

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

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

**BRIEF FOR CITIZENS EQUAL RIGHTS
FOUNDATION, CITIZENS EQUAL RIGHTS
ALLIANCE AND CENTRAL NEW YORK
FAIR BUSINESS AS AMICI CURIAE
SUPPORTING PETITIONERS**

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Interest of the Amici Curiae

The Citizen Equal Rights Foundation (CERF) was established by the Citizens Equal Rights Alliance (CERA), a South Dakota non-profit corporation with members in 34 states. CERF was established to protect and support the constitutional rights of all people, to provide education and training concerning constitutional rights, and to participate in legal actions that adversely impact constitutional rights of CERA members. The Second Circuit precedent will adversely affect CERA members who own various assets and pay property taxes on fee lands near tribal property all over the United States.

The Central New York Fair Business Association, Inc., (CNYFBA) is incorporated in the State of New York and headquartered in the City of Oneida. It is the purpose of Fair Business to identify and address significant issues affecting the equality of business opportunity in central New York. Fair Business members are residents of Madison and Oneida Counties. Allowing the Oneida Indian Nation to assert jurisdiction over fee lands to avoid the payment of property taxes will adversely affect the members by creating an unequal business advantage and exempting the Oneida Indian Nation (OIN) enterprises from the laws of the State of New York and the regulatory authority of the Counties. Any proposed use of the parcels by the OIN could affect their property values, character of the community and community safety if the civil and criminal jurisdiction of New York and the Counties are not applicable to the parcels. CERA and CNYFBA are also actual parties in the litigation

against the Record of Decision to take most of the parcels of land at issue in the *City of Sherrill* case into trust using 25 U.S.C. § 465.

Madison and Oneida Counties and the Oneida Indian Nation have consented in writing to the filing of this *amici curiae* brief.¹

Summary of the Argument

The Secretary of the Interior (Secretary) and the Oneida Indian Nation of New York (OIN) continue to argue that the lower court rulings of *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) where the trial court and Second Circuit found that the Oneida Indian reservation had never been disestablished by Congress were not overruled by this Court's majority opinion even though this Court found that the subject land had been under continuous state jurisdiction. This legal mess has now existed almost 40 years. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974)(*Oneida I*). The reality is that from 1805 onward and conclusively after the Treaty of Buffalo Creek of 1838, if the OIN still existed as a tribal entity, it was solely under the jurisdiction of the State of New York.

This Court corrected its initial ruling in *Oneida I* with the laches decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) but did not overrule

¹ Pursuant to Rule 37.6 of the Court, no counsel for a party has authored this brief, in whole or in part. No person or entity, other than *amici curiae*, CERF and CNYFBA, its members or its parent CERA's members, or its counsel have made any monetary contribution to the preparation or submission of this brief.

Oneida I leaving all land claim and property tax decisions made by lower federal courts intact. According to the OIN and Secretary, applying the doctrine of laches more than 30 years later did not resolve all of the contradictory and confused previous rulings over the Oneida's land claims, jurisdictional claims and property tax issues with the State of New York or Counties of Madison and Oneida.

The OIN and Secretary continue to assert that pursuant to the federal trust responsibility for all Indians the Secretary has the authority to continue to interpret federal law to benefit only the interests of the small remnant of descendants of the OIN against the interests of the people and residents of New York. This situation is not the only example of the problem non-Indians are having in enforcing this Court's rulings against the Secretary. Across the United States the Secretary is asserting he can ignore the express interpretation of 25 U.S.C. § 478 made in *Carciere v. Salazar*, 555 U.S. 379 (2009).

As long as this Court continues to issue only equity based decisions the jurisdiction of New York over lands clearly under state jurisdiction for the last 200 hundred years will continue to be challenged by the Secretary. The Secretary was empowered in *Oneida I* to rewrite the historical facts of the land status in New York pursuant to his Indian trust responsibility and to reconsider whether the Indian lands were properly disposed. This Court needs to finish what it started in *City of Sherrill* by reestablishing that the law of the land still applies and issue a ruling that unequivocally designates the land status and the jurisdiction of the

State and Counties and the Secretary of the Interior over the former Oneida reservation. Because this situation has so many contradictory lower court rulings, this Court needs to decide: (1) whether the former reservation was ever made into a federal Indian reservation; and, (2) whether the Oneida reservation was ever disestablished.

