No. 14-538

IN THE

# Supreme Court of the United States

STOCKBRIDGE-MUNSEE COMMUNITY,

*Petitioner,*

v.

STATE OF NEW YORK, *et al.*,

*Respondents.*

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

## BRIEF IN OPPOSITION OF RESPONDENT ONEIDA INDIAN NATION

PETER D. CARMEN
MEGHAN M. BEAKMAN
ONEIDA INDIAN NATION
LEGAL DEPARTMENT
5218 Patrick Road
Verona, NY 13478

MICHAEL R. SMITH
*Counsel of Record*
DAVID A. REISER
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Washington, DC 20036
(202) 778-1800
msmith@zuckerman.com

January 26, 2015

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

## TABLE OF CONTENTS

**TABLE OF CONTENTS-*Continued***

## TABLE OF AUTHORITIES

Page

**Cases**

**Federal Statutes and Treaties**



**Other Authorities**

## INTRODUCTION

The Stockbridge land claim case is not a suitable case for the Court to review the Second Circuit's equitable bar to tribal land claims rooted in old violations of federal law.

Although the petition frames the question presented in terms of a conflict between the decision below and the Court's recent decision in *Petrella v. Metro-Goldwyn Mayer, Inc.*, 134 S. Ct. 1962 (2014), the body of the petition repeats the same points made in earlier petitions filed by the United States and by the Cayuga and Oneida tribes. The petitions in the Oneida and Cayuga cases, like the petition here, argued that the Second Circuit's invocation of "equitable considerations" to bar tribal land claims as untimely conflicts with a decision by Congress to preserve those claims and with the Court's decision in *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida II*"). The Court denied those petitions. *United States v. New York*, 132 S. Ct. 452 (2011); *Oneida Indian Nation v. County of Oneida*, 132 S. Ct. 452 (2011); *United States v. Pataki*, 547 U.S. 1128 (2005); *Cayuga Indian Nation v. Pataki*, 547 U.S. 1128 (2005). There is no reason for the Court to grant review in this case after denying it in cases that were more suitable vehicles for resolving the question.

This case is an especially unsuitable vehicle to address the Second Circuit's equitable bar. The United States did not intervene to support the Stockbridge claim, and therefore the Eleventh Amendment bars the Stockbridge from pursuing the most equitable land claim remedy, money damages

against the State of New York for illegally acquiring tribal land. The only Stockbridge claim against the State, disguised as an *Ex parte Young* claim seeking eviction of state officers, is barred by state immunity. Because the Stockbridge cannot sue the State, they are suing defendants that are, like the Oneida Nation, current landowners. The petition acknowledges, however, the observation in *Oneida II* that equity may limit the relief available in old tribal land claims, even if the claims themselves are not time-barred. Equity could bar all of the relief sought by the Stockbridge against current landowners (eviction and damages) even if other tribal claims for relief against the State should be allowed to proceed.

The Stockbridge case also is an unsuitable vehicle for addressing the question because the Stockbridge claim will fail regardless of an equitable bar. Unlike the Oneida and Cayuga claims and the land claims of other eastern tribes that were based on federal protection of their own aboriginal occupancy, the Stockbridge are suing the Oneida Nation and other parties for land that is part of the Oneidas' aboriginal domain and that is described in the relevant federal treaty as the Oneidas' "property" and "reservation." Treaty with the Six Nations (Canandaigua), 7 Stat. 44 (Nov. 11, 1794). (C.A.J.A. A159-A162). The treaty then promises not to disturb the Oneidas' "Indian friends residing thereon," a term that the Stockbridge admit included the Stockbridge. Amended Complaint ¶¶ 21-22 (C.A.J.A. A113-A114). This treaty provision that places the Stockbridge on the Oneidas' "property" and "reservation" is the only federal treaty provision that the Stockbridge identify as a basis for their land claim. Moreover, the Stock-

