No. 10-72

IN THE

Supreme Court of the United States

MADISON COUNTY, NEW YORK, *et al.*,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent,

STOCKBRIDGE-MUNSEE COMMUNITY, BAND OF MOHICAN INDIANS,

Putative Intervenor.

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

BRIEF FOR CAYUGA COUNTY AND SENECA COUNTY AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici will address whether the ancient Oneida reservation in New York was disestablished or diminished — the second question presented for review in Madison and Oneida Counties' ("Petitioners") petition for a writ of *certiorari*.

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INTEREST OF THE *AMICI CURIAE*[1]

Although the historic boundaries of the Oneidas' claim to an 18th-century reservation do not lie within Cayuga County or Seneca County, the *amici* have a compelling interest in this dispute because it involves an Indian group's claim to sovereignty rights on ancient but long-abandoned land. *Amici* respectfully submit that this Court must clarify the status of the ancient Oneida reservation to provide guidance to other litigants. Uncertainty about the status of ancient Indian reservations in Upstate New York continues to cause conflict between Indian and non-Indian communities, and courts repeatedly look to federal law when applying state statutes in order to determine if subject land constitutes a reservation. Just as the Court of Appeals for the Second Circuit in this case concluded that the Oneidas' reservation was not disestablished, and thus not ultimately subject to taxation, the New York Court of Appeals effectuated a similar flawed result in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010). In that case, the Court of Appeals relied on federal law to determine that each of the two parcels of land recently purchased by the Cayuga Indian Nation after two centuries of non-Indian ownership were located on a federal reservation and was therefore exempt from state cigarette sales and excise taxes.

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1. This *amici* brief is presented pursuant to this Court's Rule 37.4; the counties' authorized law officers appear as co-counsel. Counsel of Record for all parties have received notice of *amici's* intention to file this brief more than 10 days prior to the brief's due date.

Even though a determination about the status of the Oneida reservation may not be dispositive on the issue of the status of other ancient reservations, this Court's review of this case would provide much needed guidance to other litigants and courts in New York struggling to resolve similar contentious issues.

ARGUMENT

LOWER COURTS NEED CLARIFICATION FROM THIS COURT TO SETTLE EXISTING CONFLICTS AND TO PREVENT FUTURE CONFLICTS REGARDING THE STATUS OF AND RIGHTS ASSOCIATED WITH ANCIENT TRIBAL LANDS.

Even though the Second Circuit below stated that "a tribe's immunity from suit is independent of its lands," it nevertheless reaffirmed its earlier finding that the Oneidas' reservation was not disestablished. *Oneida Indian Nation of New York v. Madison County and Oneida County,* 605 F.3d 149, 152 (2010). A review of that decision would clarify the status of hundreds of thousands, if not millions, of acres of ancient land in Upstate New York and the United States.

Much like Petitioners in this case, *amici* contend in their own petition for writ of *certiorari* from the New York Court of Appeals' decision in *Cayuga Indian Nation v. Gould* that this Court's decision in *City of Sherrill, New York v. Oneida Indian Nation of New York,* 544 U.S. 197 (2005), has been misinterpreted and misapplied. *Amici* contend that the New York Court of Appeals improperly bypassed *City of Sherrill* when it in effect held that the Cayuga Indian Nation rekindled

aspects of sovereignty when it repurchased ancient lands after two centuries of non-Indian ownership and governance. *Amici* also contend that the Court of Appeals incorrectly applied federal treaties and statutes and mistakenly concluded that the Cayuga Indian Nation's recently-purchased parcels of land constitute a "federal reservation" that had not been disestablished. The New York Court of Appeals' ultimate decision that the Cayuga Indian Nation possessed a federal reservation in Upstate New York – when that purported "reservation" was sold pursuant to valid treaties and owned by non-Indians for centuries – demonstrates with clarity that there are reasons, beyond this case, for the Supreme Court to determine whether federal reservations, in fact, remain under such circumstances. Although *amici's* arguments against the existence of a federal Cayuga reservation in *Cayuga Indian Nation v. Gould* are not identical to Petitioners' arguments here, Cayuga and Seneca Counties' concerns regarding the interpretation and meaning of "reservation" and rights associated therewith under federal law are quite relevant.

