No. 16-286

In The

Supreme Court of the United States

SHELDON PETERS WOLFCHILD, ERNIE PETERS LONGWALKER, SCOTT ADOLPHSON, MORRIS PENDLETON, BARBARA BUTTES AND THOMAS SMITH, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,

Petitioners,

v.

REDWOOD COUNTY, MINNESOTA, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE LOWER SIOUX INDIAN COMMUNITY IN OPPOSITION

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QUESTION PRESENTED

Whether federal common law remedies recognized in *Oneida I* and *II* for Indian tribes to vindicate land rights based on aboriginal title are available to individuals whose purported possessory rights arise from an 1863 federal statute with no private right of action that gave the Secretary of the Interior discretionary authority to set apart lands for individual Indians.

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On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF FOR THE LOWER SIOUX INDIAN COMMUNITY IN OPPOSITION

Respondent Lower Sioux Indian Community ("Community") respectfully urges the Supreme Court of the United States (the "Court") to deny the Petition for Writ of Certiorari ("Petition") to review the published opinion of the United States Court of Appeals for the Eighth Circuit ("court of appeals"), entered in this case on June 1, 2016, *Wolfchild v. Redwood Cnty.*,

824 F.3d 761, 772 (8th Cir. 2016), because this Court resolved the question presented by the Petitioners in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

OPINIONS BELOW

The opinion of the court of appeals, App. 1-22, is reported at 824 F.3d 761. The district court's decision dismissing Petitioners' first amended complaint is reported at 91 F. Supp. 3d 1093.

JURISDICTION

The judgment of the court of appeals was entered on June 1, 2016. The Petition was filed on August 31, 2016. While this Court maintains jurisdiction under 28 U.S.C. § 1254(1) to review the decision of the court of appeals through a grant of a writ of certiorari, it nonetheless lacks subject-matter jurisdiction with respect to claims against the Community because the Community is entitled to sovereign immunity from suit.

STATEMENT OF THE CASE

Having endured years of Petitioners' and their counsel's specious legal claims and bad faith conduct

in this matter, the Community welcomes the opportunity to close the final chapter of this feckless litigation. Despite 11 years of failed litigation before the United States Court of Federal Claims (the "Court of Claims") and the United States Court of Appeals for the Federal Circuit (the "Federal Circuit"),[1] Petitioners filed a complaint in March 2014 in the District of Minnesota alleging many of the same issues that the Court of Claims and the Federal Circuit previously rejected, forcing the Community to defend against a meritless attack on its lands and on its sovereign status as a federally recognized tribe. This case is not complex. But Petitioners' and their counsel's maelstrom of evolving legal theories and frenetic litigation strategy are confounding. Indeed, Petitioners' complaint has thus far resulted in three piecemeal appeals to the court of appeals, 192 *substantive* filings by the defendants in the district court, seven substantive orders from the district court and the court of appeals, and the ultimate rejection of Petitioners' legal claims on the merits of

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[1] Petitioners' claims before the Court of Claims and Federal Circuit resulted in nine published decisions, cited throughout this Opposition as follows: *Wolfchild v. United States*, 62 Fed. Cl. 521 (2004) ("*Wolfchild I*"); *Wolfchild v. United States*, 62 Fed. Cl. 779 (2005) ("*Wolfchild II*"); *Wolfchild v. United States*, 72 Fed. Cl. 511 (2006) ("*Wolfchild III*"); *Wolfchild v. United States*, 77 Fed. Cl. 72 (2007) ("*Wolfchild IV*"); *Wolfchild v. United States*, 78 Fed. Cl. 472 (2007) ("*Wolfchild V*"); *Wolfchild v. United States*, 559 F.3d 1228 (Fed. Cir. 2009) ("*Wolfchild VI*"); *Wolfchild v. United States*, 96 Fed. Cl. 302 (2010) ("*Wolfchild VII*"); *Wolfchild v. United States*, 101 Fed. Cl. 54 (2011) ("*Wolfchild VIII*"); *Wolfchild v. United States*, 731 F.3d 1280 (Fed. Cir. 2013) ("*Wolfchild IX*").

their complaint on *six* separate occasions. All this for a claim that is patently meritless under well-settled law.

Petitioners filed their amended complaint in September 2014, purporting to be lineal descendants of so-called "loyal Mdewakanton" and asserting exclusive title and rights of occupancy to a 12-square-mile "reservation" in parts of Sibley, Renville, and Redwood Counties in south-central Minnesota, including all of the Community's Reservation and various other parcels of property in the vicinity of the Reservation owned by the Community in fee. *Wolfchild v. Redwood Cnty.*, 112 F. Supp. 3d 866, 870 (D. Minn. June 9, 2015). The district court dismissed the amended complaint with prejudice for lack of jurisdiction based on the Community's sovereign immunity from suit as a federally recognized Indian tribe. App. 37-38. In addition, the court concluded that the statute upon which Petitioners' claims are predicated does not provide for an express or implied private right of action, *id.* at 39-40, and that Petitioners are not entitled to relief under federal common law, *id.* at 41. The court of appeals affirmed, concluding that federal common law claims are not available to Petitioners under this Court's decisions in *Oneida I* and *Oneida II* because they are not a tribe and their claims are not based on aboriginal title. *Id.* at 12-14. Because the court of appeals properly affirmed based on this Court's well-settled precedent, the Community respectfully requests that this Court deny the Petition.

BACKGROUND & PROCEDURAL HISTORY

The Community is compelled to provide the following Background and Procedural History that corrects the Petitioners' mischaracterizations and omissions of the historical and procedural facts underlying this case. Sup. Ct. R. 15(2).

