No. 03-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether alleged reservation land is Indian Country pursuant to 18 U.S.C. § 1151 and this Court's decision in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998) ("*Venetie*") where the land was neither set aside by the federal government nor superintended by the federal government?

2. Whether alleged reservation land was set aside by the federal government for purposes of Indian Country analysis under 18 U.S.C. § 1151 and *Venetie* where the alleged reservation was established by the State of New York in the 1788 Treaty of Fort Schuyler, and not by any federal treaty, action or enactment?

3. Whether the 1838 Treaty of Buffalo Creek, which required the New York Oneidas to permanently abandon their lands in New York, resulted in the disestablishment of the Oneida's alleged New York reservation?

4. Whether alleged reservation land may (i) remain Indian Country or (ii) be subject to the protections of the Non-Intercourse Act, 25 U.S.C. § 177, if the tribe claiming reservation status and Non-Intercourse Act protection ceases to exist?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings in the United States Court of Appeals for the Second Circuit were petitioner City of Sherrill, New York and respondents 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 Rodgers. Respondent Ruth Burr was a party in the district court and Second Circuit, but a suggestion of death of Ruth Burr was filed in the Second Circuit on May 10, 2002. Madison County, Oneida County and the State of New York appeared as *amici curiae* in the district court and Second Circuit.

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JURISDICTION

The judgment of the Court of Appeals was issued on July 21, 2003. The Petition for Rehearing or Rehearing *en banc* was denied on September 15, 2003. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pursuant to Supreme Court Rules 14(f) and 14(i)(v), the following treaty and statutory provisions are involved in the case and appear in the Appendix: The 1788 Treaty of Fort Schuyler, September 22, 1788; the 1794 Treaty of Canandaigua, November 11, 1794, 7 Stat. 44; the 1838 Treaty of Buffalo Creek, January 15, 1838, 7 Stat. 550; 18 U.S.C § 1151; 25 U.S.C § 177; 25 U.S.C. § 233; and 25 U.S.C. § 465.

STATEMENT OF THE CASE

There are special and important reasons warranting this Court's exercise of its discretion to issue a writ of *certiorari* to review the decision of the Second Circuit. The Indian land claim issues arising in this Petition are of critical importance to the State of New York and municipalities such as the City of Sherrill. The Oneida Indian Nation alone lays claim to 300,000 acres in central New York. Similar claims

exist for other Indian tribes in New York and elsewhere. If the decision of the Second Circuit is not reviewed and reversed, the tax base and viability of cities such as the City of Sherrill – across New York and elsewhere – will be imperiled.

Moreover, the Second Circuit's decision is: (i) in direct conflict with precedents of this Court (such as *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998); *New York Indians v. United States*, 170 U.S. 1 (1898); and *United States v. New York Indians*, 173 U.S. 464 (1899)); (ii) ignores the express provisions of two Indian treaties, the 1788 Treaty of Fort Schuyler and the 1838 Treaty of Buffalo Creek, 7 Stat. 550; and (iii) grossly expands the reach of the Indian Trade and Non-Intercourse Act (the "Non-Intercourse Act"), currently codified at 25 U.S.C. § 177, in direct conflict with decisions of other United States Courts of Appeals.

In the 1788 Treaty of Fort Schuyler, prior to the effective date of the United States Constitution, the New York Oneidas ceded all of their territory to the State of New York. That cession terminated all aboriginal title. The State of New York then set aside approximately 300,000 acres for the New York Oneidas' future use. In 1794, the federal government, in the Treaty of Canandaigua, 7 Stat. 44, acknowledged the reservation set aside in the Treaty of Fort Schuyler, but did not create a reservation for the Oneidas.

The New York Oneidas sold much of the 300,000 acres set aside by the State of New York, including a sale in 1805 to an individual Oneida Indian who then conveyed the land at issue in this Petition. In the centuries that followed, the conveyed land remained outside the possession of the Oneidas, held by private landowners.

In 1997, using proceeds from its casino in central

New York State, the Oneida Indian Nation of New York ("OIN") purchased several parcels of land on the open market, including those in the City of Sherrill upon which the disputed properties are situated (the "Properties"). Wrongly claiming that it had come back into possession of a portion of its ancestral Indian reservation established in 1794 by the Treaty of Canandaigua, the OIN refused to pay property taxes or collect sales taxes in connection with the Properties. The litigation giving rise to this Petition ensued.

The governing treaties and this Court's controlling case law compel the conclusion that the Properties are not Indian Country pursuant to 18 U.S.C. § 1151. First, the land at issue was neither set aside nor superintended by the federal government. Rather, the land was set aside for the use of the New York Oneidas by the State of New York in the 1788 Treaty of Fort Schuyler. For two centuries, State and local governments have provided all services with respect to the land at issue. As a result, under *Venetie*, the land at issue is not Indian Country pursuant to 18 U.S.C. § 1151, and may be taxed by the City of Sherrill.

Second, the 1838 Treaty of Buffalo Creek, 7 Stat. 550, required the New York Oneidas to abandon all lands in the State of New York and remove to Kansas, thus terminating any remaining New York Oneida reservation. The New York Oneidas sued to recover the value of the Kansas land it received in exchange for abandoning New York, and shared in the nearly $2 million recovery. *New York Indians v. United States*, 170 U.S. 1 (1898); *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906). Thus, the New York Oneidas sought and received the benefit of the Kansas reservation established in the 1838 Treaty of Buffalo Creek in exchange for any New York reservation.

