No. 03-855

IN THE

Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,

Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK,
RAY HALBRITTER, KELLER GEORGE,
CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL,
DALE ROOD, DICK LYNCH, KEN PHILLIPS,
BEULAH GREEN, BRIAN PATTERSON,
and IVA ROGERS,

Respondents.

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

AMICI CURIAE BRIEF OF THE COUNTIES OF MADISON AND ONEIDA, NEW YORK, IN SUPPORT OF PETITIONER

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The Counties of Madison and Oneida, New York ("Counties"), submit this amicus brief on the merits in support of Petitioner, City of Sherrill, New York. The Counties fully support the arguments advanced by Petitioner but would like to bring to this Court's attention additional matters relating to the questions presented.

STATEMENT OF INTEREST

The Sherrill parcels owned by the Respondent Oneida Indian Nation of New York ("the Oneidas") are within Oneida County. Other parcels claimed by the Oneidas to be Indian country are within both Counties.[1] The Counties were the defendants in *Oneida I* and *Oneida II*, and the original defendants in the main land claim filed by the Oneidas in the United States District Court for the Northern District of New York.

INTRODUCTION

The lower courts' errors in this and other pending cases share a common root: a misunderstanding of what this Court decided (and did not decide) in *Oneida I* and *Oneida II*. In *Oneida I*, this Court held that the Oneidas' complaint asserted a claim for possession under federal law. *Oneida I*, 414 U.S. 661, 677-78 (1974). In *Oneida II*, this Court held that the Counties violated the Oneidas' federal common-law right of possession to 872 acres which the State had acquired as part of the Treaty of 1795, that the common-law was not preempted by the 1793 Indian Trade and Intercourse Act, and that the Counties' affirmative defenses (statute of limitations, abatement, ratification by the Treaties of 1798 and 1802, and nonjusticiability) did not apply. *Oneida II*, 470 U.S. 226, 233-50 (1985).

This Court recognized the "potential consequences" of *Oneida II* and took pains to limit its decision:

> The question whether equitable considerations should limit the relief available to the present day

1. A map showing approximately 17,000 acres purchased during the last decade in a checkerboard fashion by the Oneidas in the Counties is appended hereto. Citations in this brief to "A__" refer to the Appendix to the Counties' *Amicus* Brief in Support of the Petition. Citations in this brief to "SCJA __" refer to the Joint Appendix filed in the Second Circuit.

> Oneida Indians was not addressed by the Court of Appeals or presented to this Court by petitioners. Accordingly, we express no opinion as to whether other considerations may be relevant to the final disposition of this case should Congress not exercise its authority to resolve these far-reaching Indian claims.

Oneida II, 470 U.S. 226, 253 (1985). Other questions were also not resolved, including: whether the Oneidas retained aboriginal title to the approximately 300,000 acres reserved to them by New York State in the 1788 Treaty of Fort Schuyler,[2] whether the 1794 Treaty of Canandaigua created a federal reservation for the Oneidas, whether the 1838 Treaty of Buffalo Creek disestablished any (supposed) federal reservation, or whether the 1802 Indian Trade and Intercourse Act applies to the parcels at issue here. The Counties discuss these questions, which were incorrectly decided below, in this brief.

SUMMARY OF THE ARGUMENT

Sherrill's enforcement of its real property tax assessments depends on whether the parcels are, today, within Indian country – notwithstanding the passage of almost two centuries of settlement, cultivation and use pursuant to treaties, willingly made, between New York State and the Oneidas beginning in 1785.[3] In answering this question, the Second Circuit erred by

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2. In the trial leading to *Oneida II*, the Counties presented no evidence. *See Oneida Indian Nation of New York v. County of Oneida*, 434 F. Supp. 527, 532 (N.D.N.Y .1977). The trial court found that, as a consequence of the 1788 Treaty with New York State, the Oneidas' "were left with a reservation of about 300,000 acres." *Id.* at 533. The court and parties appear to have assumed that this "reservation" of land preserved the aboriginal Indian title, as opposed to replacing it with property rights created by state law. *Id.* at 538. This Court's statement that the Oneidas' "were left with a reservation of about 300,000 acres," *Oneida II*, 470 U.S. at 231, reflects the trial court's finding. Accordingly, the question of whether the 1788 Treaty extinguished all the Oneidas' aboriginal title and retroceded to the Oneidas a state-law-based reservation was not presented or addressed by the Court in *Oneida II*.

3. The federal government approved of New York's purchases and took no action to prevent them. *See Oneida Nation of New York v. United States*, 43 I.C.C. 373, 405 (1978).

(I) using the wrong legal standard to interpret two critical treaties (the 1788 Treaty of Fort Schuyler and the 1794 Treaty of Canandaigua), (II) misreading the scope and applicability of the Indian Trade and Intercourse Act of 1802, (III) improperly discounting historical evidence in interpreting the 1838 Treaty of Buffalo Creek), (IV) all in violation of the Tenth Amendment of the Constitution of the United States.

I.A. In the 1788 Treaty of Fort Schuyler, the Oneidas ceded "all their lands to the people of the State of New York forever," thus extinguishing aboriginal title. In return, New York retroceded to the Oneidas a state reservation arising under and defined by New York law. The New York high court and this Court long ago endorsed this construction of the 1788 Treaty with New York. The Second Circuit's contrary interpretation that the Oneidas never ceded the entirety of their ancient domain is erroneous.

I.B. The 1794 Treaty of Canandaigua, to which New York State was not a party, did not divest New York of its property and create a federal reservation for the Oneidas. Instead, it merely "acknowledged" the existence of the reservation created by New York in the 1788 Treaty. The Senecas (not the Oneidas) were the real party-in-interest to the 1794 Treaty, and the federal commissioner who described by metes and bounds the Senecas' reservation in the 1794 Treaty confessed that the "United States had no right to the lands" he purported to relinquish to the Senecas, or, by implication, to the Oneidas' reservation which he merely acknowledged.

II. The Indian Trade and Intercourse Act ("ITIA") does not apply to the parcels at issue. ITIA was principally concerned with the frontier regions and the act applied to Indian country only. The Oneidas' reservation was not Indian country since aboriginal title had been extinguished in 1788 and it lay east of the boundary line contained in the 1796 and later versions of ITIA.

III. The jurisdictional history following the 1838 Treaty of Buffalo Creek clearly shows that Indians and non-Indians alike treated the Oneidas' reservation as having been disestablished. Consistent with their justifiable expectations,

non-Indian settlers flooded the area, built houses, created businesses, formed governments and raised their families, and now compose 99.75% of the Counties' population. Most of the Oneida Indians left the region, and the few that remained were assimilated into the overwhelmingly non-Indian population. By the end of the 19th century the Oneidas were "known no more" as a tribe in New York.

