately placed facts in the best light possible to meet its policy objectives. The fact that Felix Cohen was tasked with this project as a solicitor of the Indian Organization Division of the Bureau of Indian Affairs reflects how sweeping the IRA was intended by John Collier to be. Many specific facts of relevant statutes and actions of the United States were omitted in the

---

[2] Cohen's philosophy of how to depict federal Indian Law is explained in "The Spanish Origin of Indian Rights in the Law of the United States," The Georgetown Law Journal, Vol. 31, P. 1, November 1942.

Cohen Handbook. This short history is intended to correct the historical record by including facts that were omitted from the previous cases with the OIN.

Under the compromise that became the Northwest Ordinance, laws regarding the territorial or public lands of the United States were quickly developed as the nation grew. Only lands ceded by States outside of their boundaries were deemed "federal territory" under the Property Clause, Art. IV, Sec. 3, Cl. 2. These federal territorial lands were subject to the Northwest Ordinance of 1787 originally under the Articles of Confederation, and then as adopted as the first law passed under the new Constitution. The development of federal territorial law required decisions on how to legally acquire lands from Indian tribes to allow those lands to become part of the public domain subject to disposal under the Homestead Acts and other federal cession laws as required by the Property Clause. Territorial land law by English definition encompassed the war powers necessary to civilize a wild land and domesticate the land and its people. More importantly, the distinction made by the English as to domestic versus territorial law had been a major cause of the Revolutionary War itself by denying to the colonists the constitutional rights of Englishmen. The Framers of our Constitution because of this distinction in fundamental rights between the application of domestic and territorial law specifically required that Congress "dispose of the territories." Property Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States was defined by this Court as allowing the United States to retain territorial land only on a temporary basis. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). This specific requirement was meant to prevent

the United States from being able to use the territorial war powers as domestic law against the States and individuals. It is one of the most fundamental pieces of the structure of our Constitution.

Congressional decisions regarding disposal of tracts of land under the Homestead laws were often contentious, as immigrants poured in from Europe. The framework designed in the Northwest Ordinance to transition territories into new states of the union worked. But, there were several very difficult problems in territorial public land law that had to be legally defined in the young republic. It was understood that some of these definitions would affect the balance of power between the States and the United States. The first of these was regarding the doctrine of preemption of land in the original colonies. Preemption is necessary when a land sale or disposal is not completed and the land reverts to its territorial owner without having been transitioned into private property. Because many of the new States had not agreed as to their Western boundaries at the time of the adoption of the Constitution, including New York, there was an immediate issue of whether the United States or the Original States held the preemptive right. This question was resolved in favor of the States. *See Fletcher v. Peck*, 10 U.S. 87 (1810).

The next big question was the issue of which sovereign could extinguish "Indian title" or the occupancy interest of the Indian tribes that was acknowledged under English law. This was not considered a federalism question because the United States Congress as part of the compromise to enable the Louisiana Purchase had already passed a statute authorizing the President to negotiate the removal of any Indian tribe East of the Mississippi to the Western

territories and conceding that those Indians and Indian Tribes that remained in the Eastern States were under state jurisdiction. See Act of March 26, 1804, § 15, 2 Stat. 289. This act has never been repealed even though it has been omitted from prior statements of fact regarding the New York Indians.

The "Indian title" case of *Johnson v. McIntosh*, 21 U.S. 543 (1823) presented the problem of whether the United States was the successor to the sovereignty established by England over the Northwest Territory and former colonies. The British had negotiated many treaties with the Indian Tribes during and prior to the Revolution where all their land rights were ceded to Great Britain. The British King had made land grants based on these Indian treaties to British officers for their service in the American Revolution. If the United States was a successor to the British sovereignty then the British grants were valid. In a clever application of constitutional law, Chief Justice Marshall preserved the concept of "Indian title" but divested it from its origins in Europe by ruling that only the United States as the winner of the Revolutionary War had the authority to accept the Indian land cessions by treaty. Because the United States had already conceded that it did not control Indian land in the Eastern States in the 1804 Louisiana Purchase statute, the resolution of the Indian title question that removed the British cloud of title to millions of acres of Western lands only invigorated the outcry in the original States for the removal and actual cession of the Indian title in their respective States.

