16-1135

No.

IN THE

Supreme Court of the United States

CENTRAL NEW YORK FAIR BUSINESS ASSOCIATION et al., PETITIONERS

v.

SALLY M.R. JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior et al.

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

PETITION FOR WRIT OF CERTIORARI

JAMES J. DEVINE, JR.
Counsel of Record
128 Main Street
Oneida, New York 13421
JDevine@centralny.twcbc.com
(315) 363-6600

CURRY & TAYLOR • (202) 393-4141

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QUESTION(S) PRESENTED

1) Does the Secretary of the Interior have unlimited authority pursuant to 25 U.S.C. § 465, 25 U.S.C. § 9 and 43 U.S.C. § 1457 to promulgate and exercise the 25 CFR Part 151 regulations to acquire any fee land from state jurisdiction and place it into federal trust status?
2) Whether the Second Circuit misinterpreted the "fact" discussion in this Court's majority opinion in *City of Sherrill v. Oneida Indian Nation* upholding its prior decision that the Oneida state Indian reservation was federal Indian country affecting the authority of the Secretary of the Interior to acquire 14,000 acres of fee land to place into federal trust in the Records of Decision prejudicing these petitioners in applying 5 U.S.C. § 706 in this case.
3) What is left of the Equal Footing Doctrine if the Secretary of the Interior can acquire fee land from the original colony of the State of New York and place it into federal trust for an Indian tribe to exercise jurisdiction over it as federal territorial land?

PARTIES TO THE PROCEEDING

CENTRAL NEW YORK FAIR BUSINESS ASSOCIATION; CITIZENS EQUAL RIGHT ALLIANCE; DAVID R. TOWNSEND, New York State Assemblyman; MICHAEL J. HENNESSY, Oneida County Legislator; D. CHAD DAVIS; MELVIN L. PHILLIPS, Petitioners

SALLY M.R. JEWELL, in her official capacity as Secretary of the U.S. Department of the Interior; MICHAEL L. CONNOR, in his official capacity as Deputy Secretary of the U.S. Department of Interior; ELIZABETH J. KLEIN, in her official capacity as the Associate Deputy Secretary of the Interior; FRANKLIN KEEL, the Regional Director for the Eastern Regional Office of the Bureau of Indian Affairs; CHESTER McGHEE, in his official capacity as Eastern Regional Environmental Scientist; ARTHUR RAYMOND HALBRITTER, as a real party in interest as the Federally Recognized Leader of the Oneida Indian Nation, Respondents

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The Opinion of the Second Circuit is not reported. Appendix (App.) 1a-7a. The Opinions of the district court appear in App. 7a-49a.

JURISDICTION

The Judgment of the Second Circuit was entered on December 9, 2016. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

Petitioners challenged under the Administrative Procedures Act (APA), 25 U.S.C. § 701-706 and the Declaratory Judgments Act 28 U.S.C. § 2201-2202, the two Records of Decision to acquire approximately 14,000 acres of fee land and convert it into federal trust land. The District Court concluded and the Second Circuit affirmed that there is no limit on the authority of the Secretary of the Interior to acquire federal title to fee lands and place them into federal trust status as federal territorial land under the 25 CFR Part 151 regulations based on the authority of 25 U.S.C. § 465 being interpreted with the additional authority conferred by 43 U.S.C. §1457 and 25 U.S.C. § 9. Petitioners also challenged whether the Oneida of New York were eligible to have fee lands placed into federal trust under 25 U.S.C. § 479 as interpreted in *Carcieri v. Salazar*, 555 U.S. 379 (2009). Both the trial court and Second Circuit panel accepted the Secretary's interpretation of 25 U.S.C § 479 contained in the M-37029 opinion submitted in this case to alter this Court's interpretation of the statute. Petitioners also

raised 42 U.S.C. § 1981, 42 U.S.C. § 1983 and 42 U.S.C. § 1985 in their complaints to challenge the authority of the Secretary of the Interior to create federal territory by acquiring fee lands and placing them into trust in the State of New York. The constitutionality of 43 U.S.C. § 1457 was challenged as the real source of authority for the Records of Decision in the Motion for Reconsideration in the trial court. [1]

STATEMENT

This case started pursuant to the Administrative Procedures Act (APA), 5 U.S.C. § 701 et seq., to challenge the authority of the Secretary of the Interior to acquire almost 14,000 acres of land into trust under the Record of Decision of March 8, 2008. Petitioners challenged the Secretary's basis of authority as arbitrary, capricious and not in accordance with law to promulgate and apply the 25 CFR Part 151 regulations to restore tribal sovereignty almost two hundred years after it had ceased to exist in the original colony of New York and convert fee land into federal trust land deemed to be under tribal jurisdiction of the Oneida Indian Nation. The application to take the fee land into trust was filed after this Court's decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005). This Court rejected the unification theory and substantially altered the rendition of facts that had been determined by the Second Circuit. Most notably, by accepting that in the Treaty of Fort Schuyler of 1788

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[1] Petitioners realize that Title 25 has been recently recodified. Because this case's opinions and all of the precedents cited use the old statute numbers petitioners have continued to use them for this petition.

the Oneida had ceded all of their land interests to the State of New York before the Constitution was even in effect, this Court implied that the state Indian reservation was not under federal jurisdiction. *Id.* at 203. Then it unfortunately suggested in the *Sherrill* opinion that Congress had created a process under 25 U.S.C. § 465 that was the proper avenue to pursue for placing fee lands under state jurisdiction into federal trust status.