IV. The decision below needlessly infringes on the sovereignty of state and local governments. New York has exercised unchallenged control over the area for more than 200 years. The Oneidas do not have the right to oust long-established state and local governments simply by purchasing parcels of land in open market transactions.

ARGUMENT

I. The Court of Appeals Used the Wrong Legal Standard to Interpret the 1788 Treaty of Fort Schuyler and the 1794 Treaty of Canandaigua

According to the Second Circuit, "[t]here is no material dispute that the Sherrill Properties were part of the Oneidas' aboriginal land and the tribe's reservation as recognized by the Treaty of Canandaigua." 337 F.3d at 153. In fact, both these matters – the aboriginal status of the land, which was extinguished by the 1788 Treaty of Fort Schuyler, and the effect of the 1794 Treaty of Canandaigua – are contested. The Second Circuit erred by ignoring these issues and improperly construing the applicable treaties generously in favor of the Oneida Indian Nation of New York.

Although the principle of generous construction is often appropriate when analyzing Indian treaties, it may not be used to divest a state of its land. *United States v. Minnesota*, 270 U.S. 181, 209 (1926); *Oneida Indian Nation v. State of New York*, 860 F.2d 1145, 1163-64 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989); *Seneca Nation of Indians v. State of New York*, 206 F. Supp. 2d 448, 530 (W.D.N.Y. 2002). This court held in *Minnesota* that a treaty cannot be construed to divest a state's rights in land "unless the purpose to do so be shown in the treaty with such certainty as to put it beyond reasonable question." 270 U.S. at 209. By wrongly applying the doctrine

of generous construction, the Second Circuit misinterpreted critical treaties to divest New York State of its property interest in and jurisdiction over the land in question, and by extension a much larger area in central New York.[4] The Second Circuit also ignored contrary interpretations by this Court and renowned legal scholars that were rendered much closer in time to the treaties in question.

A. The 1788 Treaty of Fort Schuyler Between New York and the Oneidas

The 1788 Treaty of Fort Schuyler ("1788 Treaty"), first, effected a transfer of all of the Oneidas' land to New York, thereby extinguishing forever aboriginal title, and second, created a state reservation. (A10-A14). However, in a single sentence in a footnote, the Second Circuit below dismissed this argument. 337 F.3d at 156 n.13. Instead, it interpreted the 1788 Treaty generously in the Oneidas' favor as "carv[ing]-out" 300,000 acres that "never became state land" and in which aboriginal title survived. *Id.*[5] In so holding, the Second Circuit disregarded the rule of construction mandated by *Minnesota*,

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4. The long-standing sovereignty of state and local governments over not only the ancient Oneida Reservation but also other areas claimed by different Indian tribes has been thrown into question by *Sherrill*, and not just as to tax matters. Citing *Sherrill*, the same district court recently enjoined local governments from enforcing zoning and land use regulations on properties that the Cayuga Indians purchased in open market transactions in Cayuga county. *See Cayuga Indian Nation of New York v. Village of Union Springs*, 317 F. Supp. 2d 128 (2004).

5. The district court opinion cited as authority by the Second Circuit likewise misapplied the principle of generous construction. *See Oneida Indian Nation of New York v. State of New York*, 194 F. Supp. 2d 104, 139 (N.D.N.Y. 2002). The district court reached its decision, in part, on the authority of this Court's statement in *Oneida II* that "the Oneidas retained a reservation of about 300,000 acres" under the 1788 Treaty of Fort Schuyler. *Id.* (quoting *Oneida II*, 470 U.S. at 231). This Court's statement, in turn, reflected a finding by the trial court that the Oneidas "were left with a reservation of about 300,000 acres" as a consequence of the 1788 Treaty of Fort Schuyler. *Oneida Indian Nation of New York State v. County of Oneida*, 434 F. Supp. 527, 533 (N.D.N.Y. 1977). The trial court (and the parties) in *Oneida II* appear to have assumed that this "reservation" of land to the Oneidas preserved the Oneidas' aboriginal title, as opposed to extinguishing the Oneidas' original Indian title and granting them a state-law-based property right. *Id.* at 538.

and its conclusion is inconsistent with the language of the treaty, New York law, and the considered understanding of early judicial authorities.

In its "First" article, the 1788 Treaty states: "The Oneidas do cede and grant ***all their lands*** to the people of the State of New York ***forever***." (emphasis added). In the "Second" article, New York set apart for the Oneidas a tract from "the said ceded lands" that was "reserved for . . . several uses," including a portion the Oneidas could use and cultivate (but not sell, lease, or alienate in any way), and the balance of which could be leased to others, subject to certain restrictions. The effect of the plain treaty language was to convey all the Oneidas' land to New York and thereby extinguish aboriginal title. New York, as the sovereign vested with the right of preemption,[6] acquired absolute fee title to "***all*** [the Oneidas'] lands" when the treaty was made. *See, e.g.*, *Mitchel v. United States*, 34 U.S. 711, 746 (1835) (Indians may abandon, cede or sell their right to possess and occupy their lands, rendering their right extinct and disencumbering the land); *Johnson v. M'Intosh*, 21 U.S. 543, 588 (1823) ("All our institutions recognize the absolute title of the crown, subject only to the Indian right of occupancy, and recognize the absolute title of the crown to extinguish that right."). The text does not support the Second Circuit's generous interpretation that the Oneidas retained aboriginal title in the land "reserved" for their use. Rather, the 1788 Treaty unambiguously extinguished the Oneidas' aboriginal rights to their entire ancient domain in the first article, while granting them in the next article a state reservation created and defined by New York law.

Early authorities confirm this interpretation. In 1823, the Supreme Court of Judicature of New York (Chancellor James Kent),[7] described the treaty as follows:

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6. During the confederal period, New York was the sovereign vested with the right of preemption over that area now claimed by the Oneidas. *See, e.g.*, *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); *Johnson v. M'Intosh*, 21 U.S. 543, 584 (1823).

7. Chancellor Kent (with the likes of Chief Justices Jay and Marshall) is commonly regarded as a founding father of American jurisprudence. (Cont'd)

> [I]n Sep., 1788, we have the remarkable fact of the Oneidas ***ceding the whole*** of their vast territory to the people of this State, and accepting a retrocession of a part, upon restricted terms, and with permission only to lease certain parts for a term not exceeding twenty-one years.

Goodell v. Jackson, 20 Johns. 693, 729 (N.Y. Sup. Ct. 1823) (emphasis supplied). Because the 1788 Treaty was a ***New York State*** treaty – and its construction is a question of ***state*** law – the lower courts should have deferred to Goodell's construction of the treaty. *Cf.*, *Central Hanover Bank & Trust Co. v. Kelly*, 319 U.S. 94, 97 (1943) ("The determination by the New Jersey courts of the kind of interest transferred and the time when it was effected is a matter of local law binding on us").