I. The Lower Sioux Indian Community

The Community is a federally recognized Indian tribe located in Southern Minnesota and organized under a Constitution and By-laws that the Community's membership adopted and the Secretary of the Interior approved in 1936 pursuant to the Indian Reorganization Act ("IRA").[2] In 1934, the Mdewakanton Sioux in Minnesota voted to accept the terms of the IRA and then organized as three separate tribes – the Lower Sioux Indian Community and the Prairie Island Indian Community ("PIIC") organized in 1936, and the Shakopee Mdewakanton Sioux Community ("SMSC") organized in 1969. Theodore H. Haas, Ten Years of Tribal Government Under I.R.A. 16 (1947), *available at* http://www.doi.gov/library/internet/subject/upload/Haas-TenYears.pdf; *see also Wolfchild IX*, 731 F.3d 1280, 1286-87 (Fed. Cir. 2013). Petitioners have represented throughout this litigation that they are "Loyal

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[2] The Community's Constitution and By-laws are accessible on the Community's website. *See* "Constitution of the Lower Sioux Indian Community in Minnesota," Lower Sioux Indian Community, http://lowersioux.com/wp-content/uploads/2015/12/Lower-Sioux-Indian-Community-Constitution.pdf (last visited Sept. 28, 2016).

Mdewakanton" and constitute a cognizable Indian tribe, but that contention has been argued and rejected by the Federal Circuit. *Wolfchild IX*, 731 F.3d at 1294 (concluding that the court lacked jurisdiction under the Indian Non-Intercourse Act because "claimants . . . lacked the unitary organization required to be a tribe"). The three sovereign, federally recognized Communities are the *only* successors in interest to the historic Mdewakanton Sioux in Minnesota who signed treaties with the United States in 1805, 1825, 1830, 1837, 1851, and 1858.[3] Each branch of the federal government has recognized the Lower Sioux Indian Community as an Indian tribe with sovereign rights.[4]

The Community is governed by a Community Council, comprised of five officials elected from the Community's membership. The Community has 930 members, half of whom live on the Community's 1,743-acre reservation (the "Reservation"). Members receive

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[3] The 1805 Treaty was submitted by the President to the Senate on March 29, 1808, and ratified by the Senate on April 16, 1808. *See Lower Sioux Indian Cmty. v. United States*, 36 Ind. Cl. Comm. 295, 316 (1975); *see also* Treaty of August 19, 1825, 7 Stat. 272; Treaty of July 15, 1830, 7 Stat. 328; Treaty of September 29, 1837, 7 Stat. 538; Treaty of July 23, 1851, 10 Stat. 949; Treaty of August 5, 1851, 10 Stat. 954; Treaty of June 19, 1858, 12 Stat. 1031.

[4] *See, e.g.*, Pub. L. No. 92-555, 86 Stat. 1168 (1972); H.R. Rep. No. 92-1369, at 7 (1971); S. Rep. No. 99-115, at 4 (1985); Act of Dec. 19, 1980, Pub. L. No. 96-557, 94 Stat. 3262; S. Rep. No. 99-115, at 4 (1985); H.R. Rep. No. 99-298, at 1 (1985); 81 Fed. Reg. 5019, 5021 (Jan. 29, 2016); *Lower Sioux Indian Community v. United States*, 36 Ind. Cl. Comm. 295, 295-96 (1975); *In re Whitaker*, 474 B.R. 687 (BAP 8th Cir. 2012).

numerous government services from the Community, including law enforcement, housing, healthcare, and social services. *See* "Departments," Lower Sioux Indian Community, http://lowersioux.com/departments/ (last visited Sept. 29, 2016).

II. The 1863 Act and its History

The facts relevant to this litigation begin in the mid-nineteenth century on the Dakota[5] Reservation in south-central Minnesota. In 1851, the four Dakota bands ceded all of their lands to the United States through two separate treaties. Treaty of July 23, 1851, 10 Stat. 949 (Sisseton and Wahpeton Bands); Treaty of August 5, 1851, 10 Stat. 954 (Mdewakanton and Wahpekute Bands). The lands ceded by these treaties, totaling approximately 24 million acres, encompassed the southern half of Minnesota and portions of present-day Iowa and South Dakota. Royce Treaty Cession Area 289, *available at* http://usgwarchives.net/maps/cessions/ilcmap33.htm (last visited Sept. 28, 2016).

In return for these cessions, the United States promised annuities, one reservation for the Sisseton and Wahpeton bands on the north side of the Minnesota River, and a second reservation for the

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[5] The Dakota (meaning "ally" or "union") consisted of four bands: the Mdewakanton, the Wahpeton, the Wahpekute, and the Sisseton. A Dakota-English Dictionary (James Owen Dorsey ed., Minn. Historical Society Reprint ed. 1992); *see also Wolfchild VIII*, 101 Fed. Cl. at 59-60.

Mdewakanton and the Wahpekute bands on the south side. Treaty of August 5, 1851, arts. III-IV, 10 Stat. 954. Congress did not authorize the President to confirm the Dakota reservations on the Minnesota River until 1854. Act of July 31, 1854, 10 Stat. 315, 326. The President never exercised his authority. Instead, in a single 1858 treaty, the United States confirmed a reservation for the Dakota people located south of the Minnesota River. Treaty of June 19, 1858, arts. I-III, 12 Stat. 1031 and 1037.

In August 1862, tensions fueled by the United States' corrupt dealings, failed treaty promises, and the starvation of the Dakota, erupted into violence and developed into a full-scale war throughout Southern Minnesota. *Wolfchild IX*, 731 F.3d at 1285. The 1862 War raged for just over a month, but caused widespread destruction and significant military and civilian causalities on both sides. *See Wolfchild VIII*, 101 Fed. Cl. 54, 60 (2011). As the war drew to a close, the United States military took roughly 1,200 Dakota into custody[6] and initiated a series of retributive actions against the Dakota. *Wolfchild I*, 62 Fed. Cl. 521, 526 (2004).

