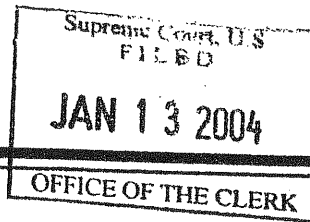


03-855



In The
Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK, RAY
HALBRITTER, KELLER GEORGE, CHUCK FOUGNIER,
MARILYN JOHN, CLINT HILL, DALE ROOD, DICK
LYNCH, KEN PHILLIPS, BEULAH GREEN, BRIAN
PATTERSON, AND IVA ROGERS,

Respondents.

**On Petition for Writ of Certiorari to the
United States Court of Appeals for the Second Circuit**

**AMICUS BRIEF BY THE COUNTIES OF MADISON AND
ONEIDA, NEW YORK, IN SUPPORT OF THE PETITION**

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The Counties of Madison and Oneida, New York (“Counties”), submit this amicus brief in support of the Petition for a Writ of Certiorari of the City of Sherrill, New York, seeking review of *Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003). The Counties fully support the arguments advanced by the City of Sherrill in its Petition and by the State of New York in its amicus brief, but would like to bring to this Court’s attention additional matters relating to the questions presented.

STATEMENT OF INTEREST

The parcels owned by the Respondent Oneida Indian Nation of New York (“the Oneidas”) are within the Counties, as is all of the area claimed by respondent to be Indian country. The Counties are defendants in related actions filed by the Oneidas in the United States District Court for the Northern District of New York.

INTRODUCTORY STATEMENT

The Oneidas were previously before this Court in two related appeals. In *Oneida I*, 414 U.S. 661 (1974), the Court recognized that their complaint alleged a federal claim, *id.* at 677-78; and in *Oneida II*, 470 U.S. 226 (1985), they sought to affirm a judgment for \$16,694 plus interest representing two years of rent on 872 acres of land owned by the Counties. The judgment was affirmed, although the majority joined with the United States in recognizing “the potential consequences” of the Court’s decision. *Id.* at 253. The Court was apparently sufficiently troubled that it expressly disclaimed any “opinion as to whether other considerations [specifically including equitable] may be relevant to the final disposition . . .” *Id.* at 253 n.27. Neither this Court nor the United States as amicus curiae, however, foresaw that the Oneidas would claim the right to treat as Indian country and assert political jurisdiction over a large area in central New York State without any action or superintendence by the United States. The dissent presciently noted:

This decision upsets long-settled expectations in the ownership of real property in the Counties of Oneida and Madison, New York, and the disruption it is sure to cause will confirm the common-law wisdom that ancient claims are best left in repose The Court, no doubt, believes that it is undoing a grave historical injustice, but in so doing, it has caused another

Id. at 273.

Since then, the Oneidas have expanded their land claim to 250,000 acres,¹ and attempted to extend the decisions in *Oneida I* and *Oneida II* beyond any fair reading. The Oneidas purchased properties within the land claim area, and unilaterally declared them to be Indian country, not subject to state or local jurisdiction. The City of Sherrill rejected the Oneidas' declaration of sovereignty, resulting in this case in which the lower courts (on summary judgment) made potentially far-reaching decisions in the context of an action to enjoin taxation of two parcels of land by the smallest city in New York. The errors below not only have a potential impact on the Land Claim Case, but also allow the Oneidas unilaterally to eviscerate state and local jurisdiction over land they acquire.

This case raises issues that were not fully presented or addressed in *Oneida II*. For instance, the Court noted, in discussing historical background, that "in 1788, the State entered into a 'treaty' with the Indians, in which it purchased the vast majority of the Oneidas' land. The Oneidas retained a reservation of about 300,000 acres" *Oneida II*, 470

¹ See, e.g., *Oneida Indian Nation of New York v. New York*, 194 F. Supp. 2d 104 (N.D.N.Y. 2002) (the "Land Claim Case"). The Land Claim Case involves the Oneidas' claim to possessory rights to approximately 250,000 acres located in the Counties. Considerable resources have been devoted to fully and comprehensively litigate the issues in that case, which is currently in expert discovery.

