No. 03-855

In the Supreme Court of the United States

CITY OF SHERRILL, NEW YORK, PETITIONER

v.

ONEIDA INDIAN NATION OF NEW YORK, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

In 1997 and 1998, respondent Oneida Indian Nation of New York (OIN) purchased certain parcels of property in Sherrill, New York, through open market transactions. Those parcels are situated within the boundaries of the Oneida Indian Reservation as defined by the 1794 Treaty of Canandaigua but had been acquired from the Oneidas without the consent of the United States. The instant case involves a dispute between the OIN and petitioner City of Sherrill regarding the susceptibility of the tracts to state and local taxation. The questions presented are as follows:

1. Whether the Treaty of Canandaigua established a federal reservation and exempted the relevant lands from state and local taxation.

2. Whether the federal reservation created by the Treaty of Canandaigua was disestablished by the 1838 Treaty of Buffalo Creek.

3. Whether the OIN, as a sovereign Tribe and a successor-in-interest to the Oneida Nation (a party to the Treaty of Canandaigua), may assert the statutory and treaty rights of its predecessor Tribe.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the interpretation of federal treaties and statutes protecting Indian interests, the proper resolution of issues concerning the recognition of Indian Tribes, and the exercise of governmental authority in Indian country and over Indian lands. At the invitation of the Court, the United States filed a brief as amicus curiae at the petition stage of this case.

STATEMENT

1. a. Respondent Oneida Indian Nation of New York (OIN) is a federally-recognized Indian Tribe and a direct descendant of the Oneida Indian Nation (Oneida Nation), a member of the Six Nations of the Iroquois Confederacy. The Oneida Nation's aboriginal homeland comprised some six million acres in what is now east-central New York. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 230-231 (1985) (*Oneida II*); *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 664 (1974) (*Oneida I*).

After the Revolutionary War, the United States entered into the Treaty of Fort Stanwix of October 22, 1784, with the Six Nations. 7 Stat. 15. That Treaty gave peace to the four

Nations that had sided with the British during the Revolutionary War, and it provided that the Oneida and Tuscarora Nations—which had sided with the colonists—"shall be secured in the possession of the lands on which they are settled." Arts. 1, 2, 7 Stat. 15. In the 1788 Treaty of Fort Schuyler with the State of New York, the Oneida Nation agreed to "cede and grant all their lands to the people of the State of New York forever." Pet. App. 136a. The Treaty further provided, however, that the Oneidas would "hold to themselves and their posterity forever" a specified tract of approximately 300,000 acres near Oneida Lake. *Id.* at 137a; see *Oneida II*, 470 U.S. at 231 ("[t]he Oneidas retained a reservation of about 300,000 acres").

b. In 1790, Congress passed the first of the Trade and Intercourse Acts (also known as the Nonintercourse Acts), which have long embodied essential features of federal Indian policy. Ch. 33, 1 Stat. 137. Section 4 of the 1790 Act provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any state, whether having the right of pre-emption to such lands or not, unless the same shall be made and duly executed at some public treaty, held under the authority of the United States." 1 Stat. 138. The substance of that prohibition was carried forward by Congress in the Trade and Intercourse Acts of 1793, 1796, 1799, 1802, and 1834, and it remains in effect today. See *Oneida I*, 414 U.S. at 668 & n.4; 25 U.S.C. 177.

c. On November 11, 1794, the United States and the Six Nations entered into the Treaty of Canandaigua. 7 Stat. 44 (Pet. App. 141a-146a). In Article 2 of the 1794 Treaty, the United States "acknowledge[d] the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their respective treaties with the state of New York, and called their reservations, to be their property." Pet. App. 141a. Article 2 further provided that "the United States will never claim the same, nor disturb" the Nations "in the free use and enjoyment" of those lands, and that "the said reservations shall re-

main theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." *Ibid.*; accord *id.* at 142a (Art. 4). The United States also promised to expend $4500 annually for clothing and other goods for the Six Nations. *Id.* at 143a (Art. 6). The Six Nations in turn agreed that they would "never claim any other lands, within the boundaries of the United States, nor ever disturb the people of the United States in the free use and enjoyment thereof." *Id.* at 142a-143a (Art. 4).

In 1795, the State of New York—without federal approval—negotiated directly with the Oneida Nation to purchase some of the Oneidas' remaining lands. *Oneida II*, 470 U.S. at 232. Both Secretary of War Pickering and Attorney General Bradford warned New York officials that title to the Six Nations' land could be extinguished only by a treaty entered into under the authority of the United States. *Ibid.*; Resp. Br. in Opp. App. 1a-4a. Despite those warnings, the State repeatedly purchased land from the Oneida Nation, without federal authorization, during the late eighteenth and early nineteenth centuries. See Pet. App. 9a; *Oneida II*, 470 U.S. at 232. By 1838, the Oneida Nation retained only approximately 5000 of the 300,000 acres secured to it by the Treaty of Canandaigua. Pet. App. 13a.

d. Between 1810 and 1816, the Six Nations purchased substantial quantities of land in Wisconsin from the Menomonee and Winnebago Tribes. *Id.* at 10a & n.8; *New York Indians* v. *United States*, 170 U.S. 1, 11-14 (1898) (*New York Indians II*). The relevant terms of purchase ultimately "were memorialized in a treaty between the federal government and the Menominee in 1831, to which the New York Indians gave their assent in 1832." Pet. App. 10a n.8; see Articles of Agreement, Feb. 8, 1831, U.S.-Menomonee Tribe, 7 Stat. 342. Although several hundred Oneidas moved to Wisconsin during the 1820s, approximately 620 Oneidas remained in New York as of 1838. Pet. App. 10a, 13a.

In 1838, the United States and several Tribes of New York Indians entered into the Treaty of Buffalo Creek.

7 Stat. 550 (Pet. App. 147a-178a). The New York Indians agreed to "cede and relinquish to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomonie treaty of 1831," with the exception of a specified tract there on which some New York Indians then resided. *Id.* at 149a (Art. 1). "In consideration of the above cession and relinquishment," the United States agreed to "set apart" a tract of approximately 1.8 million acres in the Indian Territory, in what is now the State of Kansas, "as a permanent home for the New York Indians." *Ibid.* (Art. 2); *New York Indians II*, 170 U.S. at 15; Pet. App. 12a. The vast majority of Oneida Indians residing in New York and Wisconsin, however, ultimately refused to relocate to Kansas. *Id.* at 13a. The reservation set aside for them in Kansas pursuant to the 1838 Treaty therefore was restored to the public domain and later disposed of by the United States. *Id.* at 14a-15a.

e. In 1970, the OIN filed suit in federal district court, seeking damages for the fair rental value, during the period between January 1, 1968, and December 31, 1969, of certain parcels conveyed by the Oneidas to the State of New York in 1795. See Pet. App. 15a-16a; *Oneida II*, 470 U.S. at 229. The gravamen of the suit was that the 1795 transaction had not been approved by the federal government, as required by the Trade and Intercourse Act of 1793, and that the sale was therefore void under the terms of that Act. *Ibid.* This Court in *Oneida II* affirmed the determinations of the lower courts that the defendant counties were liable under federal common law for their wrongful possession of the relevant lands. See *id.* at 230, 253. The Court noted, however, that Congress remained free to enact legislation resolving Indian land disputes, *id.* at 253, and it left open the possibility that equitable considerations might limit the relief available to the OIN in the absence of congressional action, *id.* at 253 n.27. Litigation regarding additional claims brought by the OIN and other New York Tribes, premised on the State's allegedly unlawful acquisition of tribal land, remains ongoing.

