No. 03-855

IN THE
Supreme Court of the United States

CITY OF SHERRILL, NEW YORK,
Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK,
RAY HALBRITTER, KELLER GEORGE,
CHUCK FOUGNIER, MARILYN JOHN, CLINT HILL,
DALE ROOD, DICK LYNCH, KEN PHILLIPS,
BEULAH GREEN, BRIAN PATTERSON,
and IVA ROGERS,
Respondents.

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

REPLY BRIEF

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In 1805, two bands of Oneidas – the pagan party and the Christian party – partitioned their lands in New York between them, and exchanged 100 acres with Cornelius Dockstader, an Oneida Indian, for a house and a barn. In 1807, Dockstader sold that land to Peter Smith, a non-Indian. (CA 407-15).[1] For nearly 200 years thereafter, that land – including the properties at issue here (the "Properties") – remained in possession of non-Indians, freely alienable and subject to state and local jurisdiction, taxation and services. Respondent Oneida Indian Nation of New York ("Respondent") purchased the Properties in 1997 and 1998.

Respondent argues that, throughout the 190 years that the Properties were under non-Indian ownership, possession and control, it held aboriginal title – the then-current right to possess, occupy and use the Properties – and that such aboriginal title is the basis for tax-exempt status of the Properties. (Respondent's Brief ("Resp. Br."), *passim*). That is wrong for several reasons.

First, under the equitable doctrines invoked by this Court in *Yankton Sioux Tribe of Indians v. United States*, 272 U.S. 351 (1926) ("*Yankton Sioux I*") and *Felix v. Patrick*, 145 U.S. 317 (1892), long before 1997, Respondent could no longer compel ejectment to restore itself to possession, occupancy and use of the Properties. *A fortiori*, no current right to possession, occupancy and use – aboriginal title – existed in 1997.

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[1] Citations to CA __ are to the joint appendix in the Court of Appeals. New York State did not cause or control the 1805 and 1807 conveyances. Rather, the State's only nexus to these transactions was an omnibus 1807 "Act Relative to Indians." (CA 412-13). The federal government, clearly on notice of the conveyances, did not voice any objection to them. *See Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373 (1978).

Second, the Oneidas' aboriginal title to the Properties was terminated by the exercise of New York State's right of extinguishment and preemption in the 1788 Treaty of Fort Schuyler. Third, extinguishment of the Oneidas' aboriginal title to the Properties was confirmed by the 1838 Treaty of Buffalo Creek. 7 Stat. 550. Fourth, for decades in the nineteenth and early twentieth centuries, the Oneidas abandoned their tribal status, extinguishing any surviving aboriginal title to the Properties.

Finally, Respondent has not satisfied the criteria set forth in *Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520 (1998), to support the necessary finding that the Properties are (or ever were) Indian country under 18 U.S.C. § 1151. Thus, the Properties are not exempt from taxation.

I. THE EXTRAORDINARY PASSAGE OF TIME AND THE CHANGE IN THE CHARACTER OF THE PROPERTIES EXTINGUISHED ABORIGINAL TITLE

When Respondent was previously before this Court – in connection with its claim for "damages for the occupation and use of tribal lands allegedly conveyed unlawfully in 1795" over the express objection of the federal government – all nine Justices agreed that "[o]ne would have thought that claims dating back more than a century would have been long ago barred." *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 229, 236, 253 (1985) ("*Oneida II*"); *id.* at 255 *et seq*. (Stevens, J., dissenting). The Court nevertheless concluded that it had not been presented with a legal basis for barring Respondent's damage claim. *Id.* at 236, 253. The Court did not reach the "question of whether equitable considerations should limit the relief available to the present day Oneida Indians" (*id.* at 253 n.27) and four Justices dissented and would have barred even the damage claim on laches grounds. *Id*. at 255 *et seq*. (Stevens, J.,

dissenting).

Respondent now seeks recognition of a right in 1997 and 1998 to exercise aboriginal title – the present right of possession, occupancy and use – in lands conveyed in 1805. Here, there is a sound legal basis in the time-based principles of equity to hold that Respondent's claim is "barred by the extraordinary passage of time." *Id.* at 256.

