IN THE

Supreme Court of the United States

CAYUGA COUNTY SHERIFF DAVID S. GOULD, SENECA COUNTY SHERIFF JACK S. STENBERG, CAYUGA COUNTY DISTRICT ATTORNEY JON E. BUDELMANN, and SENECA COUNTY DISTRICT ATTORNEY RICHARD E. SWINEHART,

Petitioners,

v.

CAYUGA INDIAN NATION OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF NEW YORK

PETITION FOR A WRIT OF CERTIORARI

PHILIP G. SPELLANE
Counsel of Record
KARL J. SLEIGHT
DANIEL J. MOORE
SVETLANA K. IVY
JAMES P. NONKES
HARRIS BEACH PLLC
Attorneys for Petitioners
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800
pspellane@harrisbeach.com

231374

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

Blank Page

QUESTIONS PRESENTED FOR REVIEW

I. Whether the New York State Court of Appeals in its 4-3 decision in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010), properly interpreted federal law on a matter it believed the United States Supreme Court had not yet addressed in holding that two parcels of land purchased by a successor to the historic Cayuga Indian Nation in 2003 and 2005 were exempt from New York's cigarette sales and excise taxes after two hundred years of non-Indian ownership and governance.

II. Whether in that decision the New York Court of Appeals properly held both that (i) the Cayuga Indian Nation possessed a federal reservation pursuant to the 1794 Treaty of Canandaigua despite the fact that the Cayuga Indian Nation had ceded all of its land to New York State in 1789; and (ii) the United States did not subsequently disestablish any purported federal reservation.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding below are Plaintiff-Respondent Cayuga Indian Nation of New York (the "Nation") and Defendants-Appellants Cayuga County Sheriff David S. Gould, Seneca County Sheriff Jack S. Stenberg, Cayuga County District Attorney Jon E. Budelmann, and Seneca County District Attorney Richard E. Swinehart (collectively, the "Counties").

Amicus curiae in the proceeding below on behalf of the Counties are the New York State Attorney General, the New York City Corporation Counsel, the New York Association of Counties, New York State Senator Jeffrey D. Klein, the District Attorneys Association of the State of New York, and the American Cancer Society. *Amicus curiae* in the proceeding below on behalf of the Nation are the Seneca Nation of Indians, the United States Department of Justice, and Day Wholesale, Inc.

TABLE OF CONTENTS

Contents

TABLE OF APPENDICES

Appendices

TABLE OF AUTHORITIES

Authorities

Page

Constitutional Provisions

Statutes

Blank Page

DECISIONS BELOW

The decisions below are attached in the appendix hereto. They are the May 11, 2010 Opinion of the New York State Court of Appeals (App. A); the July 10, 2009 Opinion and Order of the Supreme Court of the State of New York, Appellate Division (4th Judicial Department) (App. B); and the December 9, 2008 Decision and Order of the Supreme Court of the State of New York (Monroe County) (App. C).

BASIS FOR JURISDICTION

The New York State Court of Appeals, the state's court of last resort, issued its decision on May 11, 2010. Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257.

APPLICABLE REGULATIONS, STATUTES, TREATIES, AND CONSTITUTIONAL PROVISIONS

Applicable regulations, statutes, treaties, and constitutional provisions at issue on this appeal and are attached in the appendix hereto. They are: New York Tax Law § 470(16) (App. D); February 25, 1789 Treaty between the Cayugas and New York State (App. E); 1794 Treaty of Canandaigua, 7 Stat. 44 (App. F); July 27, 1795 Treaty between the Cayugas and New York State (App. G); May 30, 1807 Treaty between the Cayugas and New York State (App. H); 1838 Treaty of Buffalo Creek, 7 Stat. 550 (App. I); Nonintercourse Act, 25 U.S.C. § 177 (App. J); 1793 Indian Trade and Intercourse Act (App. K); 1802 Indian Trade and Intercourse Act (App. L); and U.S. Constitution, amend. V (App. M).

STATEMENT OF THE CASE

The issue on this petition for writ of *certiorari* is whether each of the two parcels of land recently purchased by the Nation in central New York after two hundred years of non-Indian ownership qualifies under New York's Tax Law as a "reservation" on which the Nation may sell cigarettes tax free. The Court of Appeals held that the outcome depended on whether each of the parcels was considered a "reservation" under federal law.

It is respectfully submitted that the Court of Appeals erred in applying and interpreting the relevant federal law because land which long ago had been abandoned by the Cayugas is not a "reservation." Even if it were, however, federal law holds that such land does not provide to the Nation any exemptions from state and local governance.