ARGUMENT

If this Court needs proof as to how out of control the Secretary of the Interior's asserted authority has become when he is acting under his "Indian trust" responsibility it need only read the definition of "Indian land" contained in 25 C.F.R § 150.2 (h). The definition clearly includes any land that the Indian tribe claims to be theirs. If this Court believes in what it said to protect the rights of the vast majority of persons living in Central New York in the *City of Sherrill* opinion, then it needs to address the legal source of this expanded federal Indian policy and expressly limit the Executive Branch and Secretary from reconsidering the land status of any lands under state jurisdiction as this Court did unanimously in *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009).

I. THE FEDERAL INDIAN POLICY OF
RESURRECTING TRIBAL RIGHTS HAS
OBFUSCATED HISTORICAL FACTS IN
NEW YORK

a. Historical Relations with the Oneida
Indians and the United States from
1784 to 1843. Determined New York's
Relationship to the Oneida Indians
that Remained in New York.

Today we forget that this nation started as 13 small colonies greatly outnumbered in population by the Native Americans. In the 1790's and beyond, no single State could defeat a confederation of Indian tribes. The main policy and purpose of the United States toward Native Americans was the acquisition and domestication of territorial land. The Indian Commerce Clause, Art. I, Sec. 8, Cl. 3, was developed to avoid military conflict in the territorial lands allowing continued settlement and expansion of civilization. Before the Revolution the French and Indian Wars convinced the colonists that it was critical to their success of maintaining and growing European settlement to be able to defend themselves against Indian tribes. The British used the Indian tribes against the colonists during the Revolutionary War and continued to provoke conflicts until after the conclusion of the War of 1812. Nowhere was this more apparent than in the nascent New York State with the split of the Iroquois Confederacy and the ensuing wars with the Seneca and Cayuga that required the national army to suppress the uprising.

Under the compromise that became the Northwest Ordinance, laws regarding the territorial or public lands of the United States were quickly developed as the nation grew. Only lands ceded by States outside of their boundaries were deemed "federal territory" under the Property Clause, Art. IV, Sec. 3, Cl. 2. These federal territorial lands were subject to the Northwest Ordinance of 1787 originally under the Articles of Confederation, and then adopted as the first law passed under the new Constitution. The development of federal territorial law required decisions on how to legally acquire lands from Indian tribes to allow those lands to become part of the public domain subject to disposal under the Homestead Acts and other federal cession laws as required by the Property Clause. Territorial land law by English definition encompassed the war powers necessary to civilize and domesticate the land and its people. More importantly, the distinction made by the English as to domestic versus territorial law had been a major cause of the Revolutionary War itself by denying to the colonists the constitutional rights of Englishmen. The Framers of our Constitution because of this distinction in fundamental rights between the application of domestic and territorial law specifically required that Congress "dispose of the territories." Property Clause, Art. IV, Sec. 3, Cl. 2. This requirement to dispose of the territory and create new States was defined by this Court as allowing the United States to retain territorial land only on a temporary basis. *See Pollard's Lessee v. Hagan*, 44 U.S. 212, 221 (1845). This specific requirement was meant to prevent the United States from being able to use the territorial war powers as domestic law against the States and individuals. It is

one of the most fundamental pieces of the structure of our Constitution.

Congressional decisions regarding disposal of tracts of land under the Homestead laws were often contentious, as immigrants poured in from Europe. The framework designed in the Northwest Ordinance to transition territories into new states of the union worked. But, there were several very difficult problems in territorial public land law that had to be legally defined in the young republic. It was understood that some of these definitions would affect the balance of power between the States and the United States. The first of these was regarding the doctrine of preemption of land in the original colonies. Preemption is necessary when a land sale or disposal is not completed and the land reverts to its territorial owner without having been transitioned into private property. Because many of the new States had not agreed as to their Western boundaries at the time of the adoption of the Constitution, including New York, there was an immediate issue of whether the United States or the Original States held the preemptive right. This question was resolved in favor of the States. See *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

The next question was the issue of which sovereign could extinguish "Indian title" or the occupancy interest of the Indian tribes acknowledged under English law. This was not considered a federalism question because the United States Congress as part of the compromise to enable the Louisiana Purchase had passed a statute authorizing the President to negotiate the removal of any Indian

tribe East of the Mississippi to the Western territories and conceding that those Indians and Indian Tribes that remained in the Eastern States were under state jurisdiction. See Act of March 26, 1804, § 15, 2 Stat. 289. This act has never been repealed.

