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,

Respondent,

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,

Putative Intervenor.

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

BRIEF OF *AMICUS CURIAE* STATE OF NEW YORK IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the ancient Oneida reservation of approximately 300,000 acres in central New York has been disestablished or almost entirely diminished, because its continued existence is incompatible with this Court's decision in *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), and with the Oneidas' agreement to remove from New York in the federal Treaty of Buffalo Creek of 1838.

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INTEREST OF THE *AMICUS CURIAE**

This case presents the question whether the 300,000-acre historic Oneida reservation exists today, nearly two centuries after the Oneidas vacated almost all of it, and seven years after this Court held in *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005) ("*Sherrill*"), that the present-day Oneida Indian Nation of New York (the "OIN") cannot exercise governmental authority over it. The question remains of vital importance to amicus curiae State of New York, which together with petitioners Madison and Oneida Counties and other local governments, has governed the area for generations. Three times during the course of this protracted litigation, the Second Circuit has rejected petitioners' claim that the ancient reservation was long ago disestablished or nearly entirely diminished, and instead has ruled that the ancient reservation still exists. That ruling cannot be reconciled with *Sherrill's* holding that the OIN has no sovereignty over the area, and in addition it is contradicted by the historical record and, in particular, the Oneidas' agreement to remove from New York in the Treaty of Buffalo Creek of 1838, 7 Stat. 550 (Pet. App. 229a-265a).[1]

**Amicus Curiae* served timely notice upon all parties of its intent to file this brief.

[1]Respondent, the present-day Oneida Indian Nation of New York, is distinct from the historic Oneida Indian Nation that signed the Buffalo Creek Treaty, which this brief refers to as the "Oneidas." *See Oneida Indian Nation of N.Y. v. Madison County, N.Y.*, 665 F.3d 408, 415 n. 2 (2d Cir. 2011) (Pet. App. 6a).

This Court has twice granted certiorari to review the disestablishment question but has not decided it.[2] The Court should resolve it now to end the continuing jurisdictional conflict. Although following remand from this Court, the Second Circuit vacated the district court injunctions barring petitioners' real property tax enforcement proceedings, Pet. App. 70a, and thus resolution of the disestablishment question will not affect those injunctions, the Second Circuit's mistaken ruling merits review now because it "continues to have an impact on the parties" as well as the State and "continue[s] to affect the relationship of litigants." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), at 569 (Justice White, for the Court), 585 (Justice O'Connor, concurring).

Indeed, the issue is the central dispute between petitioners and the OIN. Despite *Sherrill*, the Second Circuit's repeated rulings have caused continuing jurisdictional conflict regarding the governance of a large part of central New York and the State and local governments' rightful exercise of their sovereign authority there. The reservation issue remains important in petitioners' pending state real property tax litigation with the OIN and the federal land in trust litigation brought by the State and petitioners regarding a portion of the OIN's lands, and the Second Circuit's mistaken rulings

[2] *See City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 215 n.9 (2005) (rejecting OIN claim of tax immunity without deciding disestablishment question, on which certiorari had been granted, *see* Question 3 of petition *reprinted at* 2003 WL 22977923); *Madison County, N.Y. v. Oneida Indian Nation of N.Y.*, 131 S. Ct. 704 (2011) (stating that certiorari had been granted on the disestablishment question and remanding without deciding it).

have been relied on by the New York Court of Appeals and the federal district court.

In addition, the OIN has continued to assert that it, and not the State and local governments, has primary jurisdiction over its lands in the area. *See* Pet. 28. The United States has exacerbated this jurisdictional conflict, issuing a Census Bureau map purporting to show a 300,000-acre present-day reservation that incorporates large parts of the two petitioning counties, and a third county as well. Although the Census Bureau withdrew the map following protests, the Interior Department continues to assert that "the Oneida reservation has not been disestablished and is intact" and that "this position is legally binding." *See* Oneida Indian Nation, Statement regarding Census map reverting Oneida Nation reservation boundaries back to 32 acres, *available at* http://www.oneidaindiannation.com/pressroom/morenews/Nat-115283589.html (last visited Dec. 10, 2012) (quoting Interior Department letter). As long as the Second Circuit's mistaken pre-*Sherrill* holding remains uncorrected, this jurisdictional conflict will continue, impeding the legitimate exercise by the State and local governments of their longstanding authority over the area and thwarting the justifiable expectations of the residents of the area -- who are predominantly non-Indian -- who rely on the State and local governments to enforce the law.

