No. 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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF

IRA S. SACKS
GURSKY & PARTNERS, LLP
1350 Broadway
New York, New York 10018
(212) 904-1234

Attorneys for Petitioner

Table of Contents

Table of Authorities

Cases

Statutes

Treaties

REPLY BRIEF OF CITY OF SHERRILL IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

In its Petition, the City of Sherrill ("Sherrill") demonstrated that review of the Second Circuit's decision is required because the Second Circuit ignored decisions of this Court and controlling treaties and conflicted with decisions of other circuits. The Second Circuit incorrectly held that:

(1) the land upon which the disputed properties (the "Properties") are located is Indian Country, despite the fact that the land was neither set aside nor superintended by the federal government, contrary to *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) ("*Venetie*"), and the express language of the 1788 Treaty of Fort Schuyler;

(2) the 1838 Treaty of Buffalo Creek, 7 Stat. 550, did not disestablish the Oneida reservation in New York, despite the fact that the treaty required all Oneidas living in New York to abandon all lands in New York and move to Kansas, contrary to the express language of the treaty and this Court's decision in *New York Indians v. U.S.*, 170 U.S. 1, 19 (1898); and

(3) Respondent Oneida Indian Nation of New York ("OIN") continues to enjoys the protection of the Non-Intercourse Act, 25 U.S.C. §177, for its "ancestral homeland", as a matter of undisputed fact, despite evidence that OIN's tribal existence ceased for a period of several decades, contrary to logic and other circuit court decisions.

Rather than addressing the serious errors made by the Second Circuit and the consequences of those errors, OIN principally asserts that the Petition should be denied because this Court has already decided the precise issues raised by the Petition. That assertion is false, and further demonstrates why the Petition raises special and important reasons

warranting this Court's exercise of its discretion to issue a writ of certiorari to review and correct the serious errors made by the Court of Appeals.

I. THIS COURT HAS NOT PREVIOUSLY DECIDED ANY OF THE ISSUES RAISED IN THE PETITION

OIN suggests that this Court in *County of Oneida, New York v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) ("*Oneida II*") decided the issues raised by the Petition and "established that the Constitution, federal statutes and federal treaties protected the Oneidas and their reservation and that the United States never terminated that protection." (OIN Br. at 11). That is incorrect.

As this Court is well aware, in *Oneida II*, this Court held that: (i) the Oneidas had a cause of action under federal common law (470 U.S. at 236); (ii) the defenses of statute of limitations, (*id.* at 244), laches (*id.* at 245), abatement (*id.* at 246) and ratification by federal Indian treaties in 1798 and 1802 (*id.* at 248) did not apply; and (iii) the suit did not raise a political question. (*Id.* at 250). This Court in *Oneida II* was not presented with and did not address the effect of the 1788 Treaty of Fort Schuyler or the 1838 Treaty of Buffalo Creek. Indeed, the Treaty of Fort Schuyler is not cited at all and the only place the 1838 Treaty of Buffalo Creek is mentioned in *Oneida II* is in the dissenting opinion, where Justice Stevens observed that "[t]here 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, which ceded most of the Tribe's lands in Wisconsin to the United States in exchange for a new reservation in [Kansas]." 470 U.S. at 269 n.24.

To be sure, this Court in *Oneida II* noted in passing that, in 1788, the Oneidas entered into a treaty with the State of New York, pursuant to which the State purchased the vast

majority of the Oneida's land, with the Oneidas retaining a reservation of approximately 300,000 acres. (470 U.S. at 231; OIN Br. at 17). This Court, however, did not even name the treaty to which it was referring and did not address whether the reservation remaining (after the treaty) was created by the State of New York or the federal government. Thus, *Oneida II* does not discuss the federal set aside or federal superintendence consequences of the 1788 Treaty of Fort Schuyler – the requirements for establishing Indian country status under 18 U.S.C. §1151(a) pursuant to this Court's decision in *Venetie*. Indeed, *Venetie* was decided 13 years after *Oneida II*.