The "Indian title" case of *Johnson v. McIntosh*, 21 U.S. 543 (1823) presented the problem of whether the United States was the successor to the sovereignty established by England over the Northwest Territory and former colonies. The British had negotiated many treaties with the Indian Tribes during and prior to the Revolution where all their land rights were ceded to Great Britain. The British King had made land grants based on these Indian treaties to British officers for their service in the American Revolution. If the United States was a successor to the British sovereignty then the British grants were valid. In a clever application of constitutional law, Chief Justice Marshall preserved the concept of "Indian title" but divested it from its origins in Europe by ruling that only the United States as the winner of the Revolutionary War had the authority to accept the Indian land cessions by treaty. Because the United States had already conceded that it did not control Indian land in the Eastern States in 1804, the resolution of the Indian title question that removed the British cloud of title to millions of acres of Western lands only invigorated the outcry for the removal and actual cession of the Indian title in the original States.

In the 1820's the President began to vigorously pursue a removal policy east of the Mississippi River. Congress passed the federal Removal Act of 1830, 4 Stat. 411, to define and enforce the removal policy

agreed to in 1804. The Treaty of Buffalo Creek, 7 Stat. 550, was a Removal Act treaty intended to disestablish whatever federal interests may have been created in New York by the Treaty of Canandaigua, 7 Stat. 4. Congress ratified the Treaty of Buffalo Creek in 1840. President Martin Van Buren then entered the Proclamation making the Treaty of Buffalo Creek complete. See *New York Indians v. United States*, 170 U.S. 1, 10, Fn.1, Finding 10. The Removal Act was specifically drafted to meet the obligations of the federal government to the States to remove the Indians, dispose of the "Indian title" to the lands they occupied and fulfill their federal treaty interests on actual federal territory West of the Mississippi as required by the 1804 Louisiana Purchase statute so that state jurisdiction would no longer be impaired in the Eastern states.

Chief Justice Marshall disagreed with the Removal Act policy defined by Congress and tried to interfere with it by his rulings in *Cherokee Nation v. Georgia*, 30 U.S. (5 Peters) 1 (1831) and *Worcester v. Georgia*, 31 U.S. 515 (1832). Congress responded by passing the 1834 Indian Trade and Intercourse Act, 4 Stat. 729, deliberately ceding that all Indian tribes and Indian land East of the Mississippi River would no longer be under federal protection once their lands were exchanged pursuant to the Removal Act, overruling *Worcester* by statute.

The New York Indians that wished to retain their tribal ties, including the Oneida, pursuant to the Removal Act, the Treaty of Buffalo Creek and the specific treaties negotiated with each tribe pursuant to

the Buffalo Creek Treaty, mostly left New York. New York treated the remaining Indians very well. As of 1843 the remaining Oneida Indians were state citizens residing on tax exempt state lands receiving special assistance from the State of New York. See *United States v. Elm*, 25 F.Cas. 1006, F. Cas. No. 15048 (N.D.N.Y. 1877). New York did not cancel the rights of the remaining Indians to any lands without compensation for the Indian title being paid. This is how the 32 acres remain Indian in character. New York even approved of the United States defending the interests of the Indians in the *Boylan* cases. New York deferred to tribal customs. See *United States ex rel Kennedy v. Tyler*, 269 U.S. 13 (1925). As a matter of federal statutory law, the Indians that remained were solely subject to state jurisdiction. The federal government had ceded all authority to New York except its general trust responsibility for all persons of Indian descent.

b. The Historical "Facts" Used in Oneida I Are Contrary to the Historical "Facts" Used in City of Sherrill and Cannot be Reconciled by any Lower Court.

Federal Defendants and the OIN assert that the question of whether the land reserved by the Treaty of Fort Schuyler in 1788 was and is a state reservation or a federal reservation is a matter of law and not an issue of fact. In doing so, they cite the Second Circuit opinion in *Oneida Indian Nation of N.Y. v. City of Sherrill, New York*, 337 F.3d 139 (2d Cir. 2003), *rev'd on other grounds, City of Sherrill v. Oneida Indian Nation of*

N.Y., 544 U.S. 197 (2005) for the proposition that the Oneida Indian reservation has never been disestablished. The proposition that the Oneida Indian reservation has never been disestablished is in itself a legal conclusion. It is a legal conclusion that was not expressly contradicted in the Supreme Court opinion of the same case. Even cursory readings of the Second Circuit and Supreme Court opinions in *City of Sherrill* demonstrate that the factual backgrounds in each case are very different. The Second Circuit decision relied on the "facts" as first presented in *Oneida I* while Justice Ginsburg in writing the opinion of the Court applied historical "facts."