In the 1820's the President began to vigorously pursue a removal policy. The Congress passed the federal Removal Act of 1830, 4 Stat. 411, to define and enforce the removal policy agreed to in 1804. The Treaty of Buffalo Creek, 7 Stat. 550, was a Removal Act

treaty intended to disestablish whatever federal interests may have been created in New York by the Treaty of Canandaigua, 7 Stat. 4. Because many different bands of various tribes were involved in the Treaty of Buffalo Creek, amendments were made and Congress ratified the Treaty of Buffalo Creek in 1840. President Martin Van Buren then entered the Proclamation making the Treaty of Buffalo Creek complete. *See New York Indians* at 10, Fn.1, Finding 10. The Removal Act was specifically drafted to meet the obligations of the federal government to the states to remove the Indians, dispose of the "Indian title" to the lands they occupied and fulfill their federal treaty interests on actual federal territory West of the Mississippi as defined in the 1804 Louisiana Purchase statute so that state jurisdiction would no longer be impaired in the Eastern states.

Chief Justice Marshall apparently disagreed with the Removal Act policy defined by Congress. Chief Justice Marshall tried to interfere with the Removal Act with his rulings in *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832). Congress responded to the Chief Justice by passing the 1834 Indian Trade and Intercourse Act, 4 Stat. 729, deliberately ceding that all Indian tribes and Indian land East of the Mississippi River would no longer be under federal protection once their lands were exchanged pursuant to the Removal Act, overruling *Worcester* by statute. The Cherokees in Georgia were removed by the federal military to their new lands in Oklahoma. The New York Indians, including the Oneida, pursuant to the Removal Act, the Treaty of Buffalo Creek and the specific treaties negotiated with each tribe pursuant to the Buffalo Creek Treaty, mostly left New York settling partly in

Kansas but mostly in Wisconsin. As a matter of federal statutory law, the Indians that remained were solely subject to state jurisdiction.

By the 1840's federal territorial law was very developed and functioning fairly smoothly. *United States v. Gratiot*, et al, 39 U.S. 526 (1840). Congress debated when to open additional public lands to settlement and began making land grants to railroad companies as compensation for fronting the capital to extend rail service. The basic process of converting territorial land by extinguishing the "Indian title" into public domain land subject to disposal was settled law. The statutory process of setting up new territories with some powers of self-governance in an organic act was also well established. That is federal territorial law was functioning as intended by the Framers of the Constitution until 1850 when it came to the question of slavery and the adoption of an organic act for Kansas and Nebraska and the newly acquired territorial land from Mexico.

Allowing persons to be characterized as "property" was more than a simple legal question of status. Slavery was a fundamental contradiction to the way English common law had developed over centuries to protect and expand the rights of freemen. England had dealt with the slavery question before the American Revolution by prohibiting slavery on the soil of England. This allowed slavery in all of the British territories under English territorial law, including the future United States. The fundamental contradiction of slavery was incorporated into our Constitution. The slavery problem culminated in the *Dred Scott v. Sandford*, 60 U.S. 393 decision in 1857 and our Civil War. The *Dred Scott* decision permanently altered our territorial public land law by creating an absolute

power in the United States to preserve territorial status indefinitely. It did this by declaring the Northwest Ordinance of 1787 unconstitutional and the Property Clause a nullity. *Scott* at 435-6. The territorial war power of the United States to refute or declare fee land territory was deemed a "political question" during Reconstruction. Not until *Rasul v. Bush*, 542 U.S. 466, 480-4 (2004) when this Court did not accept the declaration of the military that the Guantanamo Bay Naval Station was not territory under the control of the United States was judicial review reinstated over the status of territorial land.