See *Oneida Indian Nation* v. *New York*, 194 F. Supp. 2d 104 (N.D.N.Y. 2002); *Seneca Nation* v. *New York*, No. 02-6185, 2004 WL 2008521 (2d Cir. Sept. 9, 2004); *Cayuga Indian Nation* v. *Pataki*, No. 02-6111(L) (2d Cir. argued Mar. 31, 2004).

f. In 1997 and 1998, the OIN purchased in open market transactions from non-Indians fee simple title to certain parcels of land in the City of Sherrill, New York. Pet. App. 2a. Those parcels are within the historical boundaries of the 300,000-acre reservation secured by the Treaty of Canandaigua. *Id.* at 8a n.5, 19a, 85a, 90a-91a. The tracts had been sold by the Nation to an individual Oneida Indian in 1805 and then reconveyed to a non-Indian in 1807. *Id.* at 3a n.3. Those sales were not authorized by the federal government as required by the Trade and Intercourse Acts. *Id.* at 43a-44a.

The OIN currently operates a gas station, convenience store, and textile facility on the parcels. Pet. App. 2a, 64a. Petitioner City of Sherrill assessed property taxes against the parcels. After the Tribe refused to pay the property taxes, petitioner initiated proceedings against the Tribe to collect the taxes, purchased three of the parcels at a tax sale, and then commenced eviction proceedings. *Id.* at 65a-66a.

2. In 2000, respondent OIN brought this action against petitioner, alleging that the parcels described above are immune from state and local taxation, and seeking declaratory and injunctive relief. Pet. App. 73a. The district court granted summary judgment for respondents. *Id.* at 61a-133a. The court held that the parcels are within the boundaries of the Oneida reservation acknowledged by the 1794 Treaty of Canandaigua, *id.* at 85a, 90a-91a, and that Congress has never disestablished that reservation, *id.* at 100a. The court concluded that the land at issue here "is Indian Country and is not taxable by [local authorities]." *Id.* at 105a.

3. The court of appeals affirmed in relevant part. Pet. App. 1a-60a.

a. The court of appeals held that the parcels at issue are exempt from state and local taxation because they "are lo-

cated on the Oneidas' historic reservation land set aside for the tribe under the Treaty of Canandaigua." Pet. App. 24a. The court explained that "reservation land" is "by its nature * * * set aside by Congress for Indian use under federal supervision," and thus qualifies as Indian country under this Court's decision in *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). Pet. App. 24a. The court observed that, "when Indian land has been alienated in ways inconsistent with federal law, Indian title remains with the tribe." *Id.* at 27a. The court then explained that "[t]he Indian-country status of the alienated land is irrelevant for tax purposes when non-Indians hold fee title, since they pay state taxes," but that "when the tribe holding Indian title reacquires former reservation land, both forms of title coexist." *Id.* at 27a-28a. In those circumstances, the court concluded, "the state cannot tax [the land] and the tribe can no longer legally alienate it, at least without federal approval." *Id.* at 28a.

b. The court of appeals rejected petitioner's contention that the 1838 Treaty of Buffalo Creek had disestablished the 1794 reservation. Pet. App. 33a-41a. The court found that "[n]othing in [the] text [of the Treaty of Buffalo Creek] provides 'substantial and compelling' evidence of Congress's intention to diminish or disestablish the Oneidas' New York reservation." *Id.* at 34a. Rather, the court explained, "[t]he focus of the Buffalo Creek Treaty * * * was the exchange of *Wisconsin* land—not New York land—for that in Kansas." *Id.* at 40a.

c. The court of appeals rejected petitioner's argument that the parcels at issue here have lost their federally-protected status because the OIN has not existed continuously since the establishment of the reservation. Pet. App. 42a-45a. The court explained 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." *Id.* at 42a. The court also found that, "even if continuous tribal existence were required," the record demonstrates

that the Tribe has continuously existed as "a direct descendant of the original Oneida Indian Nation." *Id.* at 44a. Judge Van Graafeiland dissented on this issue, *id.* at 53a-60a, concluding that there are "significant, unresolved questions of fact as to whether the [OIN] has been in existence continuously over the last century and a half," *id.* at 60a.

SUMMARY OF ARGUMENT

I. This Court's holding and analysis in *Oneida II* rested on the premise that the Oneidas' New York lands were subject to federal protection in 1795. That understanding was correct. Although the Oneidas ceded the bulk of their aboriginal lands to the State of New York in the 1788 Treaty of Fort Schuyler, they retained aboriginal title to a 300,000-acre parcel within which the tracts at issue here are located. In any event, regardless of the precise nature of the title held by the Oneidas as of 1788, the 1794 Treaty of Canandaigua secured the 300,000 acres as a federal reservation and guaranteed the Oneida Nation the "free use and enjoyment" of those lands. The tracts at issue in this case were therefore clearly immune from state and local taxation when they were sold by the Oneida Nation in 1805 and reconveyed to a non-Indian in 1807 without federal approval.

II. The 1838 Treaty of Buffalo Creek did not disestablish the reservation or abrogate the tax immunity secured by the Treaty of Canandaigua. The central bargain reflected in the 1838 Treaty was an exchange of most of the New York Indians' *Wisconsin* lands for property located in the Indian Territory. By the Treaty's plain terms, the Oneidas' obligation to remove to the West was contingent on their ability to "make satisfactory arrangements" for the sale of their New York lands. The negotiating history of the Treaty reinforces the natural reading of its text, since the Oneidas assented to the Treaty as finally adopted only after receiving express assurances from a federal commissioner that they would not be compelled to remove from their New York lands. This Court's decision in *New York Indians II* does not suggest

that the 1838 Treaty was intended to require removal or to disestablish the Oneidas' New York reservation. Rather, the award of damages in that case (and the New York Oneidas' receipt of a portion of that award) reflected the facts that the Treaty had effected an immediate cession of most of the Wisconsin lands, and that the Oneidas had not received the western lands promised them in return.

III. As this Court recognized in *Oneida II*, the OIN is a direct descendant of the Oneida Nation and is entitled to assert the rights of its predecessor. Decisions regarding tribal existence and recognition are entrusted to the political Branches. Congress has assigned responsibility for such decisions to the Department of the Interior, which has identified the OIN as a federally recognized Tribe and as a successor-in-interest to the Oneida Nation. The fragmentary materials identified by petitioner provide no legitimate ground on which a court could reject that determination.

