No. 12 -1279

IN THE

Supreme Court of the United States

ONONDAGA NATION,

Petitioner,

v.

THE STATE OF NEW YORK; GEORGE PATAKI, In His Individual Capacity and as Governor of New York State; ONONDAGA COUNTY; CITY OF SYRACUSE; HONEYWELL INTERNATIONAL, INC.; TRIGEN SYRACUSE ENERGY CORPORATION; CLARK CONCRETE COMPANY, INC.; VALLEY REALTY DEVELOPMENT COMPANY, INC.; and HANSON AGGREGATES NORTH AMERICA,

Respondents.

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

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Second Circuit properly affirmed dismissal of this Indian land claim as barred by laches, acquiescence and impossibility under this Court's decision in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), because petitioner's complaint seeks a declaration that petitioner owns fee title to nearly 2,500,000 acres in central New York that the historic Onondaga Nation sold to the State two centuries ago, and such a declaration would be a "disruptive remedy" that is barred by the passage of time and justifiable expectations of ownership and sovereignty.

RULE 29.6 STATEMENT

The private respondents make the following statement pursuant to Rule 29.6:

Honeywell International Inc. has no parent corporation, and no publicly traded company owns 10% or more of its stock.

Trigen Syracuse Energy Corporation is now known as Syracuse Energy Corporation. Syracuse Energy Corporation's direct parent is SUEZ Energy Cogeneration Corporation. Syracuse Energy Corporation's ultimate parent company is GDF SUEZ S.A., a publicly traded company.

Clark Concrete Company, Inc., has been dissolved. It had no parent corporation, and no publicly held company owned 10% or more of its stock prior to its dissolution.

Valley Realty Development Company, Inc., was formerly owned by Clark Concrete Company, Inc. Valley currently has no parent corporation, and no publicly held company owns 10% or more of its stock.

Hanson Aggregates New York, LLC (formerly Hanson Aggregates New York, Inc.), is a wholly owned, indirect subsidiary of Lehigh Hanson, Inc. "Hanson Aggregates North America" was formerly the business name for all of Lehigh Hanson's North American aggregate operations. Lehigh Hanson, Inc. is a wholly-owned, indirect subsidiary of HeidelbergCement AG, a publicly traded company.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Page

CONSTITUTION

Cited Authorities

Page

STATUTES

TREATIES

RULES AND REGULATIONS

Page

OTHER AUTHORITIES

STATEMENT

A. Introduction

In this action, petitioner seeks a declaration that it owns fee title to more than 2.5 million acres of land in central New York, stretching from Pennsylvania to Canada and including all or part of eleven New York counties. *See* App., *infra*, 1a (map attached to petitioner's Amended Complaint depicting the land at issue). In a series of ancient transactions, petitioner conveyed all of this land to the State of New York—nearly all of it in 1788, before the formation of the current federal government under the Constitution. For more than two centuries, non-Indians have occupied this land almost entirely and New York State and its municipalities have exercised jurisdiction and sovereignty there. And during that time, non-Indian ownership, occupancy, and governance of these lands went unchallenged by the Onondagas themselves, even after other Indian tribes began litigating claims to other parts of upstate New York.

In 2005, the long-settled status of this vast swath of land was abruptly thrown into question when petitioner sued the State of New York and its Governor, Onondaga County, the City of Syracuse and private landowners challenging the validity of the Onondagas' ancient land cessions. Petitioner seeks a declaration that these 200-year-old transactions are and always have been "null and void," that the "subject land remains [its] property,"

and that the "Onondaga Nation and the Haudenosaunee[1] continue to hold title to the subject land." Am. Compl. 16.

Petitioner's ancient land claim is barred. This Court held in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), that "standards of federal Indian law and federal equity practice" precluded an Indian tribe from asserting sovereignty over an amount of land in upstate New York that was less than 1% as large as the 2.5 million acres involved here. *Id.* at 214; *see also id.* at 211. This Court held that the "disruptive remedy" sought by the tribe was precluded by several factors, including the "long lapse of time" between the tribe's cession of the land in question and its going to court to regain the land, "the attendant dramatic changes in the character of the properties" over two centuries, the "serious[] disrupt[ion] [to] the justifiable expectations of the people living in the area," and "the impracticability of returning to Indian control land that generations earlier passed into numerous private hands." *Id.* at 215-19. Unlike here, the tribe in *Sherrill* already owned the disputed land in fee, but sought to convert its title to that of a sovereign.

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[1] Petitioner alleged that "[t]he Haudenosaunee is a confederacy, originally, of five Indian nations: the Onondaga Nation, Mohawk Nation, Oneida Nation, Cayuga Nation, and Seneca Nation. The Tuscarora Nation joined the Haudenosaunee in approximately 1712. It is called, in English, the 'Six Nations Iroquois Confederacy.'" Am. Compl. ¶ 6. For purposes of federal law, the New York Indians are separate and distinct Native American tribes, and are not part of a separate federally recognized confederacy. *See Oneida Indian Nation of N.Y. v. New York*, 194 F. Supp. 2d 104, 116 (N.D.N.Y. 2002); *Haudenosaunee Six Nations of Iroquois (Confederacy) of North America v. Canada*, 1998 U.S. Dist. LEXIS 16265, at *4 (W.D.N.Y. Oct. 16, 1998). The Haudenosaunee was not a plaintiff below and is not a petitioner here.

After *Sherrill* was decided, the United States Court of Appeals for the Second Circuit held that the rule announced in that case barred land claims brought by the Cayuga Indian Nation and the Oneida Indian Nation and (unlike in this case) supported by the United States. This Court denied the tribes' and the United States' petitions for certiorari in both cases. *See Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied, United States v. Pataki*, 547 U.S. 1128 (2006), and *Cayuga Indian Nation of N.Y. v. Pataki*, 547 U.S. 1128 (2006); *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 137 (2d Cir. 2010), *cert. denied*, *United States v. New York*, 132 S. Ct. 452 (2011), and *Oneida Indian Nation of N.Y. v. County of Oneida,* 132 S. Ct. 452 (2011).