In the current Second Circuit opinion from which this appeal is taken, the court actually begins its Background section by stating: "The background facts from this protracted and procedurally convoluted litigation are set forth in various opinions of this and other Courts." Appendix A at 5a of the Petition. The string cite that follows this sentence of reversed and partially vacated opinions is impressive. More importantly the Second Circuit also concluded that the land claim litigation is ongoing. "That litigation, which centers on the OIN's claims to more than 250,000 acres of ancestral lands that are not currently in the OIN's possession, continues to the present day. See *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 119-21 (2d Cir. 2010) (surveying procedural history of the Land Claim Litigation), *cert. denied*, -- U.S. ---, 2011 WL 1933740, 132 S. Ct. 452 (U.S. Oct. 17, 2011)." App. at 9a.

Justice Ginsburg politely addressed the constitutional error by the Second Circuit that New York "With the adoption of the Constitution, Indian relations came exclusively under federal authority. See *Oneida II*, 470 U.S. at 234; *Oneida Indian Nation of N.Y. v. New York*, 194 F. Supp. 2d 104, 146 (N.D.N.Y. 2002) (*Oneida IIIb*) ("Any rights [in Indian land] possessed by the State prior to ratification of the Constitution were ceded by the State to the federal government by the State's ratification of the Constitution.")" The Supreme Court expressly held that it would upset the equitable principles of "justifiable expectations" and laches to allow the claim. *Sherrill* at 215-7. This equitable restoration of the rights of New York State has been ignored by the lower courts and the Secretary.

When Judge Hurd applied Justice Ginsburg's *City of Sherrill* ruling on laches he confused federal and state law to create a result that cannot be sustained under either state or federal law independently. Judge Hurd cites New York State Law as providing that "real property in any Indian reservation owned by the Indian nation, tribe or band occupying them shall be exempt from taxation. N.Y.Real Prop. Law § 454." See *Oneida Indian Nation v. Madison County*, 401 F.Supp. 2d 219, 231. He then continued "The Nation's 'reservation was not disestablished.' *City of Sherrill*, 337 F.3d at 167." The Second Circuit made Judge Hurd's contradictory ruling even more confused but has now twice sustained the ruling that the "reservation was not disestablished." App. 67a-68a. The Second Circuit correctly decided that they cannot determine whether the facts first stated in *Oneida I* and litigated over 30

years into various contradictory and confused lower court opinions should apply or whether the facts as stated in the *City of Sherrill* opinion should be applied. Only this Court can finally determine what the land status of the Oneida Indian reservation is and was.

II. THE SECRETARY HAS DEVELOPED A PATTERN OF IGNORING THIS COURT'S OPINIONS WHEN THEY ARE BASED ON EQUITY PRINCIPLES

- a. **The Secretary Claims the Executive Branch Has an Independent Trust Responsibility that Allows Him to Interpret any Law or Case in Favor of the Indian Tribe.**

With the adoption of the Indian Reorganization Act in 1934, 25 U.S.C. § 461 et seq., federal Indian policy took a major turn. Instead of a policy of forced integration into white society as this nation had practiced since the adoption of the Constitution, Commissioner John Collier's theory was that restoring tribal rights and land to make the Indians more prosperous within the tribal system would allow them to make the transition into general society on their own terms. Collier wanted to restore tribal rights to any group of Indians located anywhere in the United States. Congress did not agree that resurrecting tribal rights to Indian persons of half blood or less or in places where Indian tribes had ceased to exist was prudent or necessary. In fact, Congress rejected passing Collier's sweeping legislation and instead passed a bill that limited the authority of the Secretary and Commissioner to restoring rights only to Indian tribes

"recognized and now under federal jurisdiction." See 25 U.S.C. § 478. Even though Congress had imposed a very real limitation on the authority of the Secretary and the Commissioner in Section 478, in the cases presented to this Court after the passage of the IRA, the Secretary successfully argued for this Court to create a general trust responsibility over all Indian lands in himself. See *United States v. Minnesota*, 305 U.S. 382, 388 (1938).