ARGUMENT

"The Constitution vests the Federal Government with exclusive authority over relations with Indian tribes." *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764 (1985). "As a corollary of this authority, and in recognition of the sovereignty retained by Indian tribes even after formation of the United States, Indian tribes and individuals generally are exempt from state taxation within their own territory." *Ibid.* Absent federal authorization, the States and their political subdivisions are thus "without power to tax reservation lands." *County of Yakima* v. *Confederated Tribes & Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1998); see *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110-112 (1998); *New York Indians*, 72 U.S. (5 Wall.) 761, 768-772 (1867) (*New York Indians I*) (holding that Seneca land protected by Treaty of Canandaigua was exempt from state taxation). And this Court has "consistently declined to find that Congress has authorized such taxation unless it has 'made its intention to do so unmis-

takably clear.'" *Cass County*, 524 U.S. at 110 (quoting *County of Yakima*, 502 U.S. at 258).

As we explain below, the tracts at issue in this case are within the boundaries of a federal reservation that was established by treaty in 1794. Since that time, Congress has neither authorized state or local taxation of the relevant lands nor disestablished the reservation. If the tracts had not been sold in violation of the Trade and Intercourse Acts, but instead had remained continuously in the Tribe's possession during the past two centuries, state and local taxation of the lands would clearly be barred by the 1794 Treaty, principles of tribal sovereignty, and federal supremacy over Indian affairs. The court of appeals' decision in this case thus provides the OIN with nothing more than the immunity from state and local taxation of its reservation lands that it would have possessed if the tracts had not been unlawfully alienated.

In *Oneida II*, this Court held that the OIN could assert a federal common-law cause of action against the current occupants of lands that were within the federal reservation established by the Treaty of Canandaigua and that were acquired by the State and private parties in violation of the Trade and Intercourse Acts. The Court left open the possibility, however, that the lower courts, in fashioning an appropriate remedy, might take into account the passage of time and the consequent legitimate expectations of subsequent purchasers. See 470 U.S. at 253 n.27. In subsequent lawsuits brought by the OIN and other New York Indian Tribes, based on allegations that tribal lands had been alienated in violation of the Trade and Intercourse Acts, substantial litigation has ensued concerning the manner in which those private interests should be balanced against the Tribes' interest in being restored to the positions they would have occupied if no breaches of law had occurred. See, *e.g.*, *Oneida Indian Nation* v. *County of Oneida*, 199 F.R.D. 61, 90-95 (N.D.N.Y. 2000) (based in part on equitable considerations, district court denies plaintiffs' request to author-

ize relief, including ejectment and monetary damages, from private landowners).[1]

Unlike the tracts involved in *Oneida II* and most of the tracts involved in those other subsequent lawsuits, however, the parcels at issue in the instant case were purchased by the OIN in arm's-length market transactions. That mode of acquisition effectively moots the concerns identified in *Oneida II* because it both protected the interests of innocent owners and ensured that the Tribe paid for the value of any improvements to the property. Petitioner's attempt to tax the OIN's own reservation lands, moreover, constitutes a particularly significant intrusion on tribal sovereignty and the federally protected status of the lands. See *County of Yakima*, 502 U.S. at 257-258 (explaining that, while States possess significant regulatory authority over reservation activities, the Court in the sphere of state taxation of reservation land has employed "a more categorical approach"). If the OIN, having reacquired reservation lands from willing sellers, is not entitled to regain the immunity from state and local taxation that it would have possessed if it had held the lands continuously, it is difficult to see what remedy for the prior wrongful alienation of those lands *would* be appropriate.

I. THE LANDS AT ISSUE IN THIS CASE WERE IMMUNE FROM STATE AND LOCAL TAXATION AT THE TIME THEY WERE SOLD BY THE ONEIDA NATION IN 1805 AND RECONVEYED TO A NON-INDIAN IN 1807

Petitioner contends (Pet. 17-31) that the tracts at issue in this case were subject to state and local taxation even before

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[1] The United States has taken the position that any relief in the land claims cases can and should come from the State of New York alone. See, *e.g.*, U.S. Second Amended Complaint (corrected) ¶ 2, *Oneida Indian Nation* v. *County of Oneida*, No. 74-CV-187 (N.D.N.Y. June 10, 2002) ("[P]rivate landowners are not parties to this action, and the United States does not seek any monetary or other relief from private landowners in the Subject Lands.").

they were sold by the Oneida Nation in 1805 and reconveyed to a non-Indian in 1807. Petitioner argues that (1) the 1788 Treaty of Fort Schuyler between the Oneida Nation and the State of New York extinguished the Tribe's aboriginal title to the lands; and (2) the 1794 Treaty of Canandaigua acknowledged the existence of a state reservation but did not establish a federal reservation or place the lands under federal protection. Those contentions lack merit.

A. Petitioner's Argument Is Contrary To The Holding And Basic Premises Of This Court's Decision In *Oneida II*

In *Oneida II*, this Court held that the OIN had a valid federal common-law cause of action to vindicate its rights to land that had been acquired by the State of New York in 1795 without federal authorization. 470 U.S. at 233-236. The Court affirmed the determination of the court of appeals in that case that the current owners of the property were liable in damages for wrongful possession of the relevant tracts. *Id.* at 230, 253. The Court's analysis and holding rested on the premise that the Oneida Nation had federally protected title to those lands as of 1795, when the property was sold to the State, and that the sale was in violation of the Trade and Intercourse Acts.

The necessary implication of petitioner's legal theory, by contrast, is that the plaintiffs in *Oneida II* had no valid legal claim. Petitioner argues (Pet. 20-21) that the Oneida Nation's aboriginal title to the relevant lands was extinguished by the 1788 treaty with the State, and that the lands were never thereafter placed under federal protection. If those contentions were correct, there would have been no basis in *Oneida II* for treating the 1795 sale as violative of the Trade and Intercourse Acts, and hence no ground for holding that the OIN had a live cause of action under federal law based on that violation. Acceptance of petitioner's position would also render meaningless the substantial volume of subsequent litigation undertaken by the OIN and other Tribes in reliance on this Court's decision in *Oneida II*.

B. Under The 1788 Treaty Of Fort Schuyler, The Oneida Nation Retained Aboriginal Title To The Lands At Issue In This Case

Petitioner contends that the 1788 Treaty of Fort Schuyler with the State of New York extinguished aboriginal title to all of the land (five and one-half million acres) that the Oneida Nation possessed at that time, while granting back to the Oneidas a 300,000-acre "state reservation." That reading of the 1788 treaty is incorrect. Properly construed, the 1788 treaty *excepted* the 300,000-acre portion of Oneida lands from any relinquishment of aboriginal title.

The first article of the treaty stated that "[t]he Oneidas do cede and grant all their lands to the people of the State of New York forever." Pet. App. 136a. The second article provided, however, that, "[o]f the said ceded lands," a specified 300,000-acre tract "shall be reserved for the following several uses. That is to say, * * * the Oneidas shall hold [the reserved lands] to themselves and their posterity forever for their own use and cultivation, but not to be sold, leased or in any manner alienated or disposed of to others." *Id.* at 136a-137a; see *id.* at 137a (referring to "reservation to the Oneidas" and "reservations of lands to the Oneidas for their own use"). The terms "reserved" and "reservation," with a guarantee of the lands to the Oneidas "forever," would most naturally have been understood to except the 300,000-acre parcel from the Tribe's cession of land to the State, rather than to grant the Tribe a reduced property interest in a portion of the ceded lands. See Felix S. Cohen, *Handbook of Federal Indian Law* 34 (1982 ed.) ("The term 'Indian reservation' originally had meant any land reserved from an Indian cession to the federal government regardless of the form of tenure.").