This case presents a straightforward application of *Sherrill* to yet another central New York Indian land claim based on similar 18th-century land transfers. The relief petitioner seeks is certainly no less disruptive than the forms of relief previously held to be barred: petitioner seeks title to land long owned and held by others, based on the alleged illegality of 200-year-old land transactions. The Second Circuit held that such a claim is barred because, just as this Court held in *Sherrill*, such a remedy would disrupt settled expectations based on two centuries of non-Indian sovereignty, ownership, and development. That holding does not conflict with any other appellate decision and does not for any other reason warrant plenary review by this Court, especially in light of the fact that this suit is independently barred by the State's Eleventh Amendment immunity and Rule 19 of the Federal Rules of Civil Procedure.

B. Historical Background

In the 18th century, the Onondaga Nation occupied a large portion of central New York, between lands occupied by the Oneida Nation to the east and the Cayuga Nation to the west. In September 1788, the State of New York entered into the Treaty at Fort Schuyler with the Onondaga Nation. For payments in money and in kind, the Onondagas "cede[d] and grant[ed] all their lands to the people of the State of New York, forever." The State set aside a portion of those ceded lands for the Onondagas' "use and cultivation, but not to be sold, leased or in any manner aliened or disposed of to others," comprising about 100 square miles, or 64,000 acres, in the vicinity of Onondaga Lake and the present site of Syracuse. 1788 Treaty of Fort Schuyler, *reprinted in* Report of Special Committee to Investigate the Indian Problem of the State of New York, Appointed by the Assembly of 1888, Transmitted to the Legislature February 1, 1889 ("Whipple Report"), at 190-192.

The Treaty of Fort Schuyler was made before the Constitution became effective in 1789. Under the Articles of Confederation then in force, the State of New York had the authority to extinguish Indian land interests without the consent or participation of the United States. *See Oneida Indian Nation of N.Y. v. New York*, 860 F.2d 1145, 1150-62 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

After the Constitution became effective, Congress in 1790 enacted the first Indian Trade and Intercourse Act, commonly known as the Nonintercourse Act, which provided that no sale of Indian lands "shall be valid" unless

approved by the United States government. Act of July 22, 1790, ch. 33, 1 Stat. 137. Subsequent versions of the Nonintercourse Act were enacted in 1793, 1796, 1799, 1802, and 1834;[2] the current version is codified at 25 U.S.C. § 177.

In 1793, the State entered into a second treaty with the Onondagas in which it acquired the Onondagas' rights to about three-fourths of the lands that had been set aside for the Onondagas' use and cultivation in the 1788 Treaty. Treaty with the Onondaga Nation of 1793, *reprinted in* Whipple Report at 195-199; *see* Am. Compl. ¶ 35 (quoting portions of the 1793 treaty); Whipple Report at 9 (referring to the 1793 sale of three-fourths of the lands set aside in 1788). In 1794, the United States entered into the Treaty of Canandaigua, acknowledging the lands set aside for the Onondagas in their treaties with the State of New York. Treaty of Nov. 11, 1794, 7 Stat. 44, 45. The United States agreed that it would "never claim the same" and that the lands so set aside "shall remain theirs [*i.e.*, the Onondagas'] until they choose to sell the same to the people of the United States, who have the right to purchase." *Id.* Art. II, at 45.[3] The Onondagas in turn agreed that they would "never claim any other lands within the boundaries of the United States; nor ever disturb the people of the

[2] Act of Mar. 1, 1793, 1 Stat. 329; Act of May 19, 1796, 1 Stat. 469; Act of Mar. 3, 1799, 1 Stat. 743; Act of Mar. 30, 1802, 2 Stat. 139; Act of June 30, 1834, 4 Stat. 729.

[3] The 1794 treaty's reference to the "people of the United States, who have the right to purchase" meant the State of New York, because New York then held the underlying fee title to the lands occupied by the Onondagas, also known as the pre-emptive right to purchase. *See Sherrill*, 544 U.S. at 203 n.1.

United States in the free use and enjoyment thereof." *Id.* Art. IV, at 45; *see Sherrill*, 544 U.S. at 204-05.[4]

In the early 1800s, the federal government encouraged the New York Indians to relocate to western lands. The federal government paid money and set aside lands in what is now Kansas to be the "future home" for the Onondagas and other tribes.[5] *See Sherrill*, 455 U.S. at 206-07; Treaty of Buffalo Creek, Jan. 15, 1838, 7 Stat. 550, 551-52, 554. Onondagas who wished to remain in New York were free to stay.

The Onondaga reservation now comprises 6,100 acres, slightly less than ten square miles, located south of Syracuse. According to the 2010 census, the Onondaga reservation had a population of 468. *See* http://www.cnyrpdb.org/data/pop/onondaga.asp (last visited Sept. 3, 2013).

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[4] While nearly all of the Onondagas' aboriginal lands had been conveyed to the State of New York in the 1788 and 1793 treaties, New York acquired from the Onondagas smaller parcels of the remaining lands in 1795, 1817, and 1822. *See* Whipple Report at 199-211.

[5] In 1893, with the United States' consent, the New York Indians sued the United States for monetary compensation for Kansas lands the United States had set aside for them but subsequently sold to settlers. The Onondagas shared in the resulting award of damages. *See New York Indians v. United States*, 170 U.S. 1 (1898), *on remand*, 40 Ct. Cl. 448 (1905).

C. This Court Rules Out "Disruptive" Relief in *Sherrill* and the Second Circuit Follows Suit, Dismissing the *Cayuga* and *Oneida* Land Claims

In *Sherrill*, this Court held that the Oneida Nation could not assert sovereignty over lands that were part of its ancient reservation and that the tribe had recently purchased on the open market. 544 U.S. at 202, 211. That case involved a much smaller amount of land—only 17,000 acres—but as in this case, the lands in question were part of the tribe's original reservation, created pursuant to a 1788 treaty analogous to the one involved here, and the tribe's claim of sovereignty was based on alleged violations of the Nonintercourse Act. The tribe was seeking an adjudication of "present and future" sovereignty, a "disruptive remedy" that was barred by considerations of laches, acquiescence, and impossibility. *Id.* at 202, 216-17, 221.

The Court observed that the wrongs of which the Oneidas complained "occurred during the early years of the Republic," and that the Oneidas "did not seek to regain possession of their aboriginal lands *by court decree* until the 1970's." *Id.* at 216 (emphasis added). The "long lapse of time during which the Oneidas did not seek to revive their sovereign control *through equitable relief in court*, and the attendant dramatic changes in the character of the properties, preclude[d] [the tribe] from gaining the disruptive remedy it [sought]." *Id.* at 216-17 (emphasis added).