While the Second Circuit noted that it need not reach the issue of disestablishment, *see Oneida Indian Nation v. Madison County and Oneida County*, 605 F.3d at 152 n.6, there is no question that the status of the Oneida reservation is an important issue that needs to be resolved. The *amici's* ongoing dispute with the Cayuga Indian Nation presents another scenario that highlights the need for clarification of the status of ancient Indian reservations.

A. As in *Cayuga Indian Nation v. Gould,* there is a question here as to whether there ever was an Oneida federal reservation in New York State.

In *Cayuga Indian Nation v. Gould,* the New York Court of Appeals began its analysis of the history relevant to the purported existence of a federal reservation by discussing the 1794 Treaty of Canandaigua, but, as the Cayuga and Seneca Counties argued, one cannot properly analyze whether there ever was a federal reservation without going further back in time. On February 25, 1789, the Cayugas and New York State signed a treaty, the first paragraph of which states: "First: the Cayugas do cede and grant all their lands to the people of the State of New York, forever." The only interest the Cayugas held in any portion of the ceded lands after 1789 was a limited use right granted by the State in the second article of the treaty: "Secondly: the Cayugas shall, of the said ceded lands, hold to themselves, and to their posterity, forever, for their own use and cultivation, but not to be sold, leased, or in any other manner aliened, or disposed of to others, all that tract of land, beginning at . . ." By the express terms of the treaty, the Cayugas ceded their lands to the State, which then granted to the Cayugas a right of "use and cultivation" in the same. Importantly, in the 1789 Treaty, New York State reserved for itself the exclusive right to purchase back the reservation it had created. *See Cayuga Indian Nation v. Pataki,* 413 F.3d 266, 268-69 (2d Cir. 2005), *cert. denied,* 547 U.S. 1128 (2006).

The United States Constitution took effect and the United States government began functioning as a federal government on March 4, 1789 — after the 1789 Treaty was signed. *See e.g., Oneida Indian Nation v. New York*, 691 F.2d 1070, 1079 n.6 (2d Cir. 1982). The Articles of Confederation did not prohibit or require the assent of Congress for the transfer of Indian land. *See Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1167 (2d Cir. 1988). As a result, at the time of the 1789 Treaty, New York could — and did — lawfully exercise its right to extinguish whatever interests the Cayugas had in the subject land. *See id.* The United States itself put forth exactly this argument before the American and British Claims Arbitration Tribunal in 1926, and the Tribunal concluded that the 1789 treaty "was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown," and that "[t]he title of New York . . . was independent of and anterior to the Federal Constitution." *Cayuga Indian Claims*, 20 Am. J. Int'l L. 574, 590, 591 (Am. & Br. Claims Arb. Trib. 1926).

The Court of Appeals, however, held that in the 1794 Treaty of Canandaigua, the United States recognized that the Cayuga Indian Nation possessed a federal reservation. It is respectfully submitted that this holding was incorrect. In fact, the United States merely acknowledged in the Treaty of Canandaigua that the Cayugas had certain rights to the land derived from the 1789 Treaty with New York. The Treaty of Canandaigua

did not establish any new rights, much less a federal reservation. Article II of the treaty provides in full:

> The United States *acknowledge* the lands reserved to the Oneida, Onondaga and Cayuga Nations, *in their respective treaties with the state of New York,* and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

7 Stat. 44, Art. II (emphasis added). As is apparent from this language, the United States did not purport to reserve any land by virtue of the Treaty of Canandaigua in 1794; it merely "acknowledged" that New York reserved certain rights to the land for the Cayugas after it extinguished whatever Indian title the Cayugas held. Similarly, the United States did not purport to create a reservation by virtue of the Treaty of Canandaigua, but merely acknowledged that the lands constituted a state reservation under the 1789 Treaty with New York and promised not to disturb the Cayugas' use of the land pursuant to that treaty.