Apparently not realizing that fee to trust is based on the exact same legal analysis as the unification theory[2], this Court contradicted itself making its *City of Sherrill* opinion indiscernible as to whether the underlying state reservation was or was not federal Indian country. Federal territorial land reserved for an Indian tribe is almost always federal Indian country. Whether a state Indian reservation could be considered federal Indian country and therefore under federal jurisdiction was an extension of the same territorial war powers that were the basis of the unification theory and fee to trust that were not addressed by this Court. While the Second Circuit applied the doctrine of laches to the land claim litigation from the majority opinion the result was the ending of the land claim cases while opening a whole new set of cases to decide whether the same lands could be placed into federal trust status under the 25 CFR Part 151 regulations. So instead of the Secretary and tribe having to sue individual landowners as they had in the land claim litigation, now the fight was between the federal government and tribe on one side asserting the right to

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[2] Both the unification theory and fee to trust are based on the "inevitable consequence of the right to acquire territory" language contained in *Scott v. Sandford*, 60 U.S. 393, 444 (1857).

restore tribal sovereignty and the State, counties, towns and a couple of citizens groups trying to prevent the loss of state sovereignty and their justifiable expectations of the state government processes.

This Court quickly found out that it had not even resolved the issue of the property taxes in *City of Sherrill* as the city and counties sued the Oneida Indian Nation for back taxes claiming the right to foreclose on the land. The Second Circuit remanded the case back to the trial court. Judge Hurd then wrongly concluded that even though the tribal sovereignty of the Oneida had long ago grown cold that the underlying state reservation was still somehow subject to federal jurisdiction because this Court had not overruled the Second Circuit opinion. Then the Second Circuit concluded that the Oneida Tribe could claim sovereign immunity because the former reservation was Indian country. *See Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003). This Court again accepted the petition for certiorari to decide if the Oneida tribe could claim sovereign immunity to prevent the taxation enforcement. Just before the opening brief was filed the Oneida Indian Nation waived its sovereign immunity to prevent this Court from deciding that issue.

Just three years later, the same taxation issue rose up again this time within the fee to trust proceedings over the land status and specifically whether the Treaty of Buffalo Creek had precluded the Indian and federal claims that the state reservation was Indian country in 1838. All of the facts presented and arguments made by petitioners in the District Court were deemed already decided by the express findings of the Second Circuit in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 167 (2d Cir. 2003). The Second Circuit opined that their finding of facts was not

overruled by the United States Supreme Court in 544 U.S. 197 (2005). See *Oneida Indian Nation v. Madison County*, 665 F.3d 408 (2d Cir. 2011). In this opinion the Second Circuit states it "does not have the authority to overrule a prior panel of Judges that concluded that the Oneida Indian reservation was subject to federal jurisdiction and was never diminished or disestablished by Congress." *Id.* at 443. Again this Court was interested in the petition for certiorari ordering the United States to file a response brief in the case. Just before the United States brief was due and after meeting with the Solicitor General's office, the State of New York and counties accepted a settlement of claims again blocking review by this Court.

This petition is now the third time since the *City of Sherrill* decision in 2005 by this Court that the issue of whether the former state reservation for the Oneida is federal Indian country, or is otherwise under federal jurisdiction, has come to this Court. The "fact" that the Second Circuit had determined that the state Oneida reservation was federal Indian country prevented the plaintiffs below from having any of their contrary facts from their initial complaint forward accepted as true or even contradictory to the federal Indian country determination of the Second Circuit. As argued in their opening brief to the Second Circuit, the fact that none of their oppositional facts were accepted or even considered prevented the trial court from applying the normal standards of judicial review for all of their pleadings prejudicing their challenge to the Secretary's Records of Decision under 5 U.S.C. § 706.

This reality was starkly presented to the Second Circuit after the attorney for CERA/CERF found several documents in the National Archives while researching for the *amicus curiae* brief filed by CERF

in *Nebraska v. Parker*, 136 S.Ct. 1072 (2016). These federal historical documents clearly demonstrate that the Treaty of Buffalo Creek in 1838 was executed in conformity to the Removal Act of 1830. *See New York Indians v. United States*, 170 U.S. 1, 10, Fn 1, Finding 10 and p. 21 (1898) They explain how the Civil War and the new federal Indian policy of 1871 stopped the execution of the Treaty of Buffalo Creek and then explain how the United States was going to finally execute the treaty. Unlike the United States and Oneida Tribe asserted in the land claim litigation, the process for completing the execution of the Treaty was all finished ceding all federal interest to the state reservation. If this petition is accepted, petitioners will properly lodge these documents for this Court to examine.