This Court has construed federal treaties employing a similar formula—*i.e.*, a general cession of tribal property, followed by a specific "reservation"—as preserving rather than extinguishing aboriginal rights in the reserved lands. See, *e.g.*, *United States* v. *Winans*, 198 U.S. 371, 381 (1905) ("Only

a limitation of [aboriginal rights] * * * was * * * intended, not a taking away."); cf. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 552-553 (1832). Consistent with that interpretive approach, United States Attorney General Bradford explained in a 1795 opinion that,

> as respects the lands thus reserved[,] the [state] treaties [with the Oneidas, Onondagas and Cayugas] do not operate further than to secure the State of New York the right of preemption: but subject to this right they are still the lands of those nations, and their claims to them, it is conceived cannot be extinguished [bu]t by a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress.

Resp. Br. in Opp. App. 2a-3a. This Court in *Oneida II* similarly explained that, in the 1788 treaty, the State had "purchased the vast majority of the Oneidas' land," while "[t]he Oneidas retained a reservation of about 300,000 acres." 470 U.S. at 231.

C. The 1794 Treaty Of Canandaigua Confirmed Federal Recognition Of And Protection For The Oneida Nation's New York Reservation

The correct disposition of this case ultimately does not depend on whether the Oneida Nation retained its aboriginal or other specially-protected rights in the 300,000-acre parcel after the Treaty of Fort Schuyler, or instead relinquished those rights and received a state-law property interest in the lands. Under either construction of the 1788 treaty with the State, the 1794 Treaty of Canandaigua between the United States and the Six Nations established the relevant tract of Oneida land as a *federally*-protected reservation. The 1794 Treaty thus immunized the lands from state and local taxation and (together with the Trade and Intercourse Acts) forbade their alienation without federal approval. Petitioner contends (Br. 23) that the "1794 Treaty of Canandaigua was nothing more than an acknowledgment by the federal government of the Oneida reservation previously created by

New York State in the 1788 Treaty of Fort Schuyler." That interpretation is contrary to the text and historical context of the Treaty, and to this Court's decision in *New York Indians I*.

1. Rather than simply recognizing that specific lands were "reserved to the Oneida, Onondaga, and Cayuga Nations in their respective treaties with the State of New York," Article 2 of the 1794 Treaty states that the "United States acknowledges" those lands, "called their reservations, to be their property." Pet. App. 141a. Article 2 further states that the United States will "never claim" the reservations nor "disturb" those Nations "in the free use and enjoyment thereof," and that "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." *Ibid.* By its terms, Article 2 thus provides a federal guarantee of the Oneida Nation's ownership, free use and enjoyment, and protection against alienation of the land, rather than simply an acknowledgment of the Nation's state-law rights. In return, the Tribes agreed that they would "never claim any other lands, within the boundaries of the United States." *Id.* at 142a-143a (Art. 4).

The historical context in which the Treaty of Canandaigua was negotiated reinforces the natural reading of its text. The 1794 Treaty was the third in a series of treaties over ten years (1784, 1789, and 1794) in which "the National Government promised that the Oneidas would be secure" in the possession of their lands. *Oneida II*, 470 U.S. at 231. The 1794 Treaty is thus naturally read in context as providing a "reaffirm[ation]" of the promise first made by the United States in 1784. *Ibid.*

2. In *New York Indians I*, this Court addressed the status of lands that Article 3 of the 1794 Treaty "acknowledge[d] * * * to be the property of the Seneca Nation." Pet. App. 142a. In invalidating the State of New York's attempt to tax Seneca lands protected by that Treaty, the Court characterized the tax as "a direct interference" by the

State "with these ancient possessions and occupations, secured by the most sacred of obligations of the Federal government." 72 U.S. (5 Wall.) at 768. The Court traced those "sacred obligations" directly to the provisions of the Treaty of Canandaigua that secured the Senecas' "free use and enjoyment" of the reservations and their property rights in them. *Ibid.*; see *id.* at 766-767; *Oneida I*, 414 U.S. at 671-672. Those provisions, the Court stressed, are "guarantees given by the United States, and which her faith is pledged to uphold." *New York Indians I*, 72 U.S. (5 Wall.) at 768. The Court further held that, under the 1794 Treaty, the Seneca Nation possessed an "indefeasible title to the reservations that may extend from generation to generation," which title "will cease only by dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption * * *, and this with the consent of the [federal] government." *Id.* at 771.[2]

No plausible basis exists for construing the Treaty of Canandaigua to deny the Oneida Nation the federal protec-

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[2] Petitioner suggests (Br. 27)—in an argument not presented to the courts below—that the treaty language pledging that the 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. 141a), effectively authorized the State of New York to acquire the tribal lands without federal approval. Far from constituting an implied repeal of the Trade and Intercourse Act, however, that language simply reiterated the federal government's pledge that nothing would disturb the Indians' right to occupy their lands unless and until the Indians decided to sell them to a buyer having the "right to purchase." That category of potential buyers would be limited to those who (1) owned the "right of preemption" (which, with respect to the Oneidas, was the State of New York) and (2) had complied with the requirements of the Trade and Intercourse Act. See *New York Indians I*, 72 U.S. (5 Wall.) at 771. Petitioner's misreading of the treaty language may stem from its erroneous understanding (see Br. 28-29) that the State's "right of preemption" included the authority to extinguish Indian title. In fact, although the owner of the "right of preemption" had the exclusive right to purchase land from the Indians if and when Indian title was extinguished, the power to extinguish Indian title was vested exclusively in the United States. See *Oneida Indian Nation* v. *New York*, 860 F.2d 1145, 1150 (2d Cir. 1988); *Oneida I*, 414 U.S. at 670.

tion (including immunity from state and local taxation) of its reserved lands that the Treaty conferred upon the Senecas. The guarantees made to the Oneidas in Article 2, and those given to the Senecas in Article 3, were framed in essentially identical language. Compare Pet. App. 141a, with *id.* at 142a. Article 4 of the Treaty, moreover, expressly linked the promises made by the United States to the Oneidas, Onondagas, Cayugas, and Senecas, and it recorded equivalent concessions made by all four Tribes as a group. See *id.* at 142a-143a. This Court's holding in *New York Indians I* that the Treaty of Canandaigua barred state taxation of reserved Seneca lands therefore makes clear that the parcels at issue in this case were likewise subject to federal protection, and thus immune from state and local taxation, at the time of their sale in 1805 and 1807.[3]

II. THE 1838 TREATY OF BUFFALO CREEK DID NOT DISESTABLISH THE ONEIDA NATION'S NEW YORK RESERVATION OR ABROGATE THE TAX IMMUNITY FOR THE NATION'S LANDS