The foundation of Respondent's argument is that its original aboriginal title in former Oneida lands remained inchoate for 190 years and was revived upon Respondent's renewed occupancy of the Properties. Because aboriginal title is the current right of an Indian tribe to possess, occupy and use lands inhabited by that tribe at the time colonists arrived (*see, e.g., Oneida Indian Nation of New York State v. County of Oneida,* 414 U.S. 661, 667 (1974) ("*Oneida I*"); *Cherokee Nation v. Georgia,* 30 U.S. 1, 17 (1831)), Respondent's position is unsustainable. The extreme passage of time made it impossible to judicially restore Respondent to possession of the Properties in 1997-98. *Yankton Sioux I*, 272 U.S. at 357. As a result, aboriginal title – the current right of the Indians to possess, occupy and use the land – no longer existed. And that is so whether one frames the analysis in terms of impossibility (*Yankton Sioux I*, 272 U.S. at 357) or laches (*Oneida II)*, 470 U.S. at 260 (Stevens, J., dissenting)).

The concept of applying time-based equitable doctrines to resolve Indian title claims – as opposed to damage claims – is not novel. The impossibility doctrine was applied to an Indian title claim in *Yankton Sioux I.* Giving dispositive weight to the fact that, after the passage of more than 60 years, the lands had been developed by, and were "in the hands of innumerable innocent purchasers," this Court held that it would be impossible to rescind the cession of former Sioux lands and restore the Indians to their former

lands. 272 U.S. at 357. *Accord Felix v. Patrick*, 145 U.S. 317, 330 (1892) (laches barred Indians from reclaiming property settled, held and developed by non-Indians for 28 years); *See also Menominee Indian Tribe of Wisconsin v. Thompson*, 161 F.3d 449, 462 (7th Cir. 1998) ("Because the Menominee can prove no set of facts under which they would be entitled to exercise aboriginal rights, this claim [to exercise such rights in their former reservation lands] was properly dismissed").

Invoking *Yankton Sioux I*, 74 years later the District Court in *Oneida Indian Nation of New York v. County of Oneida, New York*, 199 F.R.D. 61, 92 (N.D.N.Y. 2000) ("*Oneida III*") squarely rejected Respondent's bid to exercise current possessory rights over former reservation lands and denied as futile its motion to amend its complaint to add a claim for ejectment. As the court explained, the equitable considerations that were determinative in *Felix* and *Yankton Sioux I* are "magnified exponentially here, where development of every type imaginable has been ongoing for more than two centuries." *Id.*

This case is ripe for application of such time-based principles of equity. Moreover, application of time-based equitable considerations will allow a pragmatic resolution of the Oneidas' current land rights, without necessarily barring the tribe's claims under the Indian Trade and Intercourse Act, 25 U.S.C. § 177. Furthermore, if Respondent seeks a homeland – and not merely tax advantages and commercial ventures such as its Turning Stone casino and those operating on the Properties – it may petition the federal government pursuant to 25 U.S.C. § 465 to restore certain lands to trust status. *See Cass County, Minn. v. Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 114-115 (1998). Thus, the application in this case of time-based principles of equity, will "maintain the proper measure of flexibility to protect the legitimate interests of the tribes, while at the same time

honoring the historic wisdom in the value of repose." *Oneida II*, 470 U.S. at 262 (Stevens, J., dissenting).

II. THE TREATY OF FORT SCHUYLER EXTINGUISHED ABORIGINAL TITLE

In Article I of the Treaty of Fort Schuyler, the Oneidas expressly ceded "all of their lands to the people of the State of New York forever," thus unambiguously terminating aboriginal title to all lands then claimed by the tribe. At the time of the Treaty, New York State had the right of preemption and the sole power to extinguish the aboriginal rights of the Indians residing within its borders. *Oneida Indian Nation of New York v. New York*, 860 F.2d 1145, 1160, 1167 (2d Cir. 1988) (*"Oneida 1988"*); *Oneida I*, 414 U.S. at 667 (right to terminate aboriginal title became the province of the federal government only when the federal Constitution became effective).

Respondent strains to read Article II of the Treaty as "immediately qualify[ing]" the cession of all Oneida lands provided for in Article I, and argues that the Oneidas actually "reserved" the lands to themselves and "retained the right of perpetual possession." Resp. Br. at 20. That reading is inconsistent with the plain language of Article II and of the Treaty read as a whole. Far from "qualifying" the cession in Article I, Article II is a comprehensive provision in which New York State (i) grants land to two individuals; (ii) sets aside a reservation for the Oneidas; and (iii) affirms the continued rights of two other Indian tribes to live in settlements established on certain of the ceded Oneida lands. Further, New York State retained the right and discretion to construct public works on portions of the reserved land and the State retained the jurisdiction, power and duty to pass laws to protect and enforce the Indian's right to make leases and collect rents, and to "prevent frauds on them respecting the same."