Finally, OIN ignores the state of the record in *Oneida II*: (1) the parties in *Oneida II* stipulated in the district court that the disputed land was within the boundaries of the Oneidas' 1788 reservation, *Oneida Indian Nation of New York State*, 434 F. Supp. 527, 533 (N.D.N.Y. 1977), *aff'd*, 719 F.2d 525 (2d Cir. 1983), *aff'd in part and rev'd in part*, 470 U.S. 226 (1985); (2) the Counties submitted no evidence at trial, 434 F. Supp. at 532; and (3) on appeal, the Counties did not dispute the district court's finding that the 1795 conveyance at issue violated the Non-Intercourse Act, *Oneida II*, 470 U.S. at 233.

Thus, *Oneida II* did not decide any of the issues presented for review by the Petition.

II. THE DECISION BELOW CONFLICTS WITH *VENETIE* AND THE EXPRESS LANGUAGE OF THE 1788 TREATY OF FORT SCHUYLER

In the Petition, Sherrill demonstrated that the decision below conflicts with *Venetie* and the express language of the 1788 Treaty of Fort Schuyler, by finding Indian Country status under 18 U.S.C. §1151, despite the fact that the Properties were not federally set aside, but rather set aside by

the State of New York, and despite the fact that the Properties are not and have never been federally superintended. (Petition at 17-19).

OIN hides from *Venetie* and the Treaty of Fort Schuyler. Rather, OIN asserts that the disputed land is Indian Country because it is a reservation. (OIN Br. at 13). That is circular reasoning. Land does not attain Indian Country status – whether it is reservation land, a dependant Indian Community or allotments – under *Venetie* unless the land has been federally set aside for the use of the Indians as such and federally superintended. 522 U.S. at 530.[1] Merely labeling land a "reservation" does not supply the required analysis or proof.

OIN ignores entirely the fact that, in the 1788 Treaty of Fort Schuyler, the New York Oneidas **expressly** ceded **all** of their territory to the State of New York, terminating all aboriginal title. New York then set aside a reservation of approximately 300,000 acres for the New York Oneidas' future use. The 1794 Treaty of Canandaigua, 7 Stat. 44, acknowledged the reservation set aside in the Treaty of Fort Schuyler, but did not create or set aside a reservation for the Oneidas. (Petition at 15-17).[2] OIN's argument that the

---

[1] OIN notes that *Venetie* involved an Indian tribe's claim that certain land was a "dependent Indian community" under § 1151(b) and did not address a claim of reservation status pursuant to § 1151(a). (OIN Br. at 13). This is a classic distinction without a difference. This Court made clear in *Venetie* that the determination of whether land is Indian Country is the same, whether such land is claimed to be a reservation, a dependent Indian community or an allotment. *Venetie*, 522 U.S. at 527.

[2] OIN's observation that Sherrill first cited the 1788 Treaty of Fort Schuyler "in a post-argument letter to the Second Circuit" (OIN Br. at 14) is a diversion. Sherrill, in both its principal (11-12) and reply (16 n.12) briefs in the Court of Appeals, pointed out that, in 1788, the Oneidas sold

protection afforded the Oneidas in the 1794 Treaty of Canandaigua "was not less than the protection given in the same treaty to the Senecas' land" (OIN Br. at 12-15) is contrary to the express language of the 1794 Treaty of Canandaigua. Article II of the Treaty of Canandaigua expressly acknowledged the land reserved by New York State for the Oneidas, while Article III expressly established the Seneca's reservation, explicitly setting forth its metes and bounds.[3]

OIN also totally ignores the requirement of federal superintendence for Indian Country status under *Venetie*. Instead, OIN claims that federal superintendence is established simply because federal set aside is established, *i.e.*, because of the provisions in the 1794 Treaty of Canandaigua. (OIN Br. at 19 n.6). *Venetie*, however, requires federal set aside and federal superintendence. Treaty provisions, at most, address the issue of federal set aside, not superintendence. Superintendence requires that the federal government "actively controls the lands in question, effectively acting as guardian for the Indians." *Venetie*, 522 U.S. at 533. No such superintendence over the Properties ever occurred.

Thus, the Petition must be granted to correct the evisceration of *Venetie* by the Second Circuit.