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[6] The United States detained the Dakota who did not flee after the 1862 War at Fort Snelling, Minnesota. Three-hundred and three of the 425 Dakota arraigned for murder were "tried," convicted, and sentenced to death by military commission. The President commuted 264 of the death sentences to life imprisonment, *Medawakanton & Wahpakoota Bands of Sioux Indians v. United States*, 57 Ct. Cl. 357, 364 (1922), and 38 were executed by hanging in Mankato, Minnesota, in what remains the largest mass execution in United States history.

Congress first passed the Abrogation and Forfeiture Act (the "1863 Act"), which annulled all treaties with the Sioux of Minnesota and eliminated the Dakota Reservation. Act of Feb. 16, 1863, ch. 37, 12 Stat. 652. The annuity monies owed to the Sioux from prior land cession treaties were seized to create a victim's impact fund for non-Indians who suffered loss of life or property during the 1862 War. 12 Stat. 652, § 2; *Wolfchild IX*, 731 F.3d at 1285. A month later, Congress passed the Removal Act, which banished the Dakota from Minnesota and authorized the sale and distribution of their former reservation lands.[7] Act of Mar. 3, 1863, ch. 119, 12 Stat. 819.

Section 9 of the 1863 Act permitted, but did not require, the Secretary to set apart from public sale unappropriated lands that could be entered in 80-acre, restricted-fee allotments and held in severalty by individual "friendly Sioux"[8] Indians who aided white settlers during the 1862 War. Section 9 of the 1863 Act provides:

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[7] Many of the Dakota banished from the State of Minnesota were forcibly removed to three reservations now known as the Crow Creek Reservation in South Dakota, the Lake Traverse Reservation in North and South Dakota, and the Santee Reservation in Nebraska. *Wolfchild I*, 62 Fed. Cl. at 526 (citing *Medawakanton & Wahpakoota Bands of Sioux Indians*, 57 Ct. Cl. at 364-65).

[8] The "friendly Sioux" referred to in the 1863 Act were individuals from the Sisseton, Wahpeton, Wahpekute, and Mdewakanton bands. Petitioners have claimed throughout this litigation that the "friendly Sioux" refers *only* to the Mdewakanton, and specifically Petitioners' ancestors. But this claim is historically and statutorily baseless. Act of Feb. 16, 1863, ch. 37, § 9, 12 Stat. 652 (referring to the "friendly Sioux" as "each

> That the Secretary of the Interior is hereby authorized to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of the said Indians. The land so set apart shall not be subject to any tax, forfeiture, or sale, by process of law, and shall not be alienated or devised, except by the consent of the President of the United States, but shall be an inheritance to said Indians and their heirs forever.

12 Stat. 654, § 9.

Following passage of the 1863 Act, the Secretary of the Interior allowed Reverend S.D. Hinman to identify land that could be set apart pursuant to Section 9 of the Act, App. 29, and on March 16, 1865, Reverend Hinman submitted a proposal to the Secretary for setting apart 12 sections of land, comprising some 6,483.53 acres, on and around the former Dakota Reservation. *Wolfchild VIII*, 101 Fed. Cl. at 65-66.

Soon after Reverend Hinman submitted his proposal, the Secretary discovered that the land identified included land that was already appropriated to individuals or to the State of Minnesota, or was beyond the boundaries of the former Dakota Reservation, rendering those lands unsuitable under the 1863 Act. Ex. II, Defs.' Mot. to Dismiss, *Wolfchild v. Redwood Cnty.*, Civ. No. 0:14-cv-01597-MJD-FLN (D. Minn. Sept. 26, 2014),

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individual of the before-named *bands* who exerted himself in rescuing the whites" (emphasis added)).

Dkt. 159. But the unavailability of the lands proved far less problematic than the significant civilian, political, and military opposition to settling Dakota in the recent military theater. *See Wolfchild VI*, 559 F.3d 1228, 1232 (Fed. Cir. 2009). Faced with this opposition, the Secretary abandoned the proposal and never exercised the authority granted under the 1863 Act, *Wolfchild VIII*, 101 Fed. Cl. at 66, as Petitioners conceded before this Court. Petition for Writ of Certiorari at 21-22, *Wolfchild v. United States*, 134 S. Ct. 1516 (No. 13-794) (asserting that "no land was provided to the Mdewakanton Bands under the 1863 Act"). As a result, no Dakota entered the lands and no property rights were ever conferred. *Wolfchild IX*, 731 F.3d at 1286. By Presidential Proclamation dated August 28, 1867, President Andrew Johnson restored the lands for public sale and they were sold consistent with applicable law. *Wolfchild VIII*, 101 Fed. Cl. at 66.

III. Petitioners' Prior Litigation in *Wolfchild v. United States*

Conspicuously absent from the Petition is any mention of the Petitioners' and their counsel's more than decade-long, unsuccessful litigation of virtually identical claims in *Wolfchild v. United States* prior to filing suit in this matter. Indeed, Petitioners' amended complaint is and has always been an attempt to relitigate claims lost in the Court of Claims and the Federal Circuit. *See Wolfchild IX*, 731 F.3d at 1287-88 (discussing the history of the *Wolfchild* litigation). Petitioners

initially sued the United States for breach of trust relating to their alleged interest in land, including some of the lands that are the subject of this suit. After nine reported decisions, the Federal Circuit issued a decision dismissing the case with prejudice. *Id.* at 1285. This Court denied *certiorari* on March 10, 2014. *Wolfchild v. United States*, 134 S. Ct. 1516 (2014); *Zephier v. United States*, 134 S. Ct. 1516 (2014).