The Court rested its decision in *Sherrill* not only on the delay-based doctrine of laches, but also on the long

acquiescence by the tribe and the United States in the State's dominion and sovereignty over the lands and the "justifiable expectations" of the residents of the area, "grounded in two centuries of New York's exercise of regulatory jurisdiction." *Id.* at 215-16, 218. The Court explained that "given the extraordinary passage of time," granting the relief the Oneidas sought "would dishonor the historic wisdom in the value of repose." *Id.* at 218-19 (internal quotation marks omitted). And it observed, "[f]rom the early 1800s into the 1970s, the United States largely accepted, or was indifferent to, New York's governance of the land in question and the validity *vel non* of the Oneidas' sales to the State," and indeed, national policy in the early 1800s "was designed to dislodge east coast lands from Indian possession." *Id.* at 214.

The Court also relied on the equitable doctrine of impossibility. "[R]eturning to Indian control land that generations earlier passed into numerous private hands" is fundamentally impracticable, even when the tribe has acquired title, because the assertion of sovereignty would itself "seriously burden" state and local regulation and "adversely affect" neighboring landowners. *Id.* at 219-20.[6]

[6] This Court did not decide in *Sherrill* whether the Treaty of Buffalo Creek disestablished the Oneidas' reservation, 544 U.S. at 215 n.9, but cited Justice Stevens' dissenting opinion in *Oneida II*, 470 U.S. at 269 n.24 ("There is . . . a serious question whether the Oneida did not abandon their claim to the aboriginal lands in New York when they accepted the Treaty of Buffalo Creek in 1838"). The petition for certiorari in *Madison County v. Oneida Indian Nation of N.Y.*, No. 12-604, raises the question whether the ancient Oneida reservation was disestablished, and the State of New York has filed an amicus brief supporting the petition. The Court has invited the views of the Solicitor General on that

Shortly after *Sherrill* was decided, the United States Court of Appeals for the Second Circuit applied the principle of that case to bar a 64,000-acre land claim brought by the Cayuga Indian Nation. Holding that the claim was barred by the same considerations of laches, acquiescence, and impossibility recognized in *Sherrill*, the court dismissed the complaints of both the tribal plaintiffs and the United States. *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005). The Second Circuit concluded that the import of *Sherrill* is that disruptive, forward-looking land claims "are subject to equitable defenses, including laches." *Id.* at 277. These equitable defenses negated any continuing tribal right to possess the disputed lands and precluded any relief based on that right, including damages. *Id.* at 277-78. Both the tribal plaintiffs and the United States petitioned this Court for a writ of certiorari, which the Court denied. *See United States v. Pataki*, 547 U.S. 1128 (2006); *Cayuga Indian Nation of N.Y. v. Pataki*, 547 U.S. 1128 (2006).

The Second Circuit again applied *Sherrill* to dismiss a tribal land claim in *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 137 (2d Cir. 2010). As in this case, the tribe contended that the ancient land transactions (involving some 250,000 acres) were void *ab initio*. The court reasoned that the claim "necessarily threaten[s] to undermine broadly held and justified expectations as

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petition. By letter dated June 3, 2013, the petitioners in No. 12-604 advised the Court that the parties had reached a settlement agreement and asked to defer any further action on the petition while that settlement is pending approval. The Court need not hold this petition pending its action on the petition in No. 12-604 in any event, because the courts below rejected petitioner's claims without considering any question of reservation disestablishment.

to the ownership of a vast swath of lands—expectations that have arisen not only through the passage of time but also the attendant development of the properties." Again this Court denied both the federal and tribal petitions for certiorari. *See United States v. New York*, 132 S. Ct. 452 (2011); *Oneida Indian Nation of N.Y. v. County of Oneida*, 132 S. Ct. 452 (2011).

D. Petitioner Sues For a Declaration of Title to 2.5 Million Acres of Upstate New York

Petitioner commenced this action in March 2005 seeking a declaration "that certain lands are the property of the Onondaga Nation and the Haudenosaunee, having been unlawfully acquired by the State of New York." Am. Compl. ¶ 2. The complaint identifies the "subject of this action" as the aboriginal territory of the Onondaga Nation, which it alleges is "an area or strip of land" that "runs from the St. Lawrence River, along the east side of Lake Ontario and south as far as the Pennsylvania border" and "varies in width from about 10 miles to more than 40 miles." Am. Compl. ¶¶ 17-18. Attached to the complaint, a map depicts the enormous swath of allegedly aboriginal land at issue, comprising all or part of eleven New York counties. Am. Compl. Ex. A, *reprinted in* App., *infra*, 1a.

The complaint contends that all of these lands "remain the property of [petitioner] and the Haudenosaunee." Am. Compl. ¶ 16. Petitioner asserts that all of the agreements conveying the subject lands to the State of New York are invalid and "void," on various grounds: it asserts that the Treaty of Fort Schuyler was signed by unauthorized agents and did not bind the tribe; that the Nonintercourse Act barred all of the land transfers in the

absence of federal approval; and that the land transfers independently violated several treaties.

The complaint names as defendants the State of New York, as the original purchaser and occupier of the subject lands; the then-Governor of New York; the County of Onondaga and the City of Syracuse, as occupiers of some of the subject lands; and several private businesses, also as occupiers of some of the subject lands. Am. Compl. ¶¶ 7-16. It alleges that the non-governmental respondents have "mined," "degraded," and "polluted" areas within those lands. Am. Compl. ¶¶ 13-16.

The complaint alleges that petitioner asked the United States to file its own suit, to overcome the State's sovereign immunity. Am. Compl. ¶ 9. The United States has neither filed such a suit nor sought to intervene in this one.

In its prayer for relief, the complaint seeks a declaration "[t]hat the purported conveyances of the 'treaties' of 1788, 1790, 1793, 1795, 1817, and 1822 were and are null and void" and "[t]hat the subject land remains the property of the Onondaga Nation and the Haudenosaunee, and that the Onondaga Nation and the Haudenosaunee continue to hold title to the subject land." Am. Compl. 16.

A few weeks after petitioner filed its complaint, this Court decided *Sherrill*, and the Second Circuit soon thereafter relied on that decision to dismiss claims by the Cayugas for both ejectment and monetary compensation. *See Cayuga*, 413 F.3d at 278-80. In response to the decisions in *Sherrill* and *Cayuga*, petitioner amended its complaint to add a few paragraphs seeking to show that it had asserted its rights more diligently than the

Oneidas had in *Sherrill*. Am. Compl. ¶¶ 45-53. Petitioner did not allege, however, that it had ever "s[ought] to revive [its] sovereign control through equitable relief in court," *Sherrill*, 544 U.S. at 216, at any time between 1788 and 2005.