---

all of their land to the State of New York and received back 300,000 acres from the State.

[3] OIN claims that "a Congressional resolution and . . . three federal treaties" "acknowledged" an Oneida reservation. (OIN Br. at 13-14). Those actions refer to the acknowledgment of the existing State-created reservation in the 1794 Treaty of Canandaigua, and other references to that Act. That acknowledgment did not create a federal reservation; it merely acknowledged a State reservation.

III. THE 1838 TREATY OF BUFFALO CREEK REQUIRED THE ONEIDAS TO ABANDON ALL LANDS IN NEW YORK

In *New York Indians v. U.S.*, 170 U.S. 1 (1898), this Court held that, upon execution of the 1838 Treaty of Buffalo Creek, the Oneidas were required to abandon all eastern lands (including lands in New York) and move to Kansas (west of the Mississippi River). As a result, the New York Oneidas shared in a nearly $2 million recovery flowing from the sale of the Kansas land by the United States to non-Indian settlers. *See id.* at 19; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. U.S.*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906) (collectively, the "*New York Indians* cases"). Thus, the New York Oneidas sought and received the benefit of the 1838 Treaty of Buffalo Creek, albeit not the benefit for which they initially bargained. OIN's opposition brief and the decision below distort these dispositive facts.

OIN argues that the 1838 Treaty of Buffalo Creek was limited to Wisconsin lands, and had nothing to do with lands in New York. (OIN Br. at 22). That ignores the language of the Treaty and the *New York Indians* cases. The language of the Treaty required all New York Oneidas living east of the Mississippi River to remove to Kansas. Treaty, Arts. 1, 2, 13. Moreover, this Court has explained that the agreement by the New York Oneidas and others to abandon all eastern lands, rather than the exchange of Wisconsin and Kansas lands, was "probably . . . the main inducement" for the United States setting aside the western lands. *New York Indians*, 170 U.S. at 15. Further, the judgment was not limited to lands in Wisconsin; the New York, Wisconsin and Thames Oneidas all shared in a nearly $2 million recovery. *See id.* at 19; *United States v. New York Indians*, 173 U.S. at 468-69; *New York Indians v. U.S.*, 40 Ct. Cl. at 457-61; *In re Appeal of New York Indians*, 41 Ct. Cl. at 468-72.

OIN muses that the "[*New York Indians* cases] [do] not suggest that the damage award alienated New York lands," citing *Oneida II* (OIN Br. at 22); and that Sherrill is, in effect, asking that the Treaty of Buffalo Creek be construed "as ratifying all pre-1838 sales of Oneida land." (OIN Br. at 21). Those assertions are disingenuous. The majority opinion in *Oneida II* did not even mention the 1838 Treaty of Buffalo Creek. What is more, Sherrill is not arguing that *New York Indians* alienated New York lands or that the Treaty of Buffalo Creek ratified prior sales of New York lands. Rather, the Treaty of Buffalo Creek required the New York Oneidas to abandon all lands in New York. That federal requirement of abandonment ended any reservation in New York.

OIN suggests that Commissioner Gillett's comments would have led the Oneidas to believe that removal was not mandatory. (OIN Br. at 20, citing *Minnesota v. Mille Lacs Band*, 526 U.S. 172, 196 (1999)). First, that argument is inconsistent with *New York Indians*, which found that the Oneidas had a vested right to the Kansas lands at the time the treaty was enacted. Further, as *amicus curiae* State of New York points out in its brief in support of the Petition, reliance on Commissioner Gillett's statements is "at odds" with the *New York Indians* cases, because there is no evidence that those statements ever received Presidential or Congressional approval. (New York State Amicus Br. at 8).

The Second Circuit interprets the Treaty of Buffalo Creek as leaving the Oneidas with a 300,000-acre New York reservation and a 1,824,000-acre reservation in Kansas. That stands history, logic and the *New York Indians* decisions on their heads. This Court should grant the Petition to correct that error and its serious consequences in the State of New York.