The Second Circuit rejected the petitioner's motion to supplement the record on appeal. Petitioner's filed a motion for reconsideration which was also denied. While there are many "facts" in the prior litigation that are contradictory or misconstrued, for purposes of this petition the most prejudicial "fact" is that the remaining 32 acre Oneida reservation is under federal jurisdiction. Only this Court can determine whether its majority opinion overruled the Second Circuit decision in *City of Sherrill*, 337 F.3d 139 that the Oneida Indian reservation was subject to federal jurisdiction and was never diminished or disestablished by Congress.

Because the Second Circuit has asserted since 2003 that the state reservation is federal Indian country under federal jurisdiction, it now believes in this case there is no harm to the justifiable expectations of the surrounding non-Indian community to place 14,000 acres of state fee land into federal trust status.

State sovereignty and federalism are not even concerns as discussed in the published opinion in a parallel case that issued weeks prior to the summary affirmance in this case. *See Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556 (2d Cir. 2016). This published opinion is cited in the summary affirmance order at App. 5a as affirming and extending the two prior precedents and is the reason that the panel would not address the factual and constitutional issues raised by these petitioners.

Essentially, the newly published opinion is the third ruling by the Second Circuit that the state Indian reservation was and is subject to federal jurisdiction and can only be diminished or disestablished by act of Congress. According to the Second Circuit, since the land was already removed from state jurisdiction the decision to place the lands into trust was well within the authority of the Secretary of the Interior. The Second Circuit in the conclusion of the published opinion as a direct result of its erroneous conclusion that the land is federal Indian country, grants an unlimited power to the Secretary to remove any lands from the state and acquire them as federal territory. *Upstate Citizens for Equality* at . It is eerily similar to the reasoning of Chief Justice Taney in *Scott v. Sandford*, describing the authority of the federal government to acquire land as federal territory without any limitations. *See Scott v. Sandford*, 60 U.S. 393, 443-444 (1857).

A. Statutory Framework of Fee to Trust

Since the first fee to trust regulations were adopted by the Secretary in 1978 the Secretary has implied that 25 U.S.C. § 465 was the Congressional

delegation of the authority to the Secretary to acquire land from state jurisdiction and effectively turn it back into federal territorial land. In doing the research into the passage of the Indian Reorganization Act (IRA), 25 U.S.C. § 461 et seq., CERA discovered the original bills and numerous memoranda written by John Collier, the primary author of the proposed IRA. The original bill and the accompanying memorandum clearly demonstrate that a separate fee to trust provision was included in the original draft of the IRA bill and that provision was specifically removed by Congress from the later drafts and was not included in the full bill substitute that became the IRA. These facts are directly alleged in the amended complaint and were consistently raised in all the subsequent pleadings.

Knowing this fact, CNYFBA and CERA challenged the authority of the Secretary to promulgate the 25 CFR Part 151 regulations in their amended complaint claiming that the regulations are *ultra vires* and that the fee to trust decision in New York is "arbitrary, capricious and not in accordance with law" under 5 U.S.C. § 706 of the APA. Petitioners also claimed that the Secretarial power to use fee to trust was only for those tribes eligible for the benefits of the IRA in 1934 and that the Oneida of New York were and are not eligible as a tribe recognized in 1934 pursuant to the opinion in *Carcieri v. Salazar*, interpreting 25 U.S.C. § 479. Instead of granting CERA victory on these points against the RODs, the district court in its order of March 2015 essentially agreed that 25 U.S.C. § 465 is not the actual basis of the Part 151 fee to trust regulations. In the opinion the district court cites 25 U.S.C. § 9 and 43 U.S.C. § 1457 as additional authority for the Part 151 regulations. App. .The Secretary never claimed either of these statutes as being the source of

authority for fee to trust in any of the briefing or in the *Carcieri* M-37029 opinion submitted in this case before the district court's grant of summary judgment.

The petitioner's immediately filed a motion for reconsideration claiming that 43 U.S.C. § 1457 is an unconstitutional statute as an unlimited territorial war power that was copied directly from 1 Rev. Stat. 441 and the Indian policy of 1871. Petitioners directly argued that the majority opinion in *Scott v. Sandford* had removed all of the limitations on the territorial war power. The district court ordered the Secretary to answer the motion for reconsideration. The Secretary's answer does not deny that 43 U.S.C. § 1457 is the true source of authority for fee to trust and admits there is no limit to the authority that can be claimed by the Secretary under this law. The district court then denied the motion for reconsideration because the Part 151 regulations had authority and because the district court was bound by the prior precedents of the Second Circuit. App. 44a-49a.

B. Factual Background

It is impossible to imagine a case where the facts are more contradictory or just plain wrong than they are in this case. This happened over more than 40 years of land claim litigation in New York that started with this Court's decision in *Oneida County v. Oneida Indian Nation*, 414 U.S. 661 (1974) (*Oneida* I). The Records of Decision in this case do not contain original documents. Instead they are based on compilations of various federal court and agency rulings since the land claim litigation began. Setting aside the fact that there are multiple contradictory district court orders, petitioners were faced with two wrongly decided Second Circuit

precedents that came from all the confusion surrounding this Court's majority opinion in *City of Sherrill* as discussed in the Statement above.