In dismissing Petitioners' claims, the Federal Circuit addressed and rejected the same issues Petitioners raised in their amended complaint in this case. Specifically, the court held that the 1863 Act did "not impose any duty on the Secretary of the Interior to make the land grants it authorizes" and "therefore cannot 'fairly be interpreted as mandating compensation for damages sustained from a failure to provide such lands.'" *Wolfchild IX*, 731 F.3d at 1292 (quoting *United States v. Navajo Nation*, 556 U.S. 287, 291 (2009)). The court further determined that Petitioners' purported ancestors obtained no property interest under the 1863 Act, concluding that "[a]fter it took steps toward conveyance of the 12 sections to the designated Indians in 1865, the government terminated the process and sold the parcels to others." *Id.* at 1292-93.

IV. Procedural History of Instant Litigation

Approximately two months after this Court denied *certiorari* in the failed litigation before the Federal Circuit, Petitioners and their counsel repackaged those claims in a suit filed in the District of Minnesota. In

their amended complaint, Petitioners purport to be lineal descendants of so-called "loyal Mdewakanton"[9] and assert exclusive title and rights of occupancy to a 12-square-mile "reservation" in parts of Sibley, Renville, and Redwood Counties in south-central Minnesota. *Wolfchild*, 112 F. Supp. 3d at 870; First Am. Compl. ¶¶ 39-43, *Wolfchild v. Redwood Cnty.*, Civ. No. 0:14-cv-01597-MJD-FLN (D. Minn. Sept. 22, 2014), Dkt. 120 (hereinafter "First Am. Compl."). The property Petitioners claim includes all of the Community's Reservation and various other parcels of property in the vicinity of the Reservation owned by the Community in fee. *Id.* ¶¶ 1-7; *see Wolfchild*, 112 F. Supp. 3d at 870.

In August 2014, the Community, along with the other defendants, moved the district court to dismiss Petitioners' claims on various grounds. The court

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[9] The term "Loyal Mdewakanton" is a Court of Federal Claims-created shorthand in reference to the plaintiff group engaged in earlier litigation against the United States in *Wolfchild I-IX*. But it is a fiction. The Act at issue in this litigation does not refer to "loyal Mdewakanton" or "Mdewakanton," but to "friendly Sioux." The term "loyal Mdewakanton" has no historical meaning, and presuming to identify and label who was "loyal" and to whom, in the social, political and military disaster that caused and defined the Dakota War of 1862, is a fool's errand. The many different motivations for the actions of the many different leaders, and followers, on all sides of the 1862 War have been the subject of entire books, yet remain decidedly not a matter of consensus. And, significantly, there has never been a reliable identification of friendly Sioux. Ultimately, the plaintiffs in *Wolfchild I-IX*, like the Petitioners here, are not a recognized tribe, nor were their purported ancestors, the so-called "loyal Mdewakanton," a recognized tribe or recognized group of Indians. *See, e.g.*, *Wolfchild IX*, 731 F.3d at 1294 (citing *Wolfchild VIII*, 101 Fed. Cl. at 65-69).

granted the Community's motion to dismiss with prejudice for lack of jurisdiction based on the Community's sovereign immunity from suit as a federally recognized Indian tribe. App. 36-38. As to the remaining defendants, the court also dismissed on several additional grounds. The court concluded that Petitioners' claims were predicated on the 1863 Act and that the Act does not provide for an express or implied private right of action. *Id.* at 38-41. The court further rejected Petitioners' claim that they were entitled to relief under a federal common law cause of action:

> Plaintiffs' reliance on the *Oneida* decision is also misplaced. In that case, the Court recognized a federal common law right to sue for enforcement of Indian property rights based on aboriginal title. Here, Plaintiffs are not suing to enforce aboriginal land rights in the property at issue. Lacking such rights, *Oneida* does not support Plaintiffs' assertion that they are asserting a federal common law claim, rather than a claim under the 1863 Act.

Id. at 41.

In the ensuing months, the Community and several other defendants moved for sanctions against Petitioners and their counsel for filing in bad faith an amended complaint with no basis in fact or law after Petitioners' counsel ignored the Community's repeated requests that the complaint and amended complaint be withdrawn. *Wolfchild*, 112 F. Supp. 3d at 871, 873. On June 9, 2015, the district court granted the motions

for sanctions. Contrary to Petitioners' suggestion otherwise, *see* Pet. at 8 n.10, the Court's reasoning and rationale in issuing sanctions was explicit and unequivocal. The court concluded "that the claims asserted in this case are so completely frivolous and without a factual or legal basis that they had to have been brought in bad faith." *Wolfchild*, 112 F. Supp. 3d at 870. According to the court, Petitioners violated Rule 11 "[b]y failing to provide evidence to support the Court's jurisdiction, and by ignoring the well-settled doctrine of tribal immunity . . . ." *Id.* at 875. The court further determined that sanctions were warranted for the Petitioners' and their counsel's failure to join the United States under Federal Rule of Civil Procedure 19, emphasizing that "[a] reasonable and competent attorney, in particular one who had been involved in the related litigation for over eleven years, would know the United States held title to [the] land [claimed], not the Community, and as a result, the United States was an indispensable party with respect to Plaintiffs' claims. . . ." *Id.* at 876-77.

The Court ordered Petitioners, their counsel, and their counsel's law firm to pay $281,906.34 in reasonable attorney's fees as sanctions and to post an appeal bond in the amount of $200,000. *Id.* at 882-83; *Wolfchild v. Redwood Cnty.*, Civ. No. 14-1597 (MJD/FLN), 2015 WL 5672718, at *8 (D. Minn. Sept. 25, 2015). Thereafter, Petitioners peppered the district and appellate courts with motions, moving both courts to stay imposition of the appeal bond and sanctions and then

moving the district court to set aside its sanctions order. The courts rejected each of the Petitioners' motions. *See, e.g.*, *id.*; Order Denying Pls.' Mot. to Stay Appeal Bond, *Wolfchild v. Redwood Cnty.*, Civ. No. 14-1597 (MJD/FLN) (D. Minn. July 15, 2015), Dkt. No. 316. Petitioners never posted the appeal bond ordered by the district court.

