No. 03-855

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IN THE

Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,
Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK, *et al.*,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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In addition to the parties listed on the cover of the Petition, Madison County was the defendant in a parallel action to enjoin its tax levies on Nation land, referred to as the "Related Case" by the Second Circuit and by the District Court. (Pet. App. A3, 64). The Second Circuit's judgment vacated the district court's entry of judgment on the pleadings against Madison County, and remanded for further proceedings consistent with its opinion. (*Id.* at A53).

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STATEMENT

In 1985, the Court decided that federal law protects the right of the Oneida Indian Nation of New York to possess reservation lands previously alienated by the State of New York without the consent of the federal government. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*). In 1997 and 1998, the Oneida Indian Nation of New York, through voluntary market transactions, reacquired possession of a small amount of such land in the City of Sherrill. Despite the rule forbidding state and local taxation of Indian reservation land, *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973), Sherrill levied property taxes on the Oneidas. When the Oneidas did not pay the taxes, Sherrill took title to the Oneidas' land through a foreclosure and threatened to evict the Oneidas. The Oneidas sought the protection of the United States District Court for the Northern District of New York, which enjoined Sherrill's taxation of the Oneidas' land. The Second Circuit affirmed, holding that the Oneidas' land is reservation land protected by federal law from state and local taxation. The Second Circuit's decision is not in conflict with any decision of this Court or of any Circuit. It is a correct application of the particular principles regarding the Oneidas' continuing rights that were settled in *Oneida II*. The United States, which has intervened in the pending Oneida land claim litigation, agrees that the Oneidas' land remains a reservation protected by federal treaties and denies that the reservation was disestablished. (Resp. App. 25a-41a).

A. *Oneida I* and *Oneida II*

In 1970, the Oneidas filed a test case against Madison County and Oneida County (in which Sherrill is located). The Oneidas asserted a federal common law claim for trespass on certain Oneida reservation land. The Oneidas alleged that New York had caused the alienation of that land

in violation of federal law, that some of the land was then in the Counties' possession, that the Oneidas retained federally-protected possessory rights and that the Counties were trespassers liable for rental damages for 1968 and 1969.

In *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 674 (1974) (*Oneida I*), this Court reversed a dismissal for lack of subject matter jurisdiction. The Court held that the Oneidas could assert a federal common law claim for relief from the Counties' current trespasses. The Court explained that federal treaties with the Oneidas, the Constitution's commitment of Indian relations to the federal government and the Nonintercourse Act, 25 U.S.C. § 177, all protect the Oneidas' Indian title, a right of occupancy that can be extinguished only by the federal government. 414 U.S. at 667-74; *see also Oneida II,* 470 U.S. at 235-36 (referring to Indian title also as "aboriginal rights" and "possessory rights").

On remand, the district court conducted a trial and entered judgment requiring the Counties to pay trespass damages for 1968 and 1969. *Oneida Indian Nation v. County of Oneida,* 434 F. Supp. 527 (N.D.N.Y. 1977). The court found that the Oneida Indian Nation of New York is "the direct descendant[]" of the Oneida Indian Nation and is a tribe retaining its federally-protected rights in land. *Id.* at 538. The Second Circuit affirmed. *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 539 (2d Cir. 1983).

In *Oneida II,* this Court affirmed in all relevant respects. The Court granted review because of "the importance of the Court of Appeals' decision not only for the Oneidas, but potentially for many eastern Indian land claims." 470 U.S. at 230. The Court observed that the Oneida Indian Nation of New York is "the direct descendant[]" of the Oneida Indian Nation and held that the Oneidas' possessory rights persist in land alienated without the requisite federal

approval. 470 U.S. at 230-34. The Court acknowledged "the potential consequences of its decision." 470 U.S. at 253.

In the wake of *Oneida II*, final judgment awarding trespass damages was entered in the test case. Litigation remains pending regarding the rest of the Oneida land that New York caused to be illegally alienated. *Oneida Indian Nation v. State of New York,* No. 74-CV-187 (N.D.N.Y.). The United States has intervened as plaintiff to sue New York for all damages owed to the Oneidas. In its reply to New York's counterclaim for a declaration that the Oneidas' reservation was disestablished, "the United States takes the position that the reservation has not been disestablished. * * * No federal statute or treaty disestablished or diminished the boundaries of the Oneida Reservation as acknowledged by the 1794 Treaty of Canandaigua and by other federal treaties." (Resp. App. 26a).

B. Federal Protection of Oneida Lands

Because the Oneidas fought beside the United States in the American Revolution, *Oneida II*, 470 U.S. at 231, Congress passed a resolution in 1783 "to reassure [the Oneidas] of the friendship of the United States and that they may rely on that the lands which they claim as their inheritance will be reserved for their sole use and benefit until they may think it for their own advantage to dispose of the same." 25 J. Cont'l. Cong. 681, 687 (Oct. 15, 1783).

In 1784, when the Oneidas occupied about six million acres of land, *Oneida II*, 470 U.S. at 230, the United States made a treaty that "secured [the Oneidas] in the possession of the lands on which they are settled." Treaty with the Six Nations [Ft. Stanwix], Art. II, 7 Stat. 15 (Oct. 22, 1784); *Oneida II,* 470 U.S. at 231.

In 1785 and 1788, New York purchased more than five million acres of the Oneidas' lands. "The Oneidas

retained a reservation of about 300,000 acres" in the 1788 state treaty, *Oneida II*, 470 U.S. at 231, to "hold to themselves and their posterity forever for their own use and cultivation" (Pet. App. A137). The 1788 state treaty described the boundaries of the Oneida reservation, Treaty with the Oneida Indians [Ft. Schuyler], (Pet. App. A136-38), which include the land at issue in this case.