E. The Decisions Below

Respondents moved to dismiss the amended complaint on the ground that this 200-year-old land claim is foreclosed by the same equitable considerations that foreclosed the tribe's claim in *Sherrill*. The State of New York also sought dismissal on grounds of Eleventh Amendment immunity, because this Court has held that an Indian tribe may not sue a State in federal court without its consent or a valid abrogation of its immunity. All other respondents—the County of Onondaga, the City of Syracuse, and the private respondents—contended that the State is a required party under Rule 19 of the Federal Rules of Civil Procedure and that the action cannot proceed if the State is dismissed as a defendant on immunity grounds.

The United States District Court for the Northern District of New York held that petitioner's claim was, on its face, barred by the equitable doctrines discussed in *Sherrill* and dismissed the amended complaint with prejudice. Pet. App. 8-28. The court did not address the immunity or Rule 19 arguments.

In an unpublished, non-precedential summary order issued just one week after argument, the Second Circuit affirmed. Pet. App. 1-7. Just as in *Cayuga* and *Oneida*, the court held that the Onondaga Nation's land claims are barred by the same equitable principles that barred

the Oneidas' claim to sovereignty over ancestral land in *Sherrill*.

The court concluded that all three relevant factors justified holding that the Onondagas' ancestral land claims are foreclosed on equitable grounds. First, "the length of time at issue between [the alleged] historical injustice and the present day" was substantial: petitioner filed suit approximately 183 years after the last of the transactions from which its claims derive. Pet. App. 4, 5. Second, "the disruptive nature of claims long delayed" was "indisputable" in light of the prior decisions rejecting similar claims. *Id.* Third, these claims would dramatically "upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiffs' injury," including the individuals, private businesses, and public entities that for two centuries have occupied, developed, and improved these now "predominantly non-Indian" lands. *Id.* As in *Sherrill*, therefore, the court of appeals concluded that petitioner's claim for relief was barred and must be dismissed.

REASONS FOR DENYING THE PETITION

I. The Petition Presents No Issue Warranting Review

The unpublished, non-precedential decision of the court of appeals does not warrant further review. There is no circuit split on the question presented, and petitioner's claim is not distinguishable from the claim rejected in *Sherrill* in any meaningful way. This case therefore involves no more than the straightforward application of existing precedent, and it presents no "important question of federal law" warranting this Court's review. Sup. Ct. Rule 10(c).

Petitioner does not contend that that decision conflicts with any decision of this Court or another appellate court. This Court has repeatedly declined to review the Second Circuit's application of *Sherrill* to dismiss comparable tribal land claims, twice denying petitions for certiorari filed not only by tribes but by the United States. Indeed, petitioner's primary submission—that a supposed "right to a remedy" prohibits the application of *any* time bar to a suit seeking ownership of land—is not supported by any legal precedent.

Moreover, petitioner's reliance on international law, which it did not cite below, provides no basis to grant review. And finally, another factor counseling against plenary review in this case is that the action is barred as against the State respondents by the Eleventh Amendment and as against the non-State respondents because the State is a required party under Fed. R. Civ. P. 19.

A. This Case Fails to Satisfy Any of the Criteria for Certiorari

The court of appeals' decision does not conflict with any decision from another appellate court. Indeed, in the eight years since *Sherrill*, no appellate court has so much as suggested that a tribe may sue to regain title after 200 years. Nor does the decision conflict with any decision of this Court, and petitioner does not claim that it does. The petition does not—and could not—argue that *Sherrill* held that a claim seeking a declaration of *title* may proceed where a claim seeking a declaration of *sovereignty* may not. Instead, petitioner contends only that *Sherrill* left the question open—that the court of appeals "traveled an uncharted path." Pet. 20. But petitioner is mistaken:

the path traveled by the court of appeals was plainly charted by *Sherrill*—the same rationale that led the Court to hold that the claims in *Sherrill* were time-barred applies with equal force here. And *no* court has ever held that the supposed "fundamental right . . . to a remedy," Pet. 21, allows an Indian tribe to pursue a claim for title irrespective of the passage of time. This Court certainly did not do so in *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985) (*Oneida II*), which expressly "decline[d]" to reach the question of laches or any other equitable bar, as petitioner concedes. *Id.* at 244-45 & n.16, 253 n.27; *Sherrill*, 544 U.S. at 213; Pet. 11.[7]

B. This Court Has Twice Declined to Review the Second Circuit's Application of *Sherrill*

This Court has twice rejected petitions to review the Second Circuit's application of *Sherrill*. In fact, the decisions this Court declined to review are the very decisions the court of appeals relied on in this case. *E.g.*, Pet. App. 4 (citing *Cayuga* and *Oneida*). Petitioner's interpretation of *Sherrill* is even less tenable than those advanced by the tribes and the Solicitor General in those earlier cases, and the petition in this case should likewise be denied.

This Court emphasized in *Sherrill* that equitable

[7] Petitioner mistakenly argues (Pet. 19, 31) that *Sherrill* does not preclude its claims because the decision in *Sherrill* did not "disturb" the Court's prior ruling in *Oneida II*. But *Oneida II* did not decide the applicablity of laches and related equitable doctrines to ancient Indian land claims. *Sherrill* did resolve the issue, holding expressly that these equitable principles bar such inherently disruptive claims.

considerations preclude seeking redress "into the present and future." 544 U.S. at 202. In both *Cayuga* and *Oneida*, this Court declined to review the dismissal of claims ostensibly for *retrospective* relief under the Nonintercourse Act and the same set of treaties, notwithstanding arguments that the equitable considerations of *Sherrill* did not apply to those categories of cases. This case is even more closely controlled by *Sherrill* and even less deserving of plenary review.