This general trust responsibility came from extending the trust period indefinitely over all allotted and non-alienated Indian lands. Because the United States owns the fee of the allotted lands in trust, by preventing the trust from ever expiring in Section 4 of the IRA the land trust was converted into a general trust responsibility to protect Indian rights in general. See *Squire v. Capoeman*, 351 U.S. 1 (1956). *Squire v. Capoeman* directly cites the IRA and its prohibition against allotting or completing the allotment process to give the fee to the individual Indian owner. *Squire* at 3, Footnote 4. It then applies the treaty and trust responsibility from the Dawes Act and relies on the interpretation of the trust responsibility made by Felix Cohen in the Handbook of Federal Indian Law written to promote the new policy of the IRA. *Squire* at 9, Footnote 15.

This general trust responsibility of the Secretary for the Indians was then unleashed on the Western States in *Arizona v. California*, 373 U.S. 546 (1963). This Court actually removed water property rights from the States under a theory that the Secretary had an overriding responsibility to protect the rights of the

Indians. Justice Harlan, writing on behalf of himself and Justices Douglas and Potter, in his dissent correctly foretold that such a granting of equitable powers by this Court to the Secretary would result in grave consequences. *Id.* at 603. In 1974, this Court extended the breakdown of the rule of law by expanding the Secretary's general trust responsibility for the Indians in several cases. The 1974 decision that affects this case the most directly, is *Oneida I* as previously explained. The Secretary has reason to believe that this Court has deferred to the Secretary's interpretation of the general Indian trust responsibility.

b. The Laches ruling in City of Sherrill Is Not the Only Equity Decision Made By This Court that the Secretary has Ignored or Has Run to Congress to Overturn.

This Court has made several attempts in the last 25 years to introduce general equity principles to establish basic due process of law and equal protection of the law concepts on Indian reservations. This Court has been generally successful in protecting the rights of non-Indians. Every major decision of this Court to protect fundamental individual rights by limiting tribal authority has been followed by an outcry that the Court is limiting "tribal sovereignty." Every decision limiting "tribal sovereignty" should also limit the Indian trust responsibility of the Secretary. Instead, the Secretary has acted as a leader to expand "tribal sovereignty" as a matter of federal policy against the rulings of this Court.

In *Duro v. Reina*, 495 U.S. 676 (1990) this Court held that an Indian on a reservation on which he was not a member was not subject to that tribe's authority. This Court was harshly criticized for impairing tribal sovereignty. The Secretary led the charge to have Congress amend the so-called Indian Civil Rights Act, 25 U.S.C. § 1301 to ensure that each Tribe had jurisdiction over any and all Indians on their reservation. The legislation was passed just two years after the decision in *Duro* was made.

In *Rice v. Cayetano*, 528 U.S. 495 (2000) this Court ruled that all Hawaiians, not just persons identified as Native Hawaiians by racial classification, were allowed to vote per the 15th Amendment on selecting the trustees of the Office of Hawaiian Affairs. The Apology Resolution, Joint Resolution 19, 103rd Congress, Publ. Law 103-150, was adopted by Congress after the *Rice* decision to assuage the outcry of the American Indian tribes and the Native Hawaiians. The adoption of the Apology Resolution instead of quieting the issue further inflamed it. The *Rice* decision created a long and ongoing controversy over whether Native Hawaiians are entitled to be recognized like an Indian tribe. The Secretary has supported separate rights for Native Hawaiians encouraging Congress to grant tribal recognition and sovereignty rights to the Native Hawaiians. The decision in *Rice* became a rallying point for the Secretary and members of Congress to overcome as done against the *Duro* decision. This began the pattern of the Secretary ignoring the equity decisions of this Court.

By definition, laches stands for the proposition that as a matter of equity the matter cannot be fairly brought up because too much time has passed. The Supreme Court expressly held that it would upset "justifiable expectations" to allow the Oneida to claim that the former state reservation in New York was "Indian country." *Sherrill* at 215-7. The Secretary has thus far simply ignored the decision and moved forward in litigation as if the *Sherrill* ruling never happened. The *Sherrill* decision itself ends by citing the IRA fee to trust provision, 25 U.S.C. § 465, as the proper means for giving land to the Oneidas. This Court again deferred to the Secretary's general Indian trust responsibility under the IRA.