Petitioners separately appealed the district court's imposition of the appeal bond, the issuance of sanctions, and the dismissal of the amended complaint. The court of appeals consolidated the appeals and, ultimately, affirmed the district court's dismissal of Petitioners' amended complaint on its merits. App. 12-17. The court first concluded that Petitioners "failed to state a claim under the federal common law," emphasizing that this Court's decisions in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (hereinafter *Oneida I*) and *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) (hereinafter *Oneida II*), limited the availability of federal common law claims for vindication of possessory rights to *tribes* asserting a right to possession based on *aboriginal title*. App. 12-14. The court concluded that because Petitioners were a group of individuals as opposed to a tribe who had no claim of aboriginal title to the lands in question, *Oneida I* and *II* foreclosed the availability of common law remedies. *Id.* at 12-14. The court additionally foreclosed any right to relief directly under the 1863 Act, concluding that because the Act "does not provide a private remedy," Petitioners "cannot rely on

the 1863 Act to seek a declaration of possessory rights." *Id.* at 16.

After affirming dismissal, the court of appeals reversed the district court's imposition of sanctions. *Id.* at 18-21. In concluding that the district court abused its discretion by imposing sanctions, the court simply surmised that "[f]ederal Indian law is complex," *id.* at 19, without explaining how the Petitioners' claim could have been brought in good faith given the well-settled law articulated by this Court that federally recognized Indian tribes are entitled to sovereign immunity from suit. In light of the reversal on sanctions, the court of appeals concluded that Petitioners' claims regarding the appellate-cost bond were moot. *Id.* at 21.

The court of appeals entered its judgment on June 1, 2016. Petitioners sought review of the court of appeals' decision through its Petition filed on August 31, 2016.

REASONS FOR DENYING THE PETITION

The Petition should be denied for three reasons. First, the Petitioners and their counsel continue their unhinged litigation strategy employed below to seek this Court's review of a question that is as legally meritless as their original and amended complaints. Petitioners and their counsel contend that the court of appeals was the first to decide "an important question of federal law" regarding the unavailability of common law claims to individuals in Petitioners' circumstance.

Pet. at 13. In fact, *this* Court was the first to decide that very question over 30 years ago when in *Oneida I* and *II* it expressly foreclosed the availability of federal common law claims for individuals who, like Petitioners, are *not* a tribe and are *not* asserting possessory rights based on aboriginal title. The court of appeals' straightforward application of *Oneida I* and *II* in affirming dismissal of Petitioners' complaint best demonstrates that the law and its application to the facts of this case are neither novel nor complex.

Second, even if *Oneida* common law claims could be extended in the manner Petitioners suggest (which they cannot), Petitioners have no vested property rights upon which a common law claim could be based.

Third, Petitioners have failed to provide a proper jurisdictional basis for this Court's review of the claims against the Community in light of the Community's sovereign immunity from suit.

I. This Court's decisions in *Oneida I* and *Oneida II* foreclose common law remedies for Petitioners because they are individuals seeking non-aboriginal possessory rights to land.

The Petition should be denied because it requests review of a question that this Court has already squarely decided: whether federal common law claims to vindicate Indian tribes' rights to lands extend to individuals who do not assert rights based on aboriginal

title.[10] Petitioners' contention that the court of appeals was the "first to decide an important question of federal law" in this matter is patently false. Pet. at 5.

The court of appeals' rejection of Petitioners' purported common law claim is firmly rooted in this Court's precedent. At the outset, the court of appeals explained that the *Oneida* litigation governs the availability of federal common law remedies for violation of a *tribe's* possessory rights to lands. App. 11-12 (citing *Oneida II*, 470 U.S. at 229-30). The court of appeals emphasized that in *Oneida II*, this Court stated that "a tribe 'could bring a common-law action to vindicate their *aboriginal* rights,'" *id.* at 12 (quoting *Oneida II*, 470 U.S. at 236), as distinguished from the cases regarding "lands allocated to *individual* Indians" where allegations of possession or ownership under a United States patent are "normally insufficient" for federal jurisdiction. *Id.* (quoting *Oneida I*, 414 U.S. at 676-77

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[10] The Community does not concede that Petitioners claimed title to the subject property under federal common law. Petitioners asserted three claims against the Respondents: (1) declaratory judgment pursuant to 28 U.S.C. §§ 2201-2202 that Petitioners hold title to the subject property under the 1863 Act itself; (2) ejectment; and (3) trespass. First Am. Compl., ¶¶ 82, 98, 125. While Petitioners characterized the latter two claims as based on federal common law, *id.* ¶¶ 98, 125, the declaratory judgment claim asserting title to the subject properties is *expressly* based on the 1863 Act alone. *Id.* ¶¶ 36-38; 82-91. Because all of Petitioners' claims arise from the 1863 Act, the general representation that Petitioners claimed title to the subject property under federal common law is the very kind of factual misrepresentation that the district court sanctioned. *See* Pet. at 9.

(emphasis added)). In light of this distinction, the court of appeals reiterated the basic *Oneida* rule that "federal common law claims arise when a *tribe* 'assert[s] a present right to possession based . . . on their *aboriginal* right of occupancy which was not terminable except by act of the United States.'" *Id.* at 12-13 (quoting *Oneida I*, 414 U.S. at 677 (emphasis added)).