Eight years later, Chief Justice Marshall, apparently mindful of *Goodell*, noted that "some tribes" made pre-Constitution treaties with New York State "by which they ***ceded all their lands*** to that state, ***taking back*** a limited grant to themselves, in which they admit their dependence." *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (emphasis added). Although Chief Justice Marshall does not specifically identify the Oneidas, he almost certainly had the 1788 Treaty of Fort Schuyler in mind (as well as similar treaties with the Onondaga and Cayuga tribes) as the language of the treaty matches his description in Cherokee Nation.

Finally, identical language in a 1789 treaty between New York and the Cayuga Indians was construed in accordance with *Cherokee Nation* and *Goodell* by a panel of arbiters that included Roscoe Pound, Dean of Harvard Law School. At issue was a claim by Great Britain, on behalf of the Cayuga Indians in Canada, against the United States for annuities. *See* 20 Am. J. Int'l Law 574-594 (1926). The panel found that the Cayugas' aboriginal title to the land had been extinguished, and the

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(Cont'd)

Oliver Wendell Holmes, Jr., in his 1873 Preface to the twelfth edition of *Kent's Commentaries on American Law*, noted that "[t]he great weight attaching to any opinion of Chancellor Kent has been deemed a sufficient reason for not attempting any alteration in his text or notes."

lands ceded to New York. *Id*. at 590. Citing *Cherokee Nation*, the panel wrote, "[w]e think the treaty meant to set up an Indian reservation, not to reserve the land from the operation of the cession." *Id.*

In short, the plain language of the treaty, as interpreted by early authorities, compels the conclusion that the Oneidas ceded "all their lands" to New York – including the parcels at issue in this case – thereby extinguishing their aboriginal title, and accepted a limited grant from New York. The Second Circuit erred by construing the 1788 Treaty of Fort Schuyler as preserving aboriginal title in the retroceded portion of the Oneidas' lands.

B. The 1794 Treaty of Canandaigua Between the United States and the Six Nations

Proceeding from the invalid assumption that the Oneida Indian Nation retained aboriginal title to a portion of their ancestral lands, the Second Circuit compounded its error by failing to interpret the 1794 Treaty of Canandaigua, 7 Stat. 44 (1794), in accordance with *Minnesota* and concluded that it divested the State of its property and created a federal reservation. 337 F.3d at 156.[8] The provisions of the 1794 Treaty, read in historical context, show that no federal reservation was created for the Oneidas. Indeed, the Second Circuit's interpretation of the treaty renders it an illegal, uncompensated taking of state property in violation of the Fifth Amendment. *See, e.g.*, *Seneca Nation of Indians*, 206 F. Supp. 2d at 533-34.

In Article II of the 1794 Treaty, the United States merely "***acknowledge[d]*** the lands reserved to the Oneida, Onondaga and Cayuga Nations, ***in their respective treaties with the state of New York***, and called their reservations, to be their property; . . . ." (emphasis added). In addition, the United States asserted that ***it*** would "never claim the same, nor disturb them . . . in the free use and enjoyment thereof: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." Nothing in the quoted language, or any other article, shows

8. Significantly, the State of New York was not a party to the 1794 Treaty of Canandaigua.

that the treaty's purpose was to divest New York of its interest in the land "with such certainty as to put it beyond reasonable question." *Minnesota*, 270 U.S. at 209; *Oneida Indian Nation*, 860 F.2d at 1163-64.

This interpretation is consistent with the view expressed by U.S. Attorney General William Wirt less than 25 years later that the Treaty of Canandaigua had no effect on the rights of New York *vis-à-vis* the Oneidas:

> [T]he legal titles of the States of New York and Massachusetts, and of the grantees under them . . . ***are not divested, or in any manner impaired*** by the treaty of Canandaigua, as to any of the lands then occupied by the Six Nations, nor are the pre-existing rights of the Indians in any manner enlarged by that treaty.

Op. Att'y Gen. William Wirt (March 26, 1819) (emphasis supplied) (A23-A28).

The absence of any purpose or intent to create a federal reservation for the Oneidas is confirmed by the treaty's context. History reveals that the Seneca Nation was the primary reason for – and intended beneficiary of – the 1794 Treaty, not the other tribes of the Six Nations, including the Oneidas. *See Seneca Nation of Indians*, 206 F. Supp. 2d at 487. In 1782, New York agreed to cede to the United States its claim to western lands (present-day Ohio and the Erie Triangle). *See id.* at 473. Later, pursuant to the 1784 Treaty of Fort Stanwix, the United States obtained from the Six Nations a release of their claims to these western lands, and in 1792 patented to Pennsylvania that portion lying west of New York known as the Erie Triangle, in which, among the Six Nations, only the Seneca tribe had an interest. *Id.* at 478-80, 483; William N. Fenton, *The Great Law and the Longhouse* at 646 (1998) (A29-A35).

The 1784 Treaty of Fort Stanwix, however, proved over the next decade to be the source of much discontent among the Senecas. *Id.* at 480-86. By 1794, Pennsylvania was threatening to force the Senecas out of the Erie Triangle, *see* Fenton, *supra*, at 646-50, and rumors circulated that the Senecas (and possibly other Iroquois tribes) might join the

active warfare between the western Indians and the United States. *Id.* at 486. The United States therefore renewed treaty negotiations at Canandaigua. *Seneca Nation of Indians*, 206 F. Supp. 2d at 486-87.

The primary purposes of the 1794 Treaty of Canandaigua were to obtain an express renunciation of rights in the Erie Triangle and reconfirm peace and friendship between the United States and the Six Nations, in particular the Senecas. *Id.* at 490 (*quoting* Letter from Timothy Pickering to Secretary of War Henry Knox of November 12, 1794). Prominently absent from the historical record is any indication of a federal purpose to take New York property and establish "recognized title" in the Oneidas (or other Iroquois nations).

To mollify the Senecas, Pickering (the federal commissioner to the 1794 Treaty) resorted to trickery by purporting to relinquish rights he knew the United States did not possess. In his letter transmitting the 1794 Treaty to Secretary Knox, Pickering baldly stated "[y]et not a foot of land has been given up which by the cession then made the U. States had a right to hold: all that I have relinquished falling within the pre-emption right of Massachusetts, and lying within the State of New York." *Id.* In a subsequent letter to Secretary Knox, Pickering confessed "that the United States had no right to the lands which I relinquished" in the 1794 Treaty, and stated, "I felt myself embarrassed . . . by presenting an idea of something very valuable, while, in fact the subject of the relinquishment was a shadow." *Id.* at 492 (*quoting* Letter from Pickering to Secretary Knox of December 26, 1794). He also recognized that the land in question lay "within the jurisdiction of New York," and that "no purchase or sale of lands made of or with the Indians within the limits of that State, could be binding . . . unless made . . . with the consent of the legislature of that State." *Id.* at 491-92. Although Pickering was speaking of the Senecas, the real-party-in-interest to the 1794 Treaty, *id. at* 487, his understanding certainly applied equally to the Oneidas' state reservation, which lay hundreds of miles east of the Seneca's territory, in the center of New York.

