No. 16-1320

In the Supreme Court of the United States

UPSTATE CITIZENS FOR EQUALITY, INC., ET AL.,
PETITIONERS

v.

UNITED STATES OF AMERICA, ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Indian Reorganization Act of 1934, which authorizes the Secretary of the Interior to take land into trust "for the purpose of providing land for Indians," 25 U.S.C. 5108, is unconstitutional.

2. Whether the Oneida Indian Reservation, established in the Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44, has since been disestablished by Congress.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 841 F.3d 556. The opinion of the district court (Pet. App. 42a-71a) is not published in the *Federal Supplement* but is available at 2015 WL 1399366.

JURISDICTION

The judgment of the court of appeals was entered on November 9, 2016. A petition for rehearing was denied on January 27, 2017 (Pet. App. 170a-171a). The petition for a writ of certiorari was filed on April 26, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Enacted in 1934, the Indian Reorganization Act (IRA), 25 U.S.C. 5101 *et seq.*,[1] "was designed to improve the economic status of Indians by ending the alienation of tribal land and facilitating tribes' acquisition of additional acreage and repurchase of former tribal lands." *Cohen's Handbook of Federal Indian Law* § 1.05, at 81 (Nell Jessup Newton ed., 2012) (*Cohen*). The IRA authorizes the Secretary of the Interior, "in his discretion, to acquire, through purchase, relinquishment, gift, exchange, or assignment, any interest in lands * * * within or without existing reservations * * * for the purpose of providing land for Indians." 25 U.S.C. 5108.

The Department of the Interior has promulgated regulations to guide the exercise of authority under Section 5108. See 25 C.F.R. Pt. 151. The regulations establish a process through which a tribe may request that the Secretary of the Interior take land into trust for its benefit. See 25 C.F.R. 151.9. In evaluating such a request, the Secretary must provide notice to state and local governments and must consider a number of specified regulatory criteria. See 25 C.F.R. 151.10 (criteria governing on-reservation acquisitions); 25 C.F.R. 151.11 (criteria governing off-reservation acquisitions). For land that the Secretary seeks to acquire from an unrestricted fee owner, the Secretary must consider, among other factors, "the impact on the State and its political subdivisions resulting from the removal of the land from the tax rolls." 25 C.F.R. 151.10(e); see 25 C.F.R. 151.11(a).

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[1] In 2016, Chapter 14 of Title 25 of the United States Code was reclassified as Chapter 45, and the provisions of the IRA were renumbered.

2. The Oneida Indian Nation of New York "is a federally recognized Indian Tribe and a direct descendant of the Oneida Indian Nation * * * , one of the six nations of the Iroquois, the most powerful Indian Tribe in the Northeast at the time of the American Revolution." *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 203 (2005) (citation and internal quotation marks omitted). "At the birth of the United States, the Oneida Nation's aboriginal homeland comprised some six million acres in what is now central New York." *Ibid.*

a. In 1788, New York State and the Tribe entered into the Treaty of Fort Schuyler, in which the Tribe agreed to sell a "vast area" of its land to the State, retaining for itself a reservation of about 300,000 acres. *City of Sherrill*, 544 U.S. at 203; see *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 230-232 (1985). The federal government later "acknowledge[d]" the Oneida Reservation in the Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44, promising "never [to] claim" or "disturb" the Tribe's lands. Art. II, 7 Stat. 45. The Government further pledged that "the said reservation[] shall remain theirs, until they choose to sell [it] to the people of the United States." *Ibid.*; see *City of Sherrill*, 544 U.S. at 204-205.

To ensure that the disposition of Indian lands would be under federal control, the First Congress passed the Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137, commonly known as the Nonintercourse Act. That Act, which remains substantially in force today, see 25 U.S.C. 177, prohibited the sale of tribal lands without the consent of the United States. Nonintercourse Act § 4, 1 Stat. 138. Despite that prohibition, however, New York continued to purchase Oneida land, in some cases over federal objections. See *City of Sherrill*, 544 U.S. at 205.