After the Civil War and the assassination of President Lincoln, the Secretary of War Edwin Stanton figured out that he could make many of the territorial war powers permanent domestic law to prevent the States from ever being able to cause another civil war. He wanted to use the former slaves as wards of the national government. See War Powers, citing No. 9 Extract from the Records of the War Department regarding the proposed Emancipation Bureau, p. 464-6, (43d ed. 1871). But, the passage of the 13th Amendment conferring actual citizenship on the freedmen ended their ward status. But he could and did use the Indian wards to preserve the territorial war powers at the expense of state sovereignty. Even though he died before it was completed, his plan became the new Indian code of the Revised Statutes passed in 1871 that formally ended the treaty making power. The war powers of Reconstruction were used to form the new Indian policy of 1871 and immediately applied to the Indian tribes that had fought for the Confederacy. From 1871 forward tribes by statute are not "domestic dependent nations" but instead are wards and actual federal instrumentalities of the United States. *See*

Holden v. Joy, 84 U.S. 211 (1872). As long as there are federally recognized Indian tribes on federal territorial land, this Reconstruction policy that deliberately contradicts the carefully constructed constitutional structure requiring disposal of all territorial land to prevent territorial war powers from being used as domestic law will continue to be part of federal power.

Commissioner John Collier was aware of the policy of 1871 and the fact that the Indians were not just wards but were actual federal instrumentalities of the United States. Then the limited version of the Indian Reorganization Act (IRA) passed in June 1934 and the already formed Indian Organization Division (IOD) of the Bureau of Indian Affairs (BIA) went to work to apply the IRA the way Collier had envisioned it. This was the only way that Indian tribes on fully allotted reservations or on former state reservations that still existed in some form could be brought under the IRA and allowed to form their own tribal territorial governments.

Collier's plan was not intended to be the permanent change of law that Edwin Stanton had envisioned. John Collier was a true Indian activist that believed that by giving the Indian tribal governments true territorial status that he was making them equal enough to the States to actually earn respect and a place in greater society. This was the idea behind the doctrine of separate but equal of *Plessy v. Ferguson*, 163 U. S. 537 (1897) that was the civil rights standard in 1934. As came to light in the briefing of *Carcieri v. Salazar*, the IRA as passed by Congress was not the very expansive original version of the IRA submitted by John Collier. This led to serious interpretation problems by the Bureau of Indian Affairs and the solicitors for the Department of the Interior that had

begun applying the full version of Collier's IRA six months before Congress passed the very limited act that is today the IRA. The Bureau of Indian Affairs had created a special division of Indian Organization on January 1, 1934 in anticipation of the passage of the sweeping IRA proposal. The Indian Organization Division (IOD) was the sponsor of the ten special Indian congresses that were held all over the country to promote the passage of Commissioner John Collier's IRA. This division led personally by Commissioner Collier made many promises at the conferences and in correspondence to specific tribes over how the IRA would help them to gain their support for its passage in Congress. Many promises were made by the IOD while legislation was pending that the IRA would apply to the tribes that no longer had a land base or tribal organization, including the California Indians. Congress in particular reacted negatively against the idea of "restoring" tribal identities in California that had been wiped out by the Spanish and Mexican Mission system.

Even though Congress limited the IRA as Collier had initially designed, the territorial war power was already established and was available for use by the IOD. By indefinitely extending the trust period for holding Indian lands in the IRA, and allowing the Indian tribes actual territorial governments the Reconstruction policy of Secretary Stanton was made even more powerful. These territorial war powers are the "emergency" powers in a common law legal system. This extra-constitutional power has become so accepted today that most major federal legislation is passed by claiming an "emergency" or "declaring a war" on some problem. This Court cannot make substantial changes to federal Indian policy without affecting this claimed territorial war power of the federal government. It is

also the reason that Congress and the Executive will never willingly change federal Indian policy. The IRA really was the Indian "New Deal." The IRA reinforced President Franklin D. Roosevelt's numerous "emergency" programs by bringing the Reconstruction Policy of Secretary Stanton into the Twentieth Century for the "benefit" of the Indians. With President Nixon's Message to Congress of July 8, 1970, his administration used these powers without any restraints.

b. Indians and Indian Tribes Have Special Status That Causes Discrimination Against Non-Indian Defendants and States

How the Indians and Indian tribes have been classified in law has resulted in discrimination against non-Indians and threatens state sovereignty. The land claim litigation in New York aptly demonstrated the threat against settled expectations of property rights, municipal self-governance, rights of free speech and even the right to vote for government representatives. The potential disruption of these justifiable expectations in the general populace of Madison and Oneida Counties made the federal courts aware of the tremendous effect that Tribal litigation can bring. This ability to disrupt thousands of individual property owners and state governance flows directly from the special federal status the Indians and Indian tribes have with the federal government.