Third, there was substantial evidence below that the New York Oneidas ceased to exist as a tribe for decades in the late nineteenth and early twentieth centuries. If tribal status ceased, Indian Country status and the protections of the Non-Intercourse Act, 25 U.S.C. § 177, ceased, and the only way that the New York Oneidas could recover reservation status 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). Thus, at the very least, summary judgment for the Oneida Indian Nation was improper.

The Parties

Petitioner City of Sherrill is a municipal corporation organized under the laws of the State of New York. It is New York's smallest city, occupying one and one-half square miles, with a population of approximately 3,000. Its total annual budget is approximately $2.4 million.

Respondent Oneida Indian Nation of New York ("Oneida Indian Nation") is presently a federally recognized Indian tribe governed by a Nation Representative and a Tribal Council. Respondent Ray Halbritter is the Nation Representative, chief executive officer of the Oneida Nation enterprises, and one of the members of the Council. The other Respondents are members of the Council.

The Relevant History of the Oneida Indians

Prior to and during the Revolutionary War, the colonists respected the Oneidas' right to possession of their aboriginal lands, which totaled approximately six million acres in central New York. *Oneida Indian Nation v. City of Sherrill*, 145 F. Supp.2d 226, 233-34 (N.D.N.Y. 2001). In 1788, in the Treaty of Fort Schuyler with the State of New York, the Oneidas sold all of their land to the State of New

York, which at the same time created a 300,000-acre reservation for use by the Oneidas. *Id.* That treaty and sale terminated aboriginal title to the land.

Two years later, in 1790, Congress passed the Non-Intercourse Act, currently found at 25 U.S.C. § 177, which required the federal government to approve all sales or transfers of land from any Indian nation or Indian tribe. *Id.* The Non-Intercourse Act, however, did not limit the right of the States to engage in transactions where aboriginal title had already been extinguished. *County of Oneida, New York v. Oneida Indian Nation of New York*, 470 U.S. 226, 232 (1985). As they had prior to the passage of the Non-Intercourse Act, the Oneidas continued to sell large portions of the land that New York State had set aside for their use.

In the 1794 Treaty of Canandaigua, 7 Stat. 44, the federal government in Article II merely "acknowledge[d]" what remained of an Oneida reservation in New York, and agreed that "the . . . reservation[] shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." That is to be contrasted with the treatment of the Senecas, whose reservation was established by Article III of the treaty.

Beginning one year later, in 1795, the Oneidas sold most of what remained of their 300,000-acre reservation created by the State of New York. *Oneida Indian Nation*, 145 F. Supp.2d at 234. Since 1795, title to portions of this land has passed through voluntary, free-market transactions. *Id.* The transactions that conveyed the Properties at issue in this case occurred in 1805, when the Properties were conveyed by a group of Oneida Indians to Cornelius Dockstader, an Oneida Indian. In 1807, Dockstader conveyed them to Peter Smith, a non-Indian. *Id.* at 243.

Beginning in the early nineteenth century, the federal

government's policy toward the Indians changed from respect for the Indians' possession of their ancestral lands to removal of the eastern Indians to lands in the western United States. Between 1820 and 1822, and in keeping with the federal government's new policy, some New York Indians, including some Oneidas, relocated to land the federal government purchased for them in the state of Wisconsin. *Id.* at 234-35. Other Oneidas relocated to Ontario, Canada. *Id.* at 235. Thus, the Oneidas split into three distinct groups: the New York Oneidas, the Wisconsin Oneidas and the Canadian Oneidas (also known as the Thames Oneidas). *Id.* The Oneida Indian Nation claims to be a successor to the New York Oneidas.

The federal government codified its removal policy in the Indian Removal Act, passed by Congress in 1830, which authorized the federal government to give land west of the Mississippi River to Indians in exchange for their eastern land. *Id.* "The core purpose of the federal removal policy was to mak[e] a vast area available for white settlement while reducing the conflict of sovereign authority caused by the presence of independent Indian governments within state boundaries." Felix S. Cohen, *Handbook of Federal Indian Law*, 79 (1982 ed.).

One result of the federal policy of removal was the 1838 Treaty of Buffalo Creek, 7 Stat. 550, an obligatory removal treaty in which several Indian tribes, including the New York Oneidas, agreed to remove to Kansas. In Article 2 of the treaty, the United States designated a 1,824,000-acre reservation in what is now the State of Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States . . ." In Article 13, the New York Oneidas

agreed to remove to their new home in Kansas.[1]

Although most of the remaining New York Oneidas did not move to Kansas to live on the reservation designated for their benefit in the Treaty of Buffalo Creek, they and other New York Indian tribes sued the United States for the value of the Kansas lands after the federal government sold the Kansas lands to homesteaders. *New York Indians v. United States*, 170 U.S. 1 (1898). Their lawsuit was successful, and the New York, Wisconsin and Thames Oneidas shared in the nearly $2 million recovery. *Id.*; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 40 Ct. Cl. 448, 457-61 (1905); *In re Appeal of New York Indians*, 41 Ct. Cl. 462, 468-72 (1906). Thus, the Oneidas sought and received the benefit of the Kansas reservation established in exchange for their New York reservation in the 1838 Treaty of Buffalo Creek.