The land claim case began as an assertion that the State of New York had not properly acquired the former Oneida Indian reservation and had violated the Non-Intercourse Act, 25 U.S.C. § 177, by acquiring the reservation lands from the Indians. Somehow in all the litigation the State of New York, with Madison and Oneida counties never asserted that the Oneida Indian reservation was a state reservation of land made before the Constitution went into effect pursuant to the Treaty of Fort Schuyler of 1788.

It was not until the tiny City of Sherrill pursued its claim to the property taxes of the lands reacquired by the Oneida in fee that this Court accepted certiorari on the petition and completely recast the "facts" as they had been argued in the land claim litigation by acknowledging the Treaty of Fort Schuyler between the New York Indian tribes and the State of New York in 1788. The finding that all of the Indian land had been ceded to the State of New York before the Constitution was in effect was the basis for determining that the embers of tribal sovereignty had long ago grown cold and that the people of New York had justifiable expectations to the continuance of state jurisdiction. *Sherrill* at 199, 215 and 216. This Court however, never decided or addressed in the majority opinion of *City of Sherrill* whether the former Oneida Indian reservation was federal Indian country, under federal jurisdiction or could only be diminished or disestablished by Congress. This Court assumed incorrectly that lawyers and judges in the original colony of New York would understand that the acknowledgement of the Treaty of Fort Schuyler of 1788 changed the land status. After 40

years of being barraged by whatever theory the United States could think up to recast the land status in New York the assumption was unfair and resulted in creating an even bigger factual mess than was originally presented in *City of Sherrill.*

Petitioners also contested the facts surrounding the "recognition" of the Oneida Indian Nation submitting the lists prepared by the Department of the Interior between 1934-1936 that were first attached to the CERF *amicus* brief in *Carcieri.* The Oneida Indian Nation of New York does not appear on any of the lists. This fact caused the trial court to order the Secretary to make the determination as to whether the Oneida were actually recognized and eligible to have lands placed into trust status. The result was the M-37029 opinion and the second ROD. More of this will be discussed below.

In addition, Petitioners also raised the fact that the 1838 Treaty of Buffalo Creek, 7 Stat. 550, was negotiated between the United States, State of New York and the remaining bands of former Oneida Indians according to its own language. Petitioners also challenged the conclusion of the Second Circuit that the Treaty of Buffalo Creek had not been negotiated and executed pursuant to the Removal Act of 1830, 4 Stat. 411, citing the actual Senate ratification that cites to the authority being from the Removal Act. *See New York Indians v. United States*, 170 U.S. 1 10, Fn.1, Finding 10 and p. 21 (1898)

All of these "facts" were deemed previously decided in the Second Circuit precedents rendering the allegations made in the amended complaint inapplicable. See *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443 (2d Cir. 2011) (*quoting Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*,

337 F.3d 139, 167 (2d Cir. 2003)). Now there is a third precedent further affirming these erroneous facts, *Upstate Citizens for Equality v. United States*, 841 F.3d 556 (2d Cir. 2016).

REASONS FOR GRANTING THE PETITION

I. THIS IS THE ONLY COURT THAT HAS JURISDICTION TO SORT OUT WHETHER THE STATE INDIAN RESERVATION WAS OR IS FEDERAL INDIAN COUNTRY

From the filing of their initial complaint petitioners alleged that the land status of the remaining state Indian reservation had been wrongly interpreted by the Second Circuit as Indian country following the *City of Sherrill* ruling of this Court. In the trial court petitioners refused to file cross motions for summary judgment to preserve their right to contest the erroneous "facts." In pleading after pleading petitioners explained why the Second Circuit got the land status wrong. All the way through the Second Circuit appeal none of their facts, even with evidentiary proof, were even considered, being overshadowed by the precedents of the Second Circuit that the reservation was under federal jurisdiction.

This Court is the only forum that can decide whether the Second Circuit properly applied its prior ruling in *City of Sherrill* and correct the facts and law in this case. Then the case can either be remanded or this Court can decide whether the Secretary has the authority to do fee to trust. Either way this Court must determine whether the Secretary has the authority to place these fee lands from the original colony of New

York, where no federal territory has ever existed, into federal trust status as federal territorial land.

A. The Second Circuit has wrongly decided in three precedents that there was Federal Indian country across the State Indian reservation and made numerous other factual errors.

The reality of these proceedings in the District Court and Second Circuit is that after almost fifty years of litigation attempting to restore tribal sovereignty in New York by the United States there has never been an impartial disclosure of "facts" by the Secretary of the Interior or the United States. These petitioners are just the latest to be denied a neutral forum in which to challenge the representation of the United States against their justifiable expectations of land ownership and governance. Appellants do not in any way blame Senior Judge Lawrence Kahn for this reality.

Judge Kahn attempted to be as impartial as the precedents of the Second Circuit allowed him to be. But as clearly stated in Judge Kahn's granting of the federal motion for summary judgment in his Order of March 26, 2015, plaintiffs were not allowed to argue that federal jurisdiction over the Oneidas was extinguished by the Removal Act of 1830 and the Treaty of Buffalo Creek because it remains the law in the Second Circuit that "the Oneidas' reservation was not disestablished." *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443 (2d Cir. 2011) (*quoting Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 337 F.3d 139, 167 (2d Cir. 2003)). This same precedent wrongly decided that the Oneida reservation was also federal "Indian country." *Id.* at 156. These "precedents" prevented the

trial court from being able to fairly adjudicate this case below because the land status and tribal status had already been decided and those "facts" could not be contested. From the very beginning of the litigation against the Secretary's Record of Decision claiming he had the authority to take fee lands in New York into trust plaintiffs-appellants were trying to fight against a completely stacked deck of "facts" against them. Facts that were assumed to be accurate but which were never truly litigated.