In *Cayuga*, the tribal plaintiff sought both prospective relief—a declaration that it holds legal and equitable title to 64,000 acres of lands unlawfully acquired two centuries ago, and restoration to immediate possession—and damages in lieu of possession. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005). The district court rejected the claims for declaratory and injunctive relief but awarded damages. *Id.* at 272-73. The Second Circuit held that the rule of *Sherrill* barred not only equitable relief but also damages, because the Cayugas' claim, whether for immediate possession or damages in lieu of possession, was just as disruptive as the Oneidas' request for reinstatement of sovereignty in *Sherrill* (*id.* at 274-75) and therefore equally subject to the *Sherrill* bar. The Second Circuit also ordered dismissal of the United States' complaint in intervention based on "egregious" laches in asserting the claim. *Id.* at 279. In their petitions to this Court, the Cayugas and the Solicitor General contended that the tribe had sued within the time set by Congress in a special statute for Indian claims, that the United States is not subject to certain equitable defenses, and that the claim sought monetary damages. *E.g.,* Cayuga Pet. 19 (No. 05-982). This Court denied review.

In *Oneida*, where the tribe sought compensation based on allegations that the State had illegally acquired 250,000 acres between 1795 and 1846, the Second Circuit again held that any claims premised on the assertion of a current, continuing right to possession as a result of a flaw in the original termination of Indian title, whether seeking ejectment or monetary damages, are by their nature disruptive. The court held that the equitable defenses recognized in *Sherrill* bar such claims, notwithstanding the presence of the United States as a party. The tribe and the Solicitor General again filed petitions for certiorari, which again emphasized the indicia of timeliness, the presence of the United States, and the purportedly retrospective nature of the relief sought. *E.g.*, U.S. Pet. 16 (No. 10-1404). This Court again denied review.

This Court does not lightly deny petitions filed by the Solicitor General, much less twice on one subject within a few years. It did so in *Cayuga* and *Oneida* because the Second Circuit's application of *Sherrill* creates no circuit conflict and is altogether unexceptionable. And here the Second Circuit merely applied its prior precedent in a non-precedential summary order that broke no new legal ground. Moreover, the Onondagas' claim here lacks some of the features invoked by the tribes in the earlier cases: Petitioner, unlike the Cayugas and the Oneidas, does not contend that its claim is within any congressionally sanctioned limitations period, and it seeks indisputably prospective relief—a declaration of title. *See, e.g.*, U.S. Pet. 16 (No. 10-1404) (conceding that "it is appropriate to forswear remedies that would attempt to undo land purchases that occurred between 1795 and 1846"). And despite petitioner's request, *see* Am. Compl. ¶ 9, the United States has never intervened in support of petitioner's

claim here, as it did in both earlier cases. As a result, this case faces additional obstacles unrelated to the question presented: the State is entitled to immunity under the Eleventh Amendment, and because the State cannot be joined, the other parties are entitled to dismissal under Fed. R. Civ. P. 19, as explained in Part III, *infra*. Accordingly, this case is even less deserving of the Court's attention than the prior cases.

C. Petitioner's Reliance on International Law Does Not Present a Question Warranting This Court's Review

Petitioner's invocation of principles of international law, Pet. 25-30, does not warrant this Court's review. First, petitioner never raised that argument in either of the courts below, and neither of them decided it. Second, no other appellate court has considered such an argument either. This Court is "a court of review, not of first view," *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005), and an argument that has never been raised or decided *anywhere* before is no basis for certiorari. Third, the argument is meritless on its face, as explained below. *See* Section II.C, *infra*.

II. The Second Circuit Correctly Dismissed Petitioner's Claims

The case does not warrant this Court's review for the further reason that the Second Circuit's decision was correct. The Second Circuit correctly dismissed petitioner's centuries-old, disruptive land claim. Its decision follows directly from this Court's decision in *Sherrill*. And even if petitioner had preserved its argument that international law requires the federal

courts to permit this claim to go forward, that contention lacks any merit.

A. The Court of Appeals' Decision Is Consistent With and Follows From This Court's Decision in *Sherrill*

In *Sherrill*, this Court squarely addressed the applicability of delay-based equitable defenses to ancient Indian land claims, holding that laches, acquiescence, and impossibility barred the New York Oneidas' claim to renewed sovereignty over their former lands because of the inordinate delay in asserting the claim, its disruptive practical consequences, and the justifiable expectations of current landowners. Because the belated claim was inherently disruptive, this Court held, it was "best left in repose." *Sherrill*, 544 U.S. at 221 n.14 (quoting *Oneida II*, 470 U.S. at 273 (Stevens, J., dissenting)).

The Second Circuit's holding in this case—that the delay-based doctrines that foreclosed relief in *Sherrill* apply equally to preclude petitioner's demand for a declaration of title—is consistent with and follows from this Court's decision in *Sherrill*. This Court rejected the Oneidas' claim to expand their rights over land they *already* owned in fee simple because that claim would undermine rights established by ancient land transactions, which have been long thought settled by generations of "innumerable innocent purchasers." 544 U.S. at 219. The same equitable considerations of laches, acquiescence, and impossibility that foreclosed relief in *Sherrill* apply with even greater force to petitioner's claims, which rest on the same allegation of a centuries-old flaw in land transfer but add the even more disruptive remedy of a claim to title.

The equitable considerations that doomed the Oneidas' claim in *Sherrill* are even more compelling here. Petitioner's claims in this case are not limited to the assertion of sovereignty over 17,000 acres that the tribe already owns, as in *Sherrill*. *See id.* at 211. Nor are they limited to a request for compensation for the fair rental value of fewer than 900 acres for two years, as in *Oneida II*. The claims here involve more than 2,500,000 acres in central New York—*over 3,900 square miles*—and imperil the settled expectations of thousands of private landowners. At a minimum, any determination that these ancient transactions were unlawful in their inception could jeopardize local mortgages and inhibit investment in local real estate and businesses. And such a determination would have dire ramifications for state and local sovereignty.

Nor does the fact that the Onondagas have sued "a small group of governmental and corporate defendants," Pet. 8, make petitioner's claims any less disruptive than those in the cases that came before it. To prevail petitioner must obtain a declaration that the subject treaties are "null and void" *ab initio* and a declaration that the "Onondaga Nation and Haudenosaunee continue to hold title to the subject land." Am. Compl. 16. Such relief would implicate the State's sovereignty and cast doubt on the title of every landowner, present and future, throughout the 2,500,000-acre region stretching from New York's border with Pennsylvania to the St. Lawrence River. A declaration of this sort necessarily would affect each and every landowner within the vast claim area because, if the treaties were declared void, they would be void as to all covered land. "[T]he underlying premise of a claim based on [a Nonintercouse Act] violation is that the transaction

itself was void *ab initio*." *Oneida*, 617 F.3d at 136. "Such a claim, which necessarily calls into question the validity of the original transfer of the subject lands and at least potentially, by extension, subsequent ownership of those lands by non-Indian parties, effectively 'asks this Court to overturn years of settled land ownership.'" *Id*. at 136-37 (quoting *Cayuga*, 413 F.3d at 275). Thus a cloud of uncertainty would appear on the record title of landowners in eleven different New York counties, comprising millions of acres from the border of Pennsylvania all the way to Canada.