IV. INDIAN COUNTRY STATUS ENDS WHEN A TRIBE CEASES TO EXIST

The Second Circuit also erred in affirming summary judgment that the Properties were Indian Country in the face of serious factual disputes – established without any discovery – as to whether that the Oneidas maintained a continuous tribal existence from the time the reservation was allegedly established to when the Properties were repurchased. That is yet another compelling reason why the Petition should be granted.

In response, OIN argues that this Court in *Oneida II* found that the OIN was among the "direct descendents of the Oneida Indian Nation, one of the six nations of the Iroquois" (470 U.S. at 231) and that OIN is currently a federally recognized tribe. Those "facts" establish only that the OIN currently exists; they do not address the dispositive issue: whether the Oneidas have maintained a continuous tribal existence between from the late 1700s to the date it bought the Properties.

OIN maintains – and the Second Circuit agreed – that a federally recognized tribe need not have maintained continuous tribal existence in order to sustain a claim to reservation land. (OIN Br. at 23). This is not the law. Rather, OIN has no claim to continuing historical reservation status for the Properties, unless OIN has been in continuous tribal existence since the Properties became subject to the Non-Intercourse Act. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) ("*Paugussett*") ("To establish a *prima facie* case based on a violation of the [Non-Intercourse] Act, a plaintiff must show that . . . the trust relationship between the United States and the tribe has not been terminated or abandoned"); *Mashpee Tribe v. Town of Mashpee*, 447 F. Supp. 940, 950 n.7 (D. Mass. 1978), *aff'd*, 592 F.2d 575 (1st Cir. 1979); *Mashpee*

Tribe v. Secretary of the Interior, 820 F.2d 480, 482 (1st Cir. 1987).[4] Stated differently, if at any point tribal status ceases, Indian country status ceases.[5]

It does not matter that the tribe is currently a federally recognized tribe: "[T]ribal status for purposes of obtaining federal benefits is not necessarily the same as tribal status under the Non-Intercourse Act." *Paugussett*, 39 F.3d at 57. Thus, "[r]egardless of whether the BIA were to acknowledge [an Indian group] as a tribe for purposes of federal benefits, [the Indian group] must still [seek] an ultimate judicial determination of its claim under the Non-Intercourse Act." *Id.* at 58.

OIN is mistaken in asserting that the Second Circuit's decision below does not conflict with *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480 (1st Cir. 1987). *Mashpee* makes clear that a tribe may recover under the Non-Intercourse Act only if it shows that it was in continuous tribal existence and did not abandon tribal status from the time disputed land was alienated until the time of suit. 820 F.2d at 482.[6]

---

[4] As Judge Van Graafeiland observed in dissent below, "authoritative sources" have explained the significance of tribal discontinuity on aboriginal rights. (Petition at 25-27).

[5] It is correct that the Second Circuit noted, "if continuous tribal existence were required, the record before us shows it." (OIN Br. at 22-23). The record belies that. The Second Circuit did not address any of the substantive evidence presented by Sherrill – which surely established a disputed issue of fact barring summary judgment – other than the careful consideration given by Judge Van Graafeiland in dissent.

[6] OIN repeatedly relies upon *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919) as probative of the Oneidas' continuous tribal existence for the last 200 years. *Boylan* only addresses evidence of the status of the tribe at a single point in time nearly one hundred years ago.

There was substantial evidence presented below that the New York Oneidas ceased to exist as a tribe for decades in the late nineteenth and early twentieth centuries. (Petition at 27-29). That evidence created a triable issue of fact as to termination of tribal status and intent to abandon tribal status (contrary to the suggestion at OIN Br. at 25). If tribal status ceased at any point in time, the protections of the Non-Intercourse Act, 25 U.S.C. § 177 ceased at that time, and the only way that the New York Oneidas could recover reservation status for land it purchased was by petitioning under § 465 of the Indian Reorganization Act, 25 U.S.C. § 465. *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 115 (1998). This is yet another reason why the Petition should be granted.

CONCLUSION

For all of the foregoing reasons and for those set forth before, the Petition should be granted.

January 30, 2004

Respectfully submitted,

Ira S. Sacks
Gursky & Partners, LLP
Attorneys for Petitioner
1350 Broadway
New York, New York 10018
(212) 904-1234