Although reservation land is generally immune from state and local taxation, Congress may abrogate that immunity or revoke the land's reservation status. See *Cass County*, 524 U.S. at 110-111. Congress will not be found to have authorized taxation of reservation land, however, "unless it has 'made its intention to do so unmistakably clear.'" *Id.* at 110 (quoting *County of Yakima*, 502 U.S. at 258). Similarly, dis-

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[3] Because the parcels at issue here were initially acquired from the Oneidas in violation of the Trade and Intercourse Acts, petitioner's reliance (Br. 30, 41) on *Cass County* is misplaced. In *Cass County*, this Court held that tracts sold and later reacquired by an Indian Tribe were subject to local taxation *because* Congress had by statute "removed that reservation land from federal protection and made it fully alienable." 524 U.S. at 113. The Court relied on prior decisions holding that, when Congress renders particular Indian lands freely alienable, its action will ordinarily be construed to eliminate any federal barrier to state and local taxation. *Id.* at 110-114. Here, by contrast, Congress never authorized—indeed it prohibited—the alienation of the relevant parcels.

establishment of a reservation requires "clear and plain" evidence of congressional intent. *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); see *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984) ("Once a block of land is set aside for an Indian Reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise."). Contrary to petitioner's contention (Br. 31-40), the 1838 Treaty of Buffalo Creek did not abrogate the tax immunity for Oneida lands or the federal reservation secured by the 1794 Treaty of Canandaigua.[4]

A. The Text Of The Treaty Of Buffalo Creek Does Not Effect A Relinquishment Of The Oneidas' New York Lands, An Abrogation Of The Tax Immunity Of Those Lands, Or A Disestablishment Of The Oneidas' New York Reservation

1. The Treaty of Buffalo Creek, concluded on January 15, 1838, was negotiated by Commissioner Ransom H. Gillet on behalf of the United States with "the several tribes of New York Indians," including the Oneidas. See Pet. App. 147a. The 1838 Treaty was intended to redress the difficulties that the New York Indians had experienced in removing to lands previously set aside for them in Wisconsin, see Articles of Agreement, Feb. 8, 1831, U.S.-Menomonee Tribe, 7 Stat. 342; Pet. App. 10a n.8, 147a-148a, and it recognized that "many

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[4] In its amicus brief in *Oneida II*, the United States articulated a possible argument that, by signing the Treaty of Buffalo Creek, the Oneidas had relinquished their claim to a New York reservation. That brief stated, however, that the United States had not "reached a concluded view on the relinquishment question," and noted that the issue "would require further examination of the circumstances surrounding the Treaty of Buffalo Creek and subsequent events, including the Indians' understanding of the transaction." Nos. 83-1065 & 83-1240 U.S. Br. at 33. Upon further consideration of the historical record, including the written assurances made to the New York Oneidas by Commissioner Gillet (see pp. 20-22, *infra*), the United States has determined that the Treaty did not effect a disestablishment of the New York reservation or a relinquishment by the Oneida Nation of its claims to New York lands.

who were in favour of emigration, preferred to remove at once to the Indian territory," *id.* at 148a.

In Article 1 of the 1838 Treaty, the New York Indians "cede[d] and relinquish[ed] to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomonie treaty of 1831," with the exception of a specified tract at Green Bay on which some of the New York Indians then resided. Pet. App. 149a. In Article 2, the United States agreed, "[i]n consideration of the above cession and relinquishment," to "set apart" 1,824,000 acres of lands in 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, who have no permanent homes." *Ibid.* Articles 1 and 2 of the 1838 Treaty "summarize[d] the central bargain between the New York Indians and the federal government: the cession of the New York Indians' Wisconsin lands in exchange for reservation land in Kansas." *Id.* at 33a-34a. Those Articles did not refer to any cession of land in New York, and they provide no basis for concluding that the Treaty abrogated the tax immunity for the New York lands under the Treaty of Canandaigua or disestablished the reservation secured by that Treaty.

2. In arguing that the 1838 Treaty disestablished the Oneidas' New York reservation, petitioner principally relies on Article 13 of the Treaty, which set forth the "special provisions for the Oneidas residing in the State of New York." Pet. App. 155a. Under Article 13, the United States promised to make cash payments to specified Oneida leaders for their expenses in obtaining the Wisconsin lands, and the Oneidas "agree[d] 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." *Ibid.* By its terms, the Oneidas' obligation to remove to the Indian Territory was thus made contingent on their ability to negotiate mutually acceptable terms with the State for the sale of their New

York lands—a contingency that never occurred because the Oneidas in New York refused to relocate. Pet. App. 13a; *New York Indians II*, 170 U.S. at 8-10. Given the inherent uncertainty of such a bargaining process, and in the absence of any express reference to the Treaty of Canandaigua, Article 13 does not provide the requisite "clear and plain" evidence (*Yankton Sioux Tribe*, 522 U.S. at 343) of congressional intent to disestablish the pre-existing reservation.[5] Indeed, Article 13 squarely *refutes* any suggestion that the Treaty of Buffalo Creek effected an immediate cession of the Oneidas' New York lands, since Article 13 expressly contemplated the possibility of future transactions in which the Tribe would sell that property to the State.

3. Petitioner is also wrong in arguing (Br. 37) that allowing the Oneida Nation to retain its New York reservation would have been logically inconsistent with the 1838 Treaty's provision of Kansas lands to the Oneidas. Taken to its logical conclusion, that argument would suggest that the prior treaty with the Menomonees, under which the United States acquired Wisconsin lands "as a home to the several tribes of the New York Indians" (7 Stat. 343), implicitly divested the Oneida Nation of its New York property. The Treaty of Buffalo Creek, however, reflected a clear understanding that the Oneidas retained their New York lands even after the treaty with the Menomonees, since Article 13 of the 1838 Treaty referred to the possible future sale of those lands to the State. If the 1831 cession of Wisconsin lands to the Oneidas did not logically preclude the Nation's continued ownership of New York lands, there is no reason (absent a clear expression of such intent in the 1838 Treaty of Buffalo

[5] Petitioner does not argue that the Treaty of Buffalo Creek ratified the purchases of other lands from the Oneidas that had been made prior to 1838 without federal approval, and that Treaty does not in any event satisfy the test for ratification set forth in *Oneida II*, 470 U.S. at 246-248.

Creek) to ascribe more sweeping consequences to the subsequent exchange of Kansas lands for Wisconsin property.[6]

B. The Negotiating History Of The Treaty Of Buffalo Creek Confirms That The Treaty Did Not Abrogate Protections For The Oneidas' New York Lands

In June 1838, the Senate amended the Treaty of Buffalo Creek and gave its consent to the Treaty as amended, subject to the condition that "the treaty shall have no force or effect whatever * * * until the same, with the amendments

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[6] Petitioner's reliance (Br. 38-39) on *United States* v. *Santa Fe Pacific Railroad*, 314 U.S. 339 (1941), is misplaced. In *Santa Fe Pacific*, this Court held that, in light of the prior course of dealings between the Walapais Indians and the United States (see *id.* at 356-358), the Walapais' acceptance of a new federal reservation "must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation." *Id.* at 358. The Court based that holding, however, on the "historical setting" in which the reservation was created; it did not announce a per se rule that a Tribe's acceptance of a federal reservation invariably operates as a renunciation of tribal claims to other lands. *Ibid.*; see *id.* at 357-358.