In 1789, New York State treated with the original Cayuga tribe whereby the Cayugas ceded all of their lands to the State which then set aside a 64,015 acre state reservation in central New York for the Cayugas' use. That historic tract of land sits at the north end of Cayuga Lake and extends down the lake's eastern and western shores. In that treaty, New York State also reserved for itself the exclusive right to purchase back the land use rights it had reserved to the Cayugas. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 268-269 (2d Cir. 2005) *cert. denied*, 547 U.S. 1128 (2006). Under the Treaty of Canandaigua in 1794, the United States government sought peace with the Iroquois and, as part of that commitment, recognized the existence of the

New York State reservations. The historical record is clear that at the time of New York State's treaty with them in 1789, the Cayugas resided primarily in Canada and had no interest in retaining the New York state land use rights but instead sought to sell them on several occasions. Between 1794 and 1807, after several illegal attempts to sell their land rights to private parties, the Cayugas sold to the State all of their remaining rights and abandoned the land. *See* July 27, 1795 Treaty between the Cayugas and New York State and May 30, 1807 Treaty between the Cayugas and New York State.

For the next two centuries, the land was owned and governed by non-Indians and subject to local taxation. In 2003 and 2005, however, the Nation, a group formed in the 1970s by ancestors of the relatively few Cayugas that remained in New York with the Seneca tribe, purchased two small parcels, one in Cayuga County and the other in Seneca County, and began to sell cigarettes from convenience stores located there. In the summer of 2008 the district attorneys of Seneca and Cayuga Counties had reason to believe that large quantities of unstamped, and therefore untaxed, cigarettes were routinely being sold at the Nation's two convenience stores. (*See* Cayuga County Search Warrant (R. 126); Seneca County Search Warrant (R. 128)).[1]

New York Tax Law § 1814 imposes criminal penalties for possession of untaxed cigarettes in violation of New York Tax Law § 471, which states that there is "hereby

1. Citations to the Record, or "R.", refer to the record on appeal to the New York State Court of Appeals. That record is not being submitted herewith but will be provided at the Court's request.

imposed and shall be paid a tax on all cigarettes possessed in the state by any person for sale, except that no tax shall be imposed on cigarettes sold under such circumstances that this state is without power to impose such tax . . . ." Indian groups have argued that the state is without power to tax cigarette sales if they occur on a "qualified reservation" which is defined in New York Tax Law § 470(16)(a) as "[l]ands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the state."

On November 25, 2008, upon application of the law enforcement authorities from the two counties, New York State Supreme Court Justice Kenneth R. Fisher issued search warrants authorizing law enforcement officials to search the two convenience stores owned by the Nation operating under the name "Lakeside Trading" and located in Seneca and Cayuga counties and to seize evidence relating to the possession and sale of unstamped cigarettes and/or business records evincing the receipt and sale of untaxed cigarettes. (Plaintiff's Complaint, R. 111, ¶ 15). The same day, the sheriffs of the respective counties executed the search warrants and seized more than 1.5 million untaxed contraband cigarettes and other evidence. (R. 167, ¶ 8; 172, ¶ 6).

On November 26, 2008, the day after the sheriffs seized the evidence pursuant to the search warrants, the Nation collaterally attacked the criminal proceedings by commencing this civil action in New York State Supreme Court (Monroe County), seeking both declaratory and injunctive relief. (Plaintiff's Complaint, R. 108 et seq.). The Complaint presupposed that the

Nation's purchase of parcels of land on the open market somehow reestablished a historic state reservation that had been created in 1789 and then abandoned two hundred years ago, thereby transforming that land into a "reservation" as that term is used in Tax Law § 470(16)(a). (R. 111, ¶ 4). The Counties responded, in part, on the basis that the Nation's open market purchases of the land after two hundred years of non-Indian ownership and governance did not establish a "qualified reservation" for purposes of Tax Law § 470(16)(a). (R. 20).

By decision of December 9, 2009, New York Supreme Court Justice Kenneth Fisher agreed with the Counties and ruled that the Nation's open market purchases of land did not convert that property into a "qualified reservation" for purposes of Tax Law § 470(16)(a). (R. 18) ("To hold otherwise would be to sanction precisely the result the Supreme Court rejected in *City of Sherrill* [544 U.S. 197 (2005)].") On December 11, 2008, after sealed indictments were handed up in Cayuga County, the Nation filed a notice of appeal in the Appellate Division, Fourth Department from Justice Fisher's judgment. (R. 2).

On July 10, 2009, in a 4-1 ruling, the Appellate Division reversed Justice Fisher's judgment and granted summary judgment in the Nation's favor. (R. 943-959). The court applied federal common law and held that the Nation's recently acquired parcels of land each were located on a "qualified reservation" for purposes of Tax Law § 470(16)(a). (R. 951).

On August 19, 2009, the Counties sought leave to appeal from the order of July 10, 2009, arguing that the Appellate Division's decision was contrary to explicit holdings of the New York Court of Appeals, the United States Supreme Court, the United States Court of Appeals for the Second Circuit and the United States District Court for the Eastern District of New York. (R. 941-942). On October 2, 2009, the Appellate Division granted the Counties' motion for leave to appeal to the New York Court of Appeals, the state's court of last resort.