Last but not least are the amazing manipulations of the Secretary to avoid this Court's express ruling in *Carcieri v. Salazar*, 555 U.S. 379 (2009) interpreting 25 U.S.C. § 478. The *Carcieri* opinion of the Court appears to be based on straight principles of statutory construction to protect the authority of Congress to have the laws interpreted and applied as written. The majority clearly finds that the language of 25 U.S.C. § 478 is not ambiguous and therefore the Secretary's interpretation greatly broadening the statute's application is not entitled to deference. The holding contradicts how the Secretary has interpreted the statute for the last 40 years or more. Therefore, the Secretary had to decide whether to obey the *Carcieri* holding or ignore it and go on interpreting Section 478 the way he was before the *Carcieri* ruling. There is no question he has chosen the latter course as suggested by Justice Breyer's concurrence. *Carcieri* at 397-400.

The Secretary is openly leading the fight for a "*Carabinieri* fix" by Congress.

This Court is losing its credibility with States and individuals by issuing Indian law opinions that cannot be enforced. This Court is almost to the point of issuing advisory opinions on federal Indian law that the Secretary decides whether to apply under his general Indian trust responsibility. Federal Indian law is based on a formidable combination of constitutional authority from the Indian Commerce Clause, the Treaty Clause, Supremacy Clause, direct war powers and has been exempted from the Fourteenth Amendment. Maybe this Court has not considered that Congress and the whole Executive Branch has all of the authority the Secretary of the Interior has to overcome fundamental individual rights and federalism simply by including Indians and Indian tribes into general federally mandated programs like Medicare or the Temporary Assistance to Needy Families welfare program. This Court should consider overruling *Oneida I* and other Indian law cases to make future opinions on Indian law enforceable to restrain the virtually unlimited general Indian trust.

III. THIS COURT CAN ENFORCE ITS OPINIONS IF IT WILL RULE ON THE LAND STATUS AS A MATTER OF CONSTITUTIONAL LAW

The role of this Court is to review and make sure that the actions taken by government officials comport with their constitutional authority and do not deprive rights from individuals. What *Amici* are proposing is

that this Court apply and expand its reasoning from its unanimous opinion in *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009) that resoundingly said that federal public lands once granted to a state and placed under state jurisdiction cannot be subsequently removed from state jurisdiction even by Congress without raising grave constitutional concerns to end this 40 year old dispute.

The Second Circuit opinion that is the subject of this appeal is so confused in its reasoning that *amici* will address each of the jurisdictional land status issues raised in the case.

a. The State reservation created for the Oneida is not and has never been a federal Indian reservation.

Justice Ginsburg specifically concluded that the Oneida tribe ceded all of its lands to New York in the 1788 Treaty of Fort Schuyler and then the state reserved for the use of the Oneidas the land they mutually agreed the Oneidas would retain for their occupancy. *Sherrill* at 205. The Supreme Court further clarified this position in Footnote 1, directly citing the Second Circuit's 1988 decision that the Oneida reservation was a reservation of state land. *Sherrill* at 203-4. Justice Ginsburg continued that the Treaty of Canandaigua in 1794 "acknowledged" the Oneida reservation. Then explains what that acknowledgement meant and how the land stayed under state jurisdiction. *Sherrill* at 204-5. By contrast the Second Circuit and Judge Hurd concluded that the federal government in

the 1794 Treaty of Canandaigua "recognized" the Oneida reservation. See 337 F.3d at 167.

There is no such thing as the federal government "recognizing" a State Indian reservation and thereby converting the state reservation into a federal reservation. A federal Indian reservation can only be established by "reserving" federal public domain land for a group of Indians by treaty, executive order or congressional action before statehood has been granted unless the new State has ceded the right over the federal public lands in its enabling act. See *United States v. Midwest Oil*, 236 U.S. 459 (1915). New York State does not have an enabling act from Congress because it was an original Colony chartered by the King of England through the Colony of Massachusetts. None of the steps required to make the Oneida reservation into a federal reservation could occur in New York because all of the land within the exterior boundaries of New York was under the jurisdiction of New York and not the government of the United States. New York has never ceded its sovereignty or jurisdiction over its lands. The specific issue of whether the Constitution gave the United States jurisdiction over the unsettled lands in New York was decided in favor of New York when this Court determined that it held the right of preemption over all the lands in New York including the Indian lands as defined in *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87 (1810).