The circumstances surrounding the negotiation and ratification of the Treaty of Buffalo Creek differed substantially from those that preceded the creation of the Walapais' reservation. First, the Treaty of Buffalo Creek specifically defined the nature of the Tribe's obligations: Article 1 provided for the cession of the Oneidas' *Wisconsin* lands, and Article 13 made clear that the Nation would retain its New York lands, unless and until those lands were sold to the State, even after the Treaty took effect. Second, when the Treaty of Buffalo Creek was ratified, the Oneidas already possessed the federal reservation secured by the Treaty of Canandaigua. The Walapais, by contrast, had no pre-existing reservation, but simply claimed aboriginal title to certain lands. See *Santa Fe Pac.*, 314 U.S. at 344-345; cf. *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 277-282 (1955) (discussing difference in degree of legal protection for "recognized" title, which constitutes a property interest cognizable under the Fifth Amendment, and aboriginal title, which may be extinguished by Congress at will and without compensation). Third, the negotiating history of the Treaty of Buffalo Creek provides weighty contemporaneous evidence—evidence having no analogue in *Santa Fe Pacific*—that the Treaty was not intended to effect a disestablishment of the Oneidas' New York reservation or a relinquishment of their treaty-protected New York lands. See pp. 20-22, *infra*.

herein proposed, is submitted and fully and fairly explained by a commissioner of the United States to each of [the signatory] tribes or bands, separately assembled in council, and they have given their free and voluntary assent thereto." *New York Indians II*, 170 U.S. at 21-22. Pursuant to that directive, Commissioner Gillet met with the Oneidas on August 9, 1838. Pet. App. 35a-36a, 173a; Resp. Br. in Opp. App. 6a-11a. At that time, Gillet provided the Oneidas and their attorney with a written "assurance" to quell "their fears that they might be compelled to remove, even without selling their land to the State." *Id.* at 7a.

That assurance stated that "the treaty was not, & is not intended to compel the Oneidas to remove from their reservations in the state of New York," and that the Oneidas could "choose to * * * remain where they are forever." Resp. Br. in Opp. App. 10a. The document memorializing the Oneidas' assent to the 1838 Treaty referred to Gillet's declaration and included Gillet's affirmation that the assent was voluntary. Pet. App. 35a n.18, 173a. Petitioner's interpretation of the 1838 Treaty as implicitly disestablishing the Oneidas' New York reservation, and extinguishing all federal protection for the Nation's New York lands, cannot be reconciled with the assurances through which the Oneidas' assent to the Treaty was obtained.

Petitioner contends (Br. 36) that the court of appeals erred in relying on the Gillet declaration because it was never made part of the Treaty itself. That argument is misguided. This Court "interpret[s] treaties to give effect to the terms as the Indians themselves would have understood them," *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999), and the Gillet declaration provides powerful evidence of the Oneidas' understanding at the time they assented to the Treaty. It is also appropriate to assume that the contemporaneous explanation given by the federal commissioner accurately reflected the President's intent in making the Treaty and the Senate's intent in approving it—particularly in light of the Senate's express directive that

the treaty would take effect only after it had been "fully and fairly explained by a commissioner of the United States" and the signatory Tribes had given their "free and voluntary assent thereto." *New York Indians II*, 170 U.S. at 21-22.[7]

C. This Court's Decision In *New York Indians II* Does Not Support Petitioner's Contention That The Treaty Of Buffalo Creek Disestablished The Oneidas' New York Reservation

In *New York Indians II*, this Court held that the New York Indians (including the Oneidas) were entitled to compensation for the government's disposal of the lands set aside for them in Kansas. 170 U.S. at 36. Contrary to petitioner's contention (*e.g.*, Br. 33), the fact that the Oneidas residing in New York (and their descendants) shared in that monetary recovery does not suggest that the 1838 Treaty divested the Nation of its New York lands or abrogated federal protections for those lands. As the Court in *New York Indians II* explained, the Tribes that entered into the Treaty of Buffalo Creek "were possessed of some sort of title or interest in a large quantity of lands in Wisconsin, which the government was desirous of acquiring, and for which it was willing to make a large cession in the [Indian Territory]." *Id.* at 14. That the Indians who possessed a "title or

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[7] Although the Gillet report was not prepared until after the Senate had given its consent to the Treaty of Buffalo Creek on June 11, 1838, the report was transmitted to the Senate, and in January 1840 it was ordered to be printed together with the Treaty and other accompanying documents. See Resp. Br. in Opp. App. 5a. Subsequently, on March 25, 1840, the Senate passed a resolution stating that the Treaty of Buffalo Creek, as amended on June 11, 1838, had "been satisfactorily acceded to and approved of by [the signatory] tribes," and that the President was therefore "authorized to proclaim the treaty as in full force and operation." C.A. App. 1579; see *New York Indians II*, 170 U.S. at 23. The passage of that resolution indicates that the Senate approved of the assurances previously given to the Oneidas by Commissioner Gillet, since the earlier-stated condition precedent to the Treaty's taking effect—*i.e.*, that the Tribes must assent to the Treaty after its terms had been "fully and fairly explained"—would not have been satisfied if Commissioner Gillet's explanation of the Treaty's terms had been substantially inaccurate.

interest" in the Wisconsin lands included those who continued to reside in New York as of 1838 is clear from the Preamble to the 1838 Treaty, which stated that "various considerations have prevented those still residing in New York from removing to Green Bay, * * * [a]nd they therefore applied to the President to take their Green Bay lands." Pet. App. 148a. The New York Oneidas' cession of their interest in most of the Tribe's Wisconsin tracts in exchange for the Kansas lands provided a fully sufficient basis for their receipt of damages for the government's subsequent sale of the Kansas property.

The Court in *New York Indians II* did state that the "main inducement" for the United States to enter into the Treaty of Buffalo Creek "[p]robably" was the "agreement of the Indians to remove beyond the Mississippi." 170 U.S. at 15. But the exchange of Wisconsin lands for Kansas lands itself promoted that objective. And the fact that removal of the Indians from their eastern lands may have been the government's principal objective does not mean that the Treaty guaranteed that result as a matter of law. Cf. *Rodriguez* v. *United States*, 480 U.S. 522, 526 (1987) (per curiam) ("Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law."). Particularly in light of the facts that the New York Oneidas' obligation to remove was made contingent on their reaching "satisfactory arrangements" with the State for the sale of their New York lands (Pet. App. 155a), and that the Tribe's assent to the 1838 Treaty was premised on assurances that its members would not be *compelled* to remove, the Treaty does not provide "clear and plain" (*Yankton Sioux*, 522 U.S. at 343) evidence of congressional intent to disestablish the federal reservation secured by the 1794 Treaty of Canan-

daigua, or to abrogate the immunity from taxation under that Treaty for lands occupied by the Oneidas.[8]

III. THE ONEIDA INDIAN NATION OF NEW YORK IS A SUCCESSOR-IN-INTEREST TO THE HISTORIC ONEIDA NATION AND MAY ASSERT ITS STATUTORY AND TREATY RIGHTS

The OIN is recognized by the Executive Branch as an Indian Tribe and as a political successor-in-interest to the historic Oneida Nation. See 68 Fed. Reg. 68,182 (2003); J.A. 207-208 (1976 affidavit from Interior Department official). Petitioner nevertheless contends (Br. 40) that the OIN cannot claim an exemption from state and local taxation of the parcels it recently reacquired because the Oneidas allegedly ceased to exist as a Tribe for some unspecified period during the late nineteenth and early twentieth centuries. That argument lacks merit.