Amici will not belabor this point. The Indians and Indian tribes are "wards" of the United States that enjoy an historic "special trust relationship." In addition, many Indian tribes including the OIN have federal treaty rights that give them enumerated special

rights like hunting and fishing or in the case of the Oneida's free passage on all waterways. These treaty rights have been deemed to be supreme federal law and are enforced before all other rights or interests. Indians and Indian tribes are also "federal instrumentalities" as designated by statute placing their real and personal property, rights to contract, make leases and even their right to make wills and other testamentary instruments under the direct control of the federal government. The federal government can order an Indian or Indian tribe to move their residence or completely dispossess them without having to pay compensation. In addition, Indians were made naturalized citizens of the United States in 1924. Indian rights to state citizenship were heavily enforced beginning in the late 1960's conferring upon reservation Indians the right to vote in state elections even though they were completely exempted from paying state income or property taxes.

It is the fact that Indian tribes are considered separate sovereigns and have their own territorial governments since 1934 that has caused most of the discriminatory affect. Indian tribes continuously push to expand or defend their "sovereignty." Tribal courts are always trying to assert jurisdiction over non-Indians and to expand their jurisdiction to adjudicate all kinds of claims that affect off reservation persons and property. This Court has done well in the last 20 years in protecting non-Indians from direct discrimination caused by having to litigate in tribal court. However, requiring the exhaustion of tribal court remedies before being allowed to sue a tribal member demonstrates the bias in favor of the Indians that has become a part of federal Indian common law. Federal courts have declared that in all treaties, contracts and laws any "doubtful expressions" are to be interpreted

as an "Indian" would have understood. *Squire v. Capoeman*, 351 U.S. 1 (1956)

And then there is tribal sovereign immunity that allows the tribes to sue without being subject to suit. Because this case is about an application of tribal sovereign immunity, a full discussion of its creation as a matter of federal Indian common law is the next section of this brief. To sum up this section, Indians and Indian tribes recognized by the United States are different because of their special federal status from ordinary non-Indian state citizens. This special status disadvantages state citizens and state government far more than did the diversity law, that was overruled by *Erie Railroad v. Tompkins*.

The attempt by Madison and Oneida Counties to enforce tax liens in state court against the OIN that is the subject of this case is the perfect example of the discriminatory affects noted in Erie. In each case, not only did the OIN assert its sovereign immunity from suit it actually asserted sovereignty over the land itself that required litigation all the way to this Court. Even after this Court ruled that the OIN could not rekindle its sovereignty over the parcels of land subject to foreclosure two different federal court judges granted injunctions against the County proceedings in state court claiming federal question jurisdiction based on claimed tribal sovereignty under federal Indian common law over the land. The Second Circuit upheld the federal injunctions against the state court proceedings based on tribal sovereign immunity as a matter of federal Indian common law. Because all documents and actions are to be interpreted in favor of the Indian tribe, even if this Court strikes down tribal sovereign immunity as a defense, the federal courts in New York will just find another federal Indian common

law excuse to prevent the Counties from enforcing the taxes against the property of the OIN.

The OIN knew this when it passed its Ordinance of November 29, 2010 executing a partial waiver of sovereign immunity. The OIN rightfully has confidence in how it can continue to evade the payment of taxes and avoid actual foreclosure because the Counties are bound to pursue their claims in state court. The only way these property taxes will ever be enforced is if the OIN has no federal Indian common law claim to make in federal court to get an injunction to stop the state court proceedings.

c. The Erie Doctrine Should Be Applied to Indians and Indian Tribes

The case of *Erie Railroad v. Tompkins*, (1938) reinterprets § 34 of the Federal Judiciary Act of September 24, 1789, c.20, 28 U. S. C. § 725, which provides:

> "The laws of the several States, except where the Constitution, treaties, or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