The Treaty of Canandaigua did not convey an interest in land to the Cayugas and did not divest New York of its rights. *See Seneca Nation of Indians v. United States,* 173 Ct. Cl. 917, 922 n.5 (1965) (explaining

that the purpose of the Treaty of Canandaigua was to "reconfirm peace and friendship between the United States and the Six Nations . . . [T]here was no purpose to divest New York and Massachusetts of their right, nor was there any purpose to prevent or to supervise sales or transfers of [subject] territory."). The New York Court of Appeals' misconstrued the Treaty of Canandaigua because the United States did not have the power to grant or confirm a title to land when the sovereignty and dominion over it had become vested in New York State. *See Goodtitle v. Kibbe,* 50 U.S. 471, 478 (1850) (holding that Congress could not grant an interest in land that belonged to Alabama). After 1789, New York held the land in fee subject only to limited use rights granted to the Cayugas pursuant to state law. The federal government had no property rights in the lands and could not confer "recognized title" without illegally depriving New York of its property rights.

Although the Supreme Court has not held that the treaty-making power of the United States extends to the divestment of a state's interest in land, it has observed that if such authority were to exist, it must be shown unmistakably in the treaty. *United States v. Minnesota,* 270 U.S. 181, 209 (1926) ("[N]o treaty should be construed as intended to divest rights of property — such as the state possessed in respect of these lands — unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question."). The Treaty of Canandaigua makes no mention of an intent to divest New York of its property rights, and there is no historical evidence that the federal government intended the Treaty to divest New York of its interest. Indeed, the language of the

Treaty of Canandaigua confirms that the United States explicitly acknowledged New York State's treaty with the Cayugas.

The 1788 Treaty of Fort Schuyler between the Oneida Nation and the Colony of New York was virtually identical to New York's 1789 Treaty with the Cayugas. New York purchased all of the Oneidas' lands and granted them land use rights to approximately 300,000 acres. *See Sherrill,* 544 U.S. at 203. The Treaty of Canandaigua did nothing more than acknowledge the 1788 Treaty, and, just as *amici* argued in *Cayuga Indian Nation v. Gould,* the United States could not and did not convey any interest to the Oneida by the Treaty of Canandaigua.

If the Treaty of Canandaigua established a federal Cayuga or Oneida reservation, then in so doing the United States violated the Fifth Amendment to the Constitution. The United States' power of eminent domain extends to the taking of state-owned property without the state's consent, but the United States must pay just compensation to the property owner for the property it takes. U.S. Const. amend. V; *see also Block v. North Dakota ex rel. Bd. of Univ. & School Lands,* 461 U.S. 273, 291 (1983). A compensable taking occurs "[i]f a government has committed or authorized a pelinanent physical occupation of [the] property." *Southview Assocs. v. Bongartz,* 980 F.2d 84, 92-93 (2d Cir. 1992). Under this standard, if by the Treaty of Canandaigua the United States took New York's property rights in the subject lands, then New York State would have been entitled to compensation for that taking. No such compensation was ever given. Because

compensation was never paid to New York, even if the Unites States attempted to effect a taking by the Treaty of Canandaigua, it was incomplete and no property interest passed to the Cayugas or the Oneida. *See United States v. Dow,* 357 U.S. 17; 21 (1958) (holding that title does not pass until the owner receives compensation).

B. If a federal Oneida reservation ever existed, it was disestablished.

As Petitioners assert, any federal Oneida reservation that may have existed has long been disestablished, and there is no present-day Oneida reservation in central New York. Circumstances surrounding disestablishment of reservations are central to ongoing disputes between Indian and non-Indian communities, and recurring issues are raised during those disputes. For example, *amici* argued in *Cayuga Indian Nation v. Gould* that if a federal Cayuga reservation was created by the Treaty of Canandaigua, any such reservation was disestablished when the Cayugas sold to New York State whatever land use rights they had in the subject land in 1795 and 1807. In support of their assertion, *amici* argued that the federal government's involvement in the negotiation, consummation and subsequent implementation of the 1795 and 1807 conveyances constituted federal ratification of those treaties. Not only did federal officials actively participate in the treaty process and attend the negotiations and signing of the 1795 and 1807 treaties, but the federal government distributed New York's payments to the Cayugas. *See Cayuga Indian Nation of New York v. Cuomo,* 730 F. Supp. 485,

(N.D.N.Y. 1990) (discussing involvement of federal officials Jasper Parrish and Israel Chapin Jr. in the negotiation and signing of the 1795 and 1807 treaties and Parrish's transmittal of consideration paid by New York State to the Cayugas for the acquisition of the Cayuga land); *Cayuga Indian Nation v. United States*, 36 Ind. Cl. Comm. 75, 92, 96 (1975) (noting that Parrish and Chapin signed the 1795 treaty and that Parrish attended the signing of the 1807 treaty as the United States Superintendent of Indian Affairs).