Even raising the completely new argument from *Carcieri v. Salazar* that the Oneida Indian tribe was not a recognized tribe under federal jurisdiction in 1934 when the Indian Reorganization Act was adopted and therefore not eligible for the benefit of having land placed into federal trust status was not allowed to be heard. Judge Kahn tried to hear it and granted these petitioner's motion that the facts surrounding the recognition of the New York Oneida were unclear and ordered the Secretary of the Interior to make a final determination as to whether the New York Oneida's were recognized in 1934 or not.

Initially, the Secretary challenged the authority of the trial court and requested that all of the parties, except the Secretary, be required to disclose what "facts" they had about the Oneida's recognition. These petitioners provided federal documents that only defendant Halbritter had been recognized as the leader of the New York Oneida Nation by Commissioner Ada Deer. They also submitted federal documents from California that said that an Ada Deer letter recognizing a tribal leader was not recognition of an Indian tribe by the department. The Secretary responded to the trial court's order for a specific finding of tribal recognition with the M-37029 opinion claiming that this Court's

interpretation of 25 U.S.C. § 479 was incorrect in *Carcieri* and that the Secretary has her own authority to make her own determination as to the meaning of the statute. The M-opinion even claims it is entitled to the deference given in *Chevron , U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837, 842-3 (1984) in all federal courts and that the trial court was bound to accept its determination of recognition of the Oneida's under the binding new policy of M-37029 now known as the department's *Carcieri* Memorandum. The trial court also cites this Court's decision in *City of Sherrill* that stated that the OIN is a federally recognized tribe. *City of Sherrill* at 203. App. 10a.

The Oneida Indian Nation has never been formally recognized since 1838 when the Treaty of Buffalo Creek was negotiated with the remaining separate parties of tribal members. Petitioners also submitted documents they obtained in the National Archives regarding the decision to allow all of the New York Indian tribes to vote on the adoption of the Indian Reorganization Act. The decision was to allow all of the former New York tribes to vote after a major investigation into their status as being primarily under state jurisdiction. All of the New York tribes resoundingly rejected the adoption of the IRA including the remaining Oneida. This is apparently why the M-opinion states specifically that a former rejection of the IRA by a tribe can be ignored by the Secretary. This Carcieri M-opinion has been applied in every contested fee to trust situation across the United States since it was released in this case.

These petitioners also submitted many federal documents indicating that the Treaty of Buffalo Creek was executed pursuant to the Removal Act of 1830. Citing the specific language of the Nixon Memorandum

that was submitted to the trial court as evidence that the United States had deliberately misconstrued the "facts" surrounding the treaty of Buffalo Creek and the Removal Act made no difference. This argument was specifically disallowed in the trial court because of the contrary rulings of the Second Circuit precedents.

Just a few weeks before the summary affirmance in this case the Second Circuit issued its published memorandum decision against the other remaining parties opposing the same Records of Decision to place the 14,000 acres into federal trust for the Oneida tribe in *Upstate Citizens for Equality v. United States*, 841 F.3d 556 (2d Cir. 2016). This brand new precedent further compounded the factual errors from the earlier precedents and granted to the Secretary essentially unlimited authority to take any lands anywhere into federal trust for an Indian tribe as summarized in the conclusion of the opinion. *Id.* at 48-49.

B. This Court Should Determine whether there is a Legitimate Source of Federal Authority to Acquire Federal Territorial Land Within a State.

To examine the current sources of the federal authority to acquire land within a State a small amount of background from Eighteenth Century common law is required. At common law a sovereign could acquire new territorial lands by discovery, conquest or by purchase with a treaty of cession. These authorities were all based upon the authority of the sovereign to wage war. *See Johnson v. McIntosh*, 21 U.S. 543 (1823). Usually a combination of these authorities was used. The Navy or special envoy would discover a new island or continent that was occupied by uncivilized natives that

either were suppressed by force or given major goods or services for a written cession of land, sometimes both. Any way these powers are looked at under the common law they are true war powers not intended to be used as normal domestic law. The war powers by definition displace the normal domestic laws of a civilized government including its constitutional provisions and statutes. *See Rasul v. Bush*, 542 U.S. 446, 480-484 (2004).

Because of this historical reality there was great concern by the Founding Fathers and even more by the Framers of the Constitution as to how to prevent these war powers to acquire new territory from being used to disrupt the newly asserted concept of self-governance. The first governing documents of the alliance of colonies to conduct the Revolutionary War and make the Articles of Confederation deliberately chose not to make a strong central government that could independently exercise these traditional war powers.