In 1789, the United States confirmed the Oneidas in the possession of their lands – the 300,000 acres reserved in 1788. Treaty with the Six Nations [Ft. Harmar], Art. 3, 7 Stat. 33 (Jan. 9, 1789); 470 U.S. at 231 & n.1.

In 1794, the United States entered the Treaty with the Six Nations [Canandaigua], 7 Stat. 44 (Nov. 11, 1794); Pet. App. A141-46; *Oneida II*, 470 U.S. at 231. It protects the Oneidas' "reservation" and "property:"

> The United States acknowledge the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New-York, and called their reservations, to be their property; and the United States will never claim the same nor disturb them * * * 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.

(Pet. App. A141). Articles VI and VII also provided for a superintendent to resolve disputes and to provide an annuity, (*id.* at A143-44), which the United States continues to deliver to the Oneida Indian Nation of New York. (CA JA 1506-18).

In addition to treaty protection of the Oneidas' lands, the First Congress enacted the Nonintercourse Act in 1790, forbidding purchases of Indian land "except where such conveyances were entered pursuant to the treaty power of the

United States." *Oneida II*, 470 U.S. at 231-32 & n.2. Congress enacted a "stronger, more detailed version of the Act" in 1793 and reenacted substantially identical legislation in 1796, 1799, 1802 and 1834. *Oneida II*, 470 U.S. at 232 & 245-46; *see Oneida I*, 414 U.S. at 668 n.4. Every version of the Act has provided for the appointment of federal commissioners to superintend transactions in land covered by the Act. *See* 25 U.S.C. § 177 (current version).

C. State Alienation of Oneida Lands

"Despite Congress' clear policy that no person or entity should purchase Indian land without the acquiescence of the federal government, in 1795 the State of New York began negotiations to buy the remainder of the Oneidas' land." *Oneida II*, 470 U.S. at 232. No one argues that any alienation of the Oneidas' reserved land complied with any of the requirements of the Nonintercourse Act, except perhaps sales in 1798 and 1802 involving a federal commissioner. 470 U.S. at 246-47 & nn.19-20 (discussing validity of 1798 and 1802 treaties); *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. at 535 (N.D.N.Y. 1977) (from 1795 to 1846, only two sales involved federal commissioners).

The City of Sherrill does not claim that the alienation of the lands at issue here complied with the Nonintercourse Act. In 1805, New York, without federal approval, concluded a treaty that provided for the division of Oneida lands. Then, in 1807, New York (again without federal approval) enacted a law giving one Oneida member a fee patent, enabling him to sell to a non-Indian land speculator. (CA JA 407-15).

D. 1838 Treaty of Buffalo Creek

In 1838, a United States Commissioner negotiated the Treaty of Buffalo Creek with "the New York Indians," which included the Oneidas and several other tribes. Treaty with the New York Indians [Buffalo Creek], 7 Stat. 550 (1838) (Pet. App. A147-78). At the time, the Oneidas had possession of about 5,000 acres of land. (Pet. App. A13). The lands in Sherrill, like most of the Oneidas' lands, had been transferred from Oneida possession more than three decades earlier. The Treaty of Buffalo Creek did not refer to any of the prior transfers of Oneida land.

Article 1 of the treaty ceded to the United States most of the land the New York Indians previously had acquired in Wisconsin with the federal government's assistance. (Pet. App. A149). Article 2 set apart land in Kansas as a permanent home for the New York Indians "[in] consideration of [the] cession and relinquishment" of Wisconsin land in Article 1. (*Id.*); *New York Indians v. United States*, 170 U.S. 1, 19 (1898) (*New York Indians II*). Article 3 provided for the forfeiture of the Kansas land of such tribes "as do not accept or agree to remove" there "within five years or such other time as the President may, from time to time, appoint." (*Id.* at A150). As to New York land, the treaty ceded Seneca land described in Article 10 (*id.* at A153-54) and Tuscarora land described in Article 14. (*Id.* at A155-56). The treaty did not forfeit or cede Oneida land in New York. Article 13 conditioned the Oneidas' removal on a future agreement to sell land to New York. They "agree to remove to their new homes in the Indian territory 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.* at A155).

The Senate amended the treaty and instructed the federal treaty commissioner to return to each of the signatory

tribes to gain assent to the altered treaty after "fully and fairly explaining" it. *New York Indians II*, 170 U.S. at 21; Sen. Exec. J. 130-31 (June 11, 1838). Commissioner Ransom Gillet then met with the Oneidas on August 9, 1838 (Pet. App. A173) (treaty recites that Gillet "fully and fairly" explained it to the Oneidas). To dispel the Oneidas' fears that "they might be compelled to remove, even without selling their land to the State," S. Rep. Confidential B, 26th Cong., 1st Sess. 29-30 (1840) (Resp. App. 5a-9a), Gillet provided the Oneidas with a formally attested writing that later went to the Senate with the treaty.

> In order to prevent all mistakes and to counteract all misapprehensions concerning the purport of the treaty * * * with amendments that have been this day assented to by * * * the Oneidas at Oneida Castle[,] I hereby most solemnly assure them that the treaty does not and is *not intended to compel the Oneidas to remove from their reservation in the State of New York* to the west of the State of Missouri or elsewhere unless they shall hereafter voluntarily sell their lands where they reside & agree to do so. They can if they choose to do so remain where they are forever. When they wish to remove they can sell their lands to the Governor of the State of New York & then emigrate. But they *will not be compelled to remove*.

(Resp. App. 10a) (emphasis added). The Oneidas assented to the treaty as explained (Pet. App. A173-174), and the Senate approved the treaty by a majority vote only. (CA JA 1579). President van Buren nevertheless proclaimed the amended treaty. (CA JA 1582).