U.S. at 231. The Court, however, was not asked to determine whether the 1788 Treaty of Fort Schuyler ceded all of the interest of the Oneidas and extinguished their aboriginal title. Lower courts have rejected defenses based on the 1788 Treaty, mistakenly believing the issue is foreclosed by *Oneida II*. See, e.g., *Land Claim Case*, 194 F. Supp. 2d at 121; *Oneida Indian Nation of New York v. City of Sherrill*, 145 F. Supp. 2d 226, 234 (N.D.N.Y. 2001). *Oneida II* affirmed a \$16,694 judgment entered after a trial at which the Counties – among the weakest in New York – presented no evidence (see *Oneida Indian Nation of New York v. County of Oneida*, 434 F. Supp. 527, 532 (N.D.N.Y. 1977)), holding that the Counties’ violated the Oneidas’ federal common-law right to possess 872 acres of land, that Congress did not preempt the federal common-law right by virtue of the 1793 Trade and Intercourse Act, and that the Counties’ affirmative defenses (statute of limitations, abatement, ratification by the Treaties of 1798 and 1802, and nonjusticiability) did not apply. *Oneida II*, 470 U.S. at 233-250. The issues raised in this case are not foreclosed by *Oneida II*.

Finally, the Counties note that the United States submitted an amicus brief in *Oneida II*, asserting that equitable principles “plainly do apply where, as here, the United States has declined to sue to vindicate an abiding sovereign interest” (Br. for the United States as Amicus in *Oneida II*, at 34 (appended hereto at A1-A2)). In this case, in which the unilateral declaration of Indian country sovereignty raises equitable considerations many times more powerful than a claim for two years’ rent, the United States is conspicuously absent.

BACKGROUND

The Counties, created in 1798 and 1806, are located in central New York State and encompass the 300,000 acre ancient Oneida Indian reservation created by the State in the 1788 Treaty of Fort Schuyler. This Court has already noted that the land conveyed by the Oneidas was “converted from

wilderness to cities, towns, villages and farms.” *Oneida II* at 265-66. Over the past two centuries, the Oneida Indians largely removed from New York. By 1999, the census reported that Indians represented less than 0.3% (907) of the total population of the Counties (304,910).² However, in the past ten years the Oneidas, who in the late nineteenth century were no longer known as a tribe in New York and had assimilated into the community, *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y. 1877), have purchased in a checkerboard fashion more than 16,000 acres scattered within the Counties without any superintendence or involvement by the United States. Upon acquisition, the Oneidas unilaterally declared the parcels to be Indian country and ceased payment of real property taxes. Emboldened by their reading of *Oneida II*, they also refused to collect and remit taxes on all goods and services sold to non-members of the Tribe even though this Court has ruled such exchanges taxable. *Department of Taxation and Finance of New York v. Milhelm Attea & Bros.*, 512 U.S. 61 (1994).

This unilateral declaration of sovereignty by less than 0.3% of the population has significantly impacted the remaining 99.7% of the residents of the Counties. The resulting annual tax shortfall for Madison County is approximately \$1 million for real property taxes and an estimated \$5 million for sales taxes. For Oneida County the annual tax shortfall is \$500,000 for real property taxes and an estimated \$3-5 million for sales taxes.

² The history and legal significance of the Oneidas’ removal from (and assimilation into) New York is discussed by the Counties at length in their amicus Memorandum in Opposition to the Oneida Indian Nation of New York’s Motion for Summary Judgment, reproduced in the Joint Appendix filed with the Second Circuit below (hereinafter “JA”) at 950-979. Suffice it to say, the United States determined through its agencies that, by the 1890s, the Oneidas had no reservation, were few in number, and were considered citizens of New York. (JA at 964-970).

The refusal to collect sales and excise taxes (which account for approximately 1/3 of the cost of cigarettes and gasoline) has enabled the Oneidas to charge lower prices and place all non-Indian competitors at a disadvantage. To illustrate, in 1997 there were twenty-eight gasoline station / convenience stores in the area, of which the Oneidas owned two. Since then the Oneidas opened two new stores and purchased eight competitors, and six other competitor stores closed. Currently, only ten non-Oneida stores collect and remit taxes while the Oneidas operate twelve "tax free" stores. In Madison County, the combined sales and property tax loss has had the greatest impact on the non-Indian community where the County has had to raise property taxes by 33.8% over the last three years.