There is substantial evidence that, following the 1838 Treaty of Buffalo Creek, the New York Oneidas ceased to exist as a tribe for nearly a century. For example, in 1877 a district court noted that "[The Oneida] tribal government has ceased as to those who remained in [New York] state . . . [The designated chief's] sole authority consists in representing them in the receipt of an annuity.... They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." *United States v. Elm*, 25 F. Cas. 1006 (N.D.N.Y. 1877).

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1 At the time of the 1838 Treaty of Buffalo Creek, there were 620 Oneidas in New York and 600 in Wisconsin. Most of the remaining Oneidas left New York in the next few years. *The Oneida Indian Experience: Two Perspectives*, 61 (J. Campisi and L. Hauptman eds. 1988).

Similarly in 1891, the federal government explained that "The Oneida Indians have no reservation.... [The few Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers." *1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior.* That same observation was oft repeated over the following decades. *See 1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior; 1900 Annual Reports of the Department of the Interior; 1901 Annual Reports of the Department of the Interior; 1906 Annual Reports of the Department of the Interior.* That point is also made in the 1892 Census map of New York, which depicts no Oneida reservation.

That situation persisted into the mid-twentieth century. For example, the record below established that in 1925, an Assistant Commissioner of Indian Affairs indicated in a letter that, as a tribe, the Oneidas are no longer known in the State of New York. Further, in the 1942 *Handbook of Federal Indian Law*, Cohen explains that the Oneidas are known no more in the State of New York. Felix S. Cohen, *Handbook of Federal Indian Law*, 416-17 (1942 ed.). Moreover, into the 1950's, in a Committee Report from the Senate Committee on Interior and Insular Affairs, the Committee acknowledged that the "Oneida and Cayuga Indians have no reservations." S. Rep. No. 1836, at 5 (1950).

The Action Below

In 1997 and 1998, the Oneida Indian Nation used the proceeds from its Turning Stone casino in Verona, New York to purchase several businesses and properties in Madison and

Oneida Counties, New York in open-market transactions with private parties. Included in these purchases were the Properties in Sherrill upon which the Oneida Indian Nation operates a gas station having an attached convenience store and a textile manufacturing and distribution facility.

Contending that the Properties were located within its historical reservation, the Oneida Indian Nation refused to pay property taxes assessed by Sherrill on the land and structures, or to collect sales tax on sales of merchandise sold at their businesses. Sherrill sent the Oneida Indian Nation notices of tax delinquency for the Properties and thereafter conducted a tax sale, purchased the Properties and initiated eviction proceedings in New York State Supreme Court (the "Eviction Case").

The Oneida Indian Nation then sued Sherrill in the United States District Court for the Northern District of New York, seeking a declaratory judgment that the Properties were situated on land that was part of its historic reservation, established by the 1794 Treaty of Canandaigua and, therefore, exempt from state and local taxation (the "Lead Case"). The Oneida Indian Nation also removed the Eviction Case to federal court, and contended that Sherrill's claims were barred by sovereign immunity. In response, Sherrill commenced an action against the individual members of the Oneida Tribal Council (the "Members Case"). The Eviction, Lead and Members Cases were subsequently consolidated and adjudicated in district court.

The United States District Court for the Northern District of New York had subject matter jurisdiction to adjudicate the consolidated cases. In the Lead Case, Oneida Indian Nation asserted numerous bases for federal jurisdiction, including 28 U.S.C. §§ 1361-62; 42 U.S.C. § 1983;, the Indian Commerce Clause (Art. I, § 8) and the Due Process Clause (Amend. XIV) of the United States

Constitution; 25 U.S.C. § 177; the 1794 Treaty of Canandaigua; and federal common law. The Eviction Case and the Members Case involve similar facts as the Lead Case. The Eviction Case was filed by Sherrill in local court and removed by Oneida Indian Nation to district court based upon many of the same assertions of federal jurisdiction as in the Lead Case. Subject matter jurisdiction in the Members Case was predicated on the same bases as the Lead Case.

In a June 4, 2001 memorandum-decision and order, the district court: (1) denied Sherrill's motion in the Lead Case for summary judgment or, alternatively, a preliminary injunction enjoining Oneida Indian Nation from purchasing additional properties in Sherrill; (2) granted the Oneida Indian Nation's cross motion for summary judgment in the Lead Case and granted Oneida Indian Nation's motion for summary judgment in the Eviction Case; (3) granted summary judgment dismissing Sherrill's counterclaims against the Oneida Indian Nation in the Lead Case; (4) granted defendants' motion to dismiss the Members Case; and (5) denied Sherrill's motion for leave to amend its answer in the Lead Case. *Oneida Indian Nation*, 145 F. Supp.2d at 266-67 (N.D.N.Y. 2001).[2]

The City of Sherrill appealed and, to the extent pertinent here, the Second Circuit affirmed (in a 2-1 decision), with Senior Circuit Judge Van Graafeiland dissenting. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003). The Court of Appeals found that the Properties were Indian Country because the reservation had been established, not by New York State in the 1788 Treaty of Fort Schuyler, but rather by the federal government in the 1794 Treaty of Canandaigua, 7 Stat. 44. The Second Circuit

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2 That same day, the district court also entered three separate final judgments disposing of all parties' claims.

rejected any notion that the 1838 Treaty of Buffalo Creek, 7 Stat 550, required the New York Oneidas to abandon New York State. Finally, the Second Circuit held that tribal continuity is not required for a tribe to maintain reservation status and Non-Intercourse Act protection – that is, a reservation and Non-Intercourse Act protection continues even if a tribe ceases to exist. 337 F.3d at 155-56, 158-65, 165-68. The City of Sherrill petitioned for rehearing or rehearing *en banc*; that petition was denied on September 15, 2003.