There is no aspect of Article II, read in its entirety and in context, which supports Respondent's contention that the Oneida's carved out (or "reserved") the lands for (or to) themselves.[2] Indeed, the Article II set-aside of the reservation lands is twice characterized as a "reservation *to* the Oneidas" (not "*by* the Oneidas"). *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). Thus, the Treaty of Fort Schuyler terminated aboriginal title to the Properties.[3]

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[2] None of the cases cited by Respondent supports its interpretation of the treaty, among other reasons, because none of the cases concern the Treaty of Fort Schuyler or any other treaty made by one of the original 13 states during the time in which the state held the right of preemption. *See United States v. Klamath and Moadoc Tribes*, 304 U.S. 119 (1938) (citing 16 Stat. 707 (1866)) (cession in federal treaty qualified by set aside in same article); *United States v. Winans*, 198 U.S. 371, 378 (1905) (Article III "further secured" right of Indians to fish beyond reservation boundaries "in common with citizens of the territory"); *The Kansas Indians*, 72 U.S. 737, 755 (1866) (treaty effecting division of Indian territory into reservation held in common and separate estates held in severalty "could never have been intended by the government to make a distinction in favor of Indians who held in common, and against those who held in severalty.")

Respondent's reliance on opinion letters by Attorneys General Taney and Bradford is likewise misplaced. Resp. Br. at 21. Neither was rendered in the context of a contested dispute. The Taney opinion only responded to whether the lands in question were subject to restraints on alienation. The Bradford opinion was ignored by the federal government, which proceeded to make only a "pretense of interfering" with New York's 1795 purchase of Oneida land only a few months later, and "[was] not seriously concerned over the illegality of the purchase of Oneida lands…." *Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 384-385 (1978).

[3] Respondent desperately argues that New York did not have the right of preemption in 1788 because the Treaty of Fort Schuyler was signed after the effective date of the Constitution. Resp. Br. at 25-26. That is wrong; the Constitution was effective March 4, 1789. Indeed, this argument has been fully litigated (twice) by Respondent and conclusively rejected by the Second Circuit, holding that New York's right to enter

III. THE TREATY OF BUFFALO CREEK ALSO EXTINGUISHED ABORIGINAL TITLE OVER THE PROPERTIES

To the extent that the Treaty of Fort Schuyler did not terminate the Oneidas' aboriginal title in New York, as shown in Petitioner's Brief, and in briefs submitted by its *amici*, the Treaty of Buffalo Creek extinguished the Oneida reservation in New York. However, regardless of whether the Treaty of Buffalo Creek extinguished Indian title to the Oneida reservation in its entirety, it is beyond peradventure that the Treaty extinguished (or confirmed the extinguishment of) aboriginal title in all lands ceded before 1838, including the Properties.

A. The Treaty of Buffalo Creek Diminished the Oneida Reservation

The Treaty of Buffalo Creek was one of a series of treaties in which the federal government arranged for the New York Indians, including the Oneidas, to remove from New York to the west.[4] The federal government encouraged removal to free the maximum amount of Oneida land in New York for settlement. *See South Dakota v. Yankton Sioux Tribe*, 522 U.S. 346 (1998) ("*Yankton Sioux II*") (examining the context and "common understanding of the time" necessary for "sensible construction of treaties"). *See also Mohegan Tribe v. Connecticut*, 638 F.2d 612, 621 (2d Cir. 1980), *cert. denied*, 452 U.S. 968 (1981).

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into, and the effect of, the Treaty of Fort Schuyler is assessed under the Articles of Confederation. *Oneida 1988*, 860 F.2d at 1148 *et seq*.; *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070 (2d Cir. 1982).

[4] *E.g.*, Treaty with the Chippewa, 7 Stat. 303 (1827); Treaties with the Menominee: 7 Stat. 342 (1831); 7 Stat. 405 (1832); 7 Stat. 506 (1836).

Article 13 of the Treaty of Buffalo Creek provides that the Oneidas will remove to the reservation in Kansas upon making "arrangements with the Governor of the State of New York for the purchase of their lands." 7 Stat. 550, Article 13. As a result, at the very least, the Treaty of Buffalo Creek expressly contemplated the diminishment of the Oneida reservation from 5,000 acres (then held by the Oneidas) as a result of such sales. Those authorized sales resulted in a diminishment of the land held by the Oneidas in New York down to 32 acres.