The President never specified a deadline or "made a formal tender of performance" of the promise to assist the

New York Indians in moving to Kansas, and Congress never appropriated the promised funds to pay for removal. *New York Indians II*, 170 U.S. at 28-29. The United States discouraged an attempt by some New York Indians to remove. (CA JA 1343). A federal commissioner also assured the New York Indians in 1846 that they did not have to remove. (CA JA 1327). By 1859, the United States restored the Kansas land to the public domain, making removal impossible. *New York Indians II*, 170 U.S. at 31 & n.17. The New York Indians later recovered for the failure of the Kansas-Wisconsin exchange. *United States v. New York Indians*, 173 U.S. 464 (1899).

E. *Boylan* Litigation

In 1906, after foreclosure on a mortgage, an action to partition thirty-two acres of the remaining Oneida land and to evict the Oneidas commenced in state court. *United States v. Boylan*, 256 F. 468, 473-74 (N.D.N.Y. 1919). New York weighed in on the side of the Oneidas. The Attorney General reported to the court, at the request of Governor Charles Evans Hughes, that the Oneidas remained in possession of the land and that "[t]he present generation constitute, in fact, a band, with chiefs or head men, who speak for them, and claim tribal rights." (Resp. App. 15a). The Attorney General further reported that, "[n]o tax has ever been laid on the thirty-two acres of land under any state authority. No record has been found of any authority for an entry to be made upon this land, in hostility to the Indian possession. The Attorney-General has been unable to discover that there is anyone who disputes the matter above referred to, by way of facts." (*Id.* at 16a). Having received this report, the court ruled for the Oneidas, but an appellate court reversed on procedural grounds and ordered a partition, with the result that the Sheriff forcibly evicted the Oneidas. *Boylan v. George*, 117 N.Y.S. 573 (N.Y. App. Div.); *see United States v. Boylan*, 256 F. at 475-76.

In 1915, the United States filed suit as trustee for the Oneidas, seeking recovery of the Oneidas' land. The United States asserted that the Oneidas remained "dependents and wards of the United States" entitled to possession of their land. (Complaint, reproduced in Appendix, *Boylan v. United States*, at 4a, No. 458 (O.T. 1920)). The district court heard testimony concerning the tribal status of the Oneidas and their rights in Oneida land. (*Id.* at 13a- 63). The court held that "the Oneida reservation still existed," that the Oneidas' Indian title in the thirty-two acres had not been eliminated and that such lands were held by that title and "were not lands conveyed to them, or set apart for them, by the state of New York from its own possessions." 256 F. at 481. The court further held that the Oneidas continued their tribal existence and that they must be restored to possession. 256 F. at 494-96.

The Second Circuit affirmed, holding that the "Indians of the tribe of the Oneidas still maintain and occupy toward each other the relation of guardian and ward" and that the State of New York could not "extinguish the right of occupancy which belongs to the Indians." *United States v. Boylan*, 265 F. 165, 174 (2d Cir. 1920), *dismissed for want of jurisdiction*, 257 U.S. 614 (1921) (untimely appeal). The Oneidas then regained possession of the land, which they retain today. (Pet. App. A43).

F. Proceedings Below

The Oneidas reestablished possession of the land at issue here through voluntary market transactions in 1997 and 1998. After Sherrill foreclosed for non-payment of property taxes and threatened eviction, (CA JA 36-37), the Oneidas filed suit in federal court. The court entered judgment in favor of the Oneidas, enjoining Sherrill's property tax enforcement. (Pet. App. A61-133).

The Second Circuit affirmed. (Pet. App. A1-60). The court concluded that the Oneida land was part of the reservation protected in the federal Treaty of Canandaigua and is therefore Indian country under 18 U.S.C. § 1151. (*Id.* at A24-25 & n.13). The court held that the reservation land was a "carve-out" from the cession in the 1788 state Treaty of Ft. Schuyler "represent[ing] that portion of the Indian's aboriginal homeland that had not been conveyed to New York and thus never became state land." (*Id.* at n.13). The court further held that the 1794 federal Treaty of Canandaigua set aside the land for the Oneidas, that the Oneidas retained a tribal right of possession never extinguished by the United States and that, with reacquisition of the land, the Oneidas continue to hold it by that right of possession. (*Id.* at A23-28).

The Second Circuit also held that the Oneida reservation in New York was not disestablished by the Treaty of Buffalo Creek (*id.* at A33-41), concluding that there was not "substantial and compelling" evidence of an intent to disestablish. (*Id.* at A34). The court explained that the treaty did not effect or require any cession of Oneida land in New York. As to the Oneidas, "removal was conditioned on speculative future arrangements between the Indians and a third party." (*Id.* at A35). The court noted that Article 3 contemplated that some of the New York tribes might not accept land in Kansas, for which they would forfeit the interest in Kansas land, not New York land. (*Id.* at A36). The court also recognized that Commissioner Ransom Gillet's unequivocal assurance to the Oneidas that the treaty did *not* mandate removal from New York was relevant to the Oneidas' understanding of the treaty. *Id.* at A35-36 & n.18 (citing *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999)). The court further explained that the damage award received by the Oneidas for the government's breach of its promise to exchange Kansas land for land in Wisconsin (*New York Indians II*, 170 U.S. at 2),

did not imply disestablishment of the New York reservation. (*Id.* at A40). The Second Circuit observed that the dispersal of many New York Oneidas could not show a disestablishment by the 1838 treaty because most of the dispersal was due to illegal state transactions occurring long before the Treaty of Buffalo Creek. (*Id.* at A39-40).