STATEMENT OF THE CASE

A brief description of the course of the proceedings is essential to understanding why the disestablishment question merits review now. This real property tax litigation has a prolonged and unusual history, stretching

over more than a decade and generating two decisions by this Court and three by the Second Circuit. Whether the historic Oneida reservation still exists or, as petitioners assert, was disestablished long ago, has been at the center of the parties' dispute from the beginning and is "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

The OIN sued Madison County and the City of Sherrill in the Northern District of New York in 2000 seeking declaratory and injunctive relief barring the local governments from imposing and enforcing real property taxes on lands that the OIN had purchased in fee within the boundaries of the historic Oneida reservation. The OIN contended that the lands were not taxable because they were "Indian country" within the meaning of 18 U.S.C. § 1151(a) ("Indian country" includes "all land within the limits of any Indian reservation under the jurisdiction of the United States Government"). Both the district court and a panel of the Second Circuit, with one Judge dissenting, agreed with the OIN, holding in particular that the historic Oneida reservation had not been disestablished by the federal Treaty of Buffalo Creek in 1838, Treaty of January 15, 1838, 7 Stat. 550 (Pet. App. 229a-265a). *See Oneida Indian Nation of N.Y. v. City of Sherrill, N.Y.*, 145 F. Supp. 2d 226, 248-54 (N.D.N.Y. 2001), *aff'd*, 337 F.3d 139, 158-65 (2d Cir. 2003) (Pet. App. 135a-150a).

In 2005 this Court reversed the judgment of the Second Circuit, holding that the doctrines of "laches, acquiescence, and impossibility" precluded the OIN from "unilaterally reviv[ing] its ancient sovereignty, in whole or in part, over" parcels it purchased in the open market within "the area that once composed the Tribe's

historic reservation." *Sherrill*, 544 U.S. at 202-03, 221. In view of its reliance on equitable doctrines to resolve the case, this Court did not decide "whether, contrary to the Second Circuit's determination, the 1838 Treaty of Buffalo Creek disestablished the Oneidas' Reservation." 544 U.S. at 215 n. 9 (citing *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 269 n. 24 [1985], in which Justice Stevens, dissenting in part on behalf of four Justices, stated that there is "a serious question whether the Oneida did not abandon their claim to the aboriginal lands in New York when they accepted the Treaty of Buffalo Creek of 1838").

In post-*Sherrill* litigation, the district court entered injunctions that barred petitioners' real property tax enforcement proceedings, holding among other things that *Sherrill* did not prevent the OIN from asserting sovereign immunity to those proceedings. The Second Circuit affirmed on the sovereign immunity ground, and adhered to the prior panel's pre-*Sherrill* holding that the ancient 300,000-acre reservation was not disestablished. *See Oneida Indian Nation of N.Y. v. Madison County, N.Y.*, 605 F.3d 149, 157 n. 6 (2d Cir. 2010) (Pet. App. 86a-87a).[3] This Court granted certiorari on both the

[3]The *Madison County* panel also noted that in 2008, the U.S. Department of the Interior determined that it would take approximately 13,000 acres of the OIN's fee lands into trust pursuant to 25 U.S.C.§ 465 and that, as a result, approximately 4,000 of the 17,000 acres of land originally at issue in this dispute remained at issue. *See* 605 F.3d at 155-56 (Pet. App. 82a). The State and the Counties, among others, challenged the Interior Department's trust determination. The district court recently remanded the matter to the Interior Department to determine whether, under this Court's decision in *Carcieri v. Salazar*, 555

sovereign immunity and disestablishment questions. *See Madison County, N.Y. v. Oneida Indian Nation of N.Y.*, 131 S. Ct. 459 (2010). Again, however, the Court did not resolve the disestablishment question, this time because the OIN's abrupt disavowal of its longstanding sovereign immunity claim led the Court to remand the entire case to the Second Circuit for further proceedings. *See Madison County, N.Y. v. Oneida Indian Nation of N.Y.*, 131 S. Ct. 704 (2011).