Having authorized (at the very least) the diminishment of the Oneida reservation below 5,000 acres, the only question is what the Treaty contemplated with respect to the 295,000 acres that had already been sold and was being occupied, developed and used by non-Indians. Surely, the federal government and the Oneidas did not expect the Oneidas' lands to shrink from 5,000 acres to 32 acres, but allow Oneidas to return and reclaim reservation status on the 295,000 acres previously sold. Any other result ignores the express terms of the treaty, the contemporary historical context, subsequent references to the reservation and demographic trends. *Yankton Sioux II*, 522 U.S. at 343-46; *DeCoteau v. District County Court for the Tenth Judicial District*, 420 U.S. 425, 445-48 (1975); *Solem v. Bartlett*, 465 U.S. 463, 468-71 (1984); *Rosebud Sioux Tribe v. Kniep*, 430 U.S. 584, 604-05 (1977). This Court should give the Treaty of Buffalo Creek a sensible construction that avoids an absurd conclusion. *Yankton Sioux II*, 522 U.S. at 346.

Without exception, the record reflects either no Oneida reservation in New York thereafter or a small reservation of approximately 32 to 100 acres. *E.g., United States v. Boylan*, 265 F. 165 (2d Cir. 1920) (protection sought for 32 acres as Oneida land); Federal Annual Report of the Commissioner of Indian Affairs at 224 (1903) (New York Oneidas "formerly had a reserve…"); Federal Annual Report

of the Commissioner of Indian Affairs at 314 (1891) ("The Oneida have no reservation, their lands having been divided in severalty among them by act of the legislature many years ago"); Federal Annual Report of the Commissioner of Indian Affairs at 288 (1906) (New York Oneidas have no reservation and can hardly be said to maintain a tribal existence; those listed on the rolls as "Oneidas at Oneida" are scattered families residing in Oneida and Madison counties and other parts of upstate New York). *See also Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 385 (1978). As a result, the Treaty of Buffalo Creek, at the very least, resulted in the diminishment of the Oneida reservation, by extinguishing reservation status to the 295,000 acres that had already been sold – including the Properties – and authorizing the sale of the balance to the State of New York.

B. The Oneidas' Agreement to Remove From New York in the Treaty of Buffalo Creek is Inconsistent with Continued Oneida Sovereignty In New York

The Treaty of Buffalo Creek's creation of a new home for the Oneidas west of the Mississippi River cannot be squared with the continued existence of a more than quarter-million acre Oneida reservation in central New York that the Oneidas had largely vacated by 1838.

The history of the federal efforts prior to the Treaty of Buffalo Creek to remove the Oneidas from New York establishes that the Treaty's purpose was to complete the removal of the Oneidas from New York.[5] The Treaty recited that it was entered into pursuant to the Removal Act of 1830

[5] In its brief in *Oneida II*, the United States concluded that "the Treaty obviously contemplated [the New York Indians'] complete removal from New York." *See* U.S. *Oneida II* Br. at 31 (No. 83-1065).

and was the culmination of more than 20 years of federal efforts to remove the Indians from New York. Treaty of Buffalo Creek, 7 Stat. at 550-551; Act of May 28, 1830, 4 Stat. 411. Members of the Oneida and other tribes acknowledged before 1838 that both the Indians and the United States intended "to relieve the State of New York of its entire Indian population." See New York Br. at 5-6.

Moreover, in 1832, representatives of Oneidas and others, who had recently removed from New York to Wisconsin, formally accepted and urged ratification of the federal treaties pursuant to which the Menominees agreed to set aside 500,000 acres in Wisconsin as a home for the Oneidas and other New York Indians, stating that the Wisconsin acreage was sufficient "to answer all the wants of the New York Indians." Treaty with the Menominee, Oct. 27, 1832, 7 Stat. 405, 409 App. (emphasis added). Whatever rights the New York Oneidas had in the Wisconsin lands at the time of the Treaty of Buffalo Creek in 1838 derived from those earlier treaties, which were intended to meet all of their land needs.[6] In furtherance of the federal removal policy, nearly half the Oneidas had sold their lands to New York and removed to Wisconsin by the time of the Treaty of Buffalo Creek in 1838. Treaty of Buffalo Creek, Sch. A, 7 Stat. at 556 (census listed 600 Oneidas in Wisconsin and 620 in New York).