Finally, the Second Circuit rejected Sherrill's claim that the entire reservation was stripped of Indian country status by a lapse in tribal continuity. The court noted that this Court recognized the Indian country status of Choctaw land even though the tribe was "merely a remnant of a larger group of Indians, long ago removed * * * [and] federal supervision over them had not been continuous." (Pet. App. A42) (quoting *United States v. John*, 437 U.S. 634, 653 (1978)). Alternatively, the court concluded that the record showed continuous tribal existence. (Pet. App. A43-44).

REASONS FOR DENYING THE PETITION

The Second Circuit's decision does not conflict with a decision of this Court or of any Circuit. To the contrary, the Second Circuit's decision accords with *Oneida II*, which established that the Constitution, federal statutes and federal treaties protected the Oneidas and their reservation and that the United States never terminated that protection. Although Sherrill alleges a conflict with *Alaska v. Native Village of Venetie*, 522 U.S. 520 (1998), that case concerned a question completely irrelevant here – whether a statutorily terminated reservation could become Indian country. The Second Circuit correctly explained and applied the *Venetie* decision, as well as the other Circuit decisions mentioned by Sherrill regarding tribal continuity. (Pet. App. A23-25, A42-45).

Sherrill really is not challenging the legal principles applied by the Second Circuit, but the result, which is the logical consequence of *Oneida II*. In *Oneida II*, the Court

specifically observed that its decision had important consequences. 470 U.S. at 253. One is that the federally-protected possessory rights entitling the Oneidas to trespass damages when the Oneidas do not have possession of their lands also entitle the Oneidas to federal protection against state and local taxation of tribal lands in Oneida possession. Local governments liable to the Oneidas as trespassers on Oneida land cannot reasonably claim the right to tax the land when it is in the hands of the Oneidas.

The Second Circuit's decision approves the least disruptive way to give meaning to rights recognized in *Oneida II*. The rationale for denying ejectment as a remedy has been that monetary damages are an adequate remedy to provide a "homeland" through future purchases. *Cayuga Indian Nation v. Cuomo*, 1999 WL 509442, at 23-24 (N.D.N.Y. July 1, 1999), *appeal pending*, No. 01-7795 (2d Cir.); *cf. Oneida II*, 470 U.S. at 253 n.27 (equitable considerations may limit relief for trespass on tribal possessory right); *South Carolina v. Catawba Indian Tribe*, 476 U.S. 498, 518 n.5 (1986) (Blackmun, J., dissenting, joined by Marshall and O'Connor, JJ.) (right to be restored to immediate possession may be limited by equitable considerations). If the Oneidas retain tribal possessory rights but may not enjoy them after acquiring possession of land in market transactions, then ejectment would be the only land claim remedy that could effectuate the Oneidas' rights.

A. Federal Laws and Treaties Protected the Oneidas' Land as a Reservation Beginning in the 1780s.

Contending that a 1788 state treaty precluded federal protection of the Oneidas' land, Sherrill relies on *Alaska v. Native Village of Venetie*, to argue that the Oneidas' land was not within a federal Indian reservation when it was alienated in 1805-07.

Venetie says nothing to undermine the Indian country status of Oneida land. In *Venetie*, the Court addressed the status of land within a reservation that had been explicitly disestablished by federal statute, holding that Indian country status could not be revived by tribal purchase of lands within the former reservation. The Native Village of Venetie did not – in the face of express statutory termination – even claim "reservation" protection under 18 U.S.C. § 1151(a), arguing instead that its presence made the land a "dependent Indian community" under 18 U.S.C. § 1151(b).[1] The Court rejected the argument as inconsistent with the statute disestablishing the reservation. This case involves no such facts or legal issue. Congress never terminated the Oneida reservation.[2]

The Oneidas' land fits the statutory definition of Indian country, which includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government." 18 U.S.C. § 1151(a); *see Donnelly v. United States*, 228 U.S. 243 (1913); Felix Cohen's Handbook of Federal Indian Law, 34-35 (Rennard Strickland ed., 1982) (discussing various forms of Indian reservations). The Oneida reservation was acknowledged by a Congressional resolution and by three federal treaties. 25 J. Cont. Cong.

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[1] Section 1151 classifies as Indian country "(a) all land within the limits of any Indian reservation under the jurisdiction of the United States Government * * * (b) all dependent Indian communities * * * and (c) all Indian allotments, the titles to which have not been extinguished, including rights-of-way running through the same." The statute is reproduced at Pet. App. A179.

[2] Sherrill refers to *Blunk v. Arizona Dep't of Transp.*, 177 F.3d 879 (9th Cir. 1999), and *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073 (10th Cir. 1993), (Pet. 17), but does not actually say they create a Circuit split, which they do not. Neither decision involved land within a federally-protected reservation.

681, 687 (Oct. 15, 1783) (Oneida lands "reserved for their sole use and benefit"); Treaty with the Six Nations [Ft. Stanwix], 7 Stat. 15 (Oct. 22, 1784) (Oneidas "secured in the possession of the lands on which they are settled"); Treaty with the Six Nations [Ft. Harmar], 7 Stat. 33 (Jan. 9, 1789) (Oneidas "are also again secured and confirmed in the possession of their . . . lands"); Treaty with the Six Nations [Canandaigua], 7 Stat. 44 (Nov. 11, 1794) (acknowledging "what lands belong to the Oneidas" and assuring their "free use and enjoyment" as their "reservation[]" and "property").