The Oneidas' offer to local taxing authorities a substitute for lost taxes called a Silver Covenant Chain Grant. It is little more than a public relations gimmick and a poor substitute for a reliable tax revenue stream since the payments are voluntary and can be discontinued for improper purposes at the whim of the Oneidas. For example, the Oneidas have used these voluntary payments in an attempt to exert improper influence over local government. *See, e.g.,* Press Release of Stockbridge Valley Central School District (Jan. 8, 2004) ("[T]he revocation of the [Silver Covenant Chain] funding appears to have arisen from an intra-tribal dispute that resulted in demands by the Nation's representative, Chuck Fougner, for the firing of a Native American school employee.") (appended hereto at A3-A5); *see also*, Elizabeth Rinaldo, *SVCS faces budget cuts in wake of grant loss*, Oneida Daily Dispatch, January 12, 2004 at 1 (appended hereto at A6-A9). Moreover, unlike property taxes, the Oneidas' proposed voluntary payments are not based on present assessed value. The notion that these unenforceable payments are better than property taxes, (Br. for Appellees, *City of Sherrill*, Nos. 01-7795, -7797, at 2 (2d Cir.)), should be dismissed out of hand.

In addition to the impact on tax revenues and other taxpayers, the very fabric of the area's governance is severely compromised by the Oneidas' declaration that its patchwork of parcels is sovereign and therefore exempt from state and local law. This includes the network of local and state police powers, environmental protection laws, land use, safety and fire codes, and civil rights protections that evolved over the past two centuries. Basic principles of democracy in effect for hundreds of years – such as electing local leaders to establish and implement comprehensive, integrated policies for the area – are effectively destroyed.

SUMMARY OF THE ARGUMENT

Sherrill's enforcement of its real property tax assessments depends on whether the parcels are, today, within Indian country – notwithstanding the passage of almost two centuries of settlement, cultivation and use pursuant to treaties,³ willingly made, between New York State and the Oneidas beginning in 1785. In answering this question, the Second Circuit erred by (1) using the wrong legal standard to interpret two critical treaties, and (2) misreading the scope and applicability of the Indian Trade and Intercourse Act, (3) in violation of the Tenth Amendment of the Constitution of the United States.

ARGUMENT

1. The Court of Appeals Used the Wrong Legal Standard to Interpret Two Critical Treaties

According to the Second Circuit, “[t]here is no material dispute that the Sherrill Properties were part of the Oneidas’ aboriginal land and the tribe’s reservation as recognized by the Treaty of Canandaigua.” 337 F.3d at 153. In fact, both these matters – the aboriginal status of the land, which was

³ The federal government approved of New York’s purchases and took no action to prevent them. See *Oneida Nation of New York v. United States*, 43 I.C.C. 373, 405 (1978).

extinguished by the 1788 Treaty of Fort Schuyler, and the effect of the 1794 Treaty of Canandaigua – are contested.⁴ The Second Circuit erred by improperly construing the applicable treaties generously in favor of the Oneidas.

Although the principle of generous construction is often appropriate when analyzing Indian treaties, it may not be used to divest a state of its land. *United States v. Minnesota*, 270 U.S. 181, 209 (1926); *Oneida Indian Nation v. State of New York*, 860 F.2d 1145, 1163-64 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989); *Seneca Nation of Indians v. State of New York*, 206 F. Supp. 2d 448, 530 (W.D.N.Y. 2002). This Court held in *Minnesota* that a treaty cannot be construed to divest a state's rights in land "unless the purpose to do so be shown in the treaty with such certainty as to put it beyond reasonable question." *Minnesota*, 270 U.S. at 209. By wrongly applying the doctrine of generous construction, the Second Circuit misinterpreted critical treaties to divest New York State of its property interest in, and jurisdiction over, 300,000 acres of its land. The Second Circuit also ignored contrary interpretations by renowned legal authorities (including this Court) that were given much closer in time to the treaties in question.

a. The 1788 Treaty of Fort Schuyler Between New York and the Oneidas

In a single sentence in a footnote, the Second Circuit below dismissed the argument that the 1788 Treaty of Fort Schuyler (appended hereto at A10-A14) effected a transfer of all of the Oneidas' land to New York, extinguished forever aboriginal title, and created a state reservation. 337 F.3d at 156 n.13. Instead, the Second Circuit interpreted the treaty generously in the Oneidas' favor as "carv[ing]-out" 300,000 acres that "never became state land" and in which aboriginal

⁴ See, e.g., JA at 28-29, 55-56, 365, 864-65.

title survived. *Id.*⁵ In so holding, the Second Circuit disregarded the rule of construction mandated by *Minnesota*, and its conclusion is inconsistent with the language of the treaty, New York law, and other early authorities.