Applying this rule, the court of appeals correctly concluded that federal common law remedies were not available to Petitioners. The court first noted that, "in contrast to a claim of *aboriginal* title," the rights Petitioners claim in the 12 square miles stem directly from the 1863 Act. *Id.* at 13 (emphasis in original). And the court determined that the language of "the 1863 Act directly contradicts any claim that the loyal Mdewakanton had aboriginal title to the twelve square miles." *Id.* In addition, the court reasoned that even "assuming the twelve square miles were set apart for the loyal Mdewakanton, the land was for the benefit of 'each *individual*' – not a tribe." *Id.* (quoting 12 Stat. 654, § 9). In light of these clear facts, the Court concluded that Petitioners' claim "does not fall into the federal common law articulated in the *Oneida* progeny." *Id.*

Despite repeatedly characterizing themselves as a tribal entity in the proceedings below, Petitioners now concede that they constitute a group of individuals claiming possession to lands through rights purportedly conferred via statute as opposed to aboriginal title. Pet. at. 9. However, they contend that the federal common law causes of action identified in *Oneida I* and

II should be available to them because "the legal logic found in the *Oneida* progeny is applicable to the instant interpretation of the February 1863 Act." *Id.* at 22. And then, without identifying any analogous "legal logic" in *Oneida I* or *II*, Petitioners simply aver that "[t]here is no indication in the [1863 Act] nor in the legislative history that Congress intended to preempt common law remedies." *Id.* In essence, then, Petitioners argue that where a private right of action does not exist in a statute, common law claims must *necessarily* be available. Petitioners cite no case in support of that argument because no court has ever adopted that legal principle.

In fact, the reasoning underlying the decisions in *Oneida I* and *II* precludes extension of federal common law claims to those in Petitioners' circumstance. In *Oneida II*, this Court explained the nature of an Indian tribe's interest in its property, and how it could be conveyed, noting that "[i]t was accepted that Indian nations held 'aboriginal title' to lands they had inhabited from time immemorial," and that the "doctrine of discovery" provided that discovering nations held fee title to these lands subject to the Indians' right of occupancy and use. 470 U.S. at 234-35 (citations omitted). Consequently, no one could purchase Indian land or otherwise terminate aboriginal title without the consent of the sovereign. *Id.* This Court further recognized that with the adoption of the Constitution, Indian relations became the exclusive province of federal law, that the aboriginal rights of Indian tribes to their lands as well as their "unquestioned right" to exclusive possession

has been repeatedly recognized, and that the Oneida's present day rights in the subject aboriginal property therefore constituted a possessory *federal* right born out of the government-to-government relationship between the Oneida Nation and the United States. *Id.* at 235. Consequently, this Court determined that the Oneida Nation had a federal common law right to sue for damages to enforce aboriginal land rights. *Id.* The Court's reasoning demonstrates that the availability of a federal common law remedy is based on rights to use and occupancy inherent in aboriginal title – rights that by virtue of their recognition and reaffirmance by this Court are uniquely federal in nature. *Id.* at 234-35.

In contrast to the Oneida, Petitioners identify *no* body of federal common law recognizing rights to the statutorily-identified lands for which they seek possession. *See* Black's Law Dictionary 34 (9th ed. 2009) (defining "common-law action" as "[a]n action governed by common law, *rather than statutory*, equitable, or civil law" (emphasis added)). Indeed, for the first time throughout this litigation, Petitioners take pains to concede that there is no continuing federal interest or authority over the lands to which they claim possession, emphasizing that the 1863 Act "did not convey a continuing federal authority over the land" or the "loyal Mdewakanton." Pet. at 22. Because the facts upon which Petitioners' claim rests lack even any indicia of the federal interest that formed the basis of this Court's decisions in *Oneida I* and *II*, there is no basis for extending the principles established in *Oneida I*

and *II* to this case. With no federal common law remedies available, Petitioners are left with simply asking this Court to *create* a federal common law right out of thin air without any plausible legal basis. The Petitioners' inability to cite *any* relevant legal authority in their Petition supporting an extension of *Oneida* common law remedies to their circumstances best demonstrates the baseless nature of their request.

Ultimately, Petitioner's insistence that *Oneida* common law remedies are available to them is a continuation of their ill-conceived attempt to circumvent the lack of a private right of action in the 1863 Act.[11] Because both the district court and court of appeals concluded that there is no private right of action in the 1863 Act, Petitioners must identify some other available remedy to keep their claim alive. But "the law is consistent that when a statute does not give a private right of action, a plaintiff may not circumvent legislative intent by asserting declaratory or common law

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[11] To be clear, Petitioners *now concede* that there is no private right of action under the 1863 Act. Specifically, Petitioners assert that "when an act . . . does not include provisions for private judicial . . . enforcement, it does not mean Congress foreclosed a private right of remedy under . . . federal common law causes of action." Pet. at 13. That is why the Petitioners insist throughout their Petition that their claim is supported by federal common law. *See, e.g., id.* at 13-14. Thus, despite Petitioners' convoluted arguments that appear to rely on the doctrine of private right of action as a means of identifying property rights that can be vindicated through *Oneida* common law causes of action, *see id.* at 34-35, the only question the Petition presents is whether a statute that authorizes the set apart of lands for the benefit of individuals creates a federal common law cause of action. *Id.* at i.

causes of action based on alleged violations of the underlying statute." *MM&S Fin., Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 364 F.3d 908, 911 (8th Cir. 2004); *see also Palmer v. Ill. Farmers Ins. Co.*, 666 F.3d 1081, 1085 (8th Cir. 2012) (courts have "rejected common law causes of action based on violations of statutes which provide no private right of action"). Because there is no private right of action under the 1863 Act, Petitioners' "efforts to bring their claims as [] common-law claims are clearly an impermissible 'end run' around the [Act]." *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003).

This Court's decisions in *Oneida I* and *Oneida II* foreclose Petitioners' claims. As a result, the Petition should be denied.

II. Even if a common law cause of action was available, Petitioners have no rights to the lands identified in their amended complaint.