bridge tribe expressly surrendered any federal land rights in New York later in an 1856 treaty accepting a Wisconsin reservation, where the tribe has been located for more than a century and a half. Treaty with the Stockbridge and Munsee, 11 Stat. 663 (Feb. 5, 1856) (C.A.J.A. A179-A197); *see United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 357 (1941) (acceptance and occupation of new reservation relinquishes rights in earlier reservation); *see also* Constitution & By-Laws of the Stockbridge Munsee Community, Wisconsin, www.loc.gov/law/help/american-indian-consts/PDF/38026411.pdf (tribal membership defined by descent from residents of Wisconsin reservation); *State of Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657 (7th Cir. 2009) (discussing Stockbridge reservation and casino in Wisconsin). Finally, the Stockbridge claim to evict the Oneida Nation from land the Oneida Nation has purchased and for trespass damages also fails because the claim is barred by the Oneida Nation's sovereign immunity.

## STATEMENT

### A. Historical Background

The Oneida Nation, one of the Six Nations of the Iroquois Confederacy, held its lands in central New York from time immemorial. *Oneida II,* 470 U.S. at 230. The Stockbridge were Mohicans located along the Hudson River, a considerable distance from the Oneidas. Amended Complaint ¶ 14. (C.A.J.A. A111). The Stockbridge left New York and migrated to Massachusetts in the early 1700s. *Id.*

The Oneidas received federal protection of their lands early in the country's history. 25 J. Cont. Cong. 681, 687 (Oct. 15, 1783); Treaty with the Six Nations, 7 Stat. 15 (Oct. 22, 1784).

In the mid-1780s, the Oneidas invited the Stockbridge to live as guests within the Oneidas' lands, and they did so. *See* Amended Complaint ¶¶ 16-17 (C.A.J.A. A111). The Stockbridge did not pay anything to the Oneidas, and the United States government was not involved in the Stockbridge relocation.

In a state treaty in 1788, the Oneidas ceded their lands to the State of New York except for roughly 300,000 reserved acres, which included the lands on which the Oneidas had permitted the Stockbridge to live. Treaty with the Oneida Indians (Sep. 22, 1788) (C.A.J.A. A150-A154); *Oneida II*, 470 U.S. at 231 ("Oneidas retained a reservation of about 300,000 acres"); *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 156 & n.13 (2d Cir. 2003) (describing 1788 reservation); *rev'd on other grounds*, 544 U.S. 197 (2005).

The 1788 state treaty referenced the metes and bounds of the reserved lands, not the ceded lands, because the reserved lands had been surveyed. Article II provided that the Oneidas were to "hold to themselves and their posterity forever" the reserved lands. The Stockbridge do not dispute that the land the Stockbridge now claim was within the boundaries of the lands that the Oneidas reserved from cession. Article II of the treaty acknowledged the right of the Stockbridge and their posterity to "enjoy their

settlements on the lands heretofore given them by the Oneidas for that purpose," "notwithstanding any reservation of lands to the Oneidas for their own use."

The subsequent federal Treaty of Canandaigua confirmed the arrangement and established the rights of the parties under federal law. Treaty with the Six Nations (Canandaigua), 7 Stat. 44 (Nov. 11, 1794) (C.A.J.A. A159-A162). The treaty did not refer to the Stockbridge by name or to a Stockbridge reservation. In article II, "[t]he 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." Article IV further referred to the Oneida reservation as "lands [that] belong to the Oneidas." Relevant to the Stockbridge, article II contained a promise never to "claim" the lands reserved by the Oneidas or to "disturb" "their Indian friends residing thereon." The Stockbridge amended complaint (¶¶ 20-21) (C.A.J.A. A113-A114) confirms that the Stockbridge were among these "Indian friends residing thereon." *See also* Treaty with the Oneida, Etc., 7 Stat. 47 (Dec. 2, 1794) (C.A.J.A. A163-A165) (Stockbridge described as "residing in the country of the Oneidas").