Before the Court of Appeals, the Counties argued that federal law, in particular this Court's decision in *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), mandated that the Nation's purchase of land on the open market after two hundred years of non-Indian ownership and local taxation did not rekindle any embers of sovereignty so as to create a "qualified reservation." The Counties also argued that, at any rate, the Nation never possessed a reservation under federal law, thus voiding the Nation's claim *ab initio*.

On May 11, 2010, the Court of Appeals issued a 4-3 decision in the Nation's favor. The Court presupposed, with limited analysis, that the 1794 Treaty of Canandaigua initially granted the Nation a federal reservation by ratifying an existing state reservation and thereby establishing a federal reservation which previously had never existed and that this purported reservation was never formally disestablished.

Apparently overlooking the import of this Court's decision in *City of Sherrill*, the court also held that "the Supreme Court has not yet determined whether parcels of aboriginal lands that were later reacquired by the Nation constitute reservation property in accordance with federal law. Its answer to that question would settle the issue." *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 640 (2010). The court then held that "existing precedent" and "the absence of contrary federal precedent" entitled the lands to a "qualified reservation" status and therefore justified the cigarette sales tax exemption on the Nation's parcels. *Id.*

While the Court of Appeals decision involved the application of New York's tax laws, the court explicitly stated that its decision rested on its interpretation of federal law. *Id.* at 638 ("Viewed in this light, the 'qualified reservation' question distills to whether the convenience store parcels are viewed as reservation property under federal law.").[2] The incorrect application of federal law by the Court of Appeals is therefore ripe for review by this Court and this Court should grant this petition for a writ of *certiorari*. *See Three Affiliated Tribes v. World Engineering, P.C.*, 467 U.S. 138, 152 (1984) ("If the state court has proceeded on an incorrect perception of federal law, it has been this Court's practice to vacate the judgment of the state court and remand the case so

2. The Court of Appeals' reliance on federal, as opposed to New York, law to interpret the Tax Law is further evidenced by its rejection of the positions advanced by the New York State Attorney General, the New York City Corporation Counsel, the New York Association of Counties, New York State Senator Jeffrey D. Klein, and the District Attorneys Association of the State of New York.

that the court may reconsider the state-law question free of misapprehensions about the scope of federal law.").

REASONS FOR GRANTING THE PETITION

I. The Court of Appeals Decided *Cayuga Indian Nation of New York v. Gould* Under an Incorrect Interpretation of *Sherrill* and Its Progeny.

A. *Sherrill* Rejected Attempts to Revive Tax Exemptions and Other Sovereign Rights on Repurchased Land.

Assuming *arguendo* that the Nation at some time over two centuries ago possessed a federal reservation, which is refuted in Point II, *infra*, federal law holds that an Indian group may not revive reservation status – *and tax exempt rights associated with that status* – simply by purchasing lands on the open market after those lands have been owned by non-Indians and subject to local governance and taxation for centuries.

In *Sherrill*, this Court flatly rejected the Oneida Indian Nation's claim to a tax exempt reservation when it purchased lands on the open market after two hundred years of non-Indian ownership. The Court held that the right to be free from local taxation was reserved only for actual and long-standing Indian reservations. Thus, the parcels at issue were subject to local taxation because under federal law any remnants of sovereignty

or power arising from reservation status had long ago dissipated with the abandonment of the land:

> In this action, [Oneida Indian Nation] seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations. We now reject the unification theory of OIN and the United States and hold that "standards of federal Indian law and federal equity practice" preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.

544 U.S. at 213-14.

Sherrill holds that an Indian group's reacquisition of land it has abandoned centuries ago does not revive tax exempt status, much less full sovereignty rights. The oft-debated footnote 9 from the *Sherrill* decision states that such lands are subject to local taxation, regardless whether Congress has *formally* disestablished the ancient reservation. *Sherrill*, 544 U.S. at 216, n.9 ("The Court need not decide today whether . . . the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation . . . The relief [the Oneida Nation] seeks – recognition of present and future sovereign authority to remove the land from local taxation – is unavailable. . . ."). As Justice Stevens persuasively argued, *Sherrill*, in effect, *de facto* disestablishes the ancient reservation. *Sherrill*, 544 U.S. at 225 (Stevens, J., dissenting) ("[*Sherrill*] has effectively proclaimed a diminishment

of the Tribe's reservation and an abrogation of its elemental right to tax immunity."). *Sherrill* holds that purchasing ancient lands yields no special rights, whether these lands are referred to as a reservation or not. Thus, even if Congress has not formally removed the nominal title from ancient tribal lands, an Indian group may not claim tax exempt status on lands it purchases after centuries of non-Indian ownership.