Sherrill now argues that the federal government was powerless to recognize Oneida land as Indian country, citing a state treaty, the 1788 Treaty of Ft. Schuyler. Sherrill claims it extinguished the Oneidas' title and left nothing subject to the protection of federal law. Sherrill's argument is a sharp detour from the central argument it made below, which was that *Venetie* requires a fresh federal set aside of land after the Oneidas regain actual possession. Moreover, Sherrill first cited the 1788 treaty in a post-argument letter to the Second Circuit, which undermines claims that the treaty clearly extinguishes the Oneidas' rights. If that were clear, the 1788 treaty argument would not have been added as an afterthought. The treaty was not obscure. This Court referred to it in *Oneida II*, 470 U.S. at 231.

Federal law would protect Oneida land, which is a reservation under 18 U.S.C. § 1151 even if Sherrill were correct that the 1788 state treaty created an Oneida reservation. No matter what New York did in 1788, the United States asserted its jurisdiction over the Oneidas' lands and protected them as the Oneida reservation. Following three assertions of such jurisdiction and protection in the 1783 Congressional resolution, the 1784 Treaty of Ft. Stanwix and the 1789 Treaty of Ft. Harmar, the 1794 Treaty of Canandaigua explicitly acknowledged and protected the lands reserved in the 1788 treaty. That protection was not less than

the protection given in the same treaty to the Senecas' land, a protection recognized in *New York Indians*, 72 U.S. 761 (1866) (*New York Indians I*), to prohibit state property taxes.[3]

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[3]The County amici (Br. at 11) claim that the Treaty of Canandaigua should not be read to protect Oneida land in deference to state property rights assertedly created in the 1788 state treaty, citing *United States v. Minnesota*, 270 U.S. 181 (1926). That case involved the effect of a later Indian treaty on state land, requiring a clear statement before the Indian treaty would be construed to take state property. There is no state property interest at issue here. Under the Constitution, a state did not have a property right to tax land occupied by an Indian tribe, and New York never claimed such a right. See N.Y. Indian Law § 6. Nor did it have any authority to govern or regulate an Indian tribe, which the Constitution made an exclusively federal power. *Oneida II*, 470 U.S. at 234 ("With the adoption of the Constitution, Indian relations became the exclusive province of federal law.") Construing the Treaty of Canandaigua to prohibit state taxation of Oneida land does not affect a state property interest in the reserved land, if there was one. For the same reason, it is irrelevant that Attorney General Wirt concluded that the Treaty of Canandaigua did not "divest[]" New York of its title to "any of the lands then occupied by the Six Nations," in an 1819 opinion dealing with sales of timber on Seneca land. *Minnesota* also has absolutely no bearing on whether the 1788 state treaty should be construed to reserve land to the Oneidas or cede it with a grant of occupancy back to the Oneidas. *Minnesota* concerns the effect of a federal treaty on state property rights, not the effect of a state treaty on the rights of an Indian tribe.

The County amici also raise arguments about the Nonintercourse Act and the Tenth Amendment that were not raised or decided below and are not fairly included in the questions presented. (County Br. 14-20). Those arguments are without merit and should be disregarded.

Sherrill acknowledges that *New York Indians I* recognized the tax immunity of Seneca land referred to in the Treaty of Canandaigua. (Pet. 16). Sherrill therefore contends that Article II of the treaty offered less protection to Oneida land than Article III offered to Seneca land. Sherrill offers no reason to think that the treaty was meant to give less protection to the Oneidas' lands, which already were protected by two prior federal treaties. Article II and Article III both use the term "acknowledge" to refer to the "property" of the Oneidas and the Senecas. Article IV then confirms the equivalence of federal protection of Oneida and Seneca land, saying that "[t]he United States ha[d] thus described and acknowledged what lands belong to the Oneidas * * * and Senekas." (Pet. App. A141-43).

State protection does not preclude federal protection. Even reservations established by sovereigns other than the United States come under the protection of federal law once the reservation is part of the United States. *United States v. Candeleria*, 271 U.S 432, 442 (1926) (United States could sue to challenge alienation of Pueblo Indian land previously set aside under Mexican law and held in fee simple by tribe); Felix Cohen's Handbook of Federal Indian Law, 34-35 n.66 (1982 ed.) (term "reservation" describes "federally-protected Indian tribal lands without any particular dependence on source").

No matter how one characterizes "title" under the 1788 treaty, the treaty guarantees that the Oneidas "shall hold to themselves and their posterity forever for their own use and cultivation," the lands referred to as reserved. (Pet. App. A137). That interest always has been protected from alienation by the Nonintercourse Act. 25 U.S.C. § 177 (prohibiting conveyance "of lands, or of any title or claim thereto from any Indian nation"). Thus, in 1795, Secretary of War Timothy Pickering sent to the New York Governor the opinion of Attorney General William Bradford stating that

lands held by the Oneidas after the 1788 state treaty were restricted by federal law and that New York could not cause their alienation except "by a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress." (Resp. App. 1a-4a). The United States also asserted its jurisdiction when it sued in *Boylan*, 256 F. at 477 ("the United States does contend that it had jurisdiction over these Indians"), and in the current land claim litigation, (Resp. App. 31a).[4]

In any event, Sherrill's premise regarding the meaning of the 1788 state treaty is incorrect. The Second Circuit correctly held that the Oneidas reserved title to the reservation and were not simply given state land to live on. (Pet. App. A24). In *Oneida II*, the Court observed that, through the 1788 treaty, the State "purchased the vast majority of the Oneidas' land. The Oneidas retained a reservation of about 300,000 acres." 470 U.S. at 231. The court then held that the Oneidas' reserved Indian title remains intact and subject to the continuing protection of federal law. Thus, Sherrill's interpretation of the 1788 treaty and its effect on the Oneidas' federal rights is at odds with this Court's decision in *Oneida II*.