When it became clear that the Articles of Confederation did not create a workable system of joint governance the Framers altered their orders from their respective States and took it upon themselves to work out a new kind of constitution with sufficiently divided powers to prevent tyranny and to allow a republican form of government. To do this they divided the traditional common law war powers between the Executive, Congress and the States by prohibiting a standing federal army and requiring state militias to be organized for federal use. Primarily at the request of George Mason, the Framers strategically placed constitutional constraints on every conceivable use of the war powers. Mason was convinced that the slavery issue would cause these war powers preserved and in use in the law regarding slavery and Native Americans

to overcome whatever constitutional safeguards were made. *See* Preface in War Powers by William Whiting (43rd edition). In 1857, the issue of slavery boiled over with the opinion in *Dred Scott v. Sandford*, 60 U.S. 393.

1. The Real Source of Authority for Fee to Trust is the Dred Scott decision

As the attorney for CERA/CERF has been explaining to this Court for many years in over fifteen *amicus curiae* briefs in various Indian cases, the Civil War Amendments did not reverse the holding in Chief Justice Taney's majority opinion in *Dred Scott* that nullified the Property Clause, Northwest Ordinance and Missouri Compromise. *Id.* at 443-444. The Property Clause and Ordinance of 1787 were supposed to be the major restraints set by the Framers to limit the use of the territorial war powers.

As previously explained many times, the definition of Indian country was first developed as a term to denote the temporary loss of control because of Indian hostilities. *See generally United States v. Donnelly*, 228 U.S. 243 (1913); see also Indian Trade and Intercourse act of 1834, 4 Stat. 729. The term was not considered to be a permanent removal of state jurisdiction. Temporary war powers to deal with specific emergencies do not threaten the constitutional structure. Similarly temporary loss of individual rights and liberties are also allowed. It is only when the use of the war powers becomes a permanent or normal domestic power that self-governance is threatened.

As applied by the Second Circuit in their precedents in New York, the term Indian country is being applied as a permanent land status. It is being applied as if it existed from before the Constitution was even in effect.

It is no accident that the unification theory flowed out of this definition of Indian country in New York. This Court may not have intended with its decision in *Oneida* I to open this federal full scale assault on the original sovereignty of the State of New York but that was the result.

Since the Nixon administration the United States has asserted in litigation that there is no limitation on the use of the territorial war powers. Previously, CERA has explained this through the deliberate preservation of these powers by Secretary of War Edwin Stanton following the Civil War in the Indian policy of 1871. *See* War Powers by William Whiting (43rd edition) p. 470-478. CERA has always stated that the source of these unlimited territorial powers was the *Dred Scott* decision.

In the *Scott* majority opinion, Chief Justice Taney methodically removed most of the safeguards set up so carefully by the Framers to prevent the national government from exercising the war powers as normal domestic authority. Beginning with the interpretation that the Property Clause, Art. IV, Sec. 3, Cl. 2, only applied to the original colonies and the lands expressly ceded by them, Taney dismantled the requirement "to dispose of the territories" that insured that the territorial war powers could not be permanent. *Id.* 443-444. He then used this interpretation to reverse the Ordinance of 1787 that had been the contemporaneous interpretation by the Framers of the Property Clause as applied in the lands ceded by Virginia and the other colonies to allow the federal government to be formed. This had to be done by the Chief Justice to change the fact that the slave Dred Scott had lived in a free territory technically making him a free man under the terms of the Northwest Ordinance of 1787. Chief

Justice Taney then addresses the Missouri Compromise applying his interpretation of the Property Clause to rule that Congress had no authority to constrict the taking of the property of slaves into any federal territory.

The Chief Justice then constructs his own new theory on the authority of the United States to acquire new lands that includes a policy to protect slavery.[3] The 13th Amendment ended Taney's slavery policy but did nothing to alter or address the nullification of the Property Clause and the unleashing of unlimited authority to acquire land that could be treated as territory. The *Scott* opinion is a legal source of the unlimited territorial war power that Taney defined as "the inevitable consequence of the right to acquire territory." *Id.* at 444. This is probably the true source of the power of the Secretary of the Interior to acquire fee lands under state jurisdiction and turn them back into federal territorial lands even in an original colony that never had any federal territory.

The phrase "the inevitable consequence of the right to acquire territory" was quickly applied in the case of *Ableman v. Booth*, 62 U.S. 506 (1859) to limit state court jurisdiction and state sovereignty against the fugitive slave act. The phrase survived the Civil War and was applied to give the United States direct authority for federal eminent domain in *Kohl v. United States*, 91 U.S. 367 (1875) just as Taney had stated in the *Scott* opinion. Eight years later, at the same time

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[3] Because Chief Justice Taney created his own tangential interpretation of the Property Clause he did not address or overrule any of the prior rulings that are the basis of federalism such as *American Insurance Company v. Canter*, 26 U.S. 11 (1828) or *Pollard's Lessee v. Hagan*, 44 U.S. 212 (1845).

Congress was trying to get around the harshness of the 1871 Indian policy for the Omaha and Oneida tribes, this same language was used to justify the plenary authority over Indian affairs in Congress *in United States v. Kagama*, 118 U.S. 375 (1886) and then *Elk v. Wilkins*, 112 U.S. 94 (1884). Today, this tangential case line on federal territorial authority is identifiable by citing as its main precedent one of these four cases.