By way of contrast, the Congress in the August 3, 1795 Treaty of Greenville with the Wyandots and other Indians, 7 Stat. 49, demonstrated clearly that it knew how to protect aboriginal title where the United States – and not New York – held the underlying fee and right of preemption to a reservation which it described by metes and bounds. This treaty, which was also executed under then Secretary of War Pickering's supervision, unambiguously restricted the Indian tribes' right to sell to only the United States:

> [W]hen those tribes, or any of them, shall be disposed to sell their lands, or any part of them, they are to be sold ***only to the United States;*** and until such sale, ***the United States will protect all the said Indian tribes*** in the quiet enjoyment of their land ***against all citizens of the United States***, and against all other white persons who intrude upon the same. And the said Indian tribes again acknowledge themselves to be under the protection of the said United States ***and no other power whatever***.

Id. (emphasis added). This striking difference in language between two treaties negotiated less than a year apart and approved by the same person (Pickering) further confirms the well-known fact that the United States had no right, title or interest in the Oneida's state reservation land, and therefore had nothing to "set aside" for the Oneidas.

In fact, the Oneidas themselves have previously taken the position that the 1794 Treaty of Canandaigua applied only to lands ceded by New York in 1782 to the United States and not to lands within the state. *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1096-97 (2d Cir. 1982) ("The Oneidas . . . contend . . . that in any event the Treaty of Canandaigua, which was the last in a series aimed at obtaining Indian cession of Ohio Valley lands to the United States, applies only to the territory that had been in dispute, namely Ohio territorial lands outside the boundaries of the states, not Oneida land in New York."). Similarly, the United States argued before the Indian Claims Commission that the Treaty

of Canandaigua did not divest New York of its rights or enlarge the rights of the Indians. (A36-A49).

By failing to apply the *Minnesota* rule of treaty construction and disregarding the historical context, the Second Circuit erred in construing the 1794 Treaty of Canandaigua to effect an illegal, uncompensated taking of New York's property for the benefit of a nominal party-in-interest that, in the past, has disclaimed that interpretation. The federal reservation that the Second Circuit saw in the 1794 Treaty of Canandaigua was illusory – or in the words of Pickering, "a shadow."

II. The Indian Trade and Intercourse Act Does Not Apply To The Properties At Issue

The Second Circuit further erred by concluding that the Indian Trade and Intercourse Act of 1802, 2 Stat. 139, applied to the properties at issue (transferred by the Oneidas in 1805) and operated to preserve the Oneidas' allegedly "unextinguished" Indian title. 337 F.3d at 146-47, 157-58. As explained above, Indian title in the parcels at issue was extinguished in 1788, when the Oneidas ceded and granted all their lands to New York and took back a limited property interest. Subsequent conveyances by the Oneidas of their state reservation to the State, or with the State's approval, are not prohibited by the Indian Trade and Intercourse Act of 1802, or other iterations of the enactment ("ITIA"), because they lie outside its intended reach. *See Bates v. Clark*, 95 U.S. 204, 208 (1877) ("The simple criterion is that as to all the lands thus described it was Indian country whenever the Indian title had not been extinguished, and it continued to be Indian country so long as the Indians had title to it, and no longer."); *American Fur Co. v. United States*, 27 U.S. 358, 369 (1829).[9]

As a preliminary matter, the Second Circuit's decision improperly disregards the explicit geographic boundary line added to the 1796 version (and later versions) of the ITIA that delineated Indian country from territory of the United States. *See* Act of May 19, 1796, ch. 30, § 1, 1 Stat. 469. No part of New York State is within the area encompassed by the 1796 version

9. In addition to *Bates* and *American Fur*, this Court's dictum in *Seneca Nation v. Christy*, 162 U.S. 283 (1896), supports the view that ITIA did not apply to reservation land under the jurisdiction of New York State.

of ITIA. Moreover, section 19 of the 1796 version of ITIA explicitly provides that "nothing in this act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of the citizens of the United States and being within the ordinary jurisdiction of any of the individual states. . . ." *Id.* at § 19. The 1793 version of ITIA, Act of March 1, 1793, ch. 19, 1 Stat. 329, likewise excluded from its operation "lands surrounded by settlements." *Id.* at § 13. Accordingly, by its own terms, post-1790 ITIA applies only to the frontier regions, and not to areas under the jurisdiction of the individual states.[10]

The Counties' interpretation of ITIA is supported by *Mitchel*, an 1835 decision involving Indian land claims in Florida in which the Court suggested that some states continued to have the authority to convey Indian lands, notwithstanding ITIA:

> Grants made by the Indians at public councils have since been made directly to the purchasers or to the state in which the land lies, in trust for them, or with directions to convey to them, ***of which there are many instances of large tracts so sold and held***, ***especially in New York***.
>
> It was a universal rule that purchases made at Indian treaties, in the presence and with the approbation of the officer under whose direction they were held by the authority of the crown, gave a valid title to the lands; it prevailed under the laws of the states after the revolution ***and yet continues in those where the right to the ultimate fee is owned by the states*** or their grantees.

Mitchel, 34 U.S. at 748 (emphasis added).

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10. Although the Second Circuit in *Mohegan Tribe v. State of Connecticut*, 638 F.2d 612, 624 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981), distinguished *Bates* and *American Fur* and concluded that ITIA was not geographically limited as to land conveyances, *id.* at 627, the Counties submit that this reading is not justified as applied to the present parcels and is inconsistent with the authority of this Court. It is also contrary to the understanding of early jurists, as discussed below.

Likewise, in *New Jersey v. Wilson*, 11 U.S. 164 (1812), this Court made no mention of ITIA when discussing an 1803 conveyance to private parties by the Delaware Indians of their interest in a tract of land in New Jersey. Invalidating a New Jersey enactment that attempted to revoke the tax exempt status of the tract conveyed, the Court stated:

> It is not doubted but that the state of New Jersey might have insisted on a surrender of this privilege [tax exempt status] as the sole condition on which a sale of the property should be allowed. But this condition has not been insisted on. The land has been sold, with the assent of the state, with all its privileges and immunities. The purchaser succeeds, with the assent of the state, to all the rights of the Indians.