In its first article, the 1788 Treaty states: “The Oneidas do cede and grant *all their lands* to the people of the State of New York *forever*.” (Emphasis added). In the second article, New York set apart for the Oneidas a tract from “the said ceded lands” that was “reserved for . . . several uses,” including a portion of which the Oneidas could use and cultivate (but not sell, lease, or alienate in any way), and the balance of which could be leased to others, subject to certain restrictions.

The effect of the plain treaty language was to convey all the Oneidas’ land to New York and thereby extinguish aboriginal title. New York, as the sovereign vested with the right of preemption,⁶ acquired absolute fee title to “*all* [the

⁵ The district court opinion cited as authority by the Second Circuit likewise misapplied the principle of generous construction. See *Oneida Indian Nation of New York v. State of New York*, 194 F. Supp. 2d 104, 139 (N.D.N.Y. 2002). The district court reached its decision, in part, on the authority of this Court’s statement in *Oneida II* that “the Oneidas retained a reservation of about 300,000 acres” under the 1788 Treaty of Fort Schuyler. *Id.* (quoting *Oneida II*, 470 U.S. at 231). This Court’s statement, in turn, reflected a finding by the trial court that the Oneidas’ “were left with a reservation of about 300,000 acres” as a consequence of the 1788 Treaty of Fort Schuyler. *Oneida Indian Nation of New York State v. County of Oneida*, 434 F. Supp. 527, 533 (N.D.N.Y. 1977). The trial court (and the parties) in *Oneida II* appear to have assumed that this “reservation” of land to the Oneidas preserved the Oneidas’ aboriginal title, as opposed to extinguishing the Oneidas’ original Indian title and granting them a state-law-based property right. *Id.* at 538.

⁶ During the confederal period, New York was the sovereign vested with the right of preemption over that area now claimed by the Oneidas. See, e.g., *Oneida II*, 414 U.S. at 670; *Johnson v. M’Intosh*, 21 U.S. 543, 584 (1823).

In the 1786 Treaty of Hartford (also called the Hartford Compact), New York and Massachusetts settled an early dispute over territory and
(Footnote continued on next page)

Oneidas'] lands" when the treaty was made. *See, e.g., Mitchel v. United States*, 34 U.S. 711, 746 (1835) (Indians may abandon, cede or sell their right to possess and occupy their lands, rendering their right extinct and disencumbering the land); *M'Intosh*, 21 U.S. at 588 ("All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right."). The text does not support the Second Circuit's generous interpretation that the Oneidas' retained aboriginal title to the land "reserved" for their use. Rather, the 1788 Treaty unambiguously extinguished the Oneidas' aboriginal rights to their entire ancient domain in the first article, while granting them in the next article a state reservation created and defined by New York law.

Early authorities confirm this interpretation. In 1823, the Supreme Court of Judicature of New York (Chancellor James Kent),⁷ described the treaty as follows:

[I]n Sep., 1788, we have the remarkable fact of the Oneidas *ceding the whole* of their vast territory to the people of this State, and *accepting a retrocession of a part*, upon restricted terms, and with permission only to

(Footnote continued from previous page)

jurisdiction. This treaty confirmed that New York held the rights of "the government, sovereignty and jurisdiction" over the lands within its boundaries, but that Massachusetts owned the right of preemption from the Indians to certain land in western New York (in Seneca territory). *See* 1786 Treaty of Hartford, Arts. I & II (appended hereto at A15-A22).

⁷ Chancellor Kent (with the likes of Chief Justices Jay and Marshall) is commonly regarded as a founding father of American jurisprudence. Oliver Wendell Holmes, Jr., in his 1873 Preface to the twelfth edition of *Kent's Commentaries on American Law*, noted that "[t]he great weight attaching to any opinion of Chancellor Kent has been deemed a sufficient reason for not attempting any alteration in his text or notes."

lease certain parts for a term not exceeding twenty-one years.