By 1838, the land owned by the Oneidas had dwindled to 5,000 acres; the Tribe had less than 1,000 acres by 1843; and by 1920, only 32 acres were left. *Id.* at 206-207.

b. "In the 1990s, the Tribe began to repurchase New York reservation land in open-market transactions." Pet. App. 9a. The Tribe then asserted that its purchases had "unified fee and aboriginal title," such that the Tribe could "now assert sovereign dominion over the parcels" in a tax dispute. *City of Sherrill*, 544 U.S. at 213. This Court rejected the Tribe's argument. Because the Tribe had not exerted control over the land for more than 200 years, and because its reassertion of control after such a "long lapse of time" would upset "longstanding observances and settled expectations," the Court held that the Tribe's attempt was foreclosed by principles of equity. *Id.* at 216-221. The Court pointed, however, to an alternate route for the Tribe to achieve some control over those lands: Section 5108 "provides the proper avenue for [the Tribe] to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." *Id.* at 221. The Secretary's process under that provision for taking land into trust, the Court explained, is "sensitive to the complex inter-jurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory." *Id.* at 220-221; see *ibid.* (describing criteria under 25 C.F.R. 151.10(f) for taking land into trust).

Following *City of Sherrill*, the Oneidas petitioned the Secretary to accept a transfer of title to more than 17,000 acres, to be held in trust for the Tribe's benefit. Pet. App. 11a. All of the land subject to the request was already owned by the Oneidas in fee. The acreage

encompassed: the Tribe's governmental, health, educational, and cultural facilities; housing for tribal members; its hunting lands and undeveloped lands; and its businesses, including the Turning Stone Casino. *Ibid.* The Department of the Interior held public hearings on the Tribe's request, afforded an extended comment period, and prepared an Environmental Impact Statement that considered nine alternative actions. C.A. App. A555-A556.

In May 2008, the Secretary of the Interior decided to accept title to approximately 13,000 acres of the Tribe's fee land. Pet. App. 11a. Taking the land into trust, the Secretary explained, would "help to address the [Oneida] Nation's current and near term needs to permanently reestablish a sovereign homeland for its members and their families, preventing alienation of the lands." C.A. App. A585. The Secretary noted that, under state law, the property was already exempt from many sales, excise, and property taxes, such that "the placement of lands into trust would have the practical effect of continuing the *status quo* with regard to real property tax collections." *Id.* at A574. The Secretary acknowledged that taking the land into trust "may negatively impact the ability of state and local governments to provide cohesive and consistent governance" and could increase somewhat the demand for local government services, but he concluded that those effects would not be significant. *Id.* at A570, A573. The Secretary also found that taking land into trust for the Tribe would cause "no change in the New York State criminal and civil court jurisdiction" and that state police officers would "continue to be able to make arrests" for violation of federal, state, and local law. *Id.* at A606; see 25 U.S.C.

232, 233 (providing New York with criminal and civil jurisdiction over Indian reservations).

3. Petitioners and other parties filed suit in federal district court challenging the Secretary's land-into-trust decision.

a. One such challenge was brought by the State of New York and by Madison and Oneida Counties. See Pet. App. 12a n.8. In 2014, that suit was settled, *New York* v. *Jewell*, No. 08-cv-644, 2014 WL 841764 (N.D.N.Y. Mar. 4, 2014), resolving issues that had been litigated for a half-century, see *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 665 (1974). The settlement resolved, *inter alia*, issues of state and local taxation and regulation on tribal land. See *Jewell*, 2014 WL 841764, at *1-*2. Consequently, New York "no longer contends that the entrustment violates its sovereignty." Pet. App. 22a n.15.

b. Petitioners are residents who live near the trust land and a civic organization that opposes the Tribe's land-into-trust request. Pet. ii; Pet. App. 3a. In the district court, petitioners contended that the IRA's land-into-trust procedures are unconstitutional and that the Oneida Reservation no longer exists. Pet. App. 54a, 57a-60a. The court rejected both arguments. As to petitioners' constitutional argument, the district court explained that this Court "has consistently interpreted Congress' authority to legislate in matters involving Indian affairs broadly" and that "trust acquisition does not negate state authority." *Id.* at 58a-59a. The district

court also held that the Oneida Reservation, as recognized by the 1794 Treaty of Canandaigua, "has not been disestablished." *Id.* at 55a; see *id.* at 147a-148a.[2]

c. The court of appeals affirmed. Pet. App. 1a-41a. The court began by addressing petitioners' three constitutional objections. *Id.* at 18a-29a.