As we have previously established (Petitioner's Brief ("Pet. Br.") at 6-8; New York Br. at 8-9), the Treaty of

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[6] Secretary of War Calhoun's 1818 statement that President Monroe would not consider lands acquired in the west to be in exchange for the Six Nations' present lands (Cayuga Br. at 11, 25), was modified in 1822, when Calhoun advised an Oneida faction that the Six Nations should voluntarily dispose of their New York lands and remove to Wisconsin. *See* Letter of Secretary of War John C. Calhoun to Jasper Parrish, Sub-Agent of the Six Nations, April 15, 1822, VII W. Hemphill, ed., *The Papers of John C. Calhoun, 1822-1823*, 43-44 (1973).

Buffalo Creek continued the Oneida removal process, providing a "permanent home" west of the Mississippi River in what is now Kansas for "all the New York Indians," where the Oneidas were to exercise all tribal governmental powers. Arts. 2, 4, 7 Stat. at 551-552. Contrary to the arguments of Respondent and its *amici*, the Treaty of Buffalo Creek was more than a swap of Wisconsin land for land in Kansas. (Resp. Br. at 4-5; U.S. Br. at 18; Cayuga Br. at 12). As this Court held in *New York Indians*, "[p]robably . . . the main inducement" for the United States to set aside new lands for the New York Indians in the Indian territory was their agreement "to remove beyond the Mississippi." *New York Indians v. United States*, 170 U.S. 1, 15 (1898); U.S. *Oneida II* Br. at 31.

Contrary to the argument of Respondent and the United States (Resp. Br. at 41, U.S. Br. at 22-23), the Oneidas' agreement to remove was the bargain that this Court enforced in *New York Indians*. The Court quoted the Oneidas' agreement in Article 13 of the Treaty – "to remove to their new homes in the Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida" – in support of its holding that the Oneidas had timely "accept[ed] and agree[d] to remove to the [Kansas] country set apart for their new homes" and that their failure to occupy it in large numbers did not forfeit the new reservation under Article 3 of the Treaty. *New York Indians*, 170 U.S. at 26, 24; Treaty of Buffalo Creek, Arts. 3, 13, 7 Stat. at 552, 554.

C. No Language of Cession Was Necessary to Terminate Oneida Sovereignty Over Their Former New York Lands

The absence of language of cession in the Treaty is irrelevant. New York, which had the exclusive right to purchase Oneida lands, was not a party to the Treaty. The

United States, which was a party to the Treaty, had no right to acquire Oneida lands. *See Oneida I*, 414 U.S. at 670 (original 13 states held the preemptive right to Indian lands within their boundaries).[7] Moreover, the Oneidas had previously left all but 5,000 acres of their reservation land pursuant to the ongoing Oneida removal process that the United States had encouraged and facilitated. As to those lands, both the Oneidas and the United States would have understood that no cession was required. Accordingly, the Treaty provided simply that the Oneidas would sell their remaining lands to New York and then remove.

The Treaty resulted in a cession of jurisdiction even in the absence of explicit cession language. *See Hagen v. Utah*, 510 U.S. 399, 411-12 (1994) (specific cession language not required); *Yankton Sioux II*, 522 U.S. 329, 344 (1998). Rather, as we have shown (Pet. Br. 38-39), the Oneidas' acceptance of, and agreement to remove to, a new reservation that was to serve as their homeland released and relinquished their tribal sovereignty over their former New York lands; this relinquishment "was tantamount to an extinguishment by voluntary cession." *See United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339, 358 (1941) (internal quotation omitted).[8]

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[7] United States treaty negotiator Ransom Gillet knew that New York – and not the United States – had the exclusive right to purchase Indian lands in central New York. See Letter from R.H. Gillet to C.A. Harris, Commissioner of Indian Affairs, S. Exec. Doc. No. Confidential 10E, 25th Cong. 2d Sess. (March 26, 1838) (stating that New York State has the exclusive right to purchase Onondaga lands); *See also Oneida Indian Nation of New York v. United States*, 43 Ind. Cl. Comm. 373, 404 (1978) (Gillet recognized that Oneidas would have to make a treaty with New York to sell their lands). Thus, this Court should reject the argument of *amici* Cayuga Nation, et al., that the absence of treaty language ceding Oneida land to the United States meant that the Treaty of Buffalo Creek was not a removal treaty. (Cayuga Br. at 22-25).