Id. at 167. There is no indication that this Court considered the sale void for violating ITIA.

Attorney General William Wirt observed in 1819 that the states, including New York, stood in "precisely the same ground towards the Indians which the British King occupied" and "[a]s to the right of sale, the States of New York and Massachusetts, representing the sovereignty of the Crown in this respect, have regulated the manner in which it shall take place. . . ." Op. Att'y Gen. William Wirt (March 26, 1819) (appended hereto).[11] The United States reiterated this position before the Indian Claims Commission in 1955, with the added gloss that the 1794 Treaty of Canandaigua "was an

11. A June 16, 1795 opinion by Attorney General Bradford is sometimes cited as authority for the proposition that ITIA applied to New York. *See, e.g.*, *Oneida Indian Nation of New York*, 434 F. Supp. at 534. Bradford himself, however, qualified his opinion, noting that "the documents submitted to the Attorney General" did not disclose "circumstances of the case under consideration to take it out of the general prohibition of [ITIA]." Op. Att'y Gen. William Bradford (June 16, 1795) (A50-A51). It is unknown to historians what documents Bradford considered beyond the statute and the treaties between New York and the Oneidas, Cayugas, and Onondagas. In any event, Bradford's opinion (insofar as the Oneidas are concerned) is founded upon the erroneous assumption that the 1788 Treaty of Fort Schuyler failed to extinguish Indian title. *Id.*

acknowledgement of the then well-known fact that" New York had the right to purchase the Indian lands, and that "the Indians were free to sell their lands if they chose and that the United States was placing no restrictions upon such sales. . . ." (A43).

Chancellor Kent, in his influential *Commentaries on American Law* ("*Kent's Commentaries*"), observed that "the several local governments, before and since our Revolution, never regarded the Indian nations within their territorial domains as subjects," but nonetheless, "asserted and enforced the exclusive right to extinguish Indian titles to lands, enclosed within the exterior lines of their jurisdictions, by fair purchase." 3 *Kent's Commentaries* 384-85 (14th ed. 1896). Oliver Wendell Holmes, Jr., who edited the twelfth edition of *Kent's Commentaries* early in his career, also apparently believed the ITIA did not apply to Oneida land sales:

> So the Oneida Indians, owning lands in the counties of Oneida and Madison, were enabled, by the act of April 18, 1843, c. 185, to hold lands in severalty, and to sell and convey the same, under the care of a superintendent on the part of the state.

2 *Kent's Commentaries* 73 n.(a). Moreover, there is no mention in *Kent's Commentaries* that any of the numerous purchases by New York were thought to be in violation of ITIA.

III. Even If The Oneidas Once Had A Federally Recognized Reservation, It Was Disestablished By The 1838 Treaty of Buffalo Creek Between the United States and the Six Nations

The briefs of Sherrill and other *amici* demonstrate that the United States in the 1838 Treaty of Buffalo Creek clearly intended to disestablish any Oneida Reservation. However, this Court has said that "even in the absence of a clear expression of congressional purpose [to diminish a reservation] unequivocal evidence derived from the surrounding circumstances may support the conclusion that a reservation has been diminished." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (citing *Solem v. Bartlett*, 465 U.S. 463, 471

(1984)).[12] Further, "where non-Indian settlers flooded into . . . a reservation and the area has long since lost its Indian character, we have acknowledged that de facto, if not de jure, diminishment may have occurred." *Id.* at 356 (citing *Solem*, 465 U.S. at 471).[13] If the federal expression of intent was not clear, then the Court will examine other factors, including (a) events that occurred after 1838 and the subsequent treatment of the area; (b) established jurisdictional patterns and the development of justifiable expectations; (c) changes in the demographics of the area; (d) maps; and (e) administrative documents. *See Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010 (8th Cir. 1999); *Solem*, *supra*; *Hagen v. Utah*, 510 U.S. 399 (1994); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977).

A. Subsequent treatment of the area

According to historian Laurence M. Hauptman, who has been employed by several tribes including the Wisconsin Oneidas as a historical consultant, "[t]he process of Oneida dispossession and removal had been set in motion as early as the end of the American Revolution. . . ." Hauptman, *Conspiracy of Interests*, at 57 (1999) (SCJA 1006). Hauptman identifies a number of factors that contributed to the removal of the Oneidas:

- Hopeless division among the Oneidas. (SCJA 1005);
- A "flood of settlement into their central New York State homeland." (SCJA 1004);
- A "vast conspiracy of interlocking forces – land and transportation interests," which led to the development of canals (including the Erie Canal), railroads and roads. "No other Indian community in

12. This Court recently considered in detail (based on a record developed in a nine-day trial) both the negotiating history and subsequent events in determining congressional intent with respect to whether an Indian reservation in Idaho included certain submerged lands. *Idaho v. United States*, 533 U.S. 262 (2001).

13. The terms "diminishment" and "disestablishment" have sometimes been used interchangeably. "Diminishment" refers to the reduction in size of a reservation. "Disestablishment" generally refers to the elimination of a reservation. The Oneida reservation in New York was disestablished.

New York State was affected more by the transportation revolution than the Oneidas." (SCJA 1002);

- National security concerns and forty years of tension and wars with Great Britain (including the War of 1812) which caused American policymakers (including John C. Calhoun, secretary of war from 1817 to 1825) to formulate both defense and Indian policies which had a goal of removing Indian tribes from New York State. (SCJA 998-1001); and
- The federal government's failure to carry out its fiduciary responsibilities to the Indians. (SCJA 1003).

The area from which the Oneidas removed was located within both Madison County (created in 1806) and Oneida County (created in 1798). As Oneida lands were transferred to New York State, they were surveyed and laid out in townships, which were in turn subdivided into sections and the sections into lots. These towns included Cazenovia, Fenner, Lenox, Smithfield, Stockbridge and Sullivan in Madison County and Augusta, Vernon and Verona in Oneida County. The townships were settled by non-Indians, who started churches and schools; set up banks, factories, mills and shops; established local governments, courts, post offices, police forces and fire departments; organized bands, professional societies, seminaries and fraternal societies; and by 1880 covered the area with non-Indian culture. (SCJA 1013-1176).

By 1890, the small remnant of Oneidas who had not removed were living among their non-Indian neighbors "off reservation." (SCJA 993, 994). At all times since, the area has been treated as non-Indian except for a 32-acre parcel currently under BIA jurisdiction, title to which is recorded in the name of an individual Oneida Indian. (SCJA 1177-1179).