The Court's decision in *Sherrill* was supported by public policy concerns against creating a haphazard "checkerboard" of reservations throughout a state that could otherwise be created at the behest of an Indian group by purchasing ancient aboriginal land on the open market from non-Indians. The Court held that allowing the Oneida Indian Nation to purchase ancient lands at will and thereafter claim tax free status on those lands would overburden state and local governments and neighboring landowners:

> The city of Sherrill and Oneida County are today overwhelmingly populated by non-Indians. A checkerboard of alternating state and tribal jurisdiction in New York State–created unilaterally at [the Oneida Indian Nation's] behest–would seriously burde[n] the administration of state and local governments and would adversely affect landowners neighboring the tribal patches.

544 U.S. at 219-20. Thus, "[t]he relief [Oneida Indian Nation] seeks – recognition of present and future sovereign authority to remove the land from local taxation – is unavailable because of the long lapse of

time, during which New York's governance remained undisturbed, and the present-day and future disruption such relief would engender." *Id.* at 216, n.9. That is precisely what the New York State Court of Appeals has done for the Nation.

Sherrill recognized the concerns associated with checkerboard reservations and found that those matters are properly addressed in the land into trust process under 25 U.S.C. § 465. The Court said:

> Recognizing these practical concerns, Congress has provided a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well being. Title 25 U.S.C. § 465 authorizes the Secretary of the Interior to acquire land in trust for Indians and provides that the land "shall be exempt from State and local taxation."

Id. at 200. Only after successful completion of the land into trust process may abandoned Indian land be free from local taxation and other regulations.

Short of completing the land into trust process, *Sherrill* and its progeny made clear that Indian groups may not revive any sovereignty rights on repurchased lands. Indeed, *Sherrill* was directly applied to bar the Nation's claims of immunity from zoning laws on repurchased parcels. Specifically, prior to *Sherrill*, the

Nation had argued successfully that its purported reservation lands in Union Springs, Cayuga County, New York were exempt from local zoning laws and that it could therefore operate a gaming establishment on that property. *Cayuga Indian Nation v. Vill. of Union Springs*, 317 F. Supp.2d 128 (N.D.N.Y. 2004) ("*Union Springs I*"). After *Sherrill*, however, the United States District Court for the Northern District of New York reversed its earlier decision and held that the Nation was not accorded any such rights on repurchased land. *Cayuga Indian Nation v. Vill. of Union Springs*, 390 F. Supp.2d 203 (N.D.N.Y. 2005) ("*Union Springs II*").

The United States Court of Appeals for the Second Circuit likewise held that *Sherrill* compelled reversal of the Nation's possessory land claim. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 272 (2d Cir. 2005). The Second Circuit held that "[t]he Supreme Court's recent decision in [*Sherrill*] has dramatically altered the legal landscape against which we consider plaintiffs' claims." *Id.* As it did in *Cayuga Indian Nation of New York v. Gould*, the United States submitted briefs on the Nation's behalf in *Union Springs II* and *Pataki*. The federal courts in *Union Springs II* and *Pataki* rejected the positions advanced by the United States and the Nation in light of *Sherrill* while the New York Court of Appeals accepted those positions in the instant case despite *Sherrill*, effectively reversing this Court's prior decision.

B. The Court of Appeals Rejected the Plain, Unambiguous Holding of *Sherrill* When it Granted the Nation a Tax Exemption.

The Court of Appeals held that whether the Nation's two convenience stores were each located on a "reservation" presented "a critical threshold consideration." *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 635 (2010). The court determined that federal law – not state law – governed the question of "reservation" status. Indeed, state law would have settled the issue in the Counties' favor because the term "reservation" has been used in other long-standing New York State tax statutes, specifically Real Property Tax Law § 454 and Indian Law § 6, and the New York State Legislature has determined that the Nation's parcels do not constitute a "reservation" under either statute. Each of the Nation's parcels is assessed, and the Nation pays the corresponding real property taxes, despite express statutory exemptions for "reservation" land under these statutes. Under the rule of construction known as *in pari materia*, the Nation's payment of real property taxes under these statutes confirms that neither parcel is a "reservation" as that term is used in the New York Tax Law. Thus, as a matter of state law, the Nation possesses no "reservation" under Tax Law § 470(16)(a). Counties' Principal Brief to Court of Appeals, at 22-32; Counties' Reply Brief to Court of Appeals, at 6-16.