Goodell v. Jackson, 20 Johns. 693, 729 (N.Y. Sup. Ct. 1823) (emphasis supplied). Because the 1788 Treaty was a *New York State* treaty – and its construction is a question of *state* law – the lower courts should have deferred to the construction indicated by *Goodell*. See, e.g., *Bush v. Palm Beach Co. Canvassing Bd.*, 531 U.S. 70, 76 (2000) (“As a general rule, this Court defers to a state court’s interpretation of a state statute.”).

Eight years later, Chief Justice Marshall, apparently mindful of *Goodell*, noted that “some tribes” made pre-Constitution treaties with New York State “by which they *ceded all their lands* to that state, *taking back* a limited grant to themselves, in which they admit their dependence.” *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (emphasis added). Although Chief Justice Marshall does not specifically identify the Oneidas, he almost certainly had the 1788 Treaty of Fort Schuyler in mind (as well as similar treaties with the Onondaga and Cayuga tribes) as the language of the treaty matches his description in *Cherokee Nation*.

Finally, identical language in a 1789 treaty between New York and the Cayuga Indians was construed in accordance with *Cherokee Nation* and *Goodell* by a panel of arbiters that included Roscoe Pound, Dean of Harvard Law School. At issue was a claim by Great Britain, on behalf of the Cayuga Indians in Canada, against the United States for annuities. See 20 Am. J. Int’l Law 574-594 (1926). The panel found that the Cayugas’ aboriginal title to the land had been extinguished, and the lands ceded to New York. *Id.* at 590. Citing *Cherokee Nation*, the panel wrote, “[w]e think the treaty meant to set up an Indian reservation, not to reserve the land from the operation of the cession.” *Id.*

In short, the plain language of the treaty, as interpreted by early authorities, compels the conclusion that the Oneidas

ceded “all their lands” to New York – including the parcels at issue in this case – thereby extinguishing their aboriginal title, and accepted a limited grant from New York. The Second Circuit erred by construing the 1788 Treaty of Fort Schuyler as preserving aboriginal title in the retroceded portion of the Oneidas’ lands.

b. The 1794 Treaty of Canandaigua Between the United States and the Six Nations

Proceeding from the invalid assumption that the Oneidas retained aboriginal title to a portion of their ancestral lands, the Second Circuit compounded its error by failing to interpret the 1794 Treaty of Canandaigua, 7 Stat. 44, in accordance with *Minnesota* and concluding that it divested the State of its property and created a federal reservation.⁸ 337 F.3d at 156. The provisions of the 1794 Treaty, read in historical context, show that no federal reservation was created for the Oneidas. Indeed, the Second Circuit’s interpretation of the treaty renders it an illegal, uncompensated taking of state property in violation of the Fifth Amendment of the Constitution of the United States. *See, e.g., Seneca Nation*, 206 F. Supp. 2d at 533-34.

In Article II of the 1794 Treaty, the United States merely “*acknowledge[d]* 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. . . .” (emphasis added). In addition, the United States asserted that *it* would “never claim the same, nor disturb 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.” Nothing in the quoted language, or any other article, shows that the treaty’s purpose was to divest New York of its interest in the land “with such certainty as to

⁸ Significantly, the State of New York was not a party to the 1794 Treaty of Canandaigua.

put it beyond reasonable question.” *Minnesota*, 270 U.S. at 209; *Oneida Indian Nation*, 860 F.2d at 1163-64. This interpretation is consistent with the view expressed by U.S. Attorney General William Wirt that the Treaty of Canandaigua had no effect on the rights of *New York vis-a-vis* the Oneidas:

[T]he legal titles of the States of New York and Massachusetts, and of the grantees under them . . . *are not divested, or in any manner impaired* by the treaty of Canandaigua, as to any of the lands then occupied by the Six Nations, nor are the pre-existing rights of the Indians in any manner enlarged by that treaty.

Op. Att’y Gen. William Wirt (March 26, 1819) (appended hereto at A23-A28) (emphasis supplied).