Erie at 71. The premise of this provision was to insure that the local law as developed by the state courts would be the common law used in both state and federal courts. New York State has an entire statutory code section on Indians dating back to the 1780's and developed its own common law in regards to their treatment. In fact, New York common law went well

beyond federal law from an early date to protect actual tribal interests and tribal processes of decision making over tribal members. This is why the New York Indian tribes can rightfully claim that the Haudosaunee Council still exists to govern the six tribes of the Iroquois Confederacy. This deference to tribal cultures continued even after most of the Indians left New York for Wisconsin. The State of New York treated the Indians as a matter of statutory and common law far better than did the United States who treated them as potential combatants and as wards that they controlled completely. By contrast, the Indians that remained in New York were state citizens allowed to live under their local laws as a matter of New York common law and statute dating back to the 1830's. Only if major criminal activity occurred did New York enforce its own law against the Indians. The New York Indians including the OIN were under the primary jurisdiction of New York by federal statute and by the rulings of this Court until the passage of the IRA in 1934. *See United States ex rel Kennedy v. Tyler*, 269 U.S. 13 (1925).

With the passage of the IRA, the federal government through the IOD immediately tried to organize the still existing tribal governments of New York under the IRA. Every tribe in New York voted against organizing under the IRA in 1935. The fact they were allowed to vote at all on the IRA demonstrates the fact that the IRA was capable and even intended by Collier to alter the settled law regarding Indians that had been under primary state jurisdiction since before the Constitution was adopted. As was discussed in the briefing in the case of *Carcieri v. Salazar*, Congress threatened to repeal the IRA over how Commissioner John Collier and the IOD were applying the IRA to

exceed the limited law that Congress actually passed. As decided by this Court, the Secretary of Interior's interpretation of Section 479 allowing all Indian tribes to have the benefits of the IRA was incorrect. Congress limited the IRA. It was this Court in applying the new policy of the IRA as a matter of federal Indian common law that allowed the full brunt of its territorial war powers to displace state law.

The expansion of federal Indian common law to enforce the new policy of the IRA started with *United States v. Minnesota*, 305 U.S. 382 (1938). The legislation of the IRA as passed did not repeal any of the prior allotment acts of Congress. It is through the federal Indian common law decision in *Minnesota* that the IOD could extend the IRA over all former allotted lands. The next case was *United States v. McGowan*, 305 U.S. 535 (1938). In *McGowan*, the BIA was allowed to characterize fee lands purchased for the Indian colony in Nevada to be defined as "Indian land." By equating all types of "Indian land" as a matter of federal common law, the IRA is not confined to federal "reservations" as defined in Section 479. The IOD then used the Indian trust to invoke the paramount sovereign authority of the United States in *United States as Guardian of the Walapai v. Santa Fe Pacific Railroad*, 314 U.S. 339 (1941). This decision arguably makes all former "Indian land" federal "Indian country" again as a matter of federal Indian common law. These cases along with *U.S. Fidelity* to extend federal sovereign immunity over tribal interests to create "tribal sovereign immunity" as federal Indian common law discussed at length below were designed to get around the restrictions placed into 25 U.S.C. § 479 of the IRA. As stated by the Erie Court: "The federal courts assumed, in the broad field of 'general law,' the power to declare

rules of decision which Congress was confessedly without power to enact as statutes." *Erie* at 72. This Court in placing the federal Indian trust lands within the overriding context of the equal application of the law in *Hynes v. Grimes Packing*, 337 U.S. 86, 123 (1949) came close to adopting the Erie Doctrine to end federal Indian common law.

The cases cited above expanding federal Indian common law pale in comparison to the decisions made by this Court following the Nixon Message to Congress in 1970. The most egregious federal Indian common law decision that directly created this present controversy was the acceptance of federal jurisdiction as a matter of equity in *Oneida I*. This Court in *Oneida I* rewrote the doctrine of preemption, omitting three federal statutes and two federal treaties to find that Indian title still resided in the United States over the former Oneida state reservation. More than 30 years later, this Court in *City of Sherrill* applied the doctrine of laches to end the disruption of justifiable expectations it had allowed against the state and citizens of New York. As this case proves, the *City of Sherrill* ruling was not enough to end the litigation or resolve the questions of state versus federal jurisdiction that are now so confused by federal Indian common law rulings of the federal district courts and appellate courts that resolution will be very difficult.