The Second Circuit's reading of the 1788 treaty is fully consistent with, indeed compelled by, *United States v.*

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[4]Sherrill asserts that the Oneidas' land today is "free from any and all federal government restrictions." (Pet. 17). The point makes no sense in light of *Oneida II*, which held that the Oneidas retained federally-protected rights in their lands in 1968 and 1969 and affirmed a judgment awarding trespass damages for those years. If the Oneidas had possession in 1968 and 1969 of the lands at issue in *Oneida II*, then the same principles of federal law that protected the Oneidas' title and made the Counties trespassers would have restricted alienation of the land without federal consent.

Winans, 198 U.S. 371, 381 (1905) (tribal fishing rights were reserved, not granted, in treaty that "ceded" "all right, title and interest in and to the lands" and then "secured" fishing rights), and *Worcester v. Georgia*, 31 U.S. 515, 552-53 (1832) (treaty must be read to concern the "dividing line" between tribal lands and ceded lands, such that treaty term "allotting" land to tribe did not grant the land, which must be understood as reserved by tribe); *id.* at 582 (M'Lean, J., concurring), *see Oneida Indian Nation v. New York*, 194 F. Supp.2d 104, 140 (N.D.N.Y. 2002) ("simply makes no sense" to read 1788 treaty as ceding reserved lands); *Boylan*, 256 F at 481 (Oneida lands "not lands conveyed to them, or set apart for them, by the state of New York from its own possessions").[5]

The Second Circuit's reading is also consistent with New York's own understanding. There is no evidence that New York ever objected to the making of the Treaty of Canandaigua or to its guarantee that the Oneida reservation was the Oneidas' "property." When the State later sought to subdivide the Oneidas' land after 1843, it called the

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[5]The County amici refer (Br. at 10) to arbitrators' interpretation of a similar Cayuga treaty. British and American Claims Arbitration Tribunal, 20 Am. J. Int'l Law 574, 590 (1926). The arbitrators decided that the Cayugas did not reserve land but that New York set up a Cayuga reservation after Cayuga cession. The arbitrators explained that treaties are interpreted as unsophisticated Indians understand them and thus that the literal meaning of the cession language should be given effect. This is inconsistent with the decisions in *Winans* and *Worcester*, which found tribal understanding regarding reservation in the context and function, not the literal words, of treaties drafted by non-Indians. Further, the premise of the arbitrators' decision is undermined by *Oneida II*, in that the arbitrators decided that state law controlled sale of tribal land after the Constitution.

remaining Oneida land "the residue of the said reservation *not now nor heretofore ceded to the people of the said state*." *United States v. Boylan*, 265 F. 165, 168 (2d Cir. 1920) (quoting 1842 state treaty) (emphasis added); *see* New York Assembly, Report of Special Committee to Investigate the Indian Problem of the State of New York, at 8 (Feb. 1, 1889) ("In 1788, September 12, the Oneidas by treaty ceded to the State all their lands excepting certain reservations in Oneida and Madison counties."). The references of the County amici (Br. at 9-10) to Chancellor Kent's decision in *Goodell v. Jackson*, 20 Johns. 693, 729 (N.Y. Sup. Ct. 1823), do not undermine New York's understanding of the 1788 treaty, as there was no issue before the court in that litigation concerning the Oneidas' tribal rights in their reservation land.[6]

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[6]Sherrill also suggests absence of federal superintendence. (Pet. 16-19). The 1794 Treaty of Canandaigua provided for a federal superintendent. Federal superintendence also flows from the treaty promises of the United States to protect Oneida lands. It is evident in the actions of the United States on the Oneidas' behalf in *Boylan* and in the pending Oneida land claim litigation. Sherrill recognized federal superintendence when it asked for 25 U.S.C. § 81 approval of a utility easement on the Oneidas' land in Sherrill. (CA JA 460-63 & 1527). Nothing in the Second Circuit's opinion concerning federal superintendence is in conflict with *United States v. Roberts*, 185 F.3d 1125 (10th Cir. 1999), or *HRI, Inc. v. EPA*, 198 F.3d 1224 (10th Cir. 2000), which addressed only the existence of an "informal reservation" in the absence of a treaty.

B. The 1838 Treaty of Buffalo Creek Did Not Disestablish the Oneida Reservation.

Sherrill asserts that Treaty of Buffalo Creek clearly disestablished the Oneida reservation. That clarity escaped Sherrill when it moved for summary judgment in the district court, writing then that "Congress itself was not responsible for revoking OIN's alleged reservation." (CA JA 284).

Sherrill proposes that the Treaty of Buffalo Creek should be interpreted to be an "obligatory removal" treaty (Pet. 6), which, although it does not refer to the land at issue here, must be read to strip the Oneidas of their rights in that land. The assurances of the United States to the Oneidas, however, demonstrate conclusively that the treaty did not require Oneida removal from New York, and that same conclusion also is compelled by the terms of the treaty.

The Oneidas assented after Commissioner Ransom Gillet explained the treaty's meaning in a formally attested document, and that explanation accompanied the treaty when it was submitted to the Senate. (Pet. App. A35-36 n.18). Gillet wrote: "[T]he treaty does not and is not intended to compel the Oneidas to remove from their reservation in the State of New York... unless they shall hereafter voluntarily sell their lands where they reside & agree to do so... [t]hey will not be compelled to sell or remove." (Resp. App. 10a). This Court interprets "Indian treaties as the Indians themselves would have understood them." *Minnesota v. Mille Lacs Band*, 526 U.S. 172, 196 (1999). The Indians would have understood a treaty as it was explained to them by a federal commissioner. *Id.* at 197-199.