This language from *Dred Scott* is also the source of the 1871 Indian war power policy codified in the Revised Statutes as 1 Rev. Stat. § 440 et seq. It is the continuing and unchecked authority to acquire federal territory from the *Scott* opinion that allows the Civil War powers to be used continuously even after the end of the Civil War was declared. Taney deliberately created a continuing war power authority to preserve slavery into the future, knowingly overriding all domestic law. This is important in this case because 43 U.S.C. § 1457 is an exact copy of 1 Rev. Stat. § 441 with even more executive heads named to exercise what are unlimited territorial war powers from the 1871 Indian policy.

Because of the division created in common law between the domestic and war powers it is likely that a single Supreme Court opinion deliberately crossing the line to bring the war powers into domestic use could dominate all other laws. There may have been a reason the British called domestic law the law of the land.

Petitioners admit that this is not a normal petition for certiorari. How does any lawyer or even constitutional scholar fight against a war power that literally suspends due process of law.

2. This Petition should be granted to examine the constitutionality of 43 U.S.C. § 1457.

Just as Judge Kahn ruled below 25 U.S.C. § 465 is not the real source for the 25 CFR Part 151 regulations unless 25 U.S.C. § 9 and 43 U.S.C. § 1457 are included within the authority of the Secretary to create and exercise fee to trust. App. 19a. Statute 25 U.S.C. § 9 speaks of the Indian trust relationship. Generally, the special Indian trust relationship in and of itself is not a danger to the constitutional structure or the liberty of all Americans. Nor is the definition of Indian country. As was explained in the *Nebraska amicus* brief by CERF last year, the 1871 policy also changed significantly the definition of Indian country to what is generally used today in 18 U.S.C. § 1151. *See* 2 Rev. Stat. § 2145. With this Court's opinion in *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998) the Indian country definition from the 1871 policy was specifically limited and has been adhered to by the Secretary of the Interior.

Trying to protect the Indians was and is a laudable goal. For almost 100 years following the Civil War and Reconstruction these war powers were sparingly used. Certainly, the unlimited authority to acquire territory is the real source of what we now call the federal reserved rights doctrine. But even this power was sparingly used until the mid 1950's when Vice President Nixon and William Veeder in the Department of Justice connected.

CERA/CERF has written a great deal in *amicus* briefs about how Nixon and Veeder combined to alter our government using the 1871 Indian policy before we knew the exact connection into how it was expanded to affect all domestic law. That exact connection is 43

U.S.C. § 1457 that is part of the Government Reorganization Act of 1965, 80 Stat. 378 et seq. This law with 43 U.S.C. § 1457 as its linchpin has the authority to destroy the States using the 1871 Indian policy as its authority.[4]

II. THIS CASE FROM THE ORIGINAL COLONY OF NEW YORK PRESENTS A UNIQUE OPPORTUNITY TO RESET THE PROPERTY CLAUSE

This Court has the ultimate remedy for overruling the *Dred Scott v. Sandford* interpretation of the Property Clause that was laid out by Abraham Lincoln himself in his most famous debate with Senator Stephen Douglas in Galesburg, Illinois. Lincoln articulated how a federal constitutional amendment requiring government to equally protect all citizens would overrule and correct the *Scott* opinion. This goal became reality with the passage of the 14th Amendment. The only exception was that the Indians were deliberately left out to preserve the powers used in the Civil War as engineered after Lincoln's assassination by Edwin Stanton, the Secretary of War.

CERA understands that applying the 14th Amendment as requested in the complaints in this case by petitioners and especially for Melvin Phillips, the

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[4] The attorney for CERA was surprised that Nixon was involved in a 1965 law. Leonard Garment wrote of how Senator Robert Kennedy and President Johnson requested Nixon's assistance to find a way to authorize Medicare and Medicaid. CERA has not found proof of William Veeder's direct involvement but 43 U.S.C. § 1457 is the statutory version of the expansion of the reserved rights doctrine that Veeder developed for *Arizona v. California*, 373 U.S. 546 (1963).

last full blood New York Oneida Indian and petitioner in this case, could be an overwhelming change in federal Indian policy. CERA wants current federal Indian policy changed and for all Native Americans to have equal rights but is very concerned about a drastic alteration that would disrupt all current federal law.

The reason New York was such an important target for the Nixon Indian policy gives this Court an almost unique opportunity to correct what Chief Justice Taney deliberately broke with this case. In the *Scott* opinion, Taney said the only place the Property Clause was intended to apply was within the original colonies. *Scott* at 443. This Court can use this case to define how the original meaning of the Property Clause applies in New York. In this case the fee to trust authority of the Secretary under 43 U.S.C. § 1457 is openly stated. Title 43 is the federal public land law title that should not apply in New York if the Property Clause is given its original meaning.

The way to restore the constitutional structure and sovereignty of the State of New York is simply to apply the original meaning of the Property Clause and say it applies in New York or any other original colony. Explaining how the state Indian reservations in New York cannot be federal Indian country or subject to diminishment or disestablishment by Congress under the corrected Property Clause analysis would overrule "the inevitable consequence of the right to acquire territory" language that is the real authority for fee to trust and the 25 CFR Part 151 regulations. The Property Clause should prevent the federal government from acquiring federal territory in a sovereign state.