As Justice Brandeis wrote in Erie:

> "Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state courts against those not citizens of the State. *Swift* v. *Tyson* introduced grave discrimination 'by non-citizens against citizens. It made rights enjoyed under the

> unwritten "general law" vary according to whether enforcement was sought in the state or in the federal court; and the privilege of selecting the court in which the right should be determined was conferred upon the non-citizen. Thus, the doctrine rendered impossible equal protection of the law. In attempting to promote uniformity of law throughout the United States, the doctrine had prevented uniformity in the administration of the law of the State. The discrimination resulting became in practice far reaching. This resulted in part from the, broad province accorded to the so-called "general law" as to which federal courts exercised an independent judgment." In addition to questions of purely commercial law, "general law" was held to include the obligations under contracts entered into and to be performed within the State..."

Erie at 74. The manipulations of the OIN with their special federal status as discussed above has caused far more discrimination in the state and federal courts and more manipulations than anything diversity jurisdiction allowed under *Swift v. Tyson*, 41 U.S. (16 Pet.) 1, 18 (1842). The recent adoption of the OIN tribal Ordinance of November 29, 2010 more than proves this point. Also, there are so many federal Indian common law decisions affecting this case that correcting them all will take many more years of litigation. The people and State of New York must be given the equal protection of federal law. This Court can stop the discrimination by extending the Erie Doctrine to federal Indian common law by holding that the special federal status of Indians and Indian tribes is akin to the discrimination

previously created by diversity under *Swift v. Tyson.* Self-imposing a limitation on this Court's equity jurisdiction prevents this Court from making "law" that Congress itself has no power to make. If Congress chooses to extend tribal sovereignty in legislation then this Court is in its proper role of reviewing the statute and determining whether it is constitutional.

II. TRIBAL SOVEREIGN IMMUNITY

This Court has already determined that the legal basis of tribal sovereign immunity makes the whole doctrine suspect. *See Kiowa Tribe v. Manufacturing Technologies,* 523 U.S. 751 (1998). The Court mistakenly allowed tribal sovereign immunity to continue because it assumed that Congress would act and define limits for the doctrine. Tribal sovereign immunity is a federal common law creation. If it is going to be limited, it is up to this Court to do it.

a. Origin of Tribal Sovereign Immunity

Tribal sovereign immunity did not even exist until 1940 and the decision in *United States v. United States Fidelity and Guarantee Co. et al.*, 309 U.S. 506 (1940). This decision cites *United States v. Minnesota,* 305 U.S. 382 (1939) that extended federal sovereign immunity to the Indian Nations under the tutelage of the United States. *U.S. Fidelity* at 513, Fn 14. The Minnesota Court found that Section 2 of the IRA, 25 U.S.C. § 462, extending indefinitely the trust period for allotted lands had negated previous acts of Congress that gave the states specific rights to sue and condemn Indian allotments in state court without naming the United States as an indispensable party. *Minnesota* at

387. In *Minnesota v. United States*, the sovereign immunity of the United States was expanded to include all "Indian land" per a regulation promulgated in 1938. *Minnesota* at 390, Fn 7. One year later, this Court extended federal sovereign immunity to cover tribal interests because of public policy. *U.S. Fidelity* at 512-4. This new public policy was created by the adoption of the Indian Reorganization Act (IRA) of 1934 as discussed in *Minnesota v. United States*.

While the *Minnesota* and *U.S. Fidelity* cases expanded federal sovereign immunity and effectively made the federal courts the exclusive courts to hear claims to condemn Indian lands for public purposes, these cases do not actually decide that the sovereign immunity belongs to the Indian tribe. In fact, this Court in *U.S. Fidelity* concludes "It is as though the immunity which was theirs as sovereigns passed to the United States for their benefit, as their tribal properties did." *U.S. Fidelity* at 512.