The Status of Oneida Indian Nation's Properties Today

This case is one of many lawsuits the Oneida Indian Nation has filed in an attempt to undo the 1788 Treaty of Fort Schuyler, 1838 Treaty of Buffalo Creek and the land transactions its ancestors entered into with New York State beginning two hundred years ago. The decisions summarized below place the Oneida Indian Nation's dispute with Sherrill in context.

Oneida Indian Nation of New York State v. County of Oneida, New York, 414 U.S. 661 (1974) ("*Oneida I*") – In 1970, the Oneida Indian Nation and the Wisconsin and Thames Oneidas brought suit against Oneida and Madison Counties (the "Counties") in the Northern District of New York to recover the fair rental value of certain land possessed by the Counties for the period January 1, 1968 through December 31, 1969. *Id.* at 664-65. The Oneidas claimed that the land at issue was part of the 300,000 acres sold by the Oneidas to New York State in 1795, allegedly in violation of the Non-Intercourse Act. *Id.* This Court held that the Oneidas' complaint stated a controversy arising under the Constitution, laws, or treaties of the United States, and therefore that the district court erred in dismissing it for lack of federal question jurisdiction. *Id.* at 666.

County of Oneida, New York v. Oneida Indian Nation of New York, 470 U.S. 226 (1985) ("*Oneida II*") – This Court in *Oneida I* remanded the case to the district court for trial. On remand, after a trial in which the Counties presented no evidence, the district court held, *inter alia*, that the Counties were liable for wrongful possession of the lands conveyed to New York State in 1795 because that conveyance violated the Non-Intercourse Act. *Id.* at 232-33. The Court awarded damages for the fair rental value of the land for the two-year period specified in the complaint. *Id.* at 230. The district court's decision was appealed. This Court held that the Oneidas could maintain an action for violation of their possessory rights based on federal common law and that the action was not barred by the statute of limitations, abatement, ratification or nonjusticiability. *Id.* at 240-50. This Court declined to rule on whether laches barred the Oneidas' claim. *Id.* at 244-45.

Oneida Indian Nation of New York v. County of Oneida, 199 F.R.D. 61 (N.D.N.Y. 2000) ("*Oneida III*") - In 1974, the Oneida Indian Nation and the Wisconsin Oneidas commenced another action against the Counties, alleging that beginning in the 1790's, the State of New York illegally acquired approximately 250,000 acres of Oneida Indian land. *Id.* at 66. That case – commonly referred to as the "Land Claim Case" – remained inactive while the Oneidas pursued their so-called test case (which resulted in *Oneida I* and *Oneida II*). *Id.* In 1998, the Land Claim Case became active when the United States intervened, and the Oneidas moved to amend their complaint to: (1) add the Thames Oneidas as plaintiffs; (2) add the State of New York as a defendant; and (3) add approximately 20,000 private landowners, the New York State Thruway Authority, Niagara Mohawk Power Corporation and Oneida Valley National Bank (collectively, the "private landowners") as defendants. *Id.* at 67-68. The Oneidas sought to add private landowners as defendants to collect damages from them and/or eject them from their

homes. *Id.*

On September 25, 2000, the district court granted the Oneidas' motions to add the Thames Oneidas as a plaintiff and the State of New York as a defendant. The court, however, denied the Oneidas' motion to add the private landowners as defendants in the suit, holding that a claim to eject current landowners would be futile because the Oneidas were not entitled to possession of the land. *Id.* at 92-93.

REASONS FOR GRANTING THE WRIT

I. CONTRARY TO THE DECISION BELOW, UNDER THIS COURT'S DECISION IN *VENETIE* AND THE 1788 TREATY OF FORT SCHUYLER, THE PROPERTIES ARE NOT INDIAN COUNTRY BECAUSE THE LAND WAS SET ASIDE BY THE STATE OF NEW YORK AND SUPERINTENDED BY STATE AND LOCAL GOVERNMENTS

The Second Circuit's decision below must be reviewed and reversed because it ignores this Court's holding in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 527 (1998), that for property to be Indian Country and exempt from taxation it (1) must have been set aside by the federal government for use of Indians as such; and (2) must be under the superintendence of the federal government. The Properties here were neither: they were set aside and superintended by the State of New York and local governments.

This Court has explained that "the test for determining whether land is Indian country does not turn upon whether that land is denominated 'trust land' or 'reservation.'" *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 511 (1991).

Whatever the word "reservation" means in other contexts, reservation status for Indian Country purposes is a term of art.

The Properties the Oneida Indian Nation purchased in Sherrill are not Indian Country. Indian Country is limited to:

> (a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government . . . (b) all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state, and (c) all Indian allotments, the Indian titles to which have not been extinguished, including rights-of-way running through the same.