Given the current political atmosphere, reversing this language in the *Scott* opinion by itself may not be

sufficient to enforce an opinion overruling the 25 CFR Part 151 regulations as unconstitutional. This changes if a reinvigorated Property Clause is linked to the requirement of the equal protection of the laws as Lincoln opined. CERA respectfully suggests that instead of applying a full scale 14th Amendment analysis to completely overrule this part of the *Scott* opinion that this Court simply cite its prior decision in *Saenz v. Roe,* 526 U.S. 489, 502-503, Fn 15 (1999) that has already applied the 14th Amendment to the *Scott* opinion in a footnote. This Court also has its recent decision in *Puerto Rico v. Sanchez Valle,* 136 S.Ct. 1863 (2016) to use to back up such a ruling. This case does not require a full application of the 14th Amendment to be set right. All this case requires is for the 14th Amendment to be used to reinforce the limitations in the Property Clause.

The restored limitations in the Property Clause then can become the basis for finding the 25 CFR Part 151 regulations *ultra vires.* The Property Clause expressly requires Congress to dispose of the territories. This clause was traditionally interpreted to require all federal territorial land within a state to be sold once the state was admitted to the union. Allowing the Secretary of the Interior or Congress to remove state jurisdiction over land and make it back into federal territory defeats the limitation to dispose of the territories. Petitioners fully acknowledge that this is no way would alter how the United States can acquire needed land under the Enclave Clause, Art. I, Sec. 8, Cl. 17.

III. THE SECRTARY CANNOT HAVE UNLIMITED AUTHORITY TO ACQUIRE FEDERAL TERRITORY IF THE EQUAL FOOTING DOCTRINE STILL EXISTS.

The Secretary of Interior asserts the same powers used to protect slavery before the Civil War for asserting the plenary authority to promote tribal sovereignty. As long as the 1871 Indian war power policy is the basis of the federal authority the Secretary is exercising through 43 U.S.C. § 1457 the federal solicitors will continue to ignore all other laws and the opinions of this Court as they did in this case with the *Carcieri* M-37029 opinion.

Congress may also not want to have these plenary powers limited. This Court has known for more than 20 years that the Nixon Indian policy was threatening state sovereignty and state jurisdiction. *See Nevada v. Hicks*, 533 U.S. 353 (2001). This Court has realized the constitutional consequences of allowing Congress to reclassify land it has given to a state back into being federal territory. This Court has already ruled that Congress has no authority to alter grants of territorial land made to States and warned about the significant constitutional issues raised by such a claim of power. In *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163, 176 (2009), this Court stated the Congressional Act at issue "would raise grave constitutional concerns if it purported to 'cloud' Hawaii's title to its sovereign lands more than three decades after the State's admission to the Union."

There is technically no difference between the *Hawaii* analysis and allowing the Secretary to piece by piece remove land from state jurisdiction under the 25 U.S.C. Part 151 regulations. As this Court knows the

"pieces" being removed under fee to trust started as a few acres and under the Obama administration grew to be hundreds of thousands of acres.

This Court limited Congressional authority to continue an anachronism by preventing the Congress from continuing to treat the Southern States as unequal sovereigns over voting laws in *Shelby County v. Holder*, 133 S. Ct 2612 (2013). *Shelby County* struck down as unconstitutional the Voting Rights Act provision requiring preclearance. The 1871 Indian war power policy is now an anachronism that prevents Native Americans from having any constitutional rights. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49(1978) citing *Elk v. Wilkins*, 112 U.S. 94 (1884). The 1871 Indian Policy is contrary to the historical special trust relationship between the United States and Indian tribes. *See generally United States v. Lara*, 541 U.S. 193, 201 (2004).

The authority to acquire federal territory under the *Dred Scott* analysis is the only legal basis for the federal government to be able to treat a sovereign state unequally by citing how it was admitted to the union or retroactively changing how it was admitted as has actually happened after 50 years of litigation in New York. Under the current case law of the Second Circuit when New York was admitted to the union the state Indian reservations were federal Indian country. This completely negates *Fletcher v. Peck*, 10 U.S. 87 (1810) which stated that the original colonies were the guardians over their Indian tribes and the receivers of the preemptive authority or Indian title. Under the British doctrine of discovery conquered lands remained under military control as long as the right of preemption was maintained. *Johnson v. McIntosh*, 21 U.S. 543, 588-90 (1823).

If the original states cannot protect their sovereignty from this unlimited power of the federal government to acquire federal territory within their boundaries what is left of Equal Footing Doctrine to protect any states admitted by Congress into the union?

This Court can apply its analysis from *Shelby County* to overrule the 1871 Indian policy and 43 U.S.C. § 1457 as an anachronism that should not exist in the 21st Century. As in *Shelby County* it can then apply its own interpretation of the 14th Amendment protections to rebalance the national versus state interests. Unless this Court does something significant to confront the unlimited authority to acquire federal territory, every opinion this Court writes in Indian law that is not what the United States wants will be subject to the same constant barrage of new legal arguments that New York has faced for more than 40 years.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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