Stockbridge residence on the Oneida reservation was short-lived because the Stockbridge sought to sell land. The State initially rejected the efforts, noting that "the Oneida Indians gave said tract of land to the Stockbridge Indians on the following terms: [that] the Stockbridge Indians were to occupy and enjoy the land, and that if at any time the

Stockbridge Indians should quit the said land, in that case it was to remain the property of the said Oneida Indians." N.Y. Assembly J. 316 (March 15, 1809) (C.A.J.A. A169). Thereafter, the State purchased a quitclaim from the Oneidas (in violation of federal law). Report of the Special Committee Appointed by the Assembly of 1888 to Investigate the Indian Problem of the State of New York, No. 51, 278-80 (Feb. 1, 1889) (C.A.J.A. A174-A175); II Public Papers of Daniel Tompkins 480 (Feb. 12, 1812) (C.A.J.A. A176-A178) (report to Assembly on State's acquisition of "reversionary claim of the Oneida Nation of Indians to the Brothertown & Stockbridge tracts of Land").

In the wake of the Oneida quitclaim, the Stockbridge left New York, purporting in a series of transactions to sell land to the State. Amended Complaint ¶¶ 26-42 (C.A.J.A. A115-A118). By the 1840s, the Stockbridge tribe had fully settled on lands in Wisconsin – assisted by the federal government which, through a series of federal treaties, provided federal reservations for the Stockbridge in Wisconsin. In an 1856 treaty, the United States sought to "establish comfortably together" in Wisconsin "all such Stockbridges and Munsees – wherever they may be now located, in Wisconsin, in the State of New York, or west of the Mississippi," and the Stockbridge tribe in exchange agreed that "all such and other claims set up by or for them or any of them are hereby abrogated." Treaty with the Stockbridge and Munsee, 11 Stat. 663 (Feb. 5, 1856) (C.A.J.A. A179-A197); *see State of Wisconsin v. Stockbridge-Munsee Community*, 554 F.3d 657, 659-661 (7th Cir. 2009) (describing Stockbridge treaty history).

## B. Procedural History

The Stockbridge filed their land claim in 1986, after the Oneida Nation had won a test case regarding its land claim, *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985). The Stockbridge complaint was limited to the "subject lands," defined as land owned by the named defendants, which were the State of New York, state agencies and officials, and local villages and towns. Complaint ¶ 10 (C.A.J.A. A36). The Oneida Nation intervened as a defendant in 1987 to seek dismissal of the Stockbridge tribe's claim against the other defendants as to the "subject lands." Order, D.E. 28 (Sep. 25, 1987) (C.A.J.A. A12, A74-A75). None of the "subject lands" in the complaint on which the Oneida Nation intervened included the land from which the Stockbridge now seek to evict the Oneida Nation.

The United States did not intervene as a plaintiff to support the Stockbridge claim as it did in other New York land claim litigation involving the Oneidas, the Cayugas, the Senecas, and the Mohawks. The state defendants therefore asserted Eleventh Amendment immunity. The Stockbridge obtained a stay in 1995, and the stay lasted for years. In 2003, the District Court indicated that it would give the Stockbridge a chance to obtain the federal government's support and, regardless, would lift the stay six months later. Order, D.E. 213 (July 24, 2003) (C.A.J.A. A23). The federal government did not intervene, and the stay lifted.

The Stockbridge filed an amended complaint in 2004. (C.A.J.A. A106-A124). In addition to drop-

ping damages claims against the State of New York and adding a purported *Ex parte Young* claim to evict State officials from State-owned land, the amended complaint added claims against the Oneida Nation. The new claims sought money damages and eviction as to lands that the Oneida Nation had purchased beginning in 1998 and that had not been part of the "subject lands" in the original complaint. All defendants filed motions to dismiss.