18 U.S.C. § 1151 (emphasis added).

Although § 1151 has three prongs[3] – reservations, dependent Indian communities and allotments – this Court made clear in *Venetie*, 522 U.S. at 527, that the essential nature of Indian Country is the same under all three prongs of the statute: the land (1) must be set aside by the federal government for use of Indians as such and (2) must be under the superintendence of the federal government. In *Venetie*, this Court explained that, in enacting § 1151 in 1948, Congress codified two requirements that the Court had previously held necessary for a finding of Indian Country generally – (1) federal set-aside and (2) federal

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[3] Only the "reservations" prong of § 1151 is at issue in this case. Moreover, the Oneida Indian Nation concedes that, if the Properties are not Indian Country, then the Properties are not exempt from taxation.

superintendence. *Venetie*, 522 U.S. at 527.

In the words of the this Court,

> [In our prior cases] . . . we relied upon a finding of both a federal set-aside and federal superintendence in concluding that the Indian lands in question constituted Indian country and that it was permissible for the Federal Government to exercise jurisdiction over them. Section 1151 does not purport to alter this definition of Indian country, but merely lists the three different categories of Indian country mentioned in our prior cases: Indian reservations, dependent Indian communities, and allotments.

Id. at 530 (citations omitted). Neither federal set aside nor superintendence is present here. As a result, this Court should grant the Petition and reverse the decision below.

A. The Properties Were Set Aside By The State of New York

The Second Circuit ignored the express language of the 1788 Treaty of Fort Schuyler in concluding that the Properties were set aside by the federal government. The initial paragraph of the 1788 Treaty of Fort Schuyler states, in its entirety, "The Oneidas do cede and grant all their lands to the people of the State of New York forever."[4] Of this grant, New York reserved a 300,000-acre tract for the Oneidas' "specified uses." Thus, it cannot be questioned that it was the State of New York, and not the federal

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[4] Occurring prior to the effective date of the United States Constitution, this sale was totally lawful. *Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1148 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989).

government, that set aside for use by the Oneidas the lan upon which the Properties are situated.

The Second Circuit ignored the Treaty of For Schuyler and found that the Oneida reservation was set aside by the 1794 Treaty of Canandaigua. 337 F.3d at 155-56. That is incorrect (although that same observation appears as *dicta* in many cases where the issue was not directly litigated). Rather, the 1794 Treaty of Canandaigua merely – and expressly – "acknowledged" the land reserved by New York State for the Oneidas.

Thus, in the 1794 Treaty of Canandaigua with the Six Nations of the Iroquois,[5] Article II provides, in pertinent part, that

> "The United States acknowledges the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment thereof . . ."

That is to be contrasted with Article III of the treaty, which expressly establishes a reservation for the Senecas.

Accordingly, the 1794 Treaty of Canandaigua was nothing more than a mere acknowledgment by the federal government of the Oneida reservation created by New York State through the 1788 Treaty of Fort Schuyler. Neither in the Treaty of Canandaigua nor elsewhere did the federal

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5 The Six Nations consisted of the Mohawk, Oneida, Onondaga, Cayuga, Seneca, and Tuscarora nations.

government even purport to designate this land as Indian Country.

As in *Venetie*, the Oneidas own the Properties in Sherrill in fee simple and are free to use them for any purpose, including any non-Indian purpose. Additionally, the Oneida Indian Nation owns the Properties free from any and all federal government restrictions. The Properties simply are not located within "a reservation under the jurisdiction of the United States government." *Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879, 883-84 (9th Cir. 1999) ("The [Navajo land in question] is not [Indian Country] because the land was purchased in fee by the Navajo Nation rather than set aside by the Federal Government"); *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir.), *cert. denied*, 510 U.S. 994 (1993) (United Keetoowah Band of Cherokee Indians' ("UKB") businesses were not located on land set aside by the federal government for purposes of 18 U.S.C. § 1151(b) because title was held by UKB in fee simple and "[n]o action ha[d] been taken by the federal government indicating that it set aside the land for use by the UKB").

At bottom, the 1794 Treaty of Canandaigua did not set aside an Oneida reservation. Rather, that land was set aside by the State of New York in the 1788 Treaty of Fort Schuyler. As a result, the land on which the Properties are situated was not set aside by the federal government for use by the Oneidas. Therefore, under this Court's decision in *Venetie*, the Properties are not Indian Country pursuant to 18 U.S.C. § 1151. This Court should grant the Petition to correct the Second Circuit's tortured reading of the 1788 Treaty of Fort Schuyler and its refusal to follow *Venetie*.

B. The Properties Were Never Under Federal Superintendence

Independent of the set aside requirement, the

Properties are not now and never were under federa superintendence, which is an independent reason why the are not Indian Country. *Venetie*, 522 U.S. at 533. Th Second Circuit essentially rejected that aspect of *Venetie*, an held that there was no requirement of proof that "reservation land is federally superintended to be Indian Country. Th Petition should be granted to correct that error.