[8] Respondent's assertion (Resp. Br. at 39) that we may not rely upon *Santa Fe* is meritless. *Santa Fe* plainly supports an argument that is

That most of the New York Oneidas did not occupy the Kansas reservation and that the United States eventually sold it for settlement by others (Resp. Br. at 40) does not change the result. In *Santa Fe*, although only a few Indians moved to the new reservation created for them by the federal government, this Court nevertheless found intent to terminate the pre-existing reservation based on an "indication" that the Indians were satisfied with the newly created reservation. 314 U.S. at 357. Here, there is far more than an indication: the Oneidas entered into a federal treaty agreeing to remove to a new reservation and later recovered the value of the new reservation in this Court. Having bargained for, and accepted the benefit of, the new reservation, the Oneidas cannot now disclaim the effect of their agreement. *See Cass County*, 524 U.S. at 110 (cession of jurisdiction permits taxation).

D. There Was No Promise To The Oneidas That Their New York Reservation Would Continue After They Sold Their Lands to the State and Removed from New York

The statement apparently made to the Oneidas by United States treaty negotiator Ransom Gillet, relied upon by Respondent and the United States (Resp. Br. at 35-36, U.S. Br. at 20-22), at most assured the Oneidas that they would not be forcibly removed from their 5,000 acres before they sold these lands to New York pursuant to Article 13 of the Treaty. JA 146 (reference to "lands where they reside" and statement that Oneidas could "remain where they are forever"); *see* New York Br. at 25-27; Lenox, et al. Br. at 29-30. Notably, Gillet did not promise the Oneidas that the 5,000 acres would retain reservation status after they sold the land to New York and removed from the State.

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fairly included within the third question presented. Moreover, *Santa Fe* was argued by New York State as *amicus curiae* to the Second Circuit and in this Court in support of the petition for certiorari.

More importantly, Gillet did not promise that the lands the Oneidas had sold before 1838 would retain reservation status following the Treaty of Buffalo Creek; there is nothing in his statement or the surrounding circumstances that could be so construed. To the contrary, "[t]hose lands [that the Oneidas no longer occupied in 1838] not only were notoriously claimed by others – the white settlers who had moved into the area by 1838; they had been sold by the Oneidas themselves for disposition to white settlers." U.S. *Oneida II* Br. at 32 (internal quotes omitted). Accordingly, Gillet's statement does not conflict with the interpretation that the Treaty disestablished the portion of the reservation that the Oneidas had sold before 1838 and also ended the reservation status of the remaining portions of the reservation as the Oneidas sold them to New York and removed following the proclamation of the Treaty.

E. The Treaty Of Buffalo Creek Did Not "Fail"

The aftermath of the Treaty belies Respondent's claim (Resp. Br. at 38; *see* Cayuga Br. at 27-29) that the Treaty "failed." This Court enforced the Treaty in *New York Indians*, awarding the Oneidas the value of their Kansas lands. 170 U.S. at 36. Importantly, although few Oneidas removed to the Kansas reservation, the Oneidas remaining in New York in 1838 sold nearly all of the remaining 5,000 acres to New York during the 1840s and most of them removed from the State. *See* New York Br. at 10; Federal Annual Report of the Commissioner of Indian Affairs at 341 (1892) (most of the Oneidas removed to Wisconsin in 1846; the few who remained kept about 350 acres of land, which dwindled through subsequent sales to about 100 acres). Thus, as the Oneidas sold their remaining lands to New York and removed, the Treaty diminished the remaining reservation *pro tanto.* Even if a small remnant of an Oneida "reservation" remained at the end of the nineteenth century, which we do not concede, it did not include the Properties.

Additionally, Respondent erroneously downplays the fact that the former Oneida reservation area has been governed by the State and local governments for over 160 years. (Resp. Br. at 40-41). The history of the area after the Treaty's proclamation is uniformly consistent with the understanding that reservation status over the lands previously sold had ended. The sales that followed the Treaty of Buffalo Creek were made pursuant to the authorization contained in Article 13. Accordingly, over 160 years of state and local jurisdiction over the area and its now almost exclusively non-Indian population further demonstrate that both the Oneidas and the United States intended that the Oneidas' tribal sovereignty and jurisdiction were terminated over the lands they vacated both before and after the Treaty.

