No. 12-1279

In The Supreme Court of the United States

ONONDAGA NATION,

Petitioner,

vs.

THE STATE OF NEW YORK, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

REPLY BRIEF FOR PETITIONER

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REPLY TO BRIEF IN OPPOSITION

The Petition presents the important question of whether the federal courts are now closed to Indian nations robbed of their land in the early years of this Nation in violation of federal statutes and treaties. The State of New York and its co-respondents oppose the Petition principally by claiming that this Court in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) implicitly ruled that all Indian land rights actions alleging a violation of the Trade and Intercourse Act are barred simply by the passage of time, no matter the relief sought and regardless of the efforts of the Indian plaintiff over the years to seek resolution of the claim. That argument is wrong, a misstatement of the law, and sufficiently important to warrant this Court's review.

1. The State's framing of the issue underscores the necessity of this Court's review. If accepted, the State's view of the law would result in a *sub silentio* overruling of *Oneida County v. Oneida Indian Nation,* 470 U.S. 226 (1985) (*Oneida II*). There, this Court upheld the viability of Indian claims under the Trade and Intercourse Act despite the passage of hundreds of years. That holding has never been overruled and this Court's review is necessary to ensure that the lower courts faithfully adhere to its precedents. Unlike *Cayuga* and *Oneida,* which this Court declined to review, the Onondaga's Petition presents an ideal opportunity to resolve a far-reaching question of federal law: despite *Oneida II*, are the federal courts closed to Indian nations seeking to enforce the federal treaty

and statutory protections for Indian land where the only relief sought is a declaratory judgment against only the State that engineered the taking of Indian lands, and corporations that despoiled those lands? Because of the importance of this question for Indian nations, states, landowners, Indian law specifically and federal law generally, the Petition should be granted.

2. The Petition presents an opportunity to resolve the continuing import of *Oneida II* following this Court's decision in *Sherrill*. The State argues that this Court in *Sherrill* decided an issue left open in *Oneida II*, namely whether equitable doctrines bar Indian land claims. The State is not correct. The question left open in *Oneida II* was whether equitable doctrines may affect the *remedy* available, not whether the entire *claim* is barred. 470 U.S. at 253 n. 27 ("equitable considerations" may limit relief in the remedial phase of the case). The Oneidas' claim was found to be viable despite the long passage of time. As this Court concluded:

> One would have thought that claims dating back for more than a century and a half would have been barred long ago. As our opinion indicates, however, neither petitioners nor we have found any applicable statute of limitations *or any other relevant legal basis* for holding that the Oneidas' claims are barred or otherwise have been satisfied.

470 U.S. at 253 (emphasis added). The decision in *Sherrill* specifically noted that it did not disturb the

ruling in *Oneida II* upholding the viability of the trespass damages claim. *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 214 (2005). The Court of Appeals' ruling, and the State's argument defending it, mistakenly read *Sherrill* to sanction the application of the equitable doctrines to bar Indian land claims. In fact, those equitable doctrines affect only the relief available in Indian land claims. Review is necessary to preserve the role of this Court as the final arbiter of its precedents.

3. The State's argument about the effect of a judgment in favor of the Onondagas misapprehends the nature of declaratory judgments. A declaratory judgment is "merely a declaration of legal status and rights; it neither mandates nor prohibits action." *Perez v. Ledesma,* 401 U.S. 82, 124 (1971). Although a declaratory judgment "may be persuasive, it is not ultimately coercive; non-compliance may be inappropriate, but it is not contempt." *Id.* at 125-126. Accordingly, the primary purpose of a declaratory judgment is to declare the rights of the parties without mandating enforcement of the judgment. *Textron Lycoming Reciprocating Engine Division, et al. v. United Automobile, Aerospace and Agricultural Implement Workers of America, International Union,* 523 U.S. 653, 660 (1998). A declaratory judgment can facilitate a fair resolution of the Onondagas' claims without disrupting any existing security of private landowners' title. A judgment that the State of New York violated federal law when it acquired the Onondaga Nation's land will clarify the rights of the parties. It may serve

as the basis for discussions toward a negotiated resolution of the claims. *See, e.g., Joint Tribal Council of the Passamaquoddy Tribe v. Morton,* 388 F. Supp. 649 (D. Me. 1975), *aff'd,* 528 F.2d 370 (1st Cir. 1975) (declaratory judgment that Trade and Intercourse Act applied to the Tribe served as basis for negotiated resolution of claims in the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721 *et seq*.). Review by this Court is necessary to determine whether the Court of Appeals' rejection of the non-disruptive remedy of declaratory judgment comports with fundamental principles of federal equity practice.