These very basic federal land law principles were ignored in New York by the Secretary of the Interior in the quest to resurrect tribal rights under the IRA and the general Indian trust authority. Instead,

the Executive Branch deliberately omitted that New York State as an original Colony was not subject to any claim that there were any federal rights over the lands in New York. The Executive Branch took advantage of the fact that few lawyers in New York had any experience in understanding federal public land law. This fact has also contributed to how confused and contradictory the lower court rulings have become. This confusion has now reached all the way into the New York Court of Appeals that applied federal law to determine whether the Cayuga tribe has a reservation as a matter of state law. *Cayuga Indian Nation of New York v. Gould*, 14 N.Y.3d 614 (2010).

None of the above discussion would be necessary if this Court issues an Indian law opinion expanding its decision in *Hawaii v. Office of Hawaiian* that once land is under state jurisdiction that the United States has no authority to remove it from state jurisdiction. The one exception to this basic principle is that land can be ceded by the State under the express terms of the Enclave Clause, Art. I, Sec. 8, Cl. 17. The authority of the Property Clause was well defined by 1840. *United States v. Gratiot*, et al, 39 U.S. 526 (1840). Restoring the basic principles of how territorial lands are made into sovereign States is probably the only way to restore the sovereignty of the State and Counties of New York after 40 years of federal litigation. This Court was sufficiently concerned with protecting the sovereignty of Hawaii against the manipulations of the Apology Resolution that it issued an uncontestable jurisdictional unanimous opinion. New York deserves the same consideration.

b. **This Court Needs to Correct the Land Status and Jurisdiction of New York State Over the Former Oneida Indian Reservation**

The Second Circuit determined that it could not overrule a prior panel of its own Court and sustained the prior ruling that the *City of Sherrill* decision by this Court did not overrule the prior decision that the Oneida reservation had never been disestablished. App. at 67a-68a. The Second Circuit almost invited this Court to address this issue and make a final determination. As situated this case is going back to the New York state courts to determine whether under a New York statute these lands are tax exempt. As cited above this means that the case of *Cayuga Indian Nation of New York v. Gould*, will be applied. As already explained, *Gould* relies on the completely convoluted application of federal law in New York that began with *Oneida I*. The Counties make an excellent and thorough argument in their Petition for Certiorari that these parcels of land have been under state jurisdiction since the Treaty of Buffalo Creek. But only this Court, according to the Second Circuit and the Court of Appeals of New York, has the authority to make the factual law determinations of whether the Treaty of Buffalo Creek did disestablish the Oneida reservation.

Such a ruling on the Treaty of Buffalo Creek that restores the principles of how States are created and protected under the principles of federal public land law by this Court could limit the authority of the Executive Branch and Congress under the General Indian trust. It

could prevent equity decisions of this Court from being treated as advisory opinions by the Secretary and Congress. It is unlikely that a better factual situation or a case more worthy of being set right will ever appear before this Court.

The OIN when it revoked by tribal ordinance its claim to sovereign immunity also revoked its claims that the Nonintercourse Act, 25 U.S.C. § 177, had been violated. App. at 29a. The Second Circuit correctly decided that the abandonment of these claims required the prior decisions based on those claims to be vacated and dismissed with prejudice. App. at 31a-32a. This not only ended any question that the land could be "Indian Country" it set the legal framework necessary for a clean overruling of *Oneida I* and *II*.

Amici realize that this Court hesitates to make constitutional rulings if other remedies will resolve the case. This Court tried to do exactly this with the ruling in *City of Sherrill*. This Court has already reestablished its jurisdiction to declare the status of land against the position taken by the United States in *Rasul v. Bush*, 542 U.S. 466, 480-4 (2004) when this Court did not accept the declaration of the military that the Guantanamo Bay Naval Station was not territory under the control of the United States. This ruling reinstated judicial review over the status of territorial land, and allowed this Court to assert its authority to protect the sovereignty of the State of Hawaii in *Hawaii v. Office of Hawaiian Affairs*.

No decision of this Court could reestablish the principles of federalism more completely than clarifying

the jurisdictional issues that have arisen from this Court deferring to the elected branches to determine the land status and federal jurisdiction over States. This Court should restore the jurisdiction and sovereignty over its lands to the original Colony of New York State.

Conclusion

This Court should grant the Petition for Certiorari filed by the New York Counties and reverse the decision of the Second Circuit that the Oneida reservation has not been disestablished.

Respectfully submitted,
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