After the remand, the same Second Circuit panel vacated on other grounds the injunctions in favor of the OIN that it had previously upheld, but once again adhered to the 2003 panel's pre-*Sherrill* holding that the ancient reservation still exists. The court affirmed the dismissal of petitioners' counterclaims seeking a declaration that the reservation was disestablished. *See Oneida Indian Nation of N.Y. v. Madison County, N.Y.*, 665 F.3d 408, 443-44 (2d Cir. 2011) (Pet. App. 67a-68a). The Counties' petition for certiorari seeks review of that decision.

SUMMARY OF THE ARGUMENT

The Court should grant the petition because the issue presented is of exceptional importance to the State of New York and its citizens, as well as to the affected Counties. The continued existence of a 300,000-acre Oneida reservation occupying substantial portions of

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U.S. 379 (2009), the Department has statutory authority to take land into trust for the OIN pursuant to the Indian Reorganization Act of 1934, and in particular, to determine whether the OIN was recognized and under federal jurisdiction when the Act was adopted in 1934. *See New York v. Salazar,* 2012 WL 4364452 (N.D.N.Y. Sept. 24, 2012).

three central New York counties cannot be reconciled with *Sherrill*. Tribal jurisdiction is the essential feature of Indian country, including an Indian reservation. *See Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 and n. 1 (1998). Yet tribal jurisdiction is precisely what this Court has held the OIN lacks -- under *Sherrill* the OIN cannot exercise "its ancient sovereignty" in the area "in whole or in part." 544 U.S. at 203. In addition, following *Sherrill*, the Second Circuit correctly held that the OIN has no enforceable claims arising out of the historic Oneidas' former right of occupancy of the lands and their conveyances of their interest in the lands to the State in the late 18th and early 19th centuries. *See Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 452 (2011). Accordingly, the OIN's lack of authority regarding the historic reservation lands is inconsistent with the continued existence of a reservation.

Moreover, the Second Circuit's holding that the historic Oneida reservation was not disestablished or almost entirely diminished is at odds with the Oneidas' agreement to remove from New York in the federal Treaty of Buffalo Creek of 1838, "which envisioned removal of all remaining New York Indians, including the Oneidas, to Kansas." *Sherrill*, 544 U.S. at 206. By agreeing to remove from New York, by selling nearly all their lands to the State, and by accepting the new reservation provided for them in the Treaty, *see New York Indians v. United States*, 170 U.S. 1, 26 (1898), the Oneidas, with congressional approval, released and relinquished their tribal rights to their former New York reservation. *See United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 356-58 (1941).

The Second Circuit's reaffirmance of its mistaken pre-*Sherrill* holding that there is a huge present-day Oneida reservation creates a substantial continuing controversy because it engenders continuing jurisdictional conflict and uncertainty over a large portion of central New York. This Court has twice agreed to hear the disestablishment question and should now grant the petition to consign the "ancient reservation" to the ancient past.

REASONS FOR GRANTING THE PETITION

I. The Second Circuit's Decision Cannot Be Reconciled with this Court's Decision in *Sherrill*.

This Court should grant the petition to resolve the conflict with *Sherrill*. There, this Court emphasized that the equitable doctrines of laches, acquiescence, and impossibility barred the OIN from reviving the Oneidas' "ancient sovereignty" over the lands that "once composed the Tribe's historic reservation." 544 U.S. at 202. The Court repeatedly referred to the reservation in the past tense, as the "historic reservation" and the "ancient reservation," and described the parcels at issue as having been "once contained within the Oneidas' 300,000-acre reservation." *Id.* at 202, 213. But the OIN has never accepted this Court's holding in *Sherrill* and has instead continued to assert governmental authority over the area, pointing to the Second Circuit's pre-*Sherrill* holding that the reservation still exists, twice reiterated by that court post-*Sherrill*.