The terms of the treaty were consistent with Gillet's promises. The treaty (Pet. App. 147-48) contained no cession

of Oneida lands in New York.[7] Article 1 ceded Wisconsin lands of the New York Indians, and Article 2, "[i]n consideration of the above cession and relinquishment," provided for the United States to remove the New York Indians to Kansas and to have "a permanent home" there. Article 3 then provided for forfeiture of Kansas lands for any New York Indians who did not remove to Kansas, implying that removal was not obligatory and that there would be no forfeiture of New York lands. Then, in Article 13, which specifically addressed the Oneidas, the treaty conditioned their removal on "mak[ing] satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." Nothing in the treaty obligated them to make those arrangements. It is clear from the record in *Boylan* that the Oneidas did not sell all of their land and remove from New York. Instead, they did what Commissioner Ransom Gillet told them they could do: keep their land and stay on their New York reservation.

Because the treaty does not refer to the land in issue here, Sherrill is necessarily asking that the Treaty of Buffalo Creek be construed as ratifying all pre-1838 sales of Oneida land. That argument founders on *Oneida II*'s rejection of just such a ratification argument in the absence of plain and unambiguous ratifying language. 470 U.S. at 246-48 & n.19 (references to earlier sales not a ratification of them); *see Minnesota v. Mille Lacs Band*, 526 U.S. at 200-202 (rejecting argument that subsequent treaty and statute extinguished prior treaty rights not mentioned); *see also Oneida II*, 470 U.S. at 269 n.24 (Stevens, J., dissenting) (referring to Treaty of Buffalo Creek); *Oneida Indian Nation v. County of Oneida*,

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[7] Sherrill asserts that the Second Circuit conditioned reservation disestablishment on the presence of cession language. (Pet. 21). The Second Circuit actually stated that explicit cession language may be relevant but is not required. (Pet. App. A31).

434 F. Supp. at 539 (Treaty of Buffalo Creek did not ratify earlier illegal sales); *cf. Solem v. Bartlett*, 465 U.S at 472-75 (statute directing the Secretary of the Interior "to sell and dispose of" tribal land not explicit enough to eliminate reservation status).

Finally, disestablishment of the Oneida reservation in New York is not reflected in *New York Indians II*, which held the United States liable for the value of the Kansas lands promised to the New York Indians. The Second Circuit correctly explained that, in *New York Indians II*, the Court imposed liability because the New York Indians ceded *Wisconsin* lands to the United States in exchange for Kansas lands. That deal could not be undone; the ceded Wisconsin lands and the Kansas lands had been sold to private parties. The Court noted that the United States retained the proceeds from sale of that land, in Wisconsin and Kansas, and thus held the United States liable to pay the New York Indians the value of what had been promised to them in Kansas. The decision does not suggest that the damage award alienated New York lands. *See Oneida II*, 470 U.S. at 253 (no basis to hold that Oneidas' claims "have been satisfied").

C. The Oneidas' Lands Never Lost Reservation Status Through A Cessation of Tribal Existence.

Review of Sherrill's final question presented should be denied because, contrary to Sherrill's suggestion, the Second Circuit's decision regarding continuous tribal existence does not conflict with *Mashpee Tribe v. Secretary of the Interior*, 820 F.2d 480 (1st Cir. 1987)(*Mashpee II*) (Breyer, J.), and because resolution of the question would not affect the judgment, the Second Circuit having concluded

that, "even if continuous tribal existence were required, the record before us shows it." (Pet. App. A44).[8]

The Second Circuit cited with approval both of the First Circuit's rulings concerning the land claim of the Mashpee Tribe. (Pet. App. A43-44). *Mashpee II* involved tribes that never were federally recognized and that sought recognition on the basis of scattered documents that did not bind the federal government. 820 F.2d at 484. The issue was not continuity. It was whether the plaintiffs "1) were tribes at the time the land was alienated and 2) remain tribes at the time of suit." 820 F.2d at 482. There is no question that the Oneidas meet that test.

The Second Circuit was correct that, because "the trust relationship [defined by the Oneidas' treaties and the Nonintercourse Act] has not been terminated or abandoned," (Pet. App. A43), the Oneidas' land retains reservation status when in the Nation's possession. Sherrill cites no authority for its proposal (Pet. 24) that a federally-recognized tribe must demonstrate its continuous existence in order to assert a claim to its reservation land. "Once a tribe has been recognized, the removal of that recognition, like reservation disestablishment, is a question for other branches of government, not the courts." (Pet. App. A44) (citing *United States v. Holliday*, 70 U.S. 407, 419 (1865)).

The record shows that federal recognition of the New York Oneidas was not terminated. The federal government continued to honor its 1794 treaty obligation to deliver annuities to New York to the Oneidas throughout the period

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[8]Sherrill also asserts a conflict with *Golden Hill Paugussett Tribe v. Weicker*, 39 F.3d 51 (2d Cir. 1994). (Pet. 24). There is no conflict because the Second Circuit applied *Golden Hill*. (Pet. App. A43). Regardless, there is no Circuit split.

when Sherrill would say the Oneidas ceased to exist. *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. at 538 (CA JA 1506-18). The annuities are an uninterrupted recognition of the Oneidas as a party to treaties that protect the Oneida reservation, which is confirmed by the record in the test case litigation. See CA JA 1520 (BIA affidavit stating that federal government recognizes Oneida Indian Nation of New York as "one of the Indian tribes which entered into and signed" three treaties with the United States protecting Oneida land and "as the Indian tribe which remained on the New York Oneida Reservation").

Congress has delegated authority to the Secretary of the Interior to acknowledge tribes and to publish lists of acknowledged tribes. The Nation was on the first list in 1979, 44 Fed. Reg. 7325, 7326 (Jan. 31, 1979), and is on the current list, 68 Fed. Reg. 68180 (Dec. 5, 2003). "The Department's position is, and has always been, that the essential requirement for acknowledgment is continuity of tribal existence rather than previous acknowledgment." 59 Fed. Reg. 9280 (Feb. 25, 1994). Department of Interior acknowledgement "establishes tribal status *for all purposes.*" H.R. Rep., 103-781 at 2, reprinted in 1994 U.S.C.C.A.N. 3678, 3679 (emphasis added).

