No. 12-604

IN THE

Supreme Court of the United States

MADISON COUNTY AND
ONEIDA COUNTY, NEW YORK,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK, *et al.*,

Respondents.

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

BRIEF OF *AMICI CURIAE* CAYUGA COUNTY, NEW YORK AND SENECA COUNTY, NEW YORK IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici Cayuga County, New York and Seneca County, New York ("*Amici*" or "the Counties") will address whether the ancient Oneida reservation in New York was disestablished, the question presented by Madison and Oneida Counties in their petition for a writ of *certiorari*, and the importance of this issue to *Amici* and others.

TABLE OF CONTENTS

TABLE OF CITED AUTHORITIES

Page

CASES

OTHER AUTHORITIES

INTEREST OF THE *AMICI CURIAE*[1]

Although the historic boundaries of the Oneida's 18th century reservation do not lie within Cayuga County or Seneca County, *Amici* have a compelling interest in having this Court settle a long-running dispute over the reservation status of ancient tribal land in Upstate New York. *Amici* respectfully submit that this Court should clarify the status of the ancient Oneida reservation to provide guidance to other litigants. Uncertainty about the status of ancient Indian reservations in Upstate New York continues to cause conflict between Indian and non-Indian communities and affects governmental entities' ability to govern within their borders. Courts repeatedly look to federal law when applying state statutes in order to determine whether subject land constitutes a reservation. Just as the Court of Appeals for the Second Circuit in this case concluded in a footnote – in a decision that was later vacated by this Court – that the Oneida Indian Nation's reservation was *not* disestablished, the New York Court of Appeals reached a similarly flawed result which directly affected *Amici* in *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614, 930 N.E.2d 233 (2010), *cert. denied*, 131 S.Ct. 353 (2010). In that case, the New York Court of Appeals relied on federal law to determine that each of the two parcels of land purchased by the Cayuga Indian

1. This brief is presented pursuant to this Court's Rule 37.4; the Counties' authorized law officers appear as co- counsel and have submitted this brief for the Court's consideration. The parties have received appropriate notice.

Nation[2] after two centuries of non-Indian ownership was located on a federal reservation that had not been disestablished and was therefore exempt from state cigarette sales and excise taxes. The historical record is clear, however, that the ancient Indian lands in Upstate New York were never federal reservations or, in any event, were disestablished centuries ago. Given the widespread confusion and uncertainty causing these conflicts, this Court should settle the issue and hold that the Oneida Indian Nation's claim to a "reservation" fails.

ARGUMENT

POINT I

THIS COURT SHOULD RULE THAT ANY ONEIDA RESERVATION THAT MAY HAVE EXISTED HAS LONG BEEN DISESTABLISHED.

A. The issue of whether there exists an Oneida reservation warrants review via writ of *certiorari*.

Presented with the question of whether the Oneida reservation was disestablished, the Second Circuit below stated in its now-vacated decision that "a tribe's immunity from suit is independent of its lands" and therefore held that it need not reach the disestablishment issue. *Oneida Indian Nation of New York v. Madison County and Oneida County,* 605 F.3d 149, 157-158 n.6 (2d Cir. 2010).

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2. The terms "Cayuga Indian Nation" and the "Oneida Indian Nation" refer to present-day iterations of ancient Indian groups. The terms "Cayugas" and the "Oneidas" refer to the ancient or historic Indian groups.

The court stated: "Thus, we need not reach the Counties' argument that the [Oneida's] reservation has been disestablished. Our conclusion does not depend upon it." *Id.* The Second Circuit nevertheless reaffirmed its earlier holding that it remains the law – at least "in this circuit" – that the Oneidas' reservation was not disestablished. *Id.* ("Our prior holding on this question – that 'the Oneidas' reservation was not disestablished' – therefore remains the controlling law of this circuit.") (internal citation omitted). That decision potentially affects the status of hundreds of thousands, if not millions, of acres of ancient land in Upstate New York and the United States.

Amici respectfully submit that this Court's decision in *City of Sherrill, New York v. Oneida Indian Nation of New York,* 544 U.S. 197 (2005), has been misinterpreted and misapplied by the Second Circuit and other courts in their decisions regarding the "reservation" status of ancient Indian lands. In an example which has directly impacted *Amici*, the New York Court of Appeals appears to have bypassed *Sherrill* in *Cayuga Indian Nation of New York v. Gould,* 14 N.Y.3d 614, 930 N.E.2d 233, (2010), cert. denied, 131 S.Ct. 353 (2010), when it in effect held that the Cayuga Indian Nation rekindled long lost sovereignty when it repurchased ancient lands after two centuries of non-Indian ownership and governance. The New York Court of Appeals based its decision on its belief that the lands constituted a "reservation" that had never been formally disestablished. *See, e.g.*, 14 N.Y.3d at 640, 930 N.E.2d at 247 (holding that "based on existing precedent and federal consideration of the fee-for-trust application, the United States government continues to recognize the existence of a Cayuga reservation in New York . . ."). Perhaps evidencing some doubt on its position, the Court

of Appeals effectively requested guidance from this Court regarding the reservation status of such lands: "To be sure, 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." 14 N.Y.3d at 640, 930 N.E.2d at 247.

Although the arguments of *Amici* against the existence of a federal Cayuga reservation in *Cayuga Indian Nation v. Gould* are not identical to Petitioners' arguments here, Cayuga and Seneca counties' concerns regarding the interpretation and meaning of "reservation" and rights associated therewith under federal law are quite relevant. There is no question that the status of the Oneida reservation is an important issue to *Amici* and other governmental entities in Upstate New York and the United States. The ongoing dispute that the *Amici* have with the Cayuga Indian Nation is but one example that highlights the need for clarification of the status of ancient Indian reservations.