The Court of Appeals found state law irrelevant to its analysis, holding instead that the "question distills to whether the convenience store parcels are viewed as reservation property under federal law." *Cayuga Indian*

Nation of New York, 14 N.Y.3d at 638. According to the Court of Appeals, "the Supreme Court has not yet determined whether parcels of aboriginal lands that were later reacquired by the Nation constitute reservation property in accordance with federal law. Its answer to that question would settle the issue." *Id.* at 640. The court nevertheless found in the Nation's favor "based on existing precedent" and what it mistakenly perceived as "the absence of contrary federal authority." *Id.*

Contrary to the holding of the Court of Appeals, under *Sherrill*, *Union Springs II*, and *Pataki*, the Nation's parcels are subject to local taxation – including the cigarette excise and sales taxes -- under a federal law analysis. Indeed, the Nation's parcels were owned by non-Indians and have been subject to local governance and taxation for an even longer period than the land at issue in *Sherrill*. Thus, as noted by New York Supreme Court Justice Fisher in his decision below:

> After these cases, and in particular [*Union Springs II*], [the Nation's] current claim that their convenience stores in Seneca and Cayuga Counties are situate on a 'qualified reservation' land such that they have sovereign immunity from local taxation . . . cannot be sustained . . . To hold otherwise would for the Cayuga Indian Nation render meaningless the holdings of *City of Sherrill, New York v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005); *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266

> (2d Cir. 2005) *cert. den.*, 547 U.S. 1128 (2006); and especially *Cayuga Indian Nation of New York v. Village of Union Springs*, 390 F.Supp.2d 203 (N.D.N.Y. 2005).

(Justice Fisher Decision, R. at 24-25.)

The Court of Appeals, however, disagreed with Justice Fisher and held that the Nation's repurchased lands were accorded an exemption from New York State's cigarette sales tax. In so doing, that court disregarded, or plainly misapplied, *Sherrill* and its progeny. The Court of Appeals focused on the fact that the Nation claimed only a cigarette tax exemption rather than full sovereignty over the parcels. By finding in the Nation's favor based on this distinction, the Court of Appeals completely overlooked that *Sherrill* had already decided that reacquired historic lands were not accorded *any* special privileges, much less a special exemption from local taxes. Simply put, *Sherrill* held that the Nation's repurchasing of abandoned lands yielded no special rights or privileges vis-à-vis such lands absent a successful land into trust application.

Whereas *Sherrill*, at footnote 9, holds that repurchased parcels are subject to local taxation even without formal disestablishment, the Court of Appeals misconstrued this principle, holding that the Nation's parcels retain nominal federal "reservation" status for purposes of a tax exemption. Completely undermining *Sherrill*, the New York State court held that without formal disestablishment, the Nation's parcels were therefore exempt from New York's cigarette sales tax because they were purportedly on federal reservation land.

That holding is untenable. The decision results in a prohibited "checkerboard" of reservations and non-reservations throughout upstate New York, which the Nation may create at its behest when it repurchases any land within its purported historic claim to a massive tract of over 64,000 acres of land. That policy was flatly denounced by this Court in *Sherrill*. Unchecked development of new tax exempt havens would upset existing neighborhoods and communities and sanction cigarette sales in areas where the interest of local municipalities is paramount, such as locations near schools. The haphazard establishment of reservations on long-ago abandoned land and the rights associated with those reservations increases the tax burden on all other property owners in the taxing jurisdiction and creates a stress on any business that attempts to compete with reservation vendors who sell tax free cigarettes. Counties' Principal Brief to Court of Appeals, at 32-33.

The Court of Appeals also misapplies *Sherrill* by relying on the Nation's application to place the parcels at issue into trust with the federal government. According to the Court of Appeals, the Nation's application demonstrates that it constitutes a federal reservation exempt from New York's cigarette sales tax. Contrary to the Court of Appeals' decision, however, *Sherrill* holds that only successful completion of the land into trust process would provide that the Nation's parcels are no longer subject to state and local taxation. The Nation has not completed that process here, and the Court of Appeals has instead bypassed *Sherrill's* requirements.

This Court should also grant *certiorari* to review the decision below because *Sherrill* has recently come under attack from other courts, a trend that threatens to continue. In *Oneida Indian Nation v. Madison County and Oneida County*, 605 F.3d 149 (2d Cir. 2010), the United States Court of Appeals for the Second Circuit held that local municipalities may not foreclose on the Oneida Indian Nation's repurchased lands if the Oneidas fail to pay real property taxes associated with those lands, taxes that are properly assessed and owing in accordance with *Sherrill*. Even though the Second Circuit's holding primarily involves questions of immunity from suit, its decision effectively grants sovereignty rights, the right to avoid paying property taxes, on the parcels at issue. As does the New York Court of Appeals in *Cayuga Indian Nation of New York v. Gould*, the Second Circuit has effectively undermined *Sherrill* and its progeny. Recognizing the inherent conflict with the Court's decision in *Sherrill*, Judge Cabranes and Judge Hall write in their concurring opinion, "This result, however, is so anomalous that it calls for the Supreme Court to revisit [its prior decisions] . . . If law and logic are to be reunited in this area of law, it will have to be done by our highest Court . . . ." *Id.* at 162.

Because the New York Court of Appeals has misinterpreted federal law and the concept of rights associated with abandoned tribal lands, the Counties respectfully submit that this Court should review that court's decision in *Cayuga Indian Nation of New York v. Gould* and reaffirm the principle holding of *Sherrill* that an Indian group may not rekindle any embers of sovereignty – and specifically the right to avoid local taxation – through open market purchases of ancient land that the Indian group has long ago abandoned.