IV. ABORIGINAL TITLE CEASES WHEN TRIBAL STATUS IS ABANDONED

The conclusion reached by the Second Circuit and advocated by Respondent – that present Bureau of Indian Affairs ("BIA") recognition is sufficient to judicially establish that tribal status was never abandoned – is incorrect as a matter of law. Present tribal recognition by the political branches of government is not dispositive of whether a tribe has previously abandoned tribal status; that determination of continuous tribal existence for land rights purposes is the province of the judiciary. *Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51, 57-58 (2d Cir. 1994) ("*Paugussett*").[9]

In order to assert aboriginal rights in the Properties, Respondent must meet a four factor test: That (1) it is an Indian tribe; (2) the land is tribal land; (3) the United States has never consented to the alienation of the land; and (4) the

[9] *See also* Brief of Amicus Curiae Cayuga and Seneca Counties, In Support of Petitioner, at 11-13.

trust relationship has not been terminated or abandoned. *Paugussett*, 39 F.3d at 56; *Seneca Nation of Indians v. New York*, 382 F.3d 245 (2d Cir. 2004). Determination of tribal status by the BIA at most addresses issue (1); it does not address issue (4) – that is, whether the Oneidas abandoned tribal status.

That is particularly the case with respect to Respondent, which was recognized as a tribe before the Department of Interior promulgated regulations in 1978 establishing standards and a procedure for acknowledging Indian tribes. 25 C.F.R. §§ 83.1-83.13. Prior to 1978, federal tribal determinations were on an *ad hoc* basis. *Paugussett*, 39 F.3d at 57. Thus, whether the determination of tribal status "for all federal purposes" is a political question (Resp. Br. at 43-45) is (i) irrelevant to the issue at hand; and (ii) not conclusive (or entitled to judicial deference) since the determination with respect to Respondent was *ad hoc* and not pursuant to any governing factual standard.

Moreover, making the factual determinations necessary to establish or rebut an Indian land claim is not a political question. Courts – and not the BIA – are required to make such determinations. *See Seneca Nation*, 382 F.3d at 258; *Paugussett*, 39 F.3d at 58. Indeed, this Court in *Oneida II* observed that issues involved in such decisions are not political questions. 470 U.S. at 249 (that Congress has plenary power in Indian affairs does not make litigation involving such matters nonjusticiable political questions).

Respondent disingenuously suggests that Sherrill does not claim that the Oneidas ever abandoned tribal status. (Resp. Br. at 45). That ignores the entire course of this litigation, throughout which Sherrill contended that there was a disputed issue of fact requiring discovery – including discovery of oral Indian lore – and trial concerning whether

the Oneidas abandoned tribal status in New York State for decades during the second half of the nineteenth century and the early decades of the twentieth century. Indeed, the abandonment argument was addressed extensively by Judge Van Graafeiland in his dissent below and in Sherrill's brief on the merits. *See Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 171 (2d Cir. 2003), *et seq*.; Pet. Br. at 41-46.[10]

As we previously demonstrated (Pet. Br. at 41-46), substantial record evidence precluded summary judgment on the issue of abandonment of tribal status by the New York Oneidas. Respondent cannot avoid the impact of that evidence on its assertion that aboriginal title survived.

V. UNDER THIS COURT'S DECISION IN *VENETIE* AND 18 U.S.C. § 1151, THE PROPERTIES ARE NOT INDIAN COUNTRY

Sherrill has previously shown that the Properties are not Indian country under 18 U.S.C. § 1151 because the land was neither set aside by the federal government for the use of the Indians as such, nor has it ever been federally superintended. (Pet. Br. at 17-31). *See Alaska v. Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 530 (1998); *United States v. Pelican*, 232 U.S. 442, 449 (1914); *Cass County*, 524 U.S. at 114-115.

Remarkably, Respondent's Brief is bereft of any analysis under section 1151, as are the briefs of the myriad *amici* supporting Respondent's position. In place of such analysis, Respondent takes the position that because the Properties once had been part of the Oneidas' reservation, by

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[10] *United States v. John*, 437 U.S. 634, 652 (1978), which Respondent argues is "most pertinent" and preclusive of Sherrill's assertion of abandonment (Resp. Br. at 46), is inapposite because it addressed a mere lapse in federal tribal recognition, and not a tribe's abandonment of tribal status.

definition, they are Indian country and exempt from taxation once restored to Indian possession. *See, e.g.*, Resp. Br. at 13. However, as this Court has held, the mere denomination of land as "trust land" or a "reservation" does not elevate it to Indian country status, *E.g., Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 511 (1991); and the mere repurchase of land which was previously a reservation does not return it to Indian country status. *Cass County*, 524 U.S. at 115.