After further stays to await the final outcome of the Oneida land claim litigation, including this Court's disposition of petitions for a writ of certiorari, the District Court dismissed the Stockbridge case in 2013. Pet. App. 10a-21a. As to the Oneida Nation, the court held that the doctrine of tribal sovereign immunity barred claims in the amended complaint to Oneida-owned lands that were not at issue in the complaint upon which the Oneidas had intervened. *Id.* at 17a-18a. As to the State, although formally named as a defendant, the Stockbridge told the District Court that it "asserts no claims against the State itself," and so the court dismissed claims against the State. *Id.* at 12a. The court also dismissed *Ex parte Young* claims seeking to evict the Governor and a state agency head from .91 acres of land that might be owned by the State, ruling that the claims were barred by the State's Eleventh Amendment immunity. *Id.* at 16a. Finally, the court ruled that the Second Circuit's equitable bar required dismissal of the claims against all defendants. *Id.* at 18a-20a. The court did not reach the Oneida Nation's argument that the Stockbridge claim failed as a matter of law on the merits.

The Second Circuit affirmed, deciding that its equitable bar required dismissal of all claims. *Id.* at 1a-9a. The Second Circuit did not reach the additional immunity and merits arguments presented on appeal by the Oneida Nation.

## REASONS FOR DENYING THE PETITION

### I. THE COURT HAS DENIED OTHER PETITIONS IN CASES MORE SUITABLE FOR REVIEW OF THE SECOND CIRCUIT'S EQUITABLE BAR TO TRIBAL LAND CLAIMS.

The Court has denied petitions for certiorari in New York land claim cases brought by the Oneida Nation and by the Cayuga Nation against the State of New York and in which the United States intervened as a plaintiff to support the claim. *United States v. New York*, 132 S. Ct. 452 (2011); *Oneida Indian Nation v. County of Oneida*, 132 S. Ct. 452 (2011); *United States v. Pataki*, 547 U.S. 1128 (2005); *Cayuga Indian Nation v. Pataki*, 547 U.S. 1128 (2005); *see also Onondaga Nation v. New York*, 134 S. Ct. 452 (2013). The petitions made the same arguments that are made in the Stockbridge petition – that imposing an equitable bar to old tribal land claims based on the passage of time directly conflicts with the Court's decision in *Oneida II*, 470 U.S. 226 (1985), and that such a judge-made equitable rule cannot be applied to nullify the decision of Congress expressed in several statutes, including the Indian Claims Limitation Act, 96 Stat. 1966 (1982), that these old tribal land claims are not time-barred.

The Stockbridge petition highlights the Court's recent decision in *Petrella v. Metro-Goldwyn Mayer, Inc.*, 134 S. Ct. 1962 (2014). *Petrella* held that laches cannot entirely bar a copyright claim filed within the statute of limitations. The Court's reasoning, that laches is "essentially gap-filling, not legislation-overriding," *id* at 1974, applies equally to the "equitable considerations" bar applied by the Second Circuit in the Oneida, Cayuga and Stockbridge cases. The principles applied in *Petrella*, however, were not new, but were those argued in the earlier petitions for certiorari in the Oneida and Cayuga land claim cases.

The point in the Oneida and Cayuga petitions was that an equitable bar to tribal land claims conflicts with legislation expressing Congress' judgment that such claims are not time-barred, as well as with *Oneida II*, which in the specific context of tribal land claims applied the principle that the judgment of Congress regarding time bars trumps judge-made equitable doctrines. In its petition for a writ of certiorari in the Oneida case, the United States argued that the Second Circuit's application of "equitable considerations" to bar all remedies for the State's unlawful acquisition of tribal land "conflicts with settled and fundamental principles that extend beyond the context of Indian land claims – specifically that laches does not apply to suits brought by the United States, and especially not when the statute of limitations specified by Congress that preserves the claim has not run." U.S. Pet., No. 10-1404, at 16. The Oneidas' petition argued that "[t]he Second Circuit's decision – that the Oneidas may pursue no claim for money damages based on violations of the Noninter-

course Act – is directly contrary to this Court's decision in *Oneida II*," in substantial part because *Oneida II*, 470 U.S. at 240-44, had declined to incorporate state limitations periods into federal common law because it would conflict with the will of Congress as to tribal land claims. Pet., No. 10-1420, at 15; *see also* U.S. Pet., No. 10-1404, at 17 (asserting Second Circuit's inconsistency with *Oneida II*). The Court rejected the petitions.[1]