II. The Court of Appeals Incorrectly Applied Federal Treaties and Statutes in *Cayuga Indian Nation of New York v. Gould* and Mistakenly Concluded that a Federal Cayuga Reservation Exists.

Even if the Nation could rekindle sovereignty on its repurchased lands after two hundred years of non-Indian ownership and possession, no authority supports the argument that the land at issue was ever part of a federal reservation. Moreover, even if one were to assume that there was a federal Cayuga reservation at some point in time, any such reservation has in any event been disestablished. There is no present-day federal Cayuga reservation.

A. The Nation Never Possessed a Federal Reservation.

The New York Court of Appeals begins its analysis of the history relevant to the purported existence of a federal reservation by discussing the 1794 Treaty of Canandaigua, but, as the Counties argued to the court below, one cannot properly analyze whether there ever was a federal reservation without going further back in time. *See* Counties' Principal Brief to Court of Appeals, at 22, Counties' Reply Brief to Court of Appeals, at 17. On February 25, 1789, the Cayugas and New York State signed a treaty, the first paragraph of which states: "First: the Cayugas do cede and grant all their lands to the people of the State of New York, forever." The only interest the Cayugas held in any portion of the ceded lands after 1789 was a limited land use right granted by the State in the second article of the treaty: "Secondly: the Cayugas shall, of the said ceded lands, hold to

themselves, and to their posterity, forever, for their own use and cultivation, but not to be sold, leased, or in any other manner aliened, or disposed of to others, all that tract of land, beginning at . . . ." By the express terms of the treaty, the Cayugas ceded their lands to the State, which then granted to the Cayugas a right of "use and cultivation" in the same. Importantly, in the 1789 Treaty, New York State reserved for itself the exclusive right to purchase back the reservation it had created. *See Cayuga Indian Nation v. Pataki*, 413 F.3d 266, 268-69 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006).

The United States Constitution took effect and the United States government began functioning as a federal government on March 4, 1789 – after the 1789 Treaty was signed on February 25, 1789. *See e.g., Oneida Indian Nation v. New York*, 691 F.2d 1070, 1079 n.6 (2d Cir. 1982). The Articles of Confederation did not prohibit or require the assent of Congress for the transfer of Indian land. *See Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1167 (2d Cir. 1988). As a result, at the time of the 1789 Treaty, New York could – and did – lawfully exercise its right to extinguish whatever interests the Cayugas had in the subject land. *See id.* The United States itself put forth exactly this argument before the American and British Claims Arbitration Tribunal in 1926, and the Tribunal concluded that the 1789 treaty "was made at a time when New York had authority to make it, as successor to the Colony of New York and to the British Crown," and that "[t]he title of New York . . . was independent of and anterior to the Federal Constitution." *Cayuga Indian Claims*, 20 AM. J. INT'L L. 574, 590, 591 (Am. & Br. Claims Arb. Trib. 1926); Counties' Reply Brief to Court of Appeals at 18 n.7.

The Court of Appeals, however, now holds that in the 1794 Treaty of Canandaigua, the United States recognized that the Cayuga Indian Nation possessed a federal reservation. This holding is incorrect. In fact, the United States merely acknowledged that the Cayugas had certain land use rights derived from the 1789 Treaty with New York. The Treaty of Canandaigua did not establish any new rights, much less a federal reservation. Article II of the Treaty of Canandaigua provides in full:

> The United States *acknowledge* the lands reserved to the Oneida, Onondaga and Cayuga Nations, *in their respective treaties with the state of New York*, and called their reservations, to be their property; and the United States will never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with 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.

7 Stat. 44, Art. II (emphasis added). As is apparent from this language, the United States did not purport to reserve any land by virtue of the Treaty of Canandaigua in 1794; it merely "acknowledged" that New York reserved certain rights to the land for the Cayugas after it extinguished whatever Indian title the Cayugas held. Similarly, the United States did not purport to create a reservation by virtue of the Treaty of Canandaigua, but merely acknowledged that the lands constituted a state

reservation under the 1789 Treaty with New York and promised not to disturb the Cayugas' use of the land pursuant to that treaty.

The Treaty of Canandaigua did not convey an interest in land to the Cayugas and did not divest New York of its rights. *See Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917, 922 n.5 (1965) (explaining that the purpose of the Treaty of Canandaigua was to "reconfirm peace and friendship between the United States and the Six Nations . . . . [T]here was no purpose to divest New York and Massachusetts of their right, nor was there any purpose to prevent or to supervise sales or transfers of [subject] territory."). The New York Court of Appeals' construction of the Treaty of Canandaigua is erroneous because the United States did not have the power to grant or confirm a title to land when the sovereignty and dominion over it had become vested in New York State. *See Goodtitle v. Kibbe*, 50 U.S. 471, 478 (1850) (holding that Congress could not grant an interest in land that belonged to Alabama). After 1789, New York held the land in fee subject only to limited use rights granted to the Cayugas pursuant to state law. The federal government had no property rights in the lands and could not confer "recognized title" without illegally depriving New York of its property rights.