First, the court of appeals rejected petitioners' argument that the land-into-trust authority created by Section 5108 exceeds Congress's powers under the Indian Commerce Clause, noting that "the federal government's power under the Constitution to legislate with respect to Indian tribes is exceptionally broad." Pet. App. 18a (citing *United States* v. *Lara*, 541 U.S. 193, 200 (2004)). Although this Court has placed greater limits on Congress's powers under the Interstate Commerce Clause, the court of appeals noted, "the Supreme Court has already rejected the proposed correspondence between the Interstate and Indian Commerce Clauses." *Id.* at 20a. (citing *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989)). The court of appeals also rejected petitioners' argument that "the acquisition of land for Indian use is not a 'regulat[ion] [of] commerce' within the meaning of the Indian Commerce Clause." *Id.* at 21a (brackets in original). "Again," the court explained, "precedent deprives this argument of any traction." *Ibid.*; see *id.* at 21a-22a (citing *Monongahela*

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[2] While petitioners' suit was pending in the district court, this Court held in *Carcieri* v. *Salazar*, 555 U.S. 379 (2009), that the Secretary of the Interior may take land into trust under Section 5108 only for Indian tribes that were "under federal jurisdiction" in 1934. *Id.* at 395 (citation omitted). On remand, the Secretary determined that the Tribe satisfied that requirement, and the district court upheld the Secretary's determination. Pet. App. 53a-57a. Petitioners did not press that challenge on appeal. *Id.* at 13a n.9.

Navigation Co. v. *United States*, 148 U.S. 312, 335-337 (1893); *Cherokee Nation* v. *Southern Kan. Ry. Co.*, 135 U.S. 641, 656-659 (1890)).

Second, the court of appeals rejected petitioners' argument that, "even if permitted under Congress's broad Indian Commerce Clause powers, the land-into-trust procedures violate underlying principles of state sovereignty." Pet. App. 22a. The court of appeals quoted this Court's explanation to the contrary that "the States' inherent jurisdiction on reservations can of course be stripped by Congress." *Id.* at 23a-24a (brackets omitted) (quoting *Nevada* v. *Hicks*, 533 U.S. 353, 365 (2001)). As an example, the court of appeals pointed to *United States* v. *John*, 437 U.S. 634 (1978), in which the Supreme Court upheld the federal government's authority to displace state criminal law on lands purchased for the Choctaw Indians in Mississippi. Pet. App. 24a-25a; see *id.* at 22a ("[T]he federal government may, by acquiring land for a tribe, divest a state of important aspects of its jurisdiction, even if a state previously exercised wholesale jurisdiction over the land and even if 'federal supervision over a tribe has not been continuous.'") (brackets omitted) (quoting *John*, 437 U.S. at 653).

Third, the court of appeals rejected petitioners' argument, based on the Enclave Clause, U.S. Const. Art. I, § 8, Cl. 17, that "Congress [must] obtain [a] state legislature's express consent * * * before it can take state land into trust for Indians." Pet. App. 27a. The Enclave Clause requires such consent "when the federal government takes 'exclusive' jurisdiction over land within a state," such as when it establishes a military base in the State. *Ibid.* (quoting *Paul* v. *United States*, 371 U.S. 245, 263 (1963)). But as "[c]ase law construing

the clause" makes clear, the court explained, "state consent is *not* needed" when the assumption of federal control is less absolute, such as when the state remains "'free to enforce its criminal and civil laws on those lands.'" *Id.* at 27a-28a (quoting *Kleppe* v. *New Mexico*, 426 U.S. 529, 543 (1976)). The court concluded that, because "States retain some civil and criminal authority on reservations," particularly with regard to non-Indians, federal jurisdiction over such land is not "categorically exclusive" and the Enclave Clause does not apply. *Id.* at 28a (citing *Surplus Trading Co.* v. *Cook*, 281 U.S. 647 (1930)).

Next, the court of appeals rejected petitioners' statutory argument. Pet. App. 29a-40a. Petitioners did not contend on appeal that the Oneida Reservation had been disestablished or diminished, and the court of appeals did not address that issue *sua sponte*. Instead, the court addressed petitioners' argument that the Oneidas did not satisfy "the terms 'Indians' and 'tribe' in the IRA and related statutes." *Id.* at 29a. The court disagreed and concluded that "the United States did not exceed its statutory authority by taking land into trust for the Tribe." *Id.* at 40a.