B. Established jurisdictional patterns and justifiable expectations

First published in 1942 under the authority of the Department of Interior, Felix S. Cohen's *Handbook of Federal Indian Law* was updated and republished in 1958 and 1982 ("Cohen"). In the 1942 edition, Cohen reported that "[t]he State

of New York has for 100 years or more legislated for and dealt with the Indians within its borders." *Id.* at 419. In the chapter on New York Indians, Cohen does not even include the Oneidas in his discussion of "[t]he present status of tribal government." The reason is found in a footnote:

> The Oneidas also, by various treaties, sold all of their land, except about 350 acres, to the State, and removed to the reservation in Wisconsin procured from the Menominees by the Federal Government. The 350 acres in New York belonging to the Oneidas have long since been divided in severalty under State laws, and as a tribe these Indians are known no more in that State.

Id. at 966-967 n.1 (internal quote omitted).

The same conclusion had been reached by a federal court decades earlier in *United States v. Elm*, 1877 U.S. Dist. LEXIS 44 (N.D.N.Y. Dec. 24, 1877). Elm was an Oneida Indian who lived his entire life in Madison County. He voted in the congressional election of 1876, claiming to be a U.S. citizen. He was indicted, tried and convicted of voting illegally. The question presented on a motion for a new trial was whether or not the Oneida Indians are citizens of the U.S. and, as such, entitled to vote. The answer to this question turned on whether the Oneidas maintained their tribal integrity, and whether Elm continued to recognize his tribal relations.[14] In reversing his conviction and granting a new trial, the court wrote:

> In 1822 the supreme court of this state decided, in *Jackson v. Goodell*, 20 Johns. 187, that the Indians resident in this state were citizens, but that decision was reversed by the court of errors. Since that decision, however, great changes have taken place in the social and political relations between the Indians and the body of citizens at large, as is well illustrated by the history of the Oneidas. By treaties

14. The Act of June 2, 1924 made "all non-citizen Indians born within the territorial limits of the United States" citizens of the United States. 8 U.S.C. § 1401(b) (1999) (originally 43 Stat. 253). Thus, under modern law, all Indians are citizens of the United States.

> between the United States and the Six Nations, the Menomonies, and Winnebagoes in 1831 and 1838 the Six Nations acquired extensive cessions of lands in Wisconsin near Green Bay; and about that time the main body of the Oneidas removed to these lands. Since then, the tribal government has ceased as to those who remained in this state. It is true those remaining here have continued to designate one of their number as chief, but his sole authority consists in representing them in the receipt of an annuity which he distributes among the survivors. The 20 families which constitute the remnant of the Oneidas reside in the vicinity of their original reservation. They do not constitute a community by themselves, but their dwellings are interspersed with the habitations of the whites. In religion, in customs, in language, in everything but the color of their skins, they are identified with the rest of the population.

The local histories discussed in subsection A. above and the court's findings in *Elm* show that, beginning in the second half of the nineteenth century, the established jurisdictional patterns in central New York were non-Indian. "[A]s a tribe [the Oneidas] are known no more in that State." Cohen, at 966-67 n.1. In short, the jurisdictional patterns and justifiable expectations in the area are that the ancient state reservation was long ago disestablished and that the area is subject to non-Indian jurisdiction.

C. Changes in the demographics of the area

The demographics of the area changed dramatically in the decades before and after 1838, as the following table from *Conspiracy of Interests* shows:

"Population Increases in Madison and Oneida Counties, New York, 1790-1855"

	YEAR					
	1790	1800	1814	1825	1840	1855
Madison	—	8,036	26,276	35,646	40,008	43,687
Oneida	1,891	20,839	45,627	57,847	85,310	107,749

(SCJA 997). As the flood of non-Indian settlers increased, the removal of the Oneidas continued. According to the 1870 Census of Oneida County, the Towns of Augusta, Vernon and Verona had the following populations:

Town	Total Population	Indians
Augusta	2067	0
Vernon	2840	45
Verona	5757	0

(SCJA 1190). According to the 1870 Census of Madison County, the Towns in the former reservation area had the following populations:

Town	Total Population
Cazenovia	2,132 (one-half of 4,265 since *only* the northern half of Cazenovia is in the area)
Fenner	1,381
Lenox	9,816
Smithfield	1,227
Stockbridge	1,847
Sullivan	*4,921*
TOTAL	21,324

No Indians are recorded. (SCJA 1198). By 1890, there were 106 Oneidas living off-reservation in the area. (SCJA 993). This number of Oneidas compares to 1890 populations of 42,892 in Madison County, and 122,922 in Oneida County. (SCJA 1164, 1208).

As of 1999, there were an estimated 744 Indian, Eskimo and Aleut (most of whom are presumably Oneida Indians) living in Madison (285) and Oneida (459) Counties out of a total estimated population of 300,841 (71,127 in Madison County and 229,714 in Oneida County). (SCJA 1213-1214). Thus, the combined Indian, Eskimo and Aleut populations constitute approximately .25% of the total population of Madison and Oneida Counties (conversely, the Counties are 99.75% non-Indian).

D. Maps

The map of New York in *The Six Nations of New York 1892 United States Extra Census Bulletin* shows all the reservations of the Six Nations in the State, and there is no Oneida reservation. (SCJA 995). The absence of an Oneida reservation is confirmed by maps issued by the United States Geologic Survey in the Department of Interior. Neither the Oneida map from the Edition of 1902 nor the Utica map from 1985 shows any Oneida reservation. By comparison, the Tully map from the Edition of 1900 and the South Onondaga map edited in 1973 both show the Onondaga Indian Reservation. (SCJA 1215-1218). Maps of

Madison County and the towns within the area of the former Oneida reservation from the 1875 Atlas of Madison County make no reference to the Oneida reservation. (SCJA 1199-1205).

Some commercially published maps refer to the former location of the Oneida Indian Reservation. An earlier map of Oneida County in the 1874 Oneida County Atlas makes no reference to any Oneida reservation. However, maps of the Towns of Verona and Vernon from the same atlas make reference to "Oneida Reservation" (without boundaries). (SCJA 1191, 1193, 1196). These references to "Oneida Reservation" appear to refer to the general area of the former reservation as a matter of historical interest. It is clear from the Court's findings in *United States v. Elm*, 1877 U.S. Dist. LEXIS 44, that there was no Oneida tribe or tribal government in the area by 1877, and there was a mere "remnant of the Oneidas [residing] in the vicinity of their original reservation."

The Counties acknowledge that some maps of Madison and Oneida Counties include the words "Oneida Reservation" across unbounded areas, similar to the maps of the Towns of Vernon and Verona referred to above. (SCJA 1219-1220). However, the area of the former Oneida reservation is overlaid with substantial detail of non-Indian development, settlement, subdivisions, surveys, and local governments. General references to "Oneida Reservation" on maps, without more, have "limited interpretive value" and "cannot be said to be a considered jurisdictional statement regarding the specific status of . . . Indian lands." *Yankton Sioux Tribe*, 188 F.3d at 1029 n.11 (citations omitted).