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[8] Essentially for the foregoing reasons, petitioner's reliance (Br. 17-19, 24-25) on *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), is misplaced. In that case the Court considered whether land owned in fee by the Native Village of Venetie "falls within the 'dependent Indian communities' prong of the [Indian country] statute, [18 U.S.C.] § 1151(b)." *Id.* at 527. In concluding that the land at issue did not fall into that "limited category," the Court noted that Congress had expressly "revoked the existing Venetie Reservation, and indeed revoked all existing reservations in Alaska * * * save one." *Id.* at 532. Because Congress has not expressly revoked the Oneida reservation secured by the Treaty of Canandaigua, the Court's decision in *Venetie* has little relevance here. See Pet. App. 24a (explaining that "reservation land" is "by its nature * * * set aside by Congress for Indian use under federal supervision," and thus qualifies as "Indian country" under *Venetie*); cf. 18 U.S.C. 1151(a) (defining the term "Indian country" to include, without qualification, "all land within the limits of any Indian reservation under the jurisdiction of the United States Government"); *Venetie*, 522 U.S. at 528 n.3 (noting that, before the enactment of Section 1151, this Court "had also held, not surprisingly, that Indian reservations were Indian country"). Moreover, quite aside from the reservation status of the land at issue in this case, the Treaty of Canandaigua independently secures a tax immunity for lands owned by the Oneidas through its guarantee of the Oneidas' "free use and enjoyment" of such lands.

A. This Court Recognized In *Oneida II* That The OIN Is A Successor-In-Interest To The Oneida Nation And Is Entitled To Assert The Rights Of Its Predecessor

In *Oneida II*, this Court recognized the OIN, the Oneida Indian Nation of Wisconsin, and the Oneida of the Thames Band Council to be "the direct descendants of the Oneida Indian Nation, one of the six nations of the Iroquois." 470 U.S. at 230.[9] Recognition of the OIN as the Oneida Nation's successor Tribe was logically necessary to the Court's holding (see *id.* at 233-236) that the OIN could assert a current right of occupancy to lands wrongfully acquired from the Oneida Nation in 1795. Petitioner makes no effort to reconcile its claim of tribal discontinuity with the outcome and analysis of *Oneida II*.

B. Decisions Concerning The Recognition Of Indian Tribes Are Entrusted To The Executive Branch, Which Has Recognized The OIN To Be A Successor-In-Interest To The Oneida Nation

1. "[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Court has] consistently described as 'plenary and exclusive.'" *United States* v. *Lara*, 124 S. Ct. 1628, 1633 (2004). In particular, this Court has long held that tribal status determinations are the province of the political Branches. See *United States* v. *Holliday*, 70 U.S. (3 Wall.) 407, 419 (1866) ("If by [the political Branches] those Indians are recognized as a tribe, this court must do the same."); *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913) (Although Congress may not "bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, * * *

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[9] The other courts that have considered the question have uniformly reached the same result. See, *e.g.*, *Oneida Indian Nation* v. *United States*, 26 Ind. Cl. Comm. 138, 149 (1971), aff'd, 201 Ct. Cl. 546 (1973); *Oneida Indian Nation* v. *County of Oneida*, 434 F. Supp. 527, 532-533, 538, 540 (N.D.N.Y. 1977); *Oneida Indian Nation* v. *County of Oneida*, 719 F.2d 525, 527-528, 538-539 (2d Cir. 1983); *Oneida Indian Nation* v. *New York*, 194 F. Supp. 2d 104, 118-119 (N.D.N.Y. 2002).

in respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts."); see also *Miami Nation of Indians of Indiana, Inc.* v. *United States Dep't of the Interior*, 255 F.3d 342, 347-349 (7th Cir. 2001); cf. *Clark* v. *Allen*, 331 U.S. 503, 514 (1947) ("[T]he question whether [Germany was] in a position to perform its treaty obligations [after World War II] is essentially a political question."). Congress has assigned the authority to govern Indian relations, including the responsibility to resolve questions of tribal existence and recognition, to the Department of the Interior.[10]

In 1979, the Department of the Interior published an official list of those entities—including the OIN—already acknowledged to exist as "Indian tribal entities that have a government-to-government relationship with the United States." 44 Fed. Reg. 7236; see Federally Recognized Indian Tribe List Act of 1994, Pub. L. No. 103-454, 108 Stat. 4791 (codified in part at 25 U.S.C. 479a to 479a-1) (confirming Secretary's authority and responsibility for identifying Indian tribes). That action reflected the judgment of the Executive Branch agency charged with responsibility for Indian affairs that the Oneidas have enjoyed a sufficiently continuous existence to be (a) capable of exercising the

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[10] Recognition of Indian Tribes was originally accomplished through the negotiation and ratification of formal treaties pursuant to Article II, Section 2, Clause 2 of the Constitution. See *Golden Hill Paugussett Tribe of Indians* v. *Weicker*, 39 F.3d 51, 57 (2d Cir. 1994). "When formal treaty making was abandoned [in 1871, see 25 U.S.C. 71], the federal government continued to make agreements with Indian tribes, similar to treaties, but requiring approval by both Houses of Congress, and government policy with respect to Indians was expressed through legislation and executive orders." *Ibid.* The Department of the Interior is vested by statute with the responsibility to manage Indian affairs, see, *e.g.*, 25 U.S.C. 1, 2, 9, 461 *et seq.*, which necessarily includes the responsibility to determine which Tribes should be federally recognized.

sovereignty possessed by the historic Oneida Nation before the time of European settlement, see *United States* v. *Wheeler*, 435 U.S. 313, 322-323 (1978); and (b) entitled to vindicate the Oneida Nation's rights under federal statutes and treaties. See J.A. 207-208 (1976 affidavit by Interior Department official describing the OIN as "one of the Indian tribes which entered into and signed" the Treaties of Fort Harmar and Canandaigua).[11] Given the preeminent role of the political Branches in matters of this character, the Department's formal recognition of the OIN as an Indian Tribe and as a successor-in-interest to the Oneida Nation provides a sufficient basis for rejecting petitioner's claim of tribal discontinuity.

2. Even if some judicial review of that agency determination were appropriate, the scope of the inquiry would be highly limited and deferential. A court could not (as the dissenting judge in the court of appeals appeared to believe, see Pet. App. 56a-60a) appropriately conduct a factual inquiry into whether the Oneidas' past activities were such that the political Branches *ought* to have withdrawn recognition of the Tribe at some earlier point in time. Rather, the only question that is even arguably appropriate for judicial resolution is whether the political Branches *actually* terminated their recognition of the Tribe.