B. Petitioner Cannot Evade *Sherrill* By Seeking Only a Declaration of Title Rather Than Ejectment or Compensation

Petitioner may not escape *Sherrill's* equitable bar by framing its request for relief in terms of a declaratory judgment that it "owns" the lands in question rather than an injunction awarding it immediate possession. Petitioner is seeking a declaration of *ownership*, *i.e.*, "the functional equivalent of a quiet title action." *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 282 (1997). Petitioner sought a declaration that the centuries-old land conveyances at issue are "null and void" and that the land "remains the property of" petitioner and that petitioner "continue[s] to hold title to the subject land." Am. Compl. 16. Such an order by a federal court would impermissibly disrupt settled expectations, whether the order is styled an injunction or a declaration.

A declaratory judgment, like an injunction, is a prospective equitable remedy. *E.g.*, *Samuels v. Mackell*, 401 U.S. 66, 69 (1971). This Court has held in various

different contexts that "under ordinary circumstances the same considerations that require the withholding of injunctive relief will make declaratory relief equally inappropriate." *Id.* Petitioner cannot circumvent *Sherrill*'s limitations on equitable relief by seeking a declaration rather than an injunction.

Petitioner sought a declaration for its potential coercive effect. As the Court has noted, a declaration can be the basis for an injunction. *See Samuels*, 401 U.S. at 72; 28 U.S.C. § 2202. Petitioner has acknowledged that it would use a declaratory judgment "as the basis for . . . a negotiated settlement" (Pet. 34-35) of its claims, thereby seeking to force all respondents to the bargaining table. And petitioner candidly states that naming the non-State respondents "reflects a primary purpose of this lawsuit: to establish a legal basis for the environmental restoration of sacred land and waters adjacent and near to the Onondaga Territory." Pet. 8. Thus, petitioner seeks a declaratory judgment as leverage to pursue the very same remedies that this Court declined to award in *Sherrill* and that petitioner is barred from obtaining here.

Whether seeking injunctive relief, money damages, declaratory relief, or any other remedy, these ancient land claims are disruptive, and hence barred under *Sherrill*, because of their "underlying premise"—that these ancient transactions "were void *ab initio*." *Oneida*, 617 F.3d at 136. A declaration of ownership in this action would necessarily affect each and every landowner in the vast claim area, because each one traces his or her title back to the treaties petitioner challenges as void.

Even if there were a difference between the declaratory relief sought here and the relief requested

in prior land claim cases, the equitable considerations set out in *Sherrill* carry even more force in the declaratory judgment context. District courts have "unique and substantial discretion" to decline to hear a declaratory action. *Wilton v. Seven Falls Co.*, 515 U.S. 277, 286 (1995). "If a district court, in the sound exercise of its judgment, determines after a complaint is filed that a declaratory judgment will serve no useful purpose," it may dismiss the action without proceeding to the merits. *Id.* at 288. And a district court's decision in a declaratory action is reviewed only for abuse of discretion. *See id.* at 289. The disruptive effect of the order petitioner seeks, invalidating the first link in the chain of title for more than 2.5 million acres of land, is a more than adequate ground to refrain from entertaining a declaratory action such as this one.

Moreover, petitioner's request for a declaration of "Indian title," which it argues would leave possessory rights of current inhabitants intact (Pet. 9), runs directly counter to the historic concept of Indian title as a right of occupancy or possession. Before European colonists arrived, the Indian nations held "aboriginal title," a "possessory" right to use and enjoy the lands they inhabited. Under the "doctrine of discovery," however, fee title to the lands became vested in the sovereign, first the discovering European nation, then the original thirteen States and the United States. The Indians retained aboriginal rights to use and enjoyment of the lands unless or until the sovereign acquired or terminated those rights. *See Oneida II*, 470 U.S. at 234-35 (discussing concepts of aboriginal title versus fee ownership); *Seneca Nation of Indians v. New York*, 382 F.3d 245, 248 n.4, 262 (2d Cir. 2004) (same), *cert. denied*, 547 U.S. 1178 (2006). Petitioner's demand for a declaration of the right to fee ownership instead of a possessory interest is at odds

with these historic concepts and asks the federal courts to break wholly new ground. Petitioner's claim for a prospective award of title but not possession is certainly a far cry from the federal common law cause of action for damages for unlawful dispossession that this Court recognized in *Oneida II* (without opining on when it could be timely asserted, *see* note 7, *supra). See Oneida II*, 470 U.S. at 235-36. Petitioner's novel approach necessarily would require recognition of an entirely new type of claim, one untethered to the historic concept of "Indian title." Ultimately, whether petitioner seeks fee title, "Indian title," or any other form of title, such a drastic and long-delayed remedy is not permitted under *Sherrill*.

C. Petitioner's Argument Relying on International Law Lacks Merit

Petitioner's reliance on international law would be meritless even if properly presented. Not one of the instruments on which petitioner relies has been incorporated into United States domestic law in any privately enforceable manner.

The United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) (UNDRIP), is a non-binding declaration. The State Department announcement that petitioner cites says exactly that: UNDRIP is "not legally binding or a statement of current international law." Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples, United States Department of State (Jan. 12, 2011) at 1, http://www.state.gov/documents/organization/154782.pdf. Petitioner

acknowledges that the Universal Declaration of Human Rights, G.A. Res. 217A (III), U.N. Doc A/810 (1948), and the American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX (1948), are "nonbinding instruments." Pet. 26-27; *see also Sosa v. Alvarez-Machain*, 542 U.S. 692, 734 (2004) ("the [Universal Declaration of Human Rights] does not of its own force impose obligations as a matter of international law"); *Flores-Nova v. Att'y Gen. of the U.S.*, 652 F.3d 488, 494-95 (3d Cir. 2011) (American Declaration of the Rights and Duties of Man "is not a treaty" and "creates no binding set of obligations").