4. The State's arguments are based on mischaracterizations of the Onondagas' claims, misstatements of fact, and an incorrect statement of the law. The State seeks to evade the core issue presented by the Petition by trying to align the Onondagas' land rights action with the claims dismissed in *Cayuga* and *Oneida.* The Onondaga claim is vastly different. Unlike those Indian plaintiffs, the Onondagas do not assert any claims or seek any remedy based on a possessory interest. They do not seek ejectment, trespass damages, rental damages, or any other remedy that would require a determination of possession. By contrast, the Cayugas sought to eject "tens of thousands of landowners." *Cayuga Indian Nation v. Pataki,* 413 F.3d 266, 275 (2d Cir. 2005). The Oneidas specifically sought "possessory rights" to 250,000 acres of land, damages for "unlawful possession," and "disgorgement" of profits earned from the lands, among other relief. *Oneida Indian Nation of New York v. County*

of Oneida, 617 F.3d 114, 120 (2d Cir. 2010). The Onondagas did not sue any private non-corporate landowner, so the declaratory judgment they seek would not bind these absent parties and would not, as a result, disturb their land titles. The State conjures a catastrophic disruption of non-Indian land titles from a declaratory judgment in favor of the Onondagas, notwithstanding the narrow focus of the claims and the limited remedy. The State's vision of massive disorder is based on a misreading of the Onondagas' complaint, which sought to adjudicate only interests of governmental and corporate parties. It is axiomatic that absent parties would not be bound by the judgment, a principle the State acknowledges in its Rule 19 argument but ignores in this context.

5. *Sherrill* identified the "justifiable expectations" of the defendants as a "prime consideration" to be taken into account in fashioning a remedy for historic violations of Indian land rights. 544 U.S. at 215. On this point, too, the Court of Appeals' decision warrants review. The lower courts in this case denied the Onondagas the opportunity to prove that the expectations of the defendants were neither reasonable nor justified. From the time their lands were illegally taken, the Onondagas vigorously protested and sought redress at virtually every opportunity, putting the public and the State especially on notice of the title dispute. Nonetheless, in ruling on a motion to dismiss which presumes the truth of well-pleaded allegations, the Court of Appeals sanctioned judicial notice of

vigorously disputed facts in order to conclude that the defendants' expectations of settled title were justified. The issue of whether *Sherrill* equitable defenses may be adjudicated without the benefit of evidence is a question this Court should resolve. The State asserts, without citation to any facts in the record, that for two centuries "non-Indian ownership, occupancy and governance of these lands went unchallenged by the Onondagas themselves." Opp. at 1. The assertion is false. In the District Court, the Onondagas submitted more than 900 pages of declarations and exhibits showing their efforts to protest the loss of their lands and to obtain a remedy for the loss. Their efforts included calls on Congress to investigate the fraudulent state land transactions shortly after they occurred (C.A. App. at 204-209); congressional testimony protesting New York State's acquisitions in the 1940s (C.A. App. at 126-127); and meetings with high level governmental officials, including the Secretary of War in 1802. (C.A. App. at 214-215). In addition, the State ignores the fact that assertions of Indians' incapacity to sue and questions about the basis of federal jurisdiction kept the state and federal courts closed to Indian nations until 1974. (C.A. App. at 149-151). The State ignores the Onondagas' efforts to recover their stolen lands in the limited forums available, ignores the fact that courts were closed to these claims until late in the 20th Century, and urges this Court to deny review based simply on the passage of time. If the Court of Appeals' opinion stands, the United States will have returned to the day when the courts were closed to Indians seeking relief for violations of federal

law and treaties. This Court should have the final say about whether the *Sherrill* equitable defense can be applied to an Indian land claim, as opposed to only the remedy, where relevant facts are disputed and little factual development has been allowed.

6. The Petition raises important and recurring questions about the nature of Indian land rights that warrant review by this Court. The Court of Appeals rejected the Onondagas' argument that a declaration that they owned the subject land could be granted without implicating possessory interests or disrupting third-party private land titles. In urging this Court to decline review, the State likewise argues that decoupling title from possession is inconsistent with the "historic concept[ ]" of "Indian title" as a use and occupancy right, and that all Indian title is essentially possessory. Opp. at 24. The State asserts that the Onondagas' claim to the subject land as its property is a "far cry" from the cause of action this Court recognized in *Oneida II* and "not permitted under *Sherrill*." *Id.* The State misreads the law. Review is necessary to correct this misinterpretation and to ensure application of a uniform governing federal principle to the legal claims of Indian nations.

Taken to its logical outcome, the State's argument is that any Indian land claim is *ipso facto* unduly disruptive under *Sherrill*. The Court's own precedents demonstrate that this cannot be correct. In construing the Trade and Intercourse Act, this Court has distinguished between title and possession: the Act is intended "to prevent unfair, improvident or

improper disposition by Indians of land *owned or possessed* by them to other parties, except the United States." *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 119 (1960) (emphasis added). Contrary to the State's arguments, the Act fully protects Indian interests in land whether or not the Indian nation seeks to vindicate a possessory interest. In upholding the Oneidas' possessory claim in *Oneida II,* this Court did not suggest that the Act's protection is limited to that category of claims. This Court simply adjudicated the claim presented by the Oneidas, and did not address the distinct question of whether the Act also applies to title claims that do not include possessory interests. Consistent with this understanding of *Oneida II,* the Fifth Circuit has construed the Act to apply to "any title or claim to real property, including nonpossessory interests." *Tonkawa Tribe of Oklahoma v. Richards,* 75 F.3d 1039, 1045 (5th Cir. 1996). In any event, the State's argument reinforces the need for this Court to review the Second Circuit's decision to clarify the scope of the Act and of Indian interests in land under these circumstances.

7. International legal