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No. 10-72

IN THE
Supreme Court of the United States

MADISON COUNTY, NEW YORK, *et al.*,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent,

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,

Putative Intervenor.

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

BRIEF FOR CAYUGA COUNTY AND SENECA COUNTY AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTIONS PRESENTED

Amici will address (i) whether the ancient Oneida reservation in New York was disestablished or diminished, and (ii) whether tribal sovereign immunity from suit, to the extent it should continue to be recognized, bars taxing authorities from foreclosing to collect lawfully imposed property taxes from the Oneida Indian Nation ("OIN"), a successor entity related to the historic Oneidas – the questions presented by Madison and Oneida Counties which this Court has agreed to review via writ of *certiorari.*

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INTEREST OF THE *AMICI CURIAE*[1]

Although the historic boundaries of the Oneidas' 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. The Counties 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 that the Oneidas' reservation was not disestablished, the New York Court of Appeals recently reached a similarly flawed result 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 Nation 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

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

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 OIN's claim to a "reservation" fails.

The Court should also decide that even if the ancient reservations in Upstate New York have not been disestablished, governmental entities such as Madison and Oneida Counties may foreclose on properties owned by tribal groups if those groups fail to pay lawfully owed property taxes. This Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), unquestionably holds that such taxes are owed on lands that an Indian tribe purchases on the open market – and the Second Circuit does not dispute this – but the Second Circuit's decision leaves Madison and Oneida Counties, as well as *amici*, with no remedy to enforce such tax obligations. Without a decision from this Court that Madison and Oneida Counties and *amici* may foreclose on properties for failure to pay property taxes, *Sherrill* is rendered meaningless and Indian groups will continue to ignore their tax obligations.

ARGUMENT

POINT I

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

A. Even if the Court finds in favor of Madison and Oneida Counties on the foreclosure issue (discussed *infra*), the reservation status issue warrants review.

Presented with the question of whether the Oneida reservation was disestablished, the Second Circuit below stated 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). The Second Circuit nevertheless reaffirmed its earlier finding that the Oneidas' reservation was not disestablished and therefore the OIN retains limited rights on this reservation. *Id.* 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 contend 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 particular, the New York Court

of Appeals improperly 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. 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 *amici's* dispute 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*[2] 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 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).

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2. The *amici* here are the governmental employers of those named individuals who were the appellants in *Gould*, the sheriffs and district attorneys of Cayuga and Seneca counties.

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 after it had extinguished whatever Indian title the Cayugas 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' use of the land pursuant to that treaty, which of course the United States would have no right to do regardless.

The Treaty of Canandaigua did not convey an interest in land to the Cayugas and did not divest New York of its rights. *See Seneca Nation of Indians v. United States,* 173 Ct. Cl. 917, 922 n.5 (1965) (explaining that the purpose of the Treaty of Canandaigua was to

"reconfirm peace and friendship between the United States and the Six Nations . . . . [T]here was no purpose to divest New York and Massachusetts of their right, nor was there any purpose to prevent or to supervise sales or transfers of [subject] territory."). The New York Court of Appeals 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* 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 United States' power of eminent domain extends to the taking of state-owned property without the state's consent, but the United States must pay just compensation to the property owner for the property it takes. U.S. Const. amend. V; *see also Block v. North Dakota ex rel. Bd. of Univ. & School Lands,* 461 U.S. 273, 291 (1983). A compensable taking occurs "[i]f a government has committed or authorized a permanent physical occupation of [the] property." *Southview Assocs. v. Bongartz,* 980 F.2d 84, 92-93 (2d Cir. 1992). Under this standard, if by the Treaty of Canandaigua the United States 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* 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* 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 (which included, among the panel members, Roscoe Pound, Dean of Harvard Law School) 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 Court of Appeals' conclusion 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 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*). 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.

POINT II

THIS COURT SHOULD RECOGNIZE THE RIGHT OF A GOVERNMENTAL ENTITY TO FORECLOSE ON AN INDIAN TRIBE'S PROPERTY IF THAT TRIBE LAWFULLY OWES REAL PROPERTY TAXES BUT REFUSES OR FAILS TO PAY THEM.

Amici also have a compelling interest in having this Court settle the right of a governmental entity to foreclose on properties owned by an Indian tribe if the tribe fails to pay lawfully imposed property taxes. Without such a decision from this Court, *amici* and all other counties are left with the right to *impose* taxes under *Sherrill* but absolutely no remedy to enforce that right. Such an anomaly, which has been created by the Second Circuit's decision below, eviscerates *Sherrill* and must be rectified.

The ability to foreclose on Indian-owned properties is a particular concern to *amici* because the Cayuga Indian Nation has recently begun to purchase properties within the taxing jurisdiction of the *amici*. Further, *amici* have spent significant resources in challenging the Cayuga Indian Nation's application to place portions of its lands into trust with the federal government and to remove the land from the tax payroll. The Cayuga Indian Nation's land into trust applications raise several concerns, not the least of which is a significant detrimental impact on the natural environment. Thus, *amici*, United States Senator Charles Schumer, and many others adamantly argue that the land should not be taken into trust. If the

Second Circuit's decision in this case is not reversed, however, the dispute over the Cayuga Indian Nation's land loses much of its significance. If the Second Circuit's decision stands, even if the land is not taken into trust, the Cayuga Indian Nation may refuse to pay property taxes and there is little or nothing *amici* or anyone else can do about it. Such a result cannot stand under *Sherrill*.

Amici join Madison and Oneida Counties' position that tribal sovereign immunity does not bar *in rem* foreclosure for nonpayment of real property taxes. *Sherrill* makes clear that property taxes are lawfully due on property owned by the OIN in Upstate New York. As this Court held in *Yakima County v. Confederated Tribe of Yakima*, 502 U.S. 251 (1992), the property tax is a burden on the property alone, and an *in rem* foreclosure proceeding, which is directed at the property and not the tribe, is not significantly disruptive to tribal self-government. This Court's sovereign immunity precedents concerning *in personam* actions against tribes have no application to an *in rem* proceeding to collect taxes lawfully owed by a tribe. As Madison and Oneida Counties establish in their brief to this Court, *in rem* tax foreclosure proceedings are directed to the land; the property owner is not a defendant in a foreclosure action. Thus, sovereigns such as foreign nations and the 50 states do not enjoy immunity from *in rem* tax foreclosure proceedings if they purchase land within the taxing and regulatory jurisdiction of another sovereign. There is no basis in law or logic to give quasi-sovereign tribes greater protection from *in rem* foreclosure proceedings than sovereign foreign countries and states.

Thus, *amici* submit that this Court should hold that Madison and Oneida Counties may foreclose on properties owned by the OIN if the OIN fails to pay property taxes. Such a decision is necessary to allow *amici* and other governmental entities to enforce the rights granted to them by this Court's decision in *Sherrill*.

CONCLUSION

For the foregoing reasons, this Court should find in favor of Madison and Oneida Counties and find that the ancient Oneida reservation in New York was never a federal reservation to begin with or was disestablished or diminished and that even if it still exists, tribal sovereign immunity from suit does not bar taxing authorities from foreclosing to collect lawfully imposed property taxes.

Dated: December 10, 2010

Respectfully submitted,

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