It is not until *Puyallup Tribe v. Department of Game of Washington*, 433 U.S. 165 (1977) and *Santa Clara Pueblo v. Martinez*, 436 U.S. 39 (1978) that this Court reinterprets *U.S. Fidelity* to find independent tribal sovereign immunity as a matter of federal Indian common law. The Justice Department acting in an amicus capacity stated that the Solicitor General has no authority to waive the sovereignty of the tribe. Therefore, this Court was left to decide either the tribe had no sovereign immunity or the tribe's sovereign immunity is separate from the sovereign immunity of the United States. *See Puyallup* at 170-1. A similar ploy was used in *Santa Clara* by the Justice Department where they cut and pasted clauses from separate sentences in *U.S. Fidelity* to have this Court conclude "But 'without congressional authorization,' the

'Indian Nations are exempt from suit.' *Id.* at 512." *Santa Clara* at 58.

As this Court correctly concluded in *U.S. Fidelity* and *Minnesota*, since the IRA was passed in 1934 all Indian land over which a tribe can exercise inherent sovereignty is held in trust for Indian tribes by the United States. Therefore, it is the sovereign immunity of the United States as the trustee to the Indians and as owner of the Indian land that is controlling. To hold otherwise allows the United States to be completely unaccountable when it supports the Indian tribes and individual Indians as federal instrumentalities to challenge state jurisdiction. This Court realized that it had been misled about the expansion of tribal sovereignty being "harmless" when it smacked into the loss of individual rights and state jurisdiction that would have occurred if the United States had been able to "sell" tribal criminal jurisdiction over non-Indians in *Oliphant v. Suquamish Indian Tribe*, 435 U.S. 201 (1978). Unfortunately, the realization that tribal sovereignty had to be restricted in keeping with their status as dependent sovereigns did not translate into the realization that tribal sovereignty was threatening the constitutional structure of federalism for another twenty years. This Court should consider limiting or revoking tribal sovereign immunity. Such action would not hinder Congress from passing legislation granting tribal sovereign immunity that will then be reviewable by this Court.

b. This Court Needs to Reconsider *Oklahoma Tax Commission v. Potawatomi Tribe*

This Courts ruling in *Oklahoma Tax Commission v. Potawatomi Tribe*, 498 U.S. 505 (1991) raises the very possibility that all lands placed into trust by the United States can restore territorial tribal sovereignty by holding that all such lands are subject to "absolute tribal sovereign immunity." *Id.* at 511. Most importantly, the "unification theory" that inherent sovereignty through Indian title can somehow be rejoined to lands purchased in fee must be completely laid to rest. Nothing threatens state sovereignty more than a federal Indian common law theory that territorial Indian sovereignty can be restored to Indian tribes that have lands placed into trust status or reacquire fee ownership over lands within a former reservation.

The question presented in *Potawatomi* was artfully constructed to misconstrue the federalism conflict. "The issue presented in this case is whether a State that has not asserted jurisdiction over Indian lands under Public Law 280 may validly tax sales of goods to tribesmen and nonmembers occurring on land held in trust for a federally recognized Indian tribe." *Id.* at 507. This characterization of the issue makes it appear that the state refused to exercise jurisdiction over Indian land except to assess taxes on it. The parcel of land on which the convenience store that sold the cigarettes was situated was held in trust by the United States pursuant to the IRA. *Id.* at 507. In fact, the parcel where the convenience store was located was off reservation fee land that had probably been taken into trust pursuant to the IRA, 25 U.S.C. § 465. *Id.* at 511.

The Oklahoma Tax Commission argued that these newly acquired off reservation lands should be treated as continuing under state jurisdiction. This Court summarily rejected the idea: "Here, by contrast, the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in *John*,[*United States v. John*, 437 U.S. 634 (1978)] we find that this trust land is 'validly set apart' and thus qualifies as a reservation for tribal immunity purposes. 437 U. S., at 649." *Id.* at 507. This Court in *Potawatomi* made law that Congress itself is without power to make.