In relying on excerpts from reports of Indian agents, Sherrill is arguing for an unprecedented kind of de facto termination. It is, however, up to Congress alone to terminate a reservation once established. *Solem v. Bartlett*, 465 U.S. at 471; *United States v. Celestine*, 215 U.S. 278, 285 (1909). There has been no termination of the Oneida reservation or of the Nation. *See e.g., South Carolina v. Catawba Indian Tribe*, 476 U.S. 498 (1986) (statutory termination of Catawba tribe). In *United States v. John*, 437 U.S. at 653, this Court concluded that federal protection of the Mississippi Choctaws survived removal of most of the tribe to Oklahoma and a lapse in federal supervision. As here, Congress did not strip

the Mississippi Choctaws of federal protection. *Cass County v. Leech Lake Band*, 524 U.S. 103 (1998), which Sherrill cites for the rule that Indian land is taxable once federal protection is removed, (Pet. 25), only underscores the importance of congressional action. In *Cass County*, Congress made reservation land taxable by an allotment statute.

As to the Oneidas in particular, Sherrill's contention that the Oneida reservation was stripped of Nonintercourse Act protection by a lapse in tribal existence is also inconsistent with the result in *Oneida II*. This Court referred to the Nation as a "direct descendant" of the Oneida Nation that entered into treaties with the United States. 470 U.S. at 230. The Court's decision followed lower court litigation in which the Oneidas satisfied the *Mashpee* standards that Sherrill invokes here. *Oneida Indian Nation v. County of Oneida*, 434 F. Supp. at 537-38.

Sherrill assembles quotations referring to tribal abandonment, (Pet. 25-27), but carefully avoids claiming that it has evidence of abandonment by the New York Oneidas. Abandonment means that "[t]he Indians had to 'intend[ ] to give up their tribal organization' and abandon their tribal rights and status voluntarily." *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 587 (1st Cir. 1979) (*Mashpee I*). The Annual Reports of the Commissioner of Indian Affairs throughout this period show that the Oneidas did not abandon the reservation as a tribe. They continued to occupy a 350-acre "Oneida reserve" in substantial numbers. (CA JA 1391-1514). Each Annual Report contains a name-by-name census, or roll, of the 150 or so Oneida members living on the Oneida reservation. (*Id.*). The 1890 Annual Report referred to "the Oneida Reserve, recognized by the treaty of 1794 with the Six Nations (7 Stat., p. 45), consist[ing] of detached farms held in severalty by heads of families and contain[ing] in all about 350 acres." (CA JA 1226); *see also* (CA JA 1229). Even the decision in *United States v. Elm*, 25 F. Cas. 1006, 1008

(N.D.N.Y. 1877), acknowledges that the Oneidas continued to appoint chiefs to receive federal annuities.

No court today can improve on the assessment of Oneida tribal existence made in *Boylan*, which was decided by a federal judge in New York based on a record that included testimony from witnesses, among them the Oneidas' chief. Indeed, in 1907, the State of New York, in its filing in the *Boylan* proceedings, reported that the Attorney General "was unable to discover that there is anyone who disputes" that the Oneidas had continued to possess the 32 acre tract as a band of tribal Indians led by chiefs (and were never subject to state taxes). (Resp. App. 15a-16a). The United States also formally alleged that the Oneidas remained wards and dependents of the federal government and were entitled to invoke the protection of federal laws and treaties against the state eviction order. The court found that the Oneidas remained a tribe, continuously occupying a part of their reservation. *United States v. Boylan*, 256 F. 468, 477-78, 481, 486 (N.D.N.Y. 1919) (evidence "shows conclusively they have not abandoned their tribal relations").[9] The Second Circuit affirmed that finding. 265 F.165, 171, 174 (2d Cir. 1920). The memories of the *Boylan* witnesses, the findings of the court who saw them and the conclusions of New York's

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[9]If a cessation of tribal existence eliminated the Oneidas' rights, that would have to be true as to the entire reservation. Sensibly, Sherrill does not argue that the *Boylan* land is not federally protected reservation land immune from taxation. *See Waterman v. Mayor, City of Oneida*, 280 N.Y.S. 2d 927 (N.Y. Sup. 1967) (holding *Boylan* land is not taxable).

Attorney General cannot be undermined by the largely unexplained views of the observers cited by Sherrill.[10]

CONCLUSION

For the foregoing reasons, Sherrill's petition for a writ of certiorari should be denied.

Respectfully submitted,

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[10]To avoid the significance of *Boylan*, Sherrill refers to three scattered post-*Boylan* statements about the disappearance of the Oneidas and their reservation. Those statements are not a basis to deny the Oneidas' tribal existence. The statements are directly inconsistent with the formal position of the United States and the decision of the court in *Boylan* when there was an actual controversy to be decided. Moreover, the statements are conclusory and reflect nothing more than that the Oneidas had lost possession of almost all of their reservation. As to Cohen's Handbook of Federal Indian Law 416-17 (1942 ed.), it merely quotes from a 1915 memorandum, written before *Boylan*, and describes it generally as an "interesting account of the tribes inhabiting Western New York." Cohen did not say that the memorandum was accurate with respect to the Oneidas. Handbook, 417 n.6. This Court was not swayed by Mississippi's reliance on a similar statement in the Handbook regarding the Mississippi Choctaws. *United States v. John*, 437 U.S. at 651 n.20.