The absence of any purpose or intent to create a federal reservation for the Oneidas is confirmed by the treaty’s context. As explained below, history reveals that the Seneca nation was the primary reason for – and intended beneficiary of – the 1794 Treaty, not the other tribes of the Six Nations, including the Oneidas. *See Seneca Nation*, 206 F. Supp. 2d at 487. In 1782, New York agreed to cede to the United States its claim to western lands (present-day Ohio and the Erie Triangle). *See id.* at 473. Later, pursuant to the 1784 Treaty of Fort Stanwix, the United States obtained from the Six Nations a release of their claims to these western lands, and, in 1792, patented to Pennsylvania that portion lying west of New York known as the Erie Triangle, in which, among the Six Nations, only the Seneca tribe had an interest. *Id.* at 478-80, 483; William N. Fenton, *The Great Law and the Longhouse* at 646 (1998) (appended hereto at A29-A35). The 1784 Treaty of Fort Stanwix, however, proved over the next decade to be the source of much discontent among the Senecas. *Seneca Nation*, 206 F. Supp. 2d at 480-86. By 1794, Pennsylvania was threatening to force the Senecas out of the Erie Triangle, *see Fenton, supra*, at 646-50, and rumors

circulated that the Senecas (and possibly other Iroquois tribes) might join the active warfare between the western Indians and the United States. *Seneca Nation*, 206 F. Supp. 2d at 486. The United States therefore renewed treaty negotiations at Canandaigua. *Id.* at 486-87.

The primary purposes of the 1794 Treaty of Canandaigua were to obtain an express renunciation of rights in the Erie Triangle and reconfirm peace and friendship between the United States and the Six Nations, in particular the Senecas. *Id.* at 490 (*quoting* Letter from Timothy Pickering to Secretary of War Henry Knox of November 12, 1794). Prominently absent from the historical record is any indication of a federal purpose to take New York property and establish "recognized title" in the Oneidas (or other Iroquois nations).

In order to accomplish his mission, Pickering (the federal commissioner to the 1794 Treaty) acknowledged the boundaries of the Seneca nation land in the westernmost part of New York, abutting the Erie Triangle. Pickering baldly stated to Secretary Knox, when transmitting the Treaty, "[y]et not a foot of land has been given up which by the cession then made the U. States had a right to hold: all that I have relinquished falling within the pre-emption right of Massachusetts, and lying within the State of New York." *Id.* In a subsequent letter to Secretary Knox, Pickering confessed "that the United States had no right to the lands which I relinquished" in the 1794 Treaty, and stated, "I felt myself embarrassed . . . by presenting an idea of something very valuable, while, in fact the subject of the relinquishment was a shadow." *Id.* at 492 (*quoting* Letter from Pickering to Secretary Knox of December 26, 1794). He also recognized that the land in question lay "within the jurisdiction of New York," and that "no purchase or sale of lands made of or with the Indians within the limits of that State, could be binding . . . unless made . . . with the consent of the legislature of that State." *Id.* at 491-92. Although Pickering was

speaking of the Senecas, the real-party-in-interest to the 1794 Treaty, *id.* at 487, his understanding certainly applied equally to the Oneidas' state reservation in the center of New York, hundreds of miles east of the Seneca's territory.

In fact, the Oneidas previously took the position that the 1794 Treaty of Canandaigua applied only to lands ceded by New York in 1782 to the United States, and not to lands within the state. *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1096-97 (2d Cir. 1982) ("The Oneidas . . . contend . . . that in any event the Treaty of Canandaigua, which was the last in a series aimed at obtaining Indian cession of Ohio Valley lands to the United States, applies only to the territory that had been in dispute, namely Ohio territorial lands outside the boundaries of the states, not Oneida land in New York."). Similarly, the United States argued in proceedings before the Indian Claims Commission that the Treaty of Canandaigua did not divest New York of its rights or enlarge the rights of the Indians. (Br. of United States in Supp. of Mot. to Consolidate for Summ. J. at 39-53 (appended hereto at A36-A49)).

By failing to apply the *Minnesota* rule of treaty construction and disregarding the historical context, the Second Circuit erred in construing the 1794 Treaty of Canandaigua to effect an illegal, uncompensated taking of New York's property for the benefit of a nominal party-in-interest that, in the past, has disclaimed that interpretation.