A. Federal Superintendence

There is no dispute (i) that the Oneidas' New York reservation was superintended exclusively by New York State and/or local authorities since its creation in 1788, or (ii) that the federal government never objected to New York's jurisdiction over these lands, much less sought to assume control for itself. This fact, without more, mandates a finding that the Properties are not, and never were, Indian country.[11]

Far from actively controlling the New York Oneidas and their alleged reservation, the federal government deferred

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[11] Respondent's only effort to overcome the unassailable absence of federal superintendence is a footnote in which Respondent (i) summarily dismisses *Venetie*'s requirement of federal superintendence; and (ii) argues that there is "ample evidence of federal involvement with respect to the Oneida and their land." Resp. Br. at 17 n.2 (emphasis added). Respondent's position ignores the unequivocal teaching of *Venetie* and its predecessors that expressly require active federal control over the land in question – and not mere political dependence on the federal government or Indian Trade and Intercourse Act protection – to satisfy the Indian country requirement of federal superintendence. *Venetie*, 522 U.S. at 530 n.5, 533; *United States v. Sandoval*, 231 U.S. 28, 47 (1913)) (pattern of federal stewardship and treatment of the land in question as "dependent" for many years); *See also Blunk v. Arizona Dept. of Transp.*, 177 F.3d 879, 883 (9th Cir. 1999); *Buzzard v. Oklahoma Tax Comm'n*, 992 F.2d 1073, 1076 (10th Cir. 1993), *cert. denied*, 510 U.S. 994 (1993).

to the State's control over the Indians and their lands. *See* Federal Annual Report of the Board of Indian Commissioners at 337 (1917) (New York had exercised police jurisdiction over New York Indians for more than a century; "The Federal Government does not attempt to police the reservations," and "heartily approve[s] of the steps taken by State of New York to maintain law and order on the reservations"); Federal Annual Report of the Board of Indian Commissioners at 98-99 (1920) (State jurisdiction, involvement in health, welfare, highways, and education over Indian lands constituted "the habit and practice of a century"). *See also Mohegan Tribe v. Connecticut*, 638 F.2d 612, 623 (2d Cir. 1980) (stating that "the federal government repeatedly disclaimed any responsibility for managing the affairs of the eastern tribes.") (citations omitted).

Accordingly, because it is undisputed that the Properties were never federally superintended, they are not Indian country under 18 U.S.C. § 1151.

B. New York State, And Not The Federal Government, Set Aside The Oneida Reservation At Issue

The Properties are also not Indian country because the Oneida reservation at issue was set aside by New York State in 1788, and not by the federal government in the Treaty of Canandaigua. 7 Stat. 44 (merely "acknowledging" reservation set aside by state). The fact that the Oneidas' reservation was established "under treaties with the State, which never surrendered to the General Government any of its rights of sovereignty" (Federal Annual Report of the Commissioner of Indian Affairs at 224 (1903)), was repeatedly confirmed over the years by the United States in Annual Reports of the Commissioners of Indian Affairs, including those lodged by Respondent. *See, e.g.*, Federal Annual Report of the Commissioner of Indian Affairs at 685

(1871) (Oneida Indian reservation in New York exists "By arrangement with the State of New York"); Federal Annual Report of the Commissioner of Indian Affairs at 16 (1872) (Oneida reservation provided for by treaty stipulation between the Indians and the State of New York). *See also Goodell v. Jackson*, 20 Johns. 693, 729 (N.Y. Sup. Ct. 1823) (interpreting Treaty of Fort Schuyler, observing that "in September 1788, we have the remarkable fact of the Oneidas ceding the whole of their vast territory to the people of this state, and accepting a retrocession of a part, upon restricted terms . . . ."") (emphasis added); *Cherokee Nation v. Georgia*, 30 U.S. 1, 17 (1831) (noting pre-Constitution New York State treaties in which tribes ceded all lands to State receiving limited "grants in which they admit all dependence").

CONCLUSION

For all of the foregoing reasons and the reasons previously set forth, the judgment of the court of appeals should be reversed.

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