The level of federal superintendence over Indian lanc required for Indian Country status is that the federa government "actively controls the lands in question, effectively acting as a guardian for the Indians." *Id.* In other words, the land must be "under the jurisdiction and control of Congress for all governmental purposes, relating to the guardianship and protection of the Indians." *Id.*

Tested by that standard, the Properties are not federally superintended. The federal government never actively controlled the Properties. The federal government never exercised jurisdiction over the Properties, as guardian and protector of Oneida Indian Nation.[6] The Oneida Indian Nation purchased the Properties in fee simple and has since opened businesses on the acquired land. Services for the Properties are provided by Sherrill and not by the federal government. Moreover, the Properties are not part of the 32 acres of land in Madison County recognized by the Bureau of Indian Affairs as under the jurisdiction of the federal government. In such circumstances, the federal government does not superintend the Properties. *United States v. Roberts*,

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6 Indeed, the legislative history to 25 U.S.C. § 233, which conferred jurisdiction on the State of New York for civil actions between Indians (or to which Indians are parties) indicates that the federal Indian Bureau believed, at the time this act was passed, that the Indians of New York "are in no further need of governmental supervision or control." H.R. REP. NO. 81-2720, at 2 (1949).

185 F.3d 1125, 1130-31 (10th Cir. 1999), *cert. denied*, 529 U.S. 1108 (2000) (land was under federal superintendence only because the United States retained title to the property; the state considered the property to be beyond its taxing jurisdiction; the BIA Area Director approved the land acquisition; the government oversaw the property; and the BIA treated the property as trust land); *HRI, Inc. v. E.P.A.*, 198 F.3d 1224, 1253 (10th Cir. 2000) (land was under federal superintendence because the BIA treated the land in the same manner as lands within the tribe's formal reservation).

The Second Circuit's conclusion that the Properties are Indian Country simply because they are within the historical Oneida Indian reservation is incorrect. The court reached that conclusion by finding that the federal set aside and superintendence requirements are inapplicable where the land in question is a formal reservation. 337 F.3d at 155 ("While questions may arise as to whether nonreservation property owned by Indians is in Indian country, there are no such questions with regard to reservation land, which by its nature was set aside by Congress for Indian use under federal supervision."). That holding incorrectly (i) presumes the existence of federal set aside; (ii) ignores *Venetie*; (iii) eviscerates the requirements of proof of federal set aside and superintendence for all three prongs of 18 U.S.C. § 1151; and (iv) is based upon the incorrect finding that the federal government established the reservation for the Oneidas in New York State through the 1794 Treaty of Canandaigua. That distortion of this Court's precedents and governing treaties must not be permitted. This Court should grant the Petition and reverse the decision below.

II. THE 1838 TREATY OF BUFFALO CREEK DISESTABLISHED ANY ONEIDA NEW YORK RESERVATION

The 1838 Treaty of Buffalo Creek, 7 Stat. 550,

required the New York Oneidas to abandon any reservation in the State of New York. Thus, the Treaty of Buffalo Creek, subsequent case law, the removal policy of the United States government at the time the treaty was signed and other circumstances shows that the Oneidas' New York reservation was disestablished as a matter of law.

In Article 1 of the Treaty, the New York Oneidas and other tribes accepted a tract of land in Kansas "as a permanent home for all the New York Indians, now residing in the State of New York . . ." The Oneidas also agreed that the Kansas land was to be their "future home" and "agree[d] to remove to their new homes . . . as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." *Id.*, Arts. 2, 13. Thus, Congress intended, and the Oneidas agreed, to remove from New York and Wisconsin to Kansas permanently.

Equally clear is the fact that the Kansas lands were in exchange for the Oneidas' removal from the eastern lands, including lands in New York. Nowhere in the jurisprudence or commentary is it even suggested that the 1838 Treaty of Buffalo Creek was intended to create a Kansas reservation for the Oneidas <u>in addition</u> to a 300,000-acre parcel in New York.

Any doubt that the 1838 Treaty of Buffalo Creek disestablished the Oneidas' New York reservation was put to rest by this Court when, in the late nineteenth century, Indian tribes including the New York Oneidas successfully sued the federal government for the value of the Kansas lands that were set apart for them in the treaty, but later sold by the federal government after the tribes refused to remove to them.

While it might be reasonably contended that [the

> Indians'] failure to remove should result in a cancellation of the [Treaty of Buffalo Creek], and a restoration to them of their rights in the Wisconsin lands, that construction is precluded by the language of the first article, which contains a present and irrevocable grant of the Wisconsin lands, and puts it beyond their power to revoke the bargain.

New York Indians v. United States, 170 U.S. 1, 19 (1898).

Significantly, although the language of this Court's decision was limited to the Wisconsin reservation, the judgment was not so limited. The New York, Wisconsin and Thames Oneidas all shared in a nearly $2 million recovery flowing from the sale of the Kansas lands. *See id.*; *United States v. New York Indians*, 173 U.S. 464 (1899); *New York Indians v. United States*, 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"). The New York Oneidas shared in that recovery because they held title to the Kansas lands granted to them by the 1838 Treaty of Buffalo Creek. That grant was not a gift. Rather, it was made in consideration of the Oneidas' agreement to move from and disestablish their New York and other eastern homes. Thus, the New York Oneidas sought and received the benefit of the 1838 Treaty of Buffalo Creek, *albeit* not the benefit they initially bargained for. The Court of Appeals, however, permitted the Oneidas to undo the bargain, while retaining the benefit, *i.e.*, the proceeds of the civil judgment.