2. The Indian Trade and Intercourse Act Does Not Apply To The Properties At Issue.

The Second Circuit further erred by concluding that the Indian Trade and Intercourse Act of 1802, 2 Stat. 139, applied to the properties at issue and operated to preserve the Oneidas' "unextinguished" Indian title. 337 F.3d at 146-47, 157-58. As explained above, Indian title in the parcels at issue was extinguished in 1788, when the Oneidas ceded and granted all their lands to New York and took back a limited property interest. Subsequent conveyances by the Oneidas of

their state reservation to the State, or with the State's approval, are not prohibited by the Indian Trade and Intercourse Act of 1802, or other iterations of the enactment ("ITIA"), because they lie outside its intended reach. See *Bates v. Clark*, 95 U.S. 204, 208 (1877) ("The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer."); *American Fur Co. v. United States*, 27 U.S. 358, 369 (1829).⁹

Although the Second Circuit in *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 624 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), distinguished *Bates* and *American Fur* and concluded that ITIA was not geographically limited as to land conveyances, *id.* at 627, the Counties submit that this reading is not justified as applied to the present parcels and is inconsistent with the decisions of this Court. It is also contrary to the understanding of early jurists. Before addressing these authorities, we note that then-Justice Rehnquist believed the petition for certiorari in *Mohegan* should have been granted so this Court could decide the scope and applicability of ITIA. *Id.*, 452 U.S. at 971. Over time, the need for review by this Court has become even more clear.

⁹ In addition to *Bates* and *American Fur*, this Court's dicta in *Seneca Nation v. Christy*, 162 U.S. 283 (1896), supports the view that ITIA did not apply to reservation land under the jurisdiction of New York State. In *Oneida I*, the Court cited *Christy* for the proposition that the original 13 states held the right of preemption, but noted that "this reality did not alter the doctrine that federal law, treaties, and statutes protected Indian occupancy and that its termination was exclusively the province of federal law." *Oneida I*, 414 U.S. at 670, n.6. Based on the allegations, the Court allowed a claim under ITIA, "which put into statutory form what was or came to be the accepted rule – that the extinguishment of Indian title required the consent of the United States." *Id.* at 678. In the present litigation, however, it is clear that the Oneidas' Indian title to their lands was extinguished in 1788 before the Constitution became effective and before ITIA was enacted.

In an opinion involving Indian land claims in Florida, this Court suggested that some states continued to have the authority to convey Indian lands, notwithstanding ITIA:

Grants made by the Indians at public councils have since been made directly to the purchasers or to the state in which the land lies, in trust for them, or with directions to convey to them, *of which there are many instances of large tracts so sold and held, especially in New York.*

It was a universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the states after the revolution *and yet continues in those where the right to the ultimate fee is owned by the states* or their grantees.

Mitchel, 34 U.S. at 748 (emphasis added).

Likewise, in *New Jersey v. Wilson*, 11 U.S. 164 (1812), this Court made no mention of ITIA when discussing an 1803 conveyance to private parties by the Delaware Indians of their interest in a tract of land in New Jersey. Invalidating a New Jersey enactment that attempted to revoke the tax exempt status of the tract conveyed, the Court stated:

It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege [tax exempt status] as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with

the assent of the state, to all the rights of the Indians.

Id. at 167. There is no indication that this Court considered the sale void for violating ITIA.

Attorney General William Wirt observed in 1819 that the states, including New York, stood in “precisely the same ground towards the Indians which the British King occupied” and “[a]s to the right of sale, the States of New York and Massachusetts, representing the sovereignty of the Crown in this respect, have regulated the manner in which it shall take place” Op. Att’y Gen. William Wirt (March 26, 1819).¹⁰ The United States reiterated this position before the Indian Claims Commission in 1955, with the added gloss that the 1794 Treaty of Canandaigua “was an acknowledgement of the then well-known fact that” New York had the right to purchase the Indian lands, and that “the Indians were free to sell their lands if they chose and that the United States was placing no restrictions upon such sales” (Br. of United States in Supp. of Mot. to Consolidate for Summ. J., *supra*, at 47).