Although the Supreme Court has not held that the treaty making power of the United States extends to the divestment of a state's interest in land, it has observed that if such authority were to exist, it must be shown unmistakably in the treaty. *United States v. Minnesota*, 270 U.S. 181, 209 (1926) ("[N]o treaty should

be construed as intended to divest rights of property – such as the state possessed in respect of these lands – unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question."). The Treaty of Canandaigua makes no mention of an intent to divest New York of its property rights, and there is no historical evidence that the federal government intended the Treaty to divest New York of its interest. Indeed, the language of the Treaty of Canandaigua confirms that the United States explicitly acknowledged New York State's treaty with the Cayugas.

If, as the New York Court of Appeals contends, the Treaty of Canandaigua established a federal Cayuga reservation, then in so doing the United States violated the Fifth Amendment to the Constitution. The United States' power of eminent domain extends to the taking of state-owned property without the state's consent, but the United States must pay just compensation to the property owner for the property it takes. U.S. CONST. AMEND. V; *see also Block v. North Dakota ex rel. Bd. of Univ. & School Lands*, 461 U.S. 273, 291 (1983). A compensable taking occurs "[i]f a government has committed or authorized a permanent physical occupation of [the] property." *Southview Assocs. v. Bongartz*, 980 F.2d 84, 92-93 (2d Cir. 1992). Under this standard, if by the Treaty of Canandaigua the United States took New York's property rights in the subject lands, then New York State would have been entitled to compensation for that taking. No such compensation was ever given. Because compensation was never paid to New York, even if the Unites States attempted to effect a taking by the Treaty of Canandaigua, it was

incomplete and no property interest passed to the Cayugas. *See United States v. Dow*, 357 U.S. 17, 21 (1958) (holding that title does not pass until the owner receives compensation).

B. If a Federal Reservation Ever Existed, It Has Been Disestablished.

Even if this Court agrees with the New York Court of Appeals that the United States created a federal reservation by the Treaty of Canandaigua, it should find that any such reservation was disestablished when the Cayugas twice sold in 1795 and 1807 to New York State whatever land use rights they had in the subject land. The July 27, 1795 Treaty between the Cayugas and New York State provides:

> [I]t is Covenanted, stipulated and agreed by the said Cayuga Nation that they will sell . . . to the People of the State of New York all and singular the Lands reserved to the use of the said Cayuga Nation . . . to have and to hold the same to the People of the State of New York and to their Successors forever . . . .

The May 30, 1807 Treaty between the Cayugas and New York State, further provides:

> [T]he said Cayuga Nation for and in consideration of the sum of Four thousand eight hundred dollars . . . Do sell and release to the people of the State aforesaid all their right title Interest possession property claim and demand whatsoever of in and to the said

> . . . Land . . . commonly called the Cayuga Reservations . . . which two reservations contain all the land the said Cayuga Nation claim or have any interest in in this State To have and to hold the said Two tracts of Land as above described unto the People of the State of New York and their Successors forever.

The Court of Appeals held that these conveyances violated the federal restriction on the alienability of Indian lands contained in the Nonintercourse Act ("NIA"). That holding is wrong. The NIA applied by the courts whose decisions the Court of Appeals cited was not the law in effect at the time of the alleged violations and did not include a key provision that the relevant statutes included. *See Cayuga Indian Nation of N.Y. v. Vill. of Union Springs*, 317 F. Supp.2d 128 (N.D.N.Y. 2004) and *Cayuga Indian Nation of N.Y. v. Cuomo*, 730 F. Supp. 485 (N.D.N.Y. 1990) (both holding that the 1795 and 1807 conveyances of land to New York were invalid under the Nonintercourse Act, 25 U.S.C. § 177). In fact, Indian Trade and Intercourse Acts (TIAs) of 1793 and 1802 are the applicable statutes under which the use rights were purchased by New York in 1795 and 1807, respectively. Each of these TIAs has a provision indicating that the statute was meant to govern interstate commerce and not intrastate sales: "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." *See* 1793 TIA, sec. 13; 1802 TIA, sec. 19. Thus, under applicable law, the 1795 and

1807 conveyances did not violate any restriction because they were not barred by the statute.

Although the Counties maintain that no federal Cayuga reservation was ever created and there was, therefore, no restriction at all on the alienability of the lands transferred in 1795 and 1807, the transactions nonetheless complied even with the current version of the NIA because they were approved by the federal government.