Compounding its error, the Second Circuit required the presence of specific cession language to make a finding of reservation disestablishment. 337 F.3d at 158. To the contrary, this Court has made clear that what is required is that the "'congressional determination to terminate . . . be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.'"

DeCoteau v. District County Court for the Tenth Judicial District, 420 U.S. 425, 444 (1975) (quoting *Mattz v. Arnett*, 412 U.S. 481, 505 (1973)).

The face of the Treaty of Buffalo Creek, as well as the legislative history and surrounding circumstances, make clear that Congress intended to disestablish the Oneidas' New York reservation. First, Article 2 of the Treaty explicitly refers to the Indian Removal Act of 1830, the purpose of which was to "[m]ake a vast area available for white settlement while reducing the conflict of sovereign authority caused by the presence of independent Indian governments within state boundaries." Felix S. Cohen, *Handbook of Federal Indian Law*, 79 (1982 ed.).

Second, the legislative history of other congressional acts supports the view that Congress intended to disestablish the Oneidas' New York reservation. For example, the legislative history of 25 U.S.C. § 233, which conferred jurisdiction on the State of New York for civil actions between Indians (or to which Indians are parties) states that the "Oneida . . . Indians have no reservation" in New York State, H.R. REP. NO. 81-2720, at 2 (1949). Thus, consistent with the 1838 Treaty of Buffalo Creek and the decisions in the *New York Indians* cases, Congress (over one hundred years after the 1838 Treaty of Buffalo Creek was ratified) continued to express the view that the Oneidas' New York reservation was no more. This amply satisfies this Court's requirement that the congressional determination to terminate be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history.

Third, as explained above, in the *New York Indians* cases, this Court held that title to the Kansas lands passed to the Oneidas at the time the Treaty of Buffalo Creek was made, and that the Indians' failure to assert title did not work a forfeiture of the title. *New York Indians*, 170 U.S. at 34.

Surely, Congress did not intend to pass title to land in Kansas to the Oneidas, while at the same time allowing a 300,000-acre reservation in New York to continue to exist. As a result, the *New York Indians* cases cannot be reconciled with the continuation of a New York reservation for the Oneidas.

Finally, the circumstances surrounding the Properties mandate a finding that the 1838 Treaty of Buffalo Creek disestablished the Oneida reservation. Although the "most probative" evidence of diminishment (or disestablishment) is statutory language, this Court also considers "the subsequent treatment of the area in question and the pattern of settlement there." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 330 (1998) (citing *Hagen v. Utah*, 510 U.S. 399 (1994)). The City of Sherrill is predominantly populated by non-Indians. In fact, the record below established that only .3% (three-tenths of one percent) of Sherrill's population is American Indian, Eskimo, or Aleut. Furthermore, New York State, and later the City of Sherrill, have exercised jurisdiction over this land from the time of the Properties' transfer from the Oneida Indians to non-Indians.

Therefore, it is beyond legitimate dispute that the 1838 Treaty of Buffalo Creek disestablished the Oneida reservation in New York.[7] This Court should grant the Petition to correct the Second Circuit's decision to the contrary.

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[7] At the very least, expert evidence was required to further elucidate the purpose of the 1838 Treaty of Buffalo Creek. That is yet another reason why summary judgment for the Oneida Indian Nation was improper and must be reversed.

III. INDIAN COUNTRY STATUS AND NON-INTERCOURSE ACT PROTECTION CEASE WHEN A TRIBE NO LONGER EXISTS

A final reason why the Petition should be granted is that the Second Circuit, in conflict with the decisions of other Courts of Appeals, improperly extended the scope of the Non-Intercourse Act, 25 U.S.C. § 177. The Non-Intercourse Acts protects Indian Country. Indian Country covers, at most, reservation, dependent communities and allotments of Indian tribes. 18 U.S.C. § 1151. Once an Indian Tribe no longer exists, the protections of the Non-Intercourse Act for the tribe cease and Indian Country status for the tribe's lands ceases. To restore Indian Country status if the tribe or a successor thereafter comes back into existence, an application must be made under the Indian Reorganization Act. The Second Circuit's holding to the contrary improperly expands the scope of the Non-Intercourse Act.

The Court of Appeals held that there is "no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land." 337 F.3d at 165. That is illogical, circular and incorrect. Rather, the Oneida Indian Nation has no rights under the Non-Intercourse Act, 25 U.S.C. § 177, and no claim to historical reservation status for the Properties, unless the Oneida Indian Nation has been in continuous tribal existence since the Properties became subject to the Act. *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51, 56 (2d Cir. 1994) ("*Paugussett*"); *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480 (1st Cir. 1987) (tribe may recover only if it shows that it was in continuous tribal existence and did not abandon tribal status from the time the land was alienated until the time of suit); *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).

The fact that Oneida Indian Nation is presently a federally recognized tribe is irrelevant to the protected status of lands it owns. "[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 turn to the district court for an ultimate judicial determination of its claim under the Non-Intercourse Act." *Id.* at 58.

The Second Circuit's logical fallacy is as follows: If there was a lapse in the Oneida Indian Nation's tribal status, Non-Intercourse Act coverage and Indian Country status both terminate at that moment in time. No other result is possible: How can land be Indian Country if the tribe that previously owned or used it has ceased to exist? How can land be owned by an Indian tribe or Indian nation if the tribe or nation has ceased to exist?