The OIN and the Second Circuit are mistaken. As that court itself recognized, *Sherrill* "has dramatically altered the legal landscape." *Cayuga Indian Nation of*

N.Y. v. Pataki, 413 F.3d 266, 273 (2d Cir. 2005). Continued reservation status is simply irreconcilable with the OIN's lack of governmental authority under *Sherrill*. *See United States v. Mazurie*, 419 U.S. 544, 557 (1975) (Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory"). The essential feature of "Indian country," which includes reservations, *see* 18 U.S.C. § 1151(a), is the tribe's jurisdiction within the land so designated. *See Alaska v. Native Village of Venetie Tribal Government*, 522 U.S. 520, 527 and n. 1 (1998) ("Generally speaking, primary jurisdiction over land that is Indian country rests with the Federal Government and the Indian tribe inhabiting it, and not with the States"); *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 146 n. 12 (1982) ("'Over tribal lands, the tribe has the rights of a landowner as well as the rights of a local government, dominion as well as sovereignty'") (quoting U.S. Dept. of Interior, Office of the Solicitor, Solicitor's Opinion, Oct. 25, 1934, quoted in U.S. Dept. of Interior, Federal Indian Law 439 [1958]) (emphasis omitted).

Likewise, the existence of a present-day reservation is at odds with the fact that under *Sherrill*, the State retains its long-established tax and regulatory jurisdiction over the lands within the boundaries of the ancient reservation. Although under certain circumstances "a State may validly assert authority over the activities of nonmembers on a reservation, and . . . in exceptional circumstances a State may assert jurisdiction over the on-reservation activities of tribal members," *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 215 (1987) (footnote and quotation omitted), the scope of State jurisdiction in Indian country is narrower than the State's plenary jurisdiction

outside Indian country. *See Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134, 162 (1980) (State's power over Indian affairs outside the reservation is "considerably more expansive than it is within reservation boundaries"); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 613 n. 47 (1977) ("Land remaining within the boundaries of a reservation, of course, would not be subject to the full and complete jurisdiction of the State") (internal quotation omitted).

In addition to lacking sovereignty, the OIN cannot exercise the Oneidas' ancient dominion over the ancient reservation lands. The same equitable doctrines that this Court invoked in *Sherrill* to bar tax immunity also bar the OIN's claims, whether for possession or damages, arising from the Oneidas' former right of occupancy and their conveyances of their interest in the lands to the State in the late 18th and early 19th centuries. *See Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010), *cert. denied*, 132 S. Ct. 452 (2011).

Accordingly, the ruling that the historic Oneida reservation continues to exist cannot stand: the OIN now has no rights regarding the disputed area that could conceivably support a finding that there is a reservation today -- it has neither the right to govern the lands in question nor any enforceable right arising from the Oneidas' ancient occupancy and conveyances of the lands. Thus, any "reservation" that could be said to exist now would be an unprecedented anomaly causing only continuing jurisdictional conflict. There is no reason in law or policy to continue this disruptive state of affairs.

II. The Second Circuit's Ruling is At Odds with the Oneidas' Agreement to Remove From New York in the Treaty of Buffalo Creek.

This Court should also grant the petition to resolve the conflict between the Second Circuit's ruling and the Buffalo Creek Treaty, which provided for the removal of the remaining Oneidas from New York nearly 175 years ago.[4] The historic Oneida reservation was either disestablished or substantially diminished when the Oneidas and the United States entered into the Buffalo Creek Treaty. A finding of diminishment or disestablishment has "never required any particular form of words"; instead, it results from "a congressional intent with respect to [the] lands inconsistent with the continuation of reservation status." *Hagen v. Utah*, 510 U.S. 399, 411, 414 (1994). Although the Court will resolve ambiguities in favor of the Indians and will not lightly find diminishment, it will not "'ignore plain language that, viewed in historical context and given a fair appraisal, clearly runs counter to a tribe's later claims.'" *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 344, 346 (1998) (quoting, at 346, *Oregon Dept. of Fish and Wildlife v. Klamath Tribe*, 473 U.S. 753, 774 (1985) (internal quotation marks and citation omitted)).