In 1910, the United States and Great Britain entered into an agreement to establish an arbitral tribunal to resolve certain claims between the two governments. Among these was a claim by Great Britain on behalf of the Cayuga Indians of Canada, related to New York State's refusal to pay part of the annuity provided for by the 1795 Treaty to the Canadian Cayugas. *See Cayuga Indian Claims*, 20 Am. J. Int'l. L. 574, 576 (Am. & Br. Claims Arb. Trib. 1926). The agreement and the list of claims to be resolved were approved by the Senate. By this agreement, the United States recognized that the obligations under the 1795 Treaty were enforceable and could be adjudicated in an international forum. In 1926, the American and British Claims Arbitration Tribunal published its decision requiring the United States to pay $100,000 to Great Britain as trustee for the Canadian Cayugas. *See Id.* at 594. Thereafter, President Coolidge, with the approval of both houses of Congress, included in the federal government's budget the funds required to pay the award. *See Cayuga Indian Nation v. Cuomo*, 730 F. Supp. at 492. By payment of the Tribunal's award, the federal government plainly and unambiguously

recognized the 1795 treaty as a valid conveyance and the source of its liability.

Finally, *amici* argued, the Treaty of Buffalo Creek is the ultimate evidence that, at least as of 1838, no federal Cayuga reservation existed. The New York Court of Appeals, citing the Second Circuit's decision in *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 226, 269 n.2 (2d Cir. 2005), noted that that "the Treaty of Buffalo Creek neither mentions Cayuga land or Cayuga title in New York, nor refers to the 1795 or 1807 treaties between New York and the Cayuga." However, the Court of Appeals' conclusion that there is a federal Cayuga reservation which has not been disestablished is illogical. The Treaty of Buffalo Creek confirms the Counties' assertion that the Cayuga reservation was either never established as a federal reservation or had long been disestablished by the time of the Treaty of Buffalo Creek in 1838. Had there been a federal Cayuga reservation in existence at the time of the Treaty of Buffalo Creek, that treaty would have specifically mentioned any such reservation either as land to which rights were being relinquished or land to which Indians reserved rights. Instead, the Treaty of Buffalo Creek provides for compensation of the Cayugas upon their removal from New York State to the west, and refers to the Cayugas as "friends" of the Senecas.

The Treaty of Buffalo Creek is, of course, much more germane to the case at hand. Much like the Cayugas did in 1795 and 1807, the Oneida Nation sold its land use rights for all but 5,000 acres of the state reservation created by the Treaty of Fort Schuyler. *See Oneida Indian Nation v. Madison County and Oneida County*,

605 F.3d at 152. The Treaty of Buffalo Creek provided that the Oneidas still residing in New York state in 1838 were to remove to their new homes in the midwest and make arrangements with the governor of New York for New York to use its right of reversion and purchase the remaining rights the Oneida had in any lands within New York State. *See* Treaty of Buffalo Creek, art. 13. The Treaty of Buffalo Creek explicitly named the Oneida and provided for their removal from New York. The federal government could not have more clearly disestablished anything that may have been left of a purported federal Oneida reservation.

Amici submit that the historical record indicates that there was never a federal Cayuga or Oneida reservation in New York State, and that even if any such reservation ever existed, it has long been disestablished. As long as courts around the country look to federal law to interpret the meaning of the word "reservation" within state statutes, the need for clarity from the highest court as to what constitutes a present-day federal reservation will only grow.

CONCLUSION

For the foregoing reasons, there exist important issues of federal law that need to be determined by this Court and the petition for a writ of *certiorari* in this case should therefore be granted.

Respectfully submitted,

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