Petitioners cannot maintain a common law cause of action to lands in which they have no legal interest. Petitioners assert throughout the Petition that the 1863 Act created "enforceable rights to permanent occupancy of the lands set apart." Pet. at 13. This argument cannot be squared with the decision of the Federal Circuit in *Wolfchild IX*, Petitioners' own concessions, the plain language of the 1863 Act, and the undisputed historical facts.

The Federal Circuit has already rejected Petitioners' contention that they received enforceable property rights by virtue of the Act and the Secretary's actions. In dismissing Petitioners' claims, the court held that the 1863 Act did "not impose any duty on the Secretary of the Interior to make the land grants it authorizes" and "therefore cannot 'fairly be interpreted as mandating compensation for damages sustained from a failure to provide such lands.'" *Wolfchild IX*, 731 F.3d at 1292 (quoting *Navajo Nation*, 556 U.S. at 291). The court further determined that Petitioners' purported ancestors obtained no property interest under the 1863 Act, concluding that "[a]fter it took steps toward conveyance of the 12 sections to the designated Indians in 1865, the government terminated the process and sold the parcels to others." *Id.* at 1292-93.

In addition to prior adjudication by the federal courts, the Petitioners have alleged and argued to this Court that they lack enforceable property rights to the lands in question. In their Petition for Writ of Certiorari seeking review of the Federal Circuit's dismissal, Petitioners and their counsel asserted that "no land was provided to the Mdewakanton Bands under the 1863 Act." Petition for Writ of Certiorari at 21-22, *Wolfchild v. United States*, 134 S. Ct. 1516 (No. 13-794); *see also* Ex. JJ, Defs.' Mot. to Dismiss, *Wolfchild v. Redwood Cnty.*, Civ. No. 0:14-cv-01597-MJD-FLN (D. Minn. Sept. 26, 2014), Dkt. 159 (Petitioners asserting in *Wolfchild VII* that "[t]he Secretary of the Interior never exercised the authority granted under the 1863 Acts" in

arguing that the Secretary *did not* set apart lands under the Abrogation and Forfeiture Act).[12]

Indeed, the plain language of the 1863 Act supports Petitioners' own prior representation to this Court. Section 9 of the 1863 Act provided, in relevant part:

> That the Secretary of the Interior is hereby *authorized* to set apart of the public lands, not otherwise appropriated, eighty acres in severalty to each individual of the before-named bands who exerted himself in rescuing the whites from the late massacre of the said Indians.

12 Stat. 654, § 9 (emphasis added). The plain language of the Act makes clear that Congress delegated to the Secretary the power to set apart lands in his discretion, but did not require him to do so. *See* Black's Law Dictionary 153 (9th ed. 2009) (defining "authorize" as "[t]o give legal authority; to empower"); *I.N.S. v. Doherty*, 502 U.S. 314, 332 (1992) (Scalia, J., concurring in part and dissenting in part) (noting that because the statute "merely 'authorized' the Attorney General to withhold deportation" in certain circumstances, it "did not require withholding in any case"); *see also Wolfchild IX*, 731 F.3d at 1292. After all, Congress "must be presumed to use words in their known and ordinary signification." *Old Colony R. Co. v. Comm'r of Internal Revenue*, 284 U.S. 552, 560 (1932).

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[12] This is the type of conduct for which the district court sanctioned the Petitioners and their counsel.

The discretionary nature of the Secretary's authority is borne out in the historical facts following the passage of the 1863 Act. On March 16, 1865, Reverend Hinman, the individual designated by the Secretary to identify possible land to be set apart, *Wolfchild*, 91 F. Supp. 3d at 1097, submitted a proposal to the Secretary for setting apart 12 sections of land on and around the former Dakota Reservation. First Am. Compl. ¶ 42. Soon thereafter, the Secretary determined that the identified lands were unsuitable to be set apart for a variety of reasons, the most salient of which was the significant civilian, political, and military opposition to settling Dakota in the recent military theater. *See Wolfchild VI*, 559 F.3d at 1232. As a result, the Secretary abandoned the plan to set apart the land, never exercised the authority granted under the 1863 Act, no Dakota entered the lands, *Wolfchild IX*, 731 F.3d at 1286, and President Andrew Johnson restored the lands for public sale and they were sold consistent with applicable law. *Wolfchild VIII*, 101 Fed. Cl. at 66.

Undeterred, Petitioners cast aside the prior adjudications of their claim, their prior admissions before this Court, and the plain language of the 1863 Act, and instead rely on a single decision from the Federal Circuit in *Karuk Tribe of Cal. v. Ammon*, 209 F.3d 1366 (Fed. Cir. 2000), in a last-ditch attempt to advance their cause. In *Karuk*, the court concluded that the individual plaintiffs did not have compensable vested rights in land through a Congressional act because the act expressly provided that the United States "retained" interest in the land set apart for the purpose of

creating Indian reservations. *Id.* at 1375. Petitioners contend that the language of the act at issue in *Karuk* is an example of what Congress does to avoid conferring permanent rights to occupancy, and that such language is not present in the 1863 Act. Pet. at 30-31.

Again, Petitioners' argument misses the mark. The question is not whether the United States would have retained an interest in the lands *had* they been entered and conveyed. Rather, the question here regards the nature of the Secretary's power under the 1863 Act, which was clearly discretionary. *Wolfchild IX*, 731 F.3d at 1292. Congress's decision to retain an interest in reservation lands under one act has no bearing on the nature of the power it confers to the Secretary in another. Petitioners' reliance on and characterization of *Karuk* once again illustrates the baseless nature of their Petition.

III. Petitioners have failed to provide a proper jurisdictional basis for this Court's review of the claims against the Community in light of the Community's sovereign immunity from suit.