The ratification of the Buffalo Creek Treaty is an expression of congressional intent that is flatly inconsistent with the continuation of the ancient Oneida

[4]The State developed the Buffalo Creek argument in detail in its merits-stage amicus brief in *Sherrill*. *See* Brief of the State of New York as Amicus Curiae in No. 03-855, *City of Sherrill, N.Y. v. Oneida Indian Nation of N.Y.*, 2004 WL 1835367; *see also* Brief of the Amici Curiae Town of Lenox, N.Y., *et al.*, in No. 03-855, 2004 WL 1835370 at *13-19.

reservation. Buffalo Creek was a removal treaty, and recited that it was the culmination of more than 20 years of federal efforts to remove the Indians from New York. *See* 7 Stat. at 550-551 (Pet. App. 229a-230a). "In 1838, the Oneidas and the United States entered into the Treaty of Buffalo Creek, which envisioned removal of all remaining New York Indians, including the Oneidas, to Kansas. By this time, the Oneidas had sold all but 5,000 acres of their original reservation. Six hundred of their members resided in Wisconsin, while 620 remained in New York State." *Sherrill*, 544 U.S. at 206 (citations omitted).

In the Treaty, the Oneidas and the other New York Indians ceded to the United States certain lands previously set aside in Wisconsin for them and received a new 1,824,000-acre reservation in Kansas "as a permanent home" in which they were to "establish their own form of government, appoint their own officers, and administer their own laws." Arts. 2 & 4, 7 Stat. 551-552 (Pet. App. 232a-233a). The Treaty's terms restricted the Oneidas' exercise of these powers of tribal sovereignty and jurisdiction to "said country," *i.e.*, the part of the new reservation where the "Oneidas [were] to have their lands in the Indian Territory." Arts. 4-5, 7 Stat. at 552 (Pet. App. 233a-234a).

As this Court explained in *Sherrill*, "[i]n Article 13 of the Buffalo Creek Treaty, the Oneidas agreed to remove to the Kansas lands the United States had set aside for them 'as soon as they c[ould] make satisfactory arrangements' for New York State's 'purchase of their lands at Oneida.'" 544 U.S. at 206, quoting Buffalo Creek Treaty, 7 Stat. at 554 (Pet. App. 238a). The United States commissioner advised the Oneidas who remained in New York that they would not be forced to remove but could if they chose remain on the lands they currently occupied,

i.e., the 5,000-acre remnant of the ancient reservation. *See* 544 U.S. at 206. The Second Circuit mistakenly concluded, prior to *Sherrill,* that "the sales to New York State were never accomplished, and the planned removal never took place," 337 F.3d at 162 (Pet. App. 144a); to the contrary, as this Court explained in *Sherrill*, the remaining Oneidas thereafter "sold most of their remaining lands to the State" and left New York. 544 U.S. at 206-07. By 1920, "only 32 acres continued to be held by the Oneidas." *Id.* at 207.[5]

In the late 19th century, the United States restored the Kansas lands to the public domain and sold them to settlers. *Id.* at 207. In a suit brought by the New York Indians against the United States for compensation for the Kansas lands, this Court held that the agreement of the New York Indians to remove to the west was "[p]robably . . . the main inducement" for the United States to set aside new lands for them in Kansas, and that the Oneidas had accepted the new reservation although they had not occupied it. *New York Indians*, 170 U.S. at 15, 26. The Oneidas shared in the award of damages for the Kansas lands. *See Sherrill*, 544 U.S. at 207.

In accepting the new Kansas reservation, and agreeing to establish their "government" and "laws" out there, rather than in New York, the Oneidas released and relinquished their rights in their New York lands, including both the lands they had already left at the time

[5]The status of that 32-acre parcel, which was at issue in *United States v. Boylan*, 265 F. 165 (2d Cir. 1920), is not relevant to the question whether the rest of the ancient reservation was disestablished; as this Court recognized in *Sherrill*, that parcel differs from the rest of the ancient reservation because it "involved land the Oneidas never left." 544 U.S. at 210 n. 3.