The addition of *Petrella* to the mix does not warrant granting review now in the Stockbridge case. The Stockbridge case was stayed for years below, ultimately to await the outcome of the petitions for certiorari seeking review of the equitable bar in the Oneida land claim case. The Oneida case and the Cayuga case were much more suitable for review of an equitable bar to land claims because the United States appeared as a plaintiff in both cases, which meant that the State of New York, and not current landowners, could be held liable for all damages. Relieving the Stockbridge from the equitable bar would be sensible and fair only if the Oneida and Cayuga

---

[1] The Stockbridge suggest (Pet. 23) that this case is a better vehicle because Congress passed the last in a series of laws intended to preserve tribal land claims after the Oneida claim was filed, but before the Stockbridge tribe filed its claim. The Oneida and Cayuga claims, however, would be timely within the applicable statute of limitations even if filed today because the claims are on the list compiled by the Secretary of the Interior and "[s]o long as a listed claim is neither acted upon or formally rejected by the Secretary, it remains live." *Oneida II*, 470 U.S. at 243; *see* Pet. 21-22 (*Oneida II* held that Congress had made a decision to preserve the Oneida claim).

land claim cases, and other cases dismissed based on the equitable bar, were revived.

The other New York land claim case that remains pending involves the St. Regis Mohawks, although it appears to be in the process of settlement. If that case does not settle, it provides a more suitable vehicle in which to consider the Second Circuit's equitable bar. The Mohawk land claim involves federal treaty protection of aboriginal land and enjoys the support of the United States as a plaintiff, which means that the State is a defendant and can be called to answer in money damages. *See Canadian St. Regis Band of Mohawk Indians v. State of New York*, 2013 U.S. Dist. Lexis 112860 (N.D.N.Y. July 23, 2013). If, as the law professor *amici* contend, the application of an equitable bar to old tribal rights may be of importance beyond New York land claims governed by the Second Circuit rule, *see* Amici Br. 14 n.10 (collecting a handful of cases discussing the equitable bar between 2007 and 2009); *id.* at 6-10 (speculating about application of equitable bar to fishing or water rights), the Court should wait to see if a Circuit split or even a division of lower court authority develops in light of *Petrella*, rather than grant review now in an unsuitable case.

## II. THE STOCKBRIDGE CASE IS AN UNSUITABLE VEHICLE TO CONSIDER AN EQUITABLE BAR TO TRIBAL LAND CLAIMS BECAUSE THE STOCKBRIDGE DO NOT SEEK THE MOST EQUITABLE REMEDY, COMPREHENSIVE MONEY DAMAGES FROM THE STATE.

In *Oneida II*, the Court observed that equity may limit the relief available in an old tribal land claim case, even though the claim itself may remain viable. 470 U.S. at 253 n.27. In *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), the Court applied equitable considerations to limit remedies available to a tribe that was dispossessed of its land long ago. *Petrella* also recognized that the equitable principle of laches sometimes may justify limiting remedies. 134 S. Ct. at 1978-79.

The most equitable remedy in a tribal land claim case is an award of comprehensive monetary damages against the State that originally acquired land illegally and then passed it on through grants or sales to others. As the United States argued in its petition in the Oneida land claim case, "[a]n award of restitution, for instance, would accept as *faits accompli* the transactions in which the State acquired the land, but require the State to disgorge its profits, effectively providing the fair compensation that the Nonintercourse Act was intended to secure." U.S. Pet., No. 10-1404, at 27. The Oneida Nation similarly argued that a damage award against the State as the original wrongdoer "would effectively *affirm* subsequent transfers and the titles of current landowners by recognizing that title had passed through

transactions that could not be unwound." Pet. No. 10-1420, at 24 (emphasis in original).

The Stockbridge do not include a claim against the State for all available damages because, in the absence of intervention by the United States in support of the Stockbridge claim, the State's Eleventh Amendment immunity prevents such relief. The result is that the amended Stockbridge complaint seeks damages and eviction against local governments and the Oneida Nation as current landowners, and leaves open future litigation against private owners of other lands. "[P]laintiff does not waive or relinquish any right, title, or interest it may have in the remaining lands of New Stockbridge that are not presently subject to this action, nor does it waive any claims it may have against any claimant to possessory or ownership rights in such lands." Amended Complaint ¶ 13 (C.A.J.A. A110).