Once Indian Country status ends, or once the protection of the Non-Intercourse Act ceases, the land is then freely alienable, subject to state and local taxation; repurchase by the tribe does not create an exemption to taxation unless the lands are restored to trust protection under § 465 of the Indian Reorganization Act. *Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103 (1998).

As Judge Van Graafeiland observed in dissent below, "authoritative sources" have explained the significance of tribal discontinuity on aboriginal rights.

> • "Since original Indian title is dependent upon proof of actual, continuous, and exclusive possession, proof of voluntary abandonment of an area by a tribe

constitutes a defense to the aboriginal claim." Felix S. Cohen, *Federal Indian Law*, Ch. 9, Sec. A2a (1982 ed.).

• "The right of Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy . . . The possession, when abandoned by the Indians, attaches itself to the fee without further grant." *United States v. Cook*, 86 U.S. 591, 593 (1873).

• "We think it entirely clear that this treaty did not convey a fee simple title to the Indians; that under it no tribe could claim more than a right to continued occupancy; and that when this was abandoned all legal right or interest which both tribe and its members had in the territory came to an end." *Williams v. City of Chicago*, 242 U.S. 434, 437-38 (1917).

• "To establish a *prima facie* case based on a violation of the [Nonintercourse] Act, a plaintiff must show that ... the trust relationship between the United States and the tribe has not been terminated *or abandoned*." *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 56 (2d Cir.1994) (emphasis added).

• "Certainly individual Indians or portions of tribes may choose to give up tribal status.... If all or nearly all members of a tribe chose to abandon the tribe, then, it follows, the tribe would disappear." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir. 1979).

• "By the treaty the Osages ceded and relinquished to the United States all of that reservation, and in consideration therefor the United States reserved, set

> apart, what later was known as the Kansas Reservation in which the Indians were given only the right of occupancy so long as they might choose to remain; and as already said they later chose to go elsewhere, which is a surrender and abandonment of the only right given to them by the treaty." *Shore v. Shell Petroleum Corp.*, 60 F.2d 1, 3 (10th Cir. 1932).

Id. at 171-72.

The record below contained substantial evidence that the New York Oneidas ceased to exist for a substantial period of time:

> • 1877: "[The Oneida] tribal government has ceased as to those who remained in [New York] state . . . [The designated chief's] sole authority consists in representing them in the receipt of an annuity.... They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population." *United States v. Elm*, 25 F. Cas. 1006, 1008 (N.D.N.Y. 1877).
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> • 1891: "The Oneida Indians have no reservation.... [The few Oneidas that remain] are capable and thrifty farmers, and travelers passing through the county are unable to distinguish in point of cultivation the Indian farms from those of the whites. The Oneida have no tribal relations, and are without chiefs or other officers." *1891 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior.*
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> • The 1892 Census map of New York depicts no Oneida reservation.

• 1893: "The Oneidas have no reservation. Most of that tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land in Oneida and Madison counties, near the village of Oneida. This land was divided in severalty among them and they were made citizens." *1893 Annual Report of the Commissioner of Indian Affairs to the Secretary of the Interior.*

• 1900: "The Cayuga and Oneida have no reservations. A few families of the latter reside among the whites in Oneida and Madison counties in the vicinity of the Oneida Reservation which was sold and broken up in 1846, when most of the Oneida removed to Wisconsin. What lands they have they own in fee simple, and the Oneida here are voters in the white elections. A considerable number of the Oneida live on the Onondaga Reservation." *1900 Annual Reports of the Department of the Interior.*

• 1901: "The Oneida have no reservation. Most of the tribe removed to Wisconsin in 1846. A few families are still living in Oneida and Madison counties, near the old Oneida Reservation and near the village of that name. They are citizens of New York and are entitled to vote at white elections.... At one time they owned several hundred acres of land, which they held in severalty, but they have sold most of it, and now have only a few small and scattered pieces." *1901 Annual Reports of the Department of the Interior.*

• 1906: "The New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence. About 100 of them have "squatted" on the Onondaga Reserve: so many of these have

> intermarried with the Onondaga as to preclude any probability of their removal.... About 120 of them are carried on the agency rolls as "Oneidas at Oneida" which is somewhat misleading, as in reality this roll is made up of scattered families residing in Oneida, Madison, Livingston, Genesee, Herkimer, and other counties of the State." *1906 Annual Reports of the Department of the Interior.*

The non-existence of the New York Oneidas as a tribe persisted into the mid-twentieth century. For example, the record below also showed that in 1925, an Assistant Commission of Indian Affairs indicated in a letter that, as a tribe, the Oneidas are no longer known in the State of New York. Further, in the 1942 *Handbook of Federal Indian Law*, Cohen explains that the Oneidas are known no more in the State of New York. Felix S. Cohen, *Handbook of Federal Indian Law*, 416-17 (1942 ed.). Moreover, into the 1950's, in a Committee Report from the Senate Committee on Interior and Insular Affairs, the Committee acknowledged that the "Oneida and Cayuga Indians have no reservations." S. Rep. No. 1836, at 5 (1950).

Accordingly, the Second Circuit misinterpreted the scope of the Non-Intercourse Act, and wrongly affirmed the grant of summary judgment for the Oneida Indian Nation. The Petition should be granted to correct that error.

CONCLUSION

For all of the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

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