ARGUMENT

Petitioners argue (Pet. 7-17) that Congress exceeded its constitutional authority in enacting the IRA's land-into-trust provision, 25 U.S.C. 5108. The court of appeals correctly rejected that argument, and its decision does not conflict with any decision of this Court or another court of appeals.

Other litigants have raised similar constitutional challenges in unsuccessful petitions for writs of certiorari, see *Citizens Against Casino Gambling in Erie Cnty.* v. *Chaudhuri*, 136 S. Ct. 2387 (2016) (No. 15-780);

Stop the Casino 101 Coal. v. *Brown*, 135 S. Ct. 2364 (2015) (No. 14-1236), including a petition seeking review of a different Second Circuit decision that arose from the same district court decisions from which this case arose, *Central N.Y. Fair Bus. Ass'n* v. *Jewell*, 673 Fed. Appx. 63 (2016), cert. denied, No. 16-1135, 2017 WL 1064315 (May 15, 2017). The same result is warranted here.

Petitioners also contend (Pet. 17-23) that the Oneida Reservation was disestablished. That argument was not raised in or addressed by the court of appeals, has no bearing on the Secretary of the Interior's decision in this case, and is in any event meritless.

1. a. The Constitution gives the United States both "the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state." *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913). Congress's "broad general powers to legislate in respect to Indian tribes," *United States* v. *Lara*, 541 U.S. 193, 200 (2004), derive from the Indian Commerce Clause, U.S. Const. Art. I, § 8, Cl. 3, and the Treaty Clause, U.S. Const. Art. II, § 2, Cl. 2, among other sources. See *Lara*, 541 U.S. at 200-204; see also *United States* v. *Kagama*, 118 U.S. 375, 384 (1886) (Because tribes "are communities *dependent* on the United States * * * so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power."). On numerous occasions, this Court has described such authority "as 'plenary and exclusive.'" *Lara*, 541 U.S. at 200 (citing *Negonsott* v. *Samuels*, 507 U.S. 99, 103, (1993);

Washington v. *Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979)).

Congress's constitutional authority with respect to Indian tribes has, from the time of the Founding, consistently been understood to include power over the acquisition, sale, and regulation of Indian land. See *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 204 (2005) (describing the Nonintercourse Act); see generally *Cohen* §§ 5.02[4], 15.03. In *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998), the Court expressly recognized Congress's constitutional power to create Indian country: "The federal set-aside requirement * * * reflects the fact that because Congress has plenary power over Indian affairs, see U.S. Const. Art. I, § 8, Cl. 3, some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to create or to recognize Indian country." 522 U.S. at 531 n.6; see *United States* v. *John*, 437 U.S. 634, 652-654 (1978) (upholding federal criminal jurisdiction over lands that had been acquired through Acts of Congress and held in trust for the Mississippi Choctaws). In 1934, Congress exercised that power in the IRA by giving the Secretary of the Interior authority to take land into trust for Indian tribes, 25 U.S.C. 5108, and this Court has specifically identified Section 5108 as "provid[ing] the proper avenue" for the federal government to assume control over tribal land—including the very land at issue here, *City of Sherrill*, 544 U.S. at 221; see *id.* at 220 ("Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being.").

Given the long, unbroken history of federal supervision of tribal lands, it would be surprising for the courts

to entertain any doubt about the constitutionality of Section 5108. And, in fact, the courts of appeals have uniformly upheld Section 5108 against various constitutional challenges. See, *e.g.*, *Carcieri* v. *Kempthorne*, 497 F.3d 15, 39-40 (1st Cir. 2007) (en banc) (rejecting challenges under the Indian Commerce Clause, the Tenth Amendment, and the Enclave Clause), rev'd on other grounds, 555 U.S. 379 (2009); see also *County of Charles Mix* v. *United States Dep't of the Interior*, 674 F.3d 898, 902 (8th Cir. 2012) (rejecting challenge under the Guarantee Clause); *Michigan Gambling Opposition* v. *Kempthorne*, 525 F.3d 23, 32-33 (D.C. Cir. 2008) (rejecting challenge under the nondelegation doctrine), cert. denied, 555 U.S. 1137 (2009) (No. 08-554); *South Dakota* v. *United States Dep't of Interior*, 423 F.3d 790, 797-798 (8th Cir. 2005) (same), cert. denied, 549 U.S. 813 (2006) (No. 05-1428); *United States* v. *Roberts*, 185 F.3d 1125, 1136-1137 (10th Cir. 1999) (same), cert. denied, 529 U.S. 1108 (2000) (No. 99-1174).

b. Petitioners do not contend that the decision below, which upheld Section 5108, conflicts with a decision of any other court of appeals. Instead, petitioners offer a series of arguments as to why Section 5108 is unconstitutional. None is persuasive.