of the 1838 Buffalo Creek Treaty, and the 5,000 acres that they sold to the State shortly after Buffalo Creek. *See United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 356-58 (1941) (the creation of a new reservation and the tribe's acceptance of it was "a relinquishment of tribal rights in lands outside the reservation and notoriously claimed by others"). Any other conclusion is untenable. Under the Treaty, the Oneidas could not reasonably have expected to continue to exercise sovereignty over lands they had already left and were then leaving. *See Menominee Indian Tribe v. Thompson*, 161 F.3d 449, 458 (7th Cir. 1998) (tribe "could not reasonably have expected to continue" to exercise treaty hunting and fishing rights following a later treaty in which it agreed to leave the state and move 300 miles away). The subsequent "jurisdictional history" of uninterrupted state and local governance since the early 19th century, detailed in *Sherrill*, 544 U.S. at 202, 206-07, further demonstrates a "practical acknowledgment" that the reservation was disestablished. *Hagen*, 510 U.S. at 421.

Thus, the Second Circuit was mistaken in characterizing the Oneidas' agreement to remove as an "agreement to agree" that was never consummated. 337 F.3d at 161 (Pet. App. 142a-143a). And that court further erred in holding that there could be no disestablishment in the absence of language of cession of the Oneidas' lands to New York. *Id.* The ruling below ignores the fact that the underlying fee to the lands was held by the State of New York, which was not a party to the Treaty, and therefore the Oneidas could only agree to remove "as soon as" they sold their remaining lands to the State. *See Sherrill*, 544 U.S. at 203 n. 1 (fee title to the Indian lands was in the State). The Second Circuit's ruling cannot be squared with the Buffalo Creek Treaty and the subsequent history of

the region, and this Court should grant the petition in order to settle this important question of federal law.[6]

III. The Disestablishment Question Merits Review Now Because it Has a Continuing Impact on the Parties, the State, and the United States.

This Court should settle the disestablishment question now because it remains a substantial controversy that is both immediate and real, and there is a strong public interest in the resolution of the question. Preliminarily, petitioners' request for a declaratory judgment on the matter did not become moot when the Second Circuit vacated the injunctions prohibiting them from enforcing property taxes by foreclosing on the taxable property. Although petitioners sought their declaratory judgments through counterclaims in aid of their now-successful opposition to the OIN's injunctions, they have a continuing interest in obtaining declaratory relief apart from its effect on the injunctions against them. *See Cardinal Chemical*

[6]Both the United States and four members of this Court have previously acknowledged the force of the argument that the Buffalo Creek Treaty disestablished the Oneida reservation. In its brief in *County of Oneida, N.Y. v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985), the United States observed that Buffalo Creek "might well" have extinguished Oneida claims to the area, *see* Brief of the United States as Amicus Curiae in Nos. 83-1065, 83-1240, 1984 WL 566161 at *30-33, and four Justices called that a "serious question." 470 U.S. at 269 n. 24 (dissenting opinion of Stevens, J.). While the United States had not reached a "concluded view" on the Buffalo Creek argument at that time, 1984 WL 566161 at *33, 20 years later in *Sherrill* the United States argued that the Buffalo Creek Treaty did not disestablish the historic Oneida reservation. *See* Brief of the United States as Amicus Curiae in No. 03-855, 2004 WL 2246334, at *16-24.

Co. v. Morton Intern., Inc., 508 U.S. 83, 96-97 (1993) (in a patent infringement suit, a finding of no infringement does not deprive a federal court of jurisdiction over a counterclaim seeking a declaratory judgment that the patent is invalid); *see also Altvater v. Freeman*, 319 U.S. 359, 363-64 (1943) (the patent invalidity counterclaim remains justiciable). Petitioners' counterclaims are not moot as either a legal or a practical matter. The Second Circuit's mistaken finding of a present-day reservation "continues to have an impact on the parties," and its effects "remain and continue to affect the relationship of litigants." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561 (1984), at 569 (Justice White, for the Court), 585 (Justice O'Connor, concurring). Three continuing adverse impacts on the State and petitioners are particularly notable.