III. THERE IS NO "INDIAN COUNTRY" IN MADISON OR ONEIDA COUNTIES

a. Under the Facts determined in City of Sherrill these Parcels are Not Federal Indian Country

The Second Circuit concluded that this Court had explicitly not decided whether the Oneida reservation was disestablished in the *City of Sherrill* decision. It therefore reasoned that its prior holding determining that the parcels were "Indian country" was not overruled by this Court. Appendix A, 16a-17a, footnote 6. If the Second Circuit had concluded that the land parcels were not "Indian country" the OIN could not claim sovereign immunity to avoid the property taxes. The finding that the fee parcels subject to county taxation are "Indian country" shifts the jurisdiction over the parcels from the state to the federal court. Even though the term "Indian country" has been codified in 18 U.S.C. §§ 1151, the extension of this criminal statute into civil law is a matter of federal

Indian common law. By denominating the parcels "Indian country" the *in rem* jurisdiction of the Counties over the parcels of land was removed.

The federal common law application of "Indian country" was defined in the unanimous opinion of *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998). According to the opinion, the federal courts are empowered to designate three types of land to be Indian country (a) all land within the limits of any Indian reservation under the jurisdiction of the United States government, (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments. In addition, for an area to be Indian country, there must be (1) a federal set aside for tribal use, and (2) federal superintendence. *Id.* at 526-7.

Using the facts determined in the *City of Sherrill* ruling, *amici* can prove that the parcels subject to taxation cannot be federal "Indian country." Justice Ginsburg addressed the factual background from the standpoint that the land in question had been under state jurisdiction since 1805. *Sherrill* at 202. Determining that an area is federal Indian country is a determination that the land is under federal jurisdiction, not that the Indians or Indian tribe are under federal jurisdiction. Justice Ginsburg specifically concluded that the Oneida tribe ceded all of its lands to New York in the 1788 Treaty of Fort Schuyler and then the state reserved for the use of the Oneidas the land they mutually agreed the Oneidas would retain for their occupancy. *Sherrill* at 205. The Supreme Court further clarified this position in Footnote 1, directly citing the Second Circuit's 1988 decision that the

Oneida reservation was a reservation of state land. *Sherrill* at 203-4. Applying the definition of Indian country in *Village of Venetie*, these lands were never allotted and have never been under federal jurisdiction. This leaves only the possibility that somehow the Oneida Indians who reside all over the area are somehow a "dependent Indian community." To be a "dependent Indian community" they must be uncivilized Indians living apart from general society on territorial lands. *See United States v. Sandoval*, 231 U.S. 28, 39 (1913). The Oneida Indians were fully integrated into the citizenry of New York from the time of the signing of the Treaty of Fort Schuyler in 1788. *See United States v. Boylan*, 256 F. 468, 477-8 (N.D.N.Y. 1919). In addition, the land was set aside by the State of New York and has never been under federal superintendence. The Second Circuit was clearly wrong in determining that the state reservation for the Oneida could ever be federal "Indian country."

b. The City of Sherrill Ruling on Laches

The conclusion by the Second Circuit that the former reservation land was federal "Indian country" was reversed by the application of the doctrine of laches in *City of Sherrill*. By definition, laches stands for the proposition that as a matter of equity the matter cannot be brought up because too much time has passed. The Supreme Court expressly held that it would upset "justifiable expectations" to allow the claim. *Sherrill* at 215-7. Under the Federal Rules of Civil Procedure a dismissal under the doctrine of laches is a dismissal pursuant to Rule 12(b)(6) for failure to state a claim. If on a motion made under Rule12(b)(6) matters outside the pleadings are presented then the

motion is treated as a motion for summary judgment. Fed. R. Civ. Pro. 12. *See also Lennon v. Seaman*, 63 F.Supp.2d 428, 438-9 (S.D.N.Y. 1999). The Supreme Court reversed the judgment of the Second Circuit in *City of Sherrill* by applying laches as a matter of equity. The application of laches to the case precluded the federal courts from ever hearing the Oneida's claim that the land was not under the sovereign jurisdiction of New York, effectively nullifying all the factual findings and legal conclusions of the Second Circuit and the federal district court. The fact that the Second Circuit is still concluding that these parcels of land are federal Indian country demonstrates how absurd the application of federal Indian common law has become.

Conclusion

The Court should reverse the decision of the Second Circuit.

Respectfully submitted,

James J. Devine, Jr.
Counsel of Record
128 Main Street
Oneida, New York 13421
(315) 363-6600