First, petitioners argue (Pet. 15-16) that the Indian Commerce Clause does not give Congress the power to acquire tribal land and hold it in trust because, at the Founding, the word "commerce" had a limited meaning. Petitioners also contend (Pet. 16-17) that Congress's power to regulate commerce "with the Indian Tribes" only enables Congress to regulate commercial interactions with tribes and does not include the authority to regulate tribal lands. The court of appeals correctly rejected those arguments.

As an initial matter, this Court has located Congress's "broad general powers to legislate in respect to Indian tribes," *Lara*, 541 U.S. at 200, not only in the Indian Commerce Clause, but also in the Treaty Clause, among other sources. See *id.* at 200-204; see also p. 10, *supra*.

As the court of appeals explained, moreover, petitioners' arguments conflate Congress's powers under the *Interstate* Commerce Clause with its powers under the *Indian* Commerce Clause. Yet "the Supreme Court has already rejected the proposed correspondence between the Interstate and Indian Commerce Clauses." Pet. App. 20a. The two Clauses "have very different applications" and serve different purposes: "[W]hile the Interstate Commerce Clause is concerned with maintaining free trade among the States even in the absence of implementing federal legislation, the central function of the Indian Commerce Clause is to provide Congress with plenary power to legislate in the field of Indian affairs." *Cotton Petroleum Corp.* v. *New Mexico*, 490 U.S. 163, 192 (1989) (citations omitted). In addition, cases interpreting the Interstate Commerce Clause are "premised on a structural understanding of the unique role of the States in our constitutional system that is not readily imported to cases involving the Indian Commerce Clause." *Ibid.* For those reasons, petitioners' heavy reliance on cases arising under the Interstate Commerce Clause, see, *e.g.*, Pet. 9 (quoting *United States* v. *Morrison*, 529 U.S. 598 (2000)); Pet. 9, 15-16 (quoting and citing *United States* v. *Lopez*, 514 U.S. 549 (1995)), is misplaced.

Second, petitioners argue (Pet. 11) that Congress's authority under the Indian Commerce Clause cannot be construed to "authorize the displacement of State rights

to territorial integrity." Petitioners claim (Pet. 11-15) that the Secretary's power under Section 5108 to take land into trust for a tribe violates that principle. Petitioners again err.

This Court has made clear that "[t]he States' inherent jurisdiction on reservations can of course be stripped by Congress." *Nevada* v. *Hicks*, 533 U.S. 353, 365 (2001) (citing *Draper* v. *United States*, 164 U.S. 240, 242-243 (1896)); see *Seminole Tribe* v. *Florida*, 517 U.S. 44, 62 (1996) ("States * * * have been divested of virtually all authority over Indian commerce and Indian tribes."). For instance, criminal jurisdiction over offenses committed on an Indian reservation is governed by a framework of federal laws, and "Congress has plenary authority to alter these jurisdictional guideposts." *Negonsott*, 507 U.S. at 102-103 (citation omitted); see *John*, 437 U.S. at 652-653 (Congress may displace state criminal jurisdiction on reservation lands even where such jurisdiction previously "went unchallenged" and "federal supervision over [a tribe] has not been continuous."); see also 25 U.S.C. 232 (giving New York "jurisdiction over offenses committed by or against Indians on Indian reservations within the State"). Petitioners offer no authority for the novel proposition that "even if permitted under Congress's broad Indian Commerce Clause powers, the [IRA's] land-into-trust procedures violate underlying principles of state sovereignty." Pet. App. 22a.