Accordingly, the Stockbridge action may be subject to dismissal because the tribe is not entitled to the relief it seeks, even if tribal land claims are not barred entirely. In an appropriate case, the Court may conclude that equity does not bar tribal land claim plaintiffs from receiving damage awards against the State, even if other relief as to other defendants is deemed inequitable. That option is not available in this case, making it an unsuitable vehicle for examination of the Second Circuit's equitable bar.

## III. THE STOCKBRIDGE CASE IS AN UNSUITABLE VEHICLE TO CONSIDER AN EQUITABLE BAR TO TRIBAL LAND CLAIMS BECAUSE THE STOCKBRIDGE CLAIM FAILS AS A MATTER OF LAW, WHETHER OR NOT IT IS EQUITABLY BARRED.

Whether there is an equitable bar to the Stockbridge land claim presents a purely academic question.

### A. The Oneida Nation's Tribal Sovereign Immunity Bars the Stockbridge Claim.

The District Court ruled that tribal sovereign immunity required dismissal of claims against the Oneida Nation. The Court of Appeals did not reach the question, but it is clear that immunity dooms those claims and makes irrelevant any equitable bar. Pet. App. 17a-18a.

The Stockbridge incorrectly contend that the Oneida Nation's intervention to defend the original complaint's claims against the property of other defendants constituted a waiver of immunity as to the amended complaint's claims against the Oneida Nation's own property. The original Stockbridge complaint specified the "subject lands" that were in issue and as to which damages and eviction were sought; based on the original complaint, neither damages nor eviction could have been awarded against the Oneida Nation. Complaint ¶ 10. (C.A.J.A. A36). The amended complaint expanded the list of "subject lands" to include Oneida Nation lands that were pur-

chased by the Nation from non-Indians years after intervention. Amended Complaint, ¶ 12. (C.A.J.A. A109-A110). The Court has been clear that a tribe that files suit does not waive immunity even to compulsory counterclaims. *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *Three Affiliated Tribes v. Wold Eng'g, P.C.*, 476 U.S. 877 (1986). *A fortiori*, a tribe that intervenes to defend a lawsuit against a third party does not waive tribal sovereign immunity to later-added claims for relief against the tribe and its money and property.

### B. A 1794 Federal Treaty Declares the Land in Issue to Be the Property and Reservation of the Oneida Nation, Not the Stockbridge, and the Stockbridge Also Relinquished Any Possible Rights in That Land by Executing an 1856 Federal Treaty and by Accepting a Reservation in Wisconsin.

Although the lower courts did not address merits issues briefed by the Oneida Nation, it is evident that the Stockbridge land claim fails on the merits, whether or not there is an equitable bar.

The 1794 federal Treaty of Canandaigua is the only federal treaty under which the Stockbridge claim land rights in New York. Contrary to the implication of Pet. 3-4 n.3, the treaty confirms that the Stockbridge were living on the Oneidas' reservation and property, not on their own. 7 Stat. 44 (Nov. 11, 1794). Article II "acknowledges the lands reserved to the Oneida, Onondaga and Cayuga Nations, in their

respective treaties with the state of New-York, and called their reservations, to be their property." (C.A.J.A. A160). Article II then contains the promise of the United States not to disturb the Oneidas or "their Indian friends residing thereon" "in the free use and enjoyment thereof." The Stockbridge admit that the Stockbridge were "Indian friends" within the meaning of Article II. Amended Complaint ¶¶ 21-22 (C.A.J.A. A113-114).[2]