First, the Second Circuit's ruling that, as a matter of federal law, the historic Oneida reservation still exists today continues to affect the litigation of the instant dispute among the parties and the State. Although the *Madison County* panel vacated the district court's grant of summary judgment with respect to the OIN's state law reservation claims, it remanded them with instructions to dismiss the claims without prejudice to the OIN's pursuit of them in state court. *See Madison County*, Pet. App. 59a.

The OIN can be expected to press its claims in the New York courts, *see* Pet. at 20, and New York's highest court has already followed the Second Circuit's holding in support of its own holding that under federal law the ancient Cayuga reservation continues to exist. In *Cayuga Indian Nation of N.Y. v. Gould*, 930 N.E.2d 233 (N.Y.), *cert. denied*, 131 S. Ct. 353 (2010), the New York Court of Appeals relied on the Second Circuit's 2010 ruling in this

case prior to remand to conclude that fee lands purchased by the Cayuga Indian Nation within the historic Cayuga reservation were part of a "qualified reservation" for New York cigarette tax purposes; the New York Court reached that conclusion because the lands "*are viewed as reservation property under federal law.*" *See id.* at 246 (emphasis added), 248-49. The decision in *Gould*, although ostensibly about state law, is thus heavily dependent on the Second Circuit's ruling on the federal disestablishment question. That ruling, through *Gould*, will influence, and perhaps control, the way lower New York courts decide the pending real property tax litigation, as well as other cases where reservation status is an issue. Thus, the present-day status of the reservation under federal law remains a significant factor in resolving the very dispute that led OIN to commence this action: OIN's objection to the petitioners' collection of taxes on certain lands that were formerly part of the ancient Oneida reservation.

Second, the Second Circuit's decision has been relied on in proceedings relating to the Interior Department's 2008 determination to take into trust over 13,000 acres of the OIN's fee lands within the ancient reservation boundaries. *See* Pet. at 21-22; *New York v. Salazar*, 2009 WL 3165591, at *8-9 (N.D.N.Y. Sept. 29, 2009) (finding a reservation for purposes of the Indian Gaming Regulatory Act); *see also* United States Department of the Interior, Bureau of Indian Affairs, Record of Decision - Oneida Indian Nation of New York Fee to Trust Request, at 32 (May 20, 2008) (OIN's fee lands are within or adjacent to its reservation for purposes of 25 C.F.R. § 151.3).[7]

[7]As noted above, *supra* n. 3, the district court recently remanded the record of decision to the Interior Department, although it did not vacate it. *See New York v. Salazar,* 2012 WL 4364452 at *20 (N.D.N.Y. Sept. 24, 2012).

This Court should eliminate the influence of the Second Circuit's mistaken decision about reservation status on the parties' continuing litigation.

Finally, reliance by the OIN and federal officials on the 2003 *Sherrill* panel's ruling that the reservation exists today has created uncertainty, confusion and jurisdictional conflict throughout Madison and Oneida counties and other portions of New York that are subject to similar claims, notwithstanding this Court's decision in *Sherrill*. *See, e.g., Cayuga Indian Nation of N.Y. v. Seneca County, N.Y.*, 2012 WL 3597761 (W.D.N.Y. Aug. 20, 2012) (county's foreclosure actions barred by the Tribe's sovereign immunity). The OIN has invoked the purported modern-day federal reservation to impede the exercise of state and local zoning and building code, land use, environmental and other regulatory authority over the land. *See* Pet. at 28. Most recently, the U.S. Census Bureau amended its census map of New York to show a more than 300,000-acre Oneida reservation spread across parts of three New York counties. *See US Census Oneida Nation Swallows Half of Madison County With Map Change*, Syracuse Post-Standard, Jan. 20, 2011, at A-1. Although the Census Bureau withdrew the map after Senator Schumer protested, the Interior Department asserts that the continued existence of the ancient reservation is "legally binding." *See* Oneida Indian Nation, Statement regarding Census map reverting Oneida Nation reservation boundaries back to 32 acres, *available at* http://www.oneidaindiannation.com/pressroom/morenews/Nat-115283589.html (last visited Dec. 10, 2012) (quoting Interior Department letter). The Court should grant certiorari to end this jurisdictional conflict and unequivocally establish that the ancient Oneida reservation no longer exists.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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