Chancellor Kent, in his influential *Commentaries on American Law* (“*Kent’s Commentaries*”), observed that “the several local governments, before and since our Revolution, never regarded the Indian nations within their territorial

¹⁰ A June 16, 1795 opinion by Attorney General Bradford is sometimes cited as authority for the proposition that ITIA applied to New York. *See, e.g., Oneida Indian Nation of New York*, 434 F. Supp. at 534. Bradford himself, however, qualified his opinion, noting that “the documents submitted to the Attorney General” did not disclose “circumstances of the case under consideration to take it out of the general prohibition of [ITIA].” Op. Att’y Gen. William Bradford (June 16, 1795) (appended hereto at A50-A51). It is unclear what documents Bradford considered beyond the statute and the treaties between New York and the Oneidas, Cayugas, and Onondagas. In any event, Bradford’s opinion (insofar as the Oneidas are concerned) is founded upon the erroneous assumption that the 1788 Treaty of Fort Schuyler failed to extinguish Indian title. *Id.*

domains as subjects,” but nonetheless, “asserted and enforced the exclusive right to extinguish Indian titles to lands, enclosed within the exterior lines of their jurisdictions, by fair purchase.” 3 *Kent’s Commentaries* 384-85 (14th ed. 1896). Oliver Wendell Holmes, Jr., who edited the twelfth edition of *Kent’s Commentaries* early in his career, also apparently believed the ITIA did not apply to Oneida land sales:

So the Oneida Indians, owning lands in the counties of Oneida and Madison, were enabled, by the act of April 18, 1843, c. 185, to hold lands in severalty, and to sell and convey the same, under the care of a superintendent on the part of the state.

2 *Kent’s Commentaries* 73 n.(a). There is no mention in *Kent’s Commentaries* that any of the numerous purchases by New York were thought to violate ITIA.

3. It Would Be a Violation of the Tenth Amendment of the Constitution of United States to Deprive New York State of Jurisdiction over Its Own Territory

As discussed above, New York acquired all the Oneidas’ land, including the parcels at issue, by virtue of the 1788 Treaty of Fort Schuyler. Although that treaty created a state reservation for the Oneidas, the land was never converted to a federal reservation or otherwise taken by the United States.

The Second Circuit takes the position that New York State does not hold an interest in the reserved property because, “[a]ny rights [in Indian land] possessed by the State prior to ratification of the Constitution were ceded by the State to the federal government by the State’s ratification of the Constitution.” 337 F.3d at 146 (quotations omitted). To the extent that the Second Circuit’s opinion affects *New York State* lands (not unextinguished aboriginal title), it is in error and violates the concept of State sovereignty preserved by the Tenth Amendment to the Constitution of the United States.

In *Alden v. Maine*, 527 U.S. 706 (1999), this Court recently explained that “[a]lthough the Constitution establishes a National Government with broad, often plenary authority over matters within its recognized competence, the founding document ‘specifically recognizes the States as sovereign entities.’” *Id.* at 713 (citation omitted). The Tenth Amendment makes explicit that “the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.” As James Madison wrote:

The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite The powers reserved to the several States will extend to all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State.

Gregory v. Ashcroft, 501 U.S. 452, 458 (1991) (quoting The Federalist No. 45, at 292-293 (J. Madison) (C. Rossiter ed., 1961)). Madison further explained that “[a]lthough the States surrendered many of their powers to the new Federal Government, they retained ‘a residuary and inviolable sovereignty.’” *Printz v. United States*, 521 U.S. 898, 918 (1997) (quoting The Federalist No. 39 at 245 (J. Madison)).

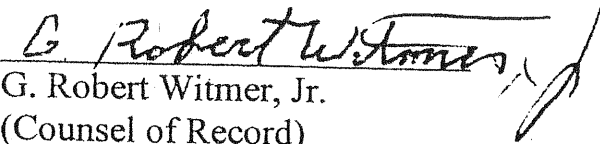
An important component of the concept of State sovereignty is that “a State has plenary powers ‘over its own territory. . . .’” *Northern Sec. Co. v. United States*, 193 U.S. 197, 347 (1904) (citation omitted). As discussed above, the 1788 Treaty of Fort Schuyler ceded all Oneida land to New York, which already exercised jurisdiction over them. New York’s rights were not divested by the 1794 Treaty of Canandaigua, which merely acknowledged that the Oneida, Cayuga and Onondaga lands had been reserved in state

treaties and that the United States would never claim them. Moreover, New York's property interest could not have been divested by ITIA, as New York State had exercised its sovereign right to extinguish aboriginal title in 1788. Accordingly, under the Constitution and specifically under the concept of State sovereignty made explicit by the Tenth Amendment, the United States cannot deprive New York of jurisdiction over its own territory.

CONCLUSION

For the reasons stated herein, as well as those stated by the City of Sherrill and the State of New York, the Court should grant the Petition for Certiorari.

Respectfully submitted,


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