If there had been a Stockbridge reservation located inside of the Oneida reservation, the 1794 federal treaty would have mentioned it. Also, because the Stockbridge allege that they were "Indian friends residing thereon" within the meaning of article II, it follows that they were residing on the "property" and "reservation" of the Oneidas that was acknowledged in article II, not on a separate Stockbridge reservation. In *Fed. Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 121 n.18 (1960), the Court construed this same 1794 treaty and held that the treaty gave the Tuscaroras, who were described in article III as "Indian friends" of the Senecas, no "possessory rights" on the Seneca reservation and that the Tuscaroras were there as "guests" and as "tenants at will or by sufferance." The same "Indian friends" provision that applied to the Stockbridge in article II and

---

[2] Contrary to the implication of Pet. 3-4 n.3, annuities paid to the Stockbridge under the 1794 treaty had nothing to do with land rights. Also, the proceedings before the Indian Claims Commission cited in the footnote concerned only whether the federal government breached a duty to the Stockbridge, and did not require a determination whether the Stockbridge had a reservation or Indian title to the land they occupied within the Oneida reservation.

to the Tuscaroras in article III could not have given the Stockbridge a possessory right that it did not give the Tuscaroras. (C.A.J.A. A160-A161).

The Stockbridge assert that an antecedent state treaty, the 1788 Treaty of Ft. Schuyler, carved Stockbridge land from the Oneida reservation. (C.A.J.A. A150-A154). But that claim is inconsistent with the Stockbridge allegation in the amended complaint that they were "Indian friends" within the meaning of the 1794 federal Treaty of Canandaigua, which acknowledges that the Indian friends were living on the reservation and property of the Oneida Nation. Amended Complaint ¶ 22. (C.A.J.A. A113-A114). The 1794 federal treaty expressed the understanding of the United States and the Oneida Nation about the earlier arrangement with the Stockbridge described in the 1788 state treaty. It also expressed the assent of the Stockbridge, whose leader Hendrick Apaumut signed the 1794 federal treaty. The Stockbridge also signed a subsequent 1794 federal treaty that referred to the Stockbridge as living in "the country of the Oneidas." Treaty with the Oneida, etc., 7 Stat 47 (Dec. 2, 1794) (C.A.J.A. A163-A165). The terms of both 1794 federal treaties and the Stockbridge position that they are Indian friends under the 1794 Treaty of Canandaigua make untenable any interpretation of the 1788 state treaty as having created a distinct Stockbridge reservation.

Even read in isolation from the federal treaties, the 1788 state treaty cannot be construed to establish a reservation within a reservation. The treaty recites that it is made "with the Tribe or Nation of Indians called the Oneidas" and that it is signed by

"the said Oneidas." (C.A.J.A. A150, A152). The treaty was not made with the Stockbridge, and the Stockbridge have never asserted that they paid the Oneidas anything for a transfer of land. Articles I and II in the treaty, read together, describe an Oneida cession to New York State of Oneida lands save for those reserved by the Oneidas pursuant to a metes and bounds description. *Oneida Indian Nation v. City of Sherrill*, 337 F.3d at 156 & n.13 (holding that the Oneidas reserved lands from cession and that the State did not effectuate an Oneida cession of all lands and then a simultaneous circular retrocession of the reserved lands), *rev'd on other grounds*, 544 U.S. 197 (2005); *see County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 231 (1985) (New York purchased "vast majority of the Oneidas' land," and "Oneidas retained a reservation of about 300,000 acres"). Article II provides that the Oneidas "shall hold to themselves and their posterity forever" the reserved lands. (C.A.J.A. A150-A151).[3]

The 1788 state treaty contains no cession to the Stockbridge. Article II provides that the Stockbridge on the reserved lands may "enjoy their set-

---

[3] The Court previously has determined that an Indian treaty ceding all lands and at the same time reserving some of the lands is not a cession of all lands by the tribe and a circular retrocession to the tribe of the reserved lands, but is actually a tribal reservation of such lands from cession. *United States v. Klamath & Moadoc Indians*, 304 U.S. 119, 122-23 (1938); *Worcester v. Georgia*, 31 U.S. 515 (1832); *see United States v. Winans*, 198 U.S 371, 377 (1905) (same analysis regarding reserved fishing rights); Title to the Pottawatomie Reservations, 2 Op. Att'y Gen. 587 (1833) (Attorney General Taney using same analysis regarding cession and reservation of land in treaty).