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[11] The Interior Department has promulgated regulations governing recognition of groups not already acknowledged by the United States as Tribes, and those regulations have always included the requirement of continuous tribal existence. See 43 Fed. Reg. 39,361 (1978), revised 59 Fed. Reg. 9280 (1994) (codified at 25 C.F.R. Pt. 83). Petitioner suggests (Br. 41) that the OIN's inclusion on the list of federally-recognized Tribes signifies nothing more than eligibility for federal benefits. That is incorrect. The list serves to identify those Indian Tribes that are sovereign entities in a legal and political sense, *i.e.*, "domestic dependent nations," *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), capable of exercising certain attributes of their original sovereignty. See 25 U.S.C. 479a(2); H.R. Rep. No. 781, 103d Cong., 2d Sess. 2 (1994) (federal "recognition" confirms that the Tribe is a "domestic dependent nation" capable of a "government-to-government relationship" with the United States); 25 C.F.R. 83.2.

The relevant course of events refutes the suggestion that such official withdrawal of recognition ever occurred, and demonstrates that the United States continued to deal with the Oneidas as a Tribe during the late nineteenth and early twentieth centuries. During that period, for example, the United States continued to honor its obligation under Article 6 of the 1794 Treaty of Canandaigua (Pet. App. 143a) to pay annuities and deliver "treaty cloth" to the Oneida Nation. See *United States* v. *Boylan*, 256 F. 468, 487 (N.D.N.Y. 1919) ("[T]he United States government, under a treaty with the Oneida Indians, is paying to the remnants of that tribe each year several thousand dollars worth of goods."), aff'd, 265 F. 165 (2d Cir. 1920); *id.* at 489-490 (explaining that the payment obligation arose under the Treaty of Canandaigua).

The *Boylan* litigation arose out of an ejectment action, brought by the United States in its trust capacity on behalf of the Oneidas, against private parties who had claimed title to a 32-acre tract of land within the boundaries of the reservation secured by the Treaty of Canandaigua. The district court observed that "[t]he United States has steadily and uniformly asserted its jurisdiction over the Indians of the 'Six Nations,' which * * * included the Oneida Indians and other New York tribes." *Boylan*, 256 F. at 479. The court held that lawful possession of the disputed lands should be restored to the Oneidas, explaining that, as of 1906,

> the Oneida Reservation still existed, although reduced in area, and what remained was peopled by Indians, quite a number of whom made their home on the premises in question; most of them coming and going, it is true, but this was their home. The title had descended to them from those who occupied the lands when Columbus discovered America, and had never gone out of them.

Id. at 481.

The court of appeals affirmed, agreeing with the district court that "the United States and the remaining Indians of the tribe of the Oneidas still maintain and occupy toward

each other the relation of guardian and ward." *United States* v. *Boylan*, 265 F. 165, 174 (2d Cir. 1920); see *id.* at 171 (holding that the United States was authorized to file the ejectment action on the Oneidas' behalf because the Oneidas "exist as a separate band or tribe, and therefore as a separate nation"). Both the position taken by the United States in *Boylan*, and the disposition of the case by the district court and court of appeals, refute petitioner's contention that federal recognition of the Oneidas as a Tribe was withdrawn during the late nineteenth or early twentieth century.[12]

In disputing the continuity of the Oneidas' tribal existence, petitioner principally relies (Br. 43-45) on selected statements from five individual reports filed by officials of the Department of the Interior between 1891 and 1906, during the assimilation period. None of these statements, however, can plausibly be characterized as a formal determination by the United States that the Oneidas' legal and political status as a Tribe had been extinguished or abandoned.[13] Even the selected reports on which petitioner relies

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[12] Unlike the lands involved in *Boylan*, the parcels involved in the instant case have been occupied by Oneida Indians for only a small portion of this country's history. Petitioner's principal legal arguments suggest, however, that local governments may now tax even those lands (like the *Boylan* tract) that have remained continuously or virtually continuously in the Oneidas' possession. That result would appear to follow logically from acceptance of petitioner's contention that (1) the 300,000-acre parcel reserved in the Treaty of Fort Schuyler was never placed under federal protection; (2) any federal reservation that the Oneidas previously possessed was disestablished by the Treaty of Buffalo Creek; or (3) the Tribe ceased to exist, and Oneida lands thereby lost their "Indian country" status, at some point in the late nineteenth or earlier twentieth century.

[13] The Commissioner of Indian Affairs' assertion (C.A. App. 1229) that the Oneidas in 1891 had no "tribal relations" might indicate that there were "[f]luctuations in tribal activity during various years." See 25 C.F.R. 83.6(e). But such fluctuations are not uncommon in this Nation's history, and they are insufficient to demonstrate that a Tribe's existence or its relationship with the United States has legally been extinguished. See, *e.g.*, *ibid.* (Interior Department regulation explains that a Tribe seeking initial recognition must demonstrate "political influence or authority * * * on a substantially continuous basis, but this demonstration does not

contain references to the Oneidas' continued tribal existence.[14] The vast majority of annual reports filed by the Commissioner of Indian Affairs from 1880 to 1915 provide official tribal population statistics for the Oneidas, and most make reference to either the Oneida "reservation" or "reserve" in New York.[15] Petitioner's evidence therefore provides no basis for rejecting the Executive Branch's determination that the Oneidas have existed continuously as a Tribe through this country's history, and that the OIN is entitled to assert the rights of its predecessor the Oneida Nation.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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require meeting these criteria at every point in time"); *United States* v. *John*, 437 U.S. 634, 652-653 (1978); *Bryan* v. *Itasca County*, 426 U.S. 373, 389 (1976); *United States* v. *Washington*, 641 F.2d 1368, 1373 (9th Cir. 1981) (noting that "[f]ederal policy has sometimes favored tribal autonomy and sometimes sought to destroy it," and that "[a] degree of assimilation is inevitable under these circumstances and does not entail the abandonment of distinct Indian communities").

[14] The 1891 report (at 312) lists the Oneidas as one of the six Tribes under the authority of the New York Indian agency. The 1893 report (at 700, 714) states that 182 Oneida Indians reside on the "Oneida Reserve," and it refers to that "Reserve" in two separate tribal statistical tables. The 1900 (at 610, 646) and 1901 (at 696, 716) reports state that 160 and 144 Oneida Indians, respectively, reside on the "Oneida Reserve," which is described as containing 365 acres. The 1906 report, in addition to providing a tribal census (at 286, 482), specifically refers (at 461) to an Oneida reservation of 350 acres as guaranteed by the Treaty of Canandaigua. By letter dated September 27, 2004, respondents have requested permission to lodge those (and other) Commissioner's reports with this Court.

[15] With only one exception, every annual report from 1880 to 1915 provides a census for the Oneidas living in New York. Most of those reports also provide acreage statistics for the Oneida "reserve" (consistently recorded as containing 350 acres after 1906) and describe the distribution of annuities to the Oneidas and the other Six Nations.

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