B. There has never been a federal Cayuga or Oneida reservation in Upstate New York.

In *Cayuga Indian Nation v. Gould,* the New York Court of Appeals began its analysis of the history relevant to the purported existence of a federal reservation by discussing the 1794 Treaty of Canandaigua, but, as *Amici* (then appellants) argued in that case, one cannot properly analyze whether there ever was a federal reservation without going further back in time. On February 25, 1789, following their migration to Canada, the ancient Cayugas entered into a treaty with New York, 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 use right granted by the State in the second article of the treaty as it pertained to a 60,000 acre parcel: "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).

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. *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 this very 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).

In *Gould*, however, the New York Court of Appeals held that in the 1794 Treaty of Canandaigua, the United States recognized that the Cayuga Indian Nation possessed a federal reservation. It is respectfully submitted that this holding was incorrect. In fact, the United States merely acknowledged in the Treaty of Canandaigua that the Cayugas had certain rights to the land 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 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, the Oneidas and the Onondagas after it had extinguished whatever Indian title those groups previously 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 the United States promised not to disturb the Cayugas', the Oneidas' and the Onondagas' use of the land pursuant to that treaty, which of course the United States would have no right to do in any event.

The Treaty of Canandaigua did not convey an interest in land to the Cayugas, the Oneidas and the Onondagas 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 misconstrued the Treaty of Canandaigua 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 State 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 . . . 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.

The 1788 Treaty of Fort Schuyler between the Oneidas and New York was virtually identical to New York's 1789 Treaty with the Cayugas. New York purchased all of the Oneidas' lands and granted them land use rights to approximately 300,000 acres. *See Sherrill*, 544 U.S. at 203. The Treaty of Canandaigua did nothing more than acknowledge the 1788 Treaty, and, just as *Amici* (then appellants) argued in *Cayuga Indian Nation v. Gould* with respect to the Cayugas, the United States could not and did not convey any interest to the Oneidas by the Treaty of Canandaigua.

If the Treaty of Canandaigua established a federal Cayuga or Oneida reservation, then in so doing the United States violated the Fifth Amendment to the Constitution. The federal government's 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 had taken New York State'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 United States attempted to effect a taking by the Treaty of Canandaigua, it was incomplete and no property interest passed to the Cayugas or the Oneidas. *See United States v. Dow,* 357 U.S. 17; 21 (1958) (holding that title does not pass until the owner receives compensation).

C. Any federal reservation that may have existed was disestablished centuries ago.

If it ever existed as a federal reservation, the vast tract of land that the Oneidas now claim remains a federal reservation has long been disestablished or diminished. Circumstances surrounding disestablishment of reservations are central to ongoing disputes between Indian and non-Indian communities, and recurring issues are raised during those disputes. For example, *Amici* (then appellants) argued in *Cayuga Indian Nation v. Gould* that if a federal Cayuga reservation were created by the Treaty of Canandaigua, any such reservation was necessarily disestablished when the Cayugas sold to New York State whatever land use rights they had in the subject

land. The Cayugas, who resided in Canada or with the Senecas in Western New York, had no interest in retaining the purported reservation land. In 1795 and 1807, after several failed attempts to sell their land to private parties, the Cayugas sold all of their land use rights to New York State. 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.

In support of their assertion, *Amici* (then appellants) argued that 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).

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 whereby the State purchased a portion of the Cayugas remaining land. *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 United States 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 the source of its liability.

Finally, *Amici* argued, the Treaty of Buffalo Creek is the ultimate evidence that, at least as of 1838, no federal Cayuga reservation existed. 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 conclusion of the New York State Court of Appeals in *Cayuga Indian Nation v. Gould* – that there is a federal Cayuga reservation which has not been disestablished – is illogical. The Treaty of Buffalo Creek confirms the assertion of *Amici* 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.

The Treaty of Buffalo Creek is, of course, much more germane to the case at hand. Much like the Cayugas did in 1795 and 1807, the Oneida Nation sold its land use rights before 1838 for all but 5,000 acres of the state reservation created by the Treaty of Fort Schuyler. *See Oneida Indian Nation*, 605 F.3d at 152 (discussed *supra*); *see also Sherrill*, 544 U.S. at 206 ("By this time [1838 Treaty of Buffalo Creek], the Oneidas had sold all but 5,000 acres of their original reservation.") (citation omitted). The Treaty of Buffalo Creek between the United States and a number of New York tribes provided that the Oneidas still residing in New York State in 1838 were to remove to their new homes in the midwest and make arrangements with the governor of New York State for New York State to purchase the remaining rights the Oneidas had in any lands within New York State. *See* Treaty of Buffalo Creek, Art. 13. The Treaty of Buffalo Creek explicitly named the Oneidas and provided for their removal from New York State. The federal government could not have more clearly disestablished anything that may have been left of a purported federal Oneida reservation.

Amici submit that the historical record indicates that there was never a federal Cayuga or Oneida reservation in New York State, and that even if any such reservation ever existed, it has long been disestablished. As long as courts around the country look to federal law to interpret the meaning of the word "reservation" within state statutes, the need for clarity from the highest court as to what constitutes a present-day federal reservation will only grow.

CONCLUSION

For the foregoing reasons, *Amici* respectfully submit that this Court should grant the petition for writ of *certiorari* Madison and Oneida Counties and ultimately find that the ancient Oneida reservation in New York was never a federal reservation to begin with or has been disestablished.

Dated: December 17, 2012

Respectfully submitted,

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