Third, petitioners argue (Pet. 7) that to uphold Section 5108 would be "[t]o construe the Indian Commerce Clause as trumping * * * the Enclave Clause's express limitations on federal power to displace state sovereignty." See Pet. 7-8. Under the Enclave Clause, U.S. Const. Art. I, § 8, Cl. 5, "state consent is needed only

when the federal government takes 'exclusive' jurisdiction over land within a state." Pet. App. 27a (quoting *Paul* v. *United States*, 371 U.S. 245, 263 (1963)); see *Fort Leavenworth R.R.* v. *Lowe*, 114 U.S. 525, 538 (1885) (State consent is necessary for the federal government to obtain "the right of exclusive legislation within the territorial limits of any State.") (citation omitted). But "[w]hen land is taken into trust by the federal government for Indian tribes, the federal government does not obtain such categorically exclusive jurisdiction over the entrusted lands." Pet. App. 28a. As this Court has explained, Indian reservation lands do not fall within the Enclave Clause because "the lands remain part of [the State's] territory and within the operation of her laws":

> Such reservations are part of the State within which they lie and her laws, civil and criminal, have the same force therein as elsewhere within her limits, save that they can have only restricted application to the Indian wards. Private property within such a reservation, if not belonging to such Indians, is subject to taxation under the laws of the State.

Surplus Trading Co. v. *Cook*, 281 U.S. 647, 650-651 (1930); see *Hicks*, 533 U.S. at 361 ("State sovereignty does not end at a reservation's border."); see also 533 U.S. at 363-365 (upholding a State's right to enter a reservation to execute a search warrant related to off-reservation conduct). Thus, land taken into trust under Section 5108 is not "exclusive" in the sense contemplated by the Enclave Clause. *Paul*, 371 U.S. at 263.

2. Petitioners also contend (Pet. 17-23) that the federal government disestablished the Oneida Reservation. That contention does not merit further review.

First, petitioners waived their argument by failing to raise it in the court of appeals, which did not consider

the issue *sua sponte*. See p. 9, *supra*. This Court should not address it in the first instance. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

Second, resolution of petitioners' argument would have no effect on the outcome of this case. The IRA authorizes the Secretary of the Interior to acquire "*any* interest in lands * * * *within or without* existing reservations." 25 U.S.C. 5108 (emphasis added). The Secretary's authority under Section 5108 to take land into trust thus is not limited to "reservation" land. See 25 C.F.R. 151.11 (criteria governing off-reservation acquisitions). And in approving the Tribe's land-into-trust request in this case, the Secretary noted that the request satisfied the criteria for off-reservation acquisitions as well as for on-reservation acquisitions. C.A. App. A582 n.5.

Third, and in any event, petitioners' argument is incorrect. "'Only Congress can divest a reservation of its land and diminish its boundaries,' and its intent to do so must be clear." *Nebraska* v. *Parker*, 136 S. Ct. 1072, 1078-1079 (2016) (brackets omitted) (quoting *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984)). After examining the historical record in detail, the Second Circuit ruled, more than a decade ago, that Congress had not diminished or disestablished the Oneida Reservation. *Oneida Indian Nation* v. *City of Sherrill*, 337 F.3d 139, 159-165 (2d Cir. 2003), rev'd on other grounds, 544 U.S. 197 (2005). Addressing in particular the Treaty of Buffalo Creek, see Treaty with the New York Indians, June 11, 1838, 7 Stat. 550, which petitioners invoke here (Pet. 22-23), the court concluded that "neither its text nor the circumstances surrounding its passage and implemen-

tation establish a clear congressional purpose to disestablish or diminish the [Oneida] reservation." 337 F.3d at 165.

Although this Court in *City of Sherrill* overturned that decision on other grounds, the Court expressly declined to address "whether * * * the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation." 544 U.S. at 215 n.9. Following *City of Sherrill*, the court of appeals has on multiple occasions declined to disturb its prior conclusion. See *Central N.Y. Fair Bus. Ass'n* v. *Jewell*, 673 Fed. Appx. 63, 65-66 (2d Cir. 2016), cert. denied, 2017 WL 1064315 (May 15, 2017) (No. 16-1135); *Oneida Indian Nation* v. *Madison Cnty.*, 665 F.3d 408, 443-444 (2d Cir. 2011), cert. dismissed, 134 S. Ct. 1582 (2014) (No. 12-604). No reason exists for the Court to intervene now, particularly in light of the 2014 settlement involving the State of New York and Madison and Oneida Counties, see p. 6, *supra*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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