tlements on the lands heretofore given them by the Oneidas for that purpose" – and may do so "notwithstanding" the Oneidas' reservation of the land, which confirmed continued Oneida ownership. *Id.* at A151-A152. The State's promise in article II of the 1788 state treaty that the Stockbridge could remain in their settlements on the Oneida reservation was no different from the later promise of the United States in article II of the 1794 treaty that the Stockbridge would be left undisturbed on the property and reservation of the Oneidas. The State of New York concluded as much when it determined in the early nineteenth century that the Stockbridge did not have the authority to sell the lands and that it was necessary first to get a quitclaim from the Oneidas, who retained ownership. N.Y. Assembly J. 316 (Mar. 15, 1809) (C.A.J.A. A169); Report of the Special Committee Appointed by the Assembly of 1888 to Investigate the Indian Problem of the State of New York, No. 51, 278-80 (Feb. 1, 1889) (C.A.J.A. A174-A175); II Public Papers of Daniel Tompkins 480 (Feb. 12, 1812). (C.A.J.A. A176-A178).[4]

---

[4] Contrary to the implication of Pet. 3 n.2, the Second Circuit has never considered the validity of any alleged transfer of land from the Oneidas to the Stockbridge, under the 1788 state treaty or otherwise. The decision cited concerned the validity of the Oneidas' cession of land outside the reservation to the State. The Second Circuit held that, under the Articles of Confederation, states retained the "right of preemption," which was a right to extinguish Indian or aboriginal title by purchase, notwithstanding the Articles' general assignment of Indian affairs power to the national Congress. *Oneida Indian Nation v. State of New York*, 860 F.2d 1145, 1154-60 (2d Cir. 1988). The transfer of land from one tribe to another is not an exercise of the right of preemption.

If the Stockbridge ever had a claim to land in New York based on the 1788 state treaty, they relinquished it in exchange for a federal reservation in 1856. In the Treaty with the Stockbridge and Munsee, 11 Stat. 663 (Feb. 5, 1856) (C.A.J.A. A179-A197), the United States sought to "establish comfortably together" in Wisconsin "all such Stockbridges and Munsees – wherever they may be now located, in Wisconsin, in the State of New York, or west of the Mississippi," and the Stockbridge tribe in exchange agreed that "all such and other claims set up by or for them or any of them are hereby abrogated." No Stockbridge claim to land in New York could have survived this exchange, for abrogation of all claims to land outside of the new Wisconsin reservation was part of the *quid pro quo* involved in establishing the new reservation. Further, there is no dispute that the Stockbridge as a tribe fully moved onto their Wisconsin reservation lands. Such acceptance of a federal reservation and the consequent occupation of it operate to eliminate federal protection of any tribal land rights that might previously have existed elsewhere. *United States v. Santa Fe Pac. R.R. Co.*, 314 U.S. 339, 357 (1941); *see* 27 Stat. 744, Ch. 219 (Mar. 3, 1893) (confirming that the Stockbridge tribe "accepted . . . certain lands as a reservation, to which said Indians removed, and upon which they have ever since resided").

To decide the question presented by the Stockbridge petition concerning the Second Circuit's equitable bar would be pointless because the answer to that question ultimately would not matter to the outcome of the Stockbridge claim. The Stockbridge would lose on remand even if they were to prevail as

to the equitable bar. The Court would have grappled with the question in a case in which it has no real world impact.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

PETER D. CARMEN
MEGHAN M. BEAKMAN
ONEIDA INDIAN NATION
LEGAL DEPARTMENT
5218 Patrick Road
Verona, NY 13478

MICHAEL R. SMITH
*COUNSEL OF RECORD*
DAVID A. REISER
ZUCKERMAN SPAEDER LLP
1800 M Street, NW
Washington, DC 20036
(202) 778-1800
msmith@zuckerman.com

*Counsel for Respondent*
*Oneida Nation of New York*

January 26, 2015