Petitioners and their counsel continue to brazenly ignore the application of sovereign immunity as a bar to their claim against the Community – a threshold jurisdictional barrier that the district court concluded any "reasonable and competent attorney would have recognized." *Wolfchild*, 112 F. Supp. 3d at 876. In addition to the absence of any legal merit to Petitioners'

claims, the Petition should be denied because Petitioners have failed to provide a proper jurisdictional basis for this Court's review of the claims against the Community.

It is a well-settled principle that Indian tribes exercise "inherent sovereign authority." *Okla. Tax Comm'n v. Citizen Band Potawatomi Tribe of Okla.*, 498 U.S. 505, 509 (1991) (citing *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831)). By recognizing an Indian tribe, the United States acknowledges the tribe in a formal government-to-government context as a sovereign body politic with reserved rights that predate the United States Constitution. *Worcester v. Georgia*, 31 U.S. 515, 559 (1832); *see also Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55-59 (1978); *United States v. Wheeler*, 435 U.S. 313, 322-23 (1978). This Court recently reaffirmed that "[a]mong the core aspects of sovereignty that tribes possess – subject [only] to congressional action – is the 'common-law immunity from suit traditionally enjoyed by sovereign powers.'" *Michigan v. Bay Mills Indian Cmty.*, 134 S. Ct. 2024, 2030 (2014) (quoting *Martinez*, 436 U.S. at 58); *see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Eng'g, P.C.*, 476 U.S. 877, 890 (1986) ("The common law sovereign immunity possessed by the Tribe is a necessary corollary to Indian sovereignty and self-governance."); *Santa Clara Pueblo*, 436 U.S. at 58 ("Indian tribes have *long been recognized* as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." (emphasis added)). And this immunity exists absent an unequivocal

waiver by Congress or the tribe itself. *Bay Mills Indian Cmty.*, 134 S. Ct. at 2030.

Applying this precedent, the district court correctly concluded that "the Community is a federally recognized Indian tribe pursuant to the Indian Reorganization Act" that is entitled to sovereign immunity from suit. *Wolfchild*, 91 F. Supp. 3d at 1100-01. And the court could not have concluded otherwise given the express recognition of the Community as an Indian tribe by the federal government. *See, e.g.*, 81 Fed. Reg. 5019, 5020-21 (Jan. 29, 2016) (the Secretary of the Interior listing the Community as a federally recognized Indian tribe that is "acknowledged to have the immunities and privileges available to federally recognized Indian Tribes by virtue of [its] government-to-government relationship with the United States"). Thus, in light of the Community's immunity, and the absence of any "evidence or even an allegation that the Community has waived sovereign immunity with respect to lands in which it has an interest," the district court correctly dismissed all claims against the Community for lack of subject-matter jurisdiction. *Wolfchild*, 91 F. Supp. 3d at 1101.

The court of appeals side-stepped the Community's sovereign immunity and dismissed on a basis shared by all defendants, reasoning that it was unnecessary to address the Community's immunity from suit because of its dismissal on other grounds. App. 17.

But the Community's sovereign immunity is jurisdictional in nature. *See Puyallup Tribe, Inc. v. Dep't of Game of State of Wash.*, 433 U.S. 165, 172 (1977) (holding that "[a]bsent an effective waiver or consent" of sovereign immunity, "it is settled that a state court may not exercise jurisdiction over a recognized Indian tribe"); *see also Kiowa Tribe of Okla. v. Mfg. Techs., Inc.*, 523 U.S. 751, 754, 760 (1998) (concluding that the tribe's motion to dismiss for lack of jurisdiction based on tribal sovereign immunity should have been granted notwithstanding the governmental or commercial activities giving rise to a dispute occurring off-reservation). Relying on this precedent, the courts of appeals have similarly concluded that sovereign immunity is a jurisdictional prerequisite that must be addressed before turning to the merits. *See, e.g.*, *Florida v. Seminole Tribe of Fla.*, 181 F.3d 1237, 1241 n.4 (11th Cir. 1999) (emphasizing the "fundamentally jurisdictional nature of a claim of sovereign immunity"); *United States v. Cnty. of Cook*, 167 F.3d 381, 390 (7th Cir. 1999) (noting the Supreme Court's "thoroughgoing equation of sovereign immunity to a jurisdictional shortcoming"); *Fletcher v. United States*, 116 F.3d 1315, 1326 (10th Cir. 1997) (holding that the Osage Tribal Council and its members "properly and adequately challenged federal jurisdiction on the ground of tribal sovereign immunity"); *Kreig v. Prairie Island Dakota Sioux*, 21 F.3d 302, 304 (8th Cir. 1994) (concluding that "sovereign immunity is jurisdictional in nature"); *Maynard v. Narragansett Indian Tribe*, 984 F.2d 14, 16 (1st Cir. 1993) (holding that tribal immunity was not

waived or abrogated, and that the district court therefore correctly dismissed the action for lack of jurisdiction). Because a federal court must assess a jurisdictional bar to its review before turning to the merits, *Lance v. Coffman*, 549 U.S. 437, 439 (2007), Petitioners have failed to provide a proper jurisdictional basis for this Court's review of the Question Presented with the respect to the Community. Accordingly, the Petition should be denied.

CONCLUSION

The Petition offers nothing valuable for the Court's consideration. To answer their own Question Presented, Petitioners need to look no further than this Court's decisions in *Oneida I* and *II*, which expressly preclude the availability of a federal common law claim for individuals who, like Petitioners, are not a tribe and are not asserting possessory rights based on aboriginal title. Additionally, Petitioners have no rights to the lands identified in their amended complaint and have failed to provide a proper jurisdictional basis for this Court's review in light of the Community's sovereign immunity from suit. For all of these reasons, the

Community respectfully requests that this Court deny the Petition.

Respectfully submitted,

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