The NIA prohibits the purchase or grant of lands from any Indian Nation "unless the same shall be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177. The plain language of the statute indicates that ratification by the federal government through formalities of the Treaty Clause is not the sole source of federal approval for agreements between states and Indian tribes. Indeed, this Court's decision in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 248 (1985), holds only that federal approval must be "plain and unambiguous." It says nothing about the form such "plain and unambiguous" consent must take. *See Cayuga Indian Nation v. Cuomo*, 667 F. Supp. 938, 944 (N.D.N.Y. 1987) (noting that the U.S. Supreme Court could have, but "did not set down an unequivocal rule that any conveyance of Indian land must be by express federal treaty in order to comply with the Nonintercourse Act").

Under the applicable "plain and unambiguous" standard, the federal government's involvement in the negotiation, consummation and subsequent implementation of the 1795 and 1807 conveyances

constituted federal ratification of those treaties. Not only did federal officials actively participate in the treaty process and attend the negotiations and signing of the 1795 and 1807 treaties, but the federal government distributed New York's payments to the Cayugas. *See Cayuga Indian Nation of New York v. Cuomo*, 730 F. Supp. 485, (N.D.N.Y. 1990) (discussing involvement of federal officials Jasper Parrish and Israel Chapin Jr. in the negotiation and signing of the 1795 and 1807 treaties and Parrish's transmittal of consideration paid by New York State to the Cayugas for the acquisition of the Cayuga land); *Cayuga Indian Nation v. United States*, 36 Ind. Cl. Comm. 75, 92, 96 (1975) (noting that Parrish and Chapin signed the 1795 treaty and that Parrish attended the signing of the 1807 treaty as the United States Superintendent of Indian Affairs). The conduct of the federal government throughout the negotiation and implementation of both treaties demonstrates federal acquiescence to the conveyances, and the conveyances, therefore, were valid and did not violate the NIA.

In 1910, the United States and Great Britain entered into an agreement to establish an arbitral tribunal to resolve certain claims between the two governments. Among these was a claim by Great Britain on behalf of the Cayuga Indians of Canada, related to New York State's refusal to pay part of the annuity provided for by the 1795 Treaty to the Canadian Cayugas. *See Cayuga Indian Claims*, 20 AM. J. INT'L L. 574, 576 (Am. & Br. Claims Arb. Trib. 1926). The agreement and the list of claims to be resolved were approved by the Senate. By this agreement, the United States recognized that the obligations under the 1795

Treaty were enforceable and could be adjudicated in an international forum. In 1926, the American and British Claims Arbitration Tribunal published its decision requiring the United States to pay $100,000 to Great Britain as trustee for the Canadian Cayugas. *See id.* at 594. Thereafter, President Coolidge, with the approval of both houses of Congress, included in the federal government's budget the funds required to pay the award. *See Cayuga Indian Nation v. Cuomo*, 730 F. Supp. at 492. By payment of the Tribunal's award, the federal government plainly and unambiguously recognized the 1795 Treaty as a valid conveyance and therefore the source of its liability.

C. The Treaty of Buffalo Creek Confirmed That No Federal Reservation Existed.

In deciding whether the Nation has ever possessed a federal reservation which remains in place, the New York Court of Appeals, citing the Second Circuit's decision in *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266, 269 n.2 (2d Cir. 2005), noted that that "the Treaty of Buffalo Creek neither mentions Cayuga land or Cayuga title in New York, nor refers to the 1795 or 1807 treaties between New York and the Cayuga." However, the Court of Appeals' conclusion that there is a federal Cayuga reservation which has not been disestablished does not follow. The Treaty of Buffalo Creek confirms the Counties' assertion that the Cayuga reservation was either never established as a federal reservation or had long been disestablished by the time of the Treaty of Buffalo Creek in 1838. Had there been a federal Cayuga reservation in existence at the time of the Treaty of Buffalo Creek, that treaty would have

specifically mentioned any such reservation either as land to which rights were being relinquished or land to which Indians reserved rights. Instead, the Treaty of Buffalo Creek provides for compensation of the Cayugas upon their removal from New York State to the west, and refers to the Cayugas as "friends" of the Senecas. With no Cayuga reservation for the Treaty to address specifically, it simply recognizes Cayugas and Onondagas "residing among [the Senecas]". The Treaty of Buffalo Creek is the ultimate evidence that, at least as of 1838, the federal government did not believe a federal Cayuga reservation existed.

CONCLUSION

For the foregoing reasons, there exist important issues of federal law that need to be determined by this Court and the petition for a writ of *certiorari* should therefore be granted.

Respectfully submitted,

PHILIP G. SPELLANE
Counsel of Record
KARL J. SLEIGHT
DANIEL J. MOORE
SVETLANA K. IVY
JAMES P. NONKES
HARRIS BEACH PLLC
Attorneys for Petitioners
99 Garnsey Road
Pittsford, New York 14534
(585) 419-8800
pspellane@harrisbeach.com