Finally, although the United States has ratified the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXXI), 999 U.N.T.S. 171 (Dec. 16, 1966), and the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 660 U.N.T.S. 195 (Jan. 4, 1969), neither is self-executing or enforceable in federal courts. 138 Cong. Rec. 8,071 (1992) ("[T]he United States declares that the provisions of Articles 1 through 27 of the [International Covenant on Civil and Political Rights] are not self-executing."); 140 Cong. Rec. 14,326 (1994) ("[T]he United States declares that the provisions of the [International Convention on the Elimination of All Forms of Racial Discrimination] are not self-executing."); *see Sosa*, 542 U.S. at 735 ("the United States ratified the [International Covenant on Civil and Political Rights] on the express understanding that it was not self-executing and so did not itself create obligations enforceable in the federal courts").

Ultimately, none of the documents petitioner cites does anything to defeat the deeply-rooted principle that a tribal land claim, like any other land claim, can become

barred by the passage of time. The application of laches and similar principles to tribes as well as states, *see Sherrill*, 544 U.S. at 218-19, is not race discrimination or otherwise in violation of international law. Even if these international instruments created actionable rights, therefore, the United States' accession to them would do nothing to "rekindl[e] embers of sovereignty that long ago grew cold." *Id.* at 214.

III. Independent Grounds Preclude Petitioner From Obtaining Relief

Even if this Court were to grant review and hold that petitioner had stated a claim, this action nonetheless could not proceed, and petitioner could not obtain the relief it seeks. As respondents argued in both the district court and the Second Circuit, they are entitled to dismissal on alternative grounds: the State of New York because of its sovereign immunity, and the other respondents because of the consequent absence of the State, a required party. Because the case must in any event be dismissed, the question whether the complaint states a claim is ultimately an abstract question and for that reason alone does not warrant this Court's review. *See, e.g.*, *DTD Enters., Inc. v. Wells*, 130 S. Ct. 7, 8 (2009) (statement of Kennedy, J., respecting the denial of certiorari) ("procedural obstacle unrelated to the question presented" is a reason to deny certiorari).

A. Petitioner's Claim Against the State Is Barred by the Eleventh Amendment

The Eleventh Amendment bars suit in federal court by an Indian tribe against a State. *Blatchford v. Native*

Village of Noatak, 501 U.S. 775 (1991). When the United States intervenes, as it did in the land claims of the Cayuga Indian Nation and the Oneida Indian Nation, the State is not immune to the claims raised by the United States. But the United States has chosen not to intervene in this case. *Cf. Oneida*, 617 F.3d at 131-32 (Eleventh Amendment bars tribe's claims to the extent that they were not raised by the United States in intervention). Nor was New York's sovereign immunity abrogated by Congress in the Nonintercourse Act, 25 U.S.C. § 177. *See Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress lacked the power to abrogate the States' Eleventh Amendment immunity under its Indian Commerce Clause or other Article I powers); *Ysleta Del Sur Pueblo v. Raney*, 199 F.3d 281, 288 (5th Cir. 2000). There could be no abrogation in any event for the "federal common law" cause of action petitioner claims to be pursuing. And the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), does not apply to defeat New York's sovereign immunity in these types of Indian land claims. Land claims are essentially actions to "quiet title," which are not subject to the *Ex parte Young* exception. *Coeur d'Alene*, 521 U.S. at 296-97; *accord Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18, 20-23 (2d Cir. 2004). Thus, the courts would have to dismiss the claims against the State on the ground of Eleventh Amendment immunity.

B. Dismissing the State, a Required Party, Would Require Dismissing All Respondents

Given the State's immunity from suit, the complaint must be dismissed against all remaining respondents because the State is a required party in whose absence the action cannot proceed. *See* Fed. R. Civ. P. 12(b)(7) &

19. Indeed, this Court has held that "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008); *see also Seneca Nation of Indians v. New York*, 383 F.3d 45 (2d Cir. 2004) (claims against non-State defendants dismissed under Rule 19 where Indian land claims against the State were barred by sovereign immunity), *cert. denied*, 547 U.S. 1178 (2006).

Under Fed. R. Civ. P. 19(a), the State is a required party, for at least three reasons. First, if this lawsuit were to proceed without the State, petitioner could not obtain complete relief. Second, the State's ability to protect its interests would be materially impaired. And third, the non-State respondents would be subject to multiple and inconsistent obligations.

Petitioner cannot obtain complete relief without the State as a party. Although petitioner's claim is premised on allegations that the State was the original wrongdoer, the State would not be bound by any ruling that its acquisition of the lands was illegal with respect to the lands it owns and to the lands over which it has sovereign control.

Moreover, a judgment in petitioner's favor rendered in the State's absence would materially impair the State's ability to exercise the incidents of sovereignty. *See Coeur d'Alene*, 521 U.S. at 281 ("a quiet title action . . . implicates special sovereignty interests"). As the original owner of the lands, and the source of record title for it, the State has a sovereign interest in protecting the rights that it acquired on behalf of the people of New York. The State also could not protect its interest in countless public rights-of-way,

State roads and highways, and government buildings. *Seneca*, 383 F.3d at 48. Additionally, the State's interest in the challenged treaties, to which it was a party, would be adjudicated in its absence. *See* 7 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1621, at 332 (3d ed. 2001) ("Disputes over the transfer of an interest in land generally necessitate joinder of all parties to the document of conveyance.").

Finally, if the case were to proceed without the State, the non-State respondents would be subject to competing claims of sovereignty by petitioner and the State—the most extreme form of multiple and inconsistent obligations: obligations to two dueling sovereigns. The non-State respondents would be left guessing as to whose laws govern. Worse still, the non-State respondents could be without recourse in the courts because both the State and petitioner could assert immunity.

Under Fed. R. Civ. P. 19(b), this case cannot properly proceed without the State. While Rule 19(b) involves a number of factors, this Court has made clear that some Rule 19(b) factors are "compelling by themselves." *Pimentel*, 553 U.S. at 863 (quoting *Provident Tradesmens Bank & Trust Co. v. Patterson*, 390 U.S. 102, 119 (1968)). One such factor is sovereign immunity. *Id*. at 869. "[W]here sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Id.* at 867. *Pimentel* mandates dismissal here because the State's interest in the litigation is indisputably non-frivolous, as discussed above, and the State's sovereign interests would be gravely injured in its absence.