E. Administrative documents

The Acts of Congress and the 1838 Treaty of Buffalo Creek, discussed in detail in Oneida Ltd.'s *amicus* brief, (SCJA 879, 886-907), demonstrate Congress' intent to remove the Oneidas from New York State and to disestablish the Oneida reservation. In addition, the 1892 Census Bulletin, (SCJA 990-995), and the following administrative

documents confirm that the Oneida reservation in New York was disestablished:

- *1877* Annual Report of the Commissioner of Indian Affairs for the Year 1877, at 168. Reporting that some Oneidas lived on the reservations of the Onondagas and Senecas of Tonawanda, but that most lived "on detached farms" partitioned "from their former reservations in the counties of Oneida and Madison." (SCJA 1222).
- *1890* Annual Report of the Commissioner of Indian Affairs 1890, at XXVII. Reporting that the "Oneida Reserve .. . consists of detached farms held in severalty by the heads of families and contains in all about 350 acres." (SCJA 1226).
- *1891* Annual Report of the Commissioner of Indian Affairs 1891, at 314:

  > The Oneida Indians have no reservation, their lands having been divided in severalty among them by act of the legislature many years ago.
  >
  > * * *
  >
  > The Oneida have no tribal relations, and are without chiefs or other officers.

  (SCJA 1228-1229).
- *1893* Annual Report of the Commissioner of Indian Affairs 1893, at 223. Reporting that the "Oneidas have no reservation. Most of the tribe removed to Wisconsin in 1846. The few who remained retained 350 acres of land . . . divided in severalty among them and they were made citizens." (SCJA 1230-1231).
- *1900* Annual Reports of the Department of the Interior for the Fiscal Year Ended June 30, 1900, Report Concerning Indians in New York, at 298:

> The Indian reservations. There are six Indian reservations in the agency, which extends over the State of New York. The names, location and acreage of the reservations are as follows: Allegany . . . Cattaraugus . . . Onondaga . . . St. Regis . . . Tonawanda . . . Tuscarora . . .
>
> . . . The Cayuga and Oneida have no reservations. A few families of the latter reside among the whites in Oneida and Madison Counties, in the vicinity of the Oneida Reservation, which was sold and broken up in 1846, when most of the Oneida removed to Wisconsin.

(SCJA 1232-1234).

The 1901 Annual Report at 288 is to the same effect. (SCJA 1236-1239). And the 1906 Annual Report at 288 states, "[t]he New York Oneida have no reservation: in fact can hardly be said to maintain a tribal existence." (SCJA 1240-1241).

Responding to correspondence from the United States Attorney, Northern District of New York, asking about the Oneida reservation in New York, the Assistant Commissioner of Indian Affairs stated:

> In answer you are advised that in the Fall of 1914 a representative of this Office was detailed to investigate conditions on the Indian reservations in the State of New York; and in his report dated December 26, 1914, he set out clearly the status of the lands of the Oneidas as follows:
>
> The Oneidas also, by various treaties, sold all of their land, except about 350 acres, to the State, and removed to the reservation in Wisconsin procured from the Menominees by treaty with the Federal Government. The 350 acres in New York belonging to the Oneidas have long since

> been divided in severalty under State laws, and as a tribe these Indians are known no more in that State.

(SCJA 1246-1247).

A letter from the Assistant Commissioner of Indian Affairs dated March 14, 1924, referring to the 1920 decision of the Second Circuit in *United States v. Boylan*, 265 F. 165 (2d. Cir. 1920)[15] advised:

> This Office has no knowledge of any steps having been taken by the Government for the purpose of contesting or voiding the present titles to the lands in controversy.
>
> So far as this Office is aware, there is but little, if any, merit in the legal claim of the Six Nations

15. In *United States v. Boylan*, 256 F. 468 (N.D.N.Y. 1919), *aff'd*, 265 F. 165 (2d Cir. 1920), *appeal dismissed*, 257 U.S. 614 (1921)), the district court dealt with the 32 acres in Madison County currently under the jurisdiction of the Bureau of Indian Affairs. In fact, the *Boylan* decisions recognize that the Oneida Reservation had been reduced (or diminished) and recognize that "the right was given to the Indians as a tribe to dispose of their lands in the State of New York, if they decided to move to Green Bay and there accept other lands allotted to them. After this, the Indians remaining held a single and undivided tract out of the original Oneida reservation." *Id.* 265 F. at 167. (The District Court's opinion in *Boylan* indicates that as of 1906, "the Oneida reservation still existed, although reduced in area." 256 F. at 481.) Thereafter in the treaty of 1842, as authorized by the 1838 Treaty of Buffalo Creek, the State arranged to purchase the portion of the reservation that represented the equitable share of the Oneidas who emigrated to Green Bay in 1842. *Id.* 265 F. at 168. Thus, the court recognized the effect of the treaty of 1842 as further diminishing the Oneida reservation. The court then went on to discuss the particular land in question and found that "[n]o partition was ever made of lots 17 and 19 by the tribe or band of Indians, as required by Chapter 420, [New York] Laws of 1849." *Id.* 265 F. at 170. Further, since "Congress has never legislated so as to permit title to pass from the Indians to the lots here in question [to aliens]" the Court affirmed, concluding that the partition action, judgment and sale made thereunder were void. *Id.* 265 F. at 173, 174. The *Boylan* case does not support the continued existence of the ancient Oneida Reservation acknowledged in the 1794 Treaty of Canandaigua, although it helps to explain why the 32 acres is currently under BIA jurisdiction.

> against the State of New York for lands heretofore conveyed for valuable considerations to that State by the Oneida tribe.

(SCJA 1248-1249).

A letter from the Assistant Commissioner of Indian Affairs dated January 7, 1925 stated: "Furthermore, the Oneida Indians years ago disposed of their lands in New York State and removed to a reservation in Wisconsin. As a tribe these Indians are no longer known in the State of New York." (SCJA 1250).

A letter from the Commissioner of Indian Affairs dated June 14, 1931 distinguished the *Boylan* case from lands formerly owned by Lydia B. Doxtater, a deceased Oneida Indian, on the grounds that

> [T]he Boylan case dealt with lands retained by the Oneida Indians as a tribe, as a part of their original domain or "reservation" in the State of New York, while the lands formerly owned by Mrs. Doxtater, as pointed out to you in our prior letter, were ceded and sold to the State of New York by the Oneida tribe in 1840 and were subsequently acquired in 1907 by Mrs. Doxtater, as an individual, in her private capacity, with her own funds, from private parties, patentees of the State of New York or their assignees.
>
> There is a substantial fundamental difference, of course, between restricted Indian property over which the Federal Government exercises beneficent supervision or control, and unrestricted Indian property acquired by individual Indians by their own industry or with their own unrestricted funds. With the former we have considerable to do but with the latter practically nothing. . . .

(SCJA 1251).

Three 1939 letters likewise confirm that the Oneida Reservation no longer exists. (SCJA 1252-1254). The Statistical Supplement to the Annual Report of the Commissioner of Indian Affairs for the Fiscal Year ended June 30, 1942, shows 30 acres of "Trust Allotted" land for the Oneida (New York) without further explanation. (SCJA 1256). And more recently, the Annual Report of Indian Lands, U.S. Department of the Interior, Bureau of Indian Affairs, Table of Lands under the Jurisdiction of The Bureau of Indian Affairs as of December 31, 1997 shows no land in Oneida County, New York and only 32 acres in Madison County, New York. (SCJA 250).

Except possibly for the 32 acres, there has been no Oneida reservation and the area is and has been under non-Indian jurisdiction for nearly 200 years. Both as a matter of law and as a matter of fact, the ancient Oneida Reservation in New York was long ago disestablished.

IV. The Second Circuit's Decision Below Is Inconsistent With State Sovereignty Preserved To New York (And The Counties) By The Tenth Amendment To The Constitution Of The United States

The Second Circuit's decision violates the Tenth Amendment because it unnecessarily diminishes the sovereignty of the State of New York (and the sovereign powers delegated to the Counties). This is so for two separate reasons. First, as discussed above, the parcels at issue have been New York land since 1788 when they were ceded to New York and Indian title was extinguished. Second, even if Indian title was not extinguished, New York has exerted unchallenged *de facto* sovereignty over the former Oneida reservation for more than 200 years. In either case, the Tenth Amendment prohibits the Oneidas from unilaterally creating, in piecemeal fashion, a separatist enclave in the middle of New York that is free from state and local law.

In *Alden v. Maine*, 527 U.S. 706 (1999), this Court explained that "[a]lthough the Constitution establishes a

National Government with broad, often plenary authority over matters within its recognized competence, the founding document 'specifically recognizes the States as sovereign entities.'" *Id.* at 713 (citation omitted). A State's power over its own territory and transfers of property within its territory are an integral part of State sovereignty. *See, e.g.*, *Northern Sec. Co. v. United States*, 193 U.S. 197, 347 (1904) ("a State has plenary powers over its own territory, its highways, its franchises, and its corporations" (internal quotes and cites omitted)); *Hervey v. Rhode Island Locomotive Works*, 93 U.S. 664, 671 (1876) ("every State has the right to regulate the transfer of property within its limits"). So, too, is the right to enter into contracts and (before the Constitution) treaties. *See, e.g.*, *United States v. Bekins*, 304 U.S. 27, 51-52 (1938) ("It is the essence of sovereignty to be able to make contracts and give consents bearing upon the exertion of governmental power").

The 1788 Treaty of Fort Schuyler – signed before the Constitution created our National Government – extinguished the Oneidas' Indian title to their ancient domain. *See Oneida Indian Nation of New York v. State of New York*, 860 F.2d 1145, 1159-60 (2d Cir. 1988). As discussed above, the Oneidas' ceded ***all*** their territory to New York State, including the parcels at issue. The Oneidas' land thus became New York's land, subject to New York sovereignty. *See, e.g.*, *Johnson v. M'Intosh*, 21 U.S. 543, 584 (1823). In exchange for relinquishing their aboriginal title, the Oneidas secured from New York certain rights created and defined by New York state law. *See Goodell v. Jackson*, 20 Johns. at 729. The National Government, which did not exist when the 1788 Treaty of Fort Schuyler was signed, by definition had no authority over the scope or effect of the 1788 Treaty. *Cf. Cook v. Harman*, 531 U.S. 501, 522-23 (2001) (Powers granted by Constitution can "not precede their very creation by the Constitution"). The Second Circuit's conclusion that Indian title quietly survived for more than 175 years (apparently unknown to the federal government, the Oneidas, New York State and the Counties) and that New York ceded those lands to the federal government when the

Constitution was ratified, *see Oneida Indian Nation of N.Y. v. City of Sherrill*, 337 F.3d 139, 146, 156 nn. 5, 13 (2d Cir. 2003), is incorrect for the reasons discussed above.

However, even if this Court were to accept the Second Circuit's interpretation of the relevant treaties and history, it should not allow the Oneidas unilaterally to destroy 200-years of *de facto* New York sovereignty. The National Government never sought to exert sovereignty over the former "reservation" or otherwise superintend the Oneidas. Instead, New York State (and the Counties and other local governments) have held uncontested sovereignty over the entire area for almost 200 years. As the Court noted in *New York ex rel. Cutler v. Dibble*, 62 U.S. 366, 370 (1859), speaking of lands in possession of the Seneca Indians:

> Notwithstanding the peculiar relation which these Indian nations hold to the Government of the United States, the State of New York had the power of a sovereign over their persons and property, so far as it was necessary to preserve the peace of the Commonwealth, and protect these feeble and helpless bands from imposition and intrusion. The power of a State to make such regulations to preserve the peace of the community is absolute, and has never been surrendered.

In the pending Lands Claim Case, No. 74-CV-187 (N.D.N.Y), the Oneidas are seeking to vindicate possessory rights to their former "reservation." If successful, they will receive an appropriate remedy. It does not follow, however, that the Oneidas are entitled to found a separate nation in the middle of New York State and oust its sovereign power. Such a result is not required by *Oneida II* or other federal law, and is fundamentally at odds with the Tenth Amendment in this case. *Cf. Nevada v. Hicks*, 533 U.S. 353, (2001) ("State sovereignty does not end at a reservation's border. Though tribes are often referred to as sovereign entities, it was long ago that the Court departed from Chief Justice Marshall's view that the laws of [a State] can have no force within

reservation boundaries. Ordinarily, it is now clear, an Indian reservation is considered part of the territory of the State"). As the Towns of Lennox, Stockbridge and Southampton argue in Part III of their *amici* brief, where there has been no Oneida "reservation" for centuries – and state and local government have always exerted plenary authority over the territory – state and local sovereignty should continue, irrespective of who has the right to possess the land.

By circumscribing New York's control over territory to which it exerted sovereignty, either *de jure* or *de facto*, since before the Constitution was ratified, the Second Circuit violated the Tenth Amendment.

CONCLUSION

For the reasons stated herein, as well as those stated by the City of Sherrill and other *amici*, the Court should reverse the court below.

Respectfully submitted,

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