A straightforward analysis of Rule 19(b)'s factors leads to the same result. As already discussed, if this lawsuit were to continue without the State, a judgment could substantially prejudice both the non-State respondents and the State, Fed. R. Civ. P. 19(b)(1), no remedy could be crafted to avoid this prejudice, Fed. R. Civ. P. 19(b)(2), and a judgment without the State would be inadequate (indeed it would be meaningless as to the land owned by the State), Fed. R. Civ. P. 19(b)(3). *See Pimentel*, 553 U.S. at 870 ("adequacy refers to the 'public stake in settling disputes by wholes, whenever possible'") (quoting *Provident Bank*, 390 U.S. at 111). Finally, even where no adequate alternative remedy exists, *see* Fed. R. Civ. P. 19(b)(4), dismissal is required because "that result is contemplated under the doctrine of . . . sovereign immunity." *Pimentel*, 553 U.S. at 872.

In light of the State's sovereign immunity, this case cannot proceed against either the State or any of the remaining respondents. Accordingly, even if this Court were to review the court of appeals' holding that equitable considerations bar relief, petitioner still could not win the judgment it seeks. This case therefore would be unsuitable for plenary review even if petitioner had presented a question meeting this Court's criteria for certiorari.[8]

[8] The petition should not be held pending disposition of the petition in No. 12-604, *Madison County v. Oneida Indian Nation*. *See* note 6, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

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APPENDIX

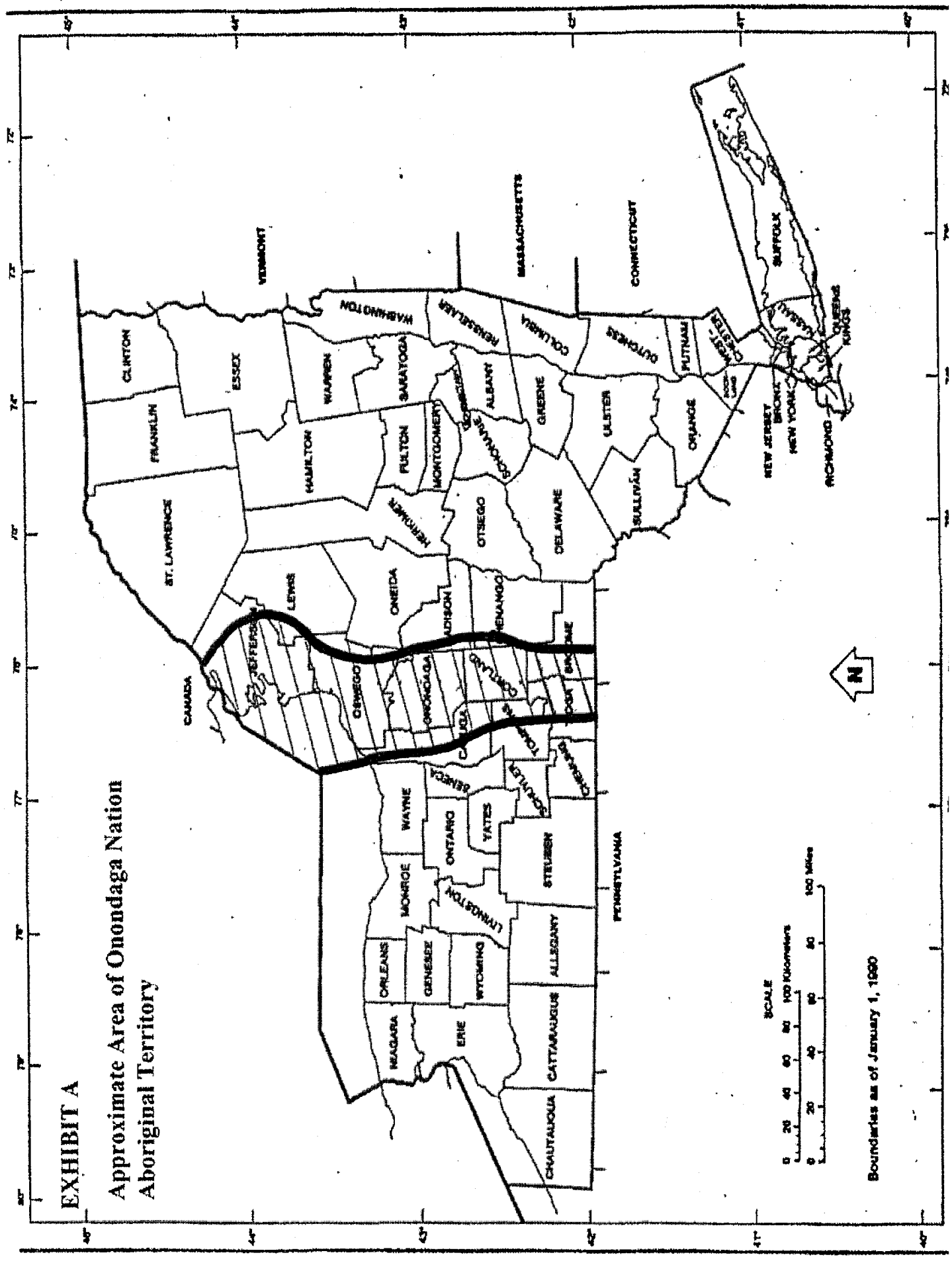
EXHIBIT A
Approximate Area of Onondaga Nation
Aboriginal Territory
VERMONT
MASSACHUSETTS
CONNECTICUT
NEW JERSEY
PENNSYLVANIA
CANADA
CLINTON
FRANKLIN
ESSEX
WARREN
SARATOGA
HAMILTON
FULTON
MONTGOMERY
ALBANY
GREENE
ULSTER
ORANGE
PUTNAM
DUTCHESS
SUFFOLK
QUEENS
KINGS
RICHMOND
ST. LAWRENCE
LEWIS
ONEIDA
OTSEGO
DELAWARE
SULLIVAN
JEFFERSON
OSWEGO
ONONDAGA
CORTLAND
CHENANGO
MADISON
BROOME
TOMPKINS
CAYUGA
SENECA
WAYNE
ONTARIO
YATES
STEUBEN
MONROE
LIVINGSTON
ORLEANS
GENESEE
WYOMING
ALLEGANY
NIAGARA
ERIE
CATTARAUGUS
CHAUTAUQUA
N
SCALE
0 20 40 60 80 100 Kilometers
0 20 40 60 80 100 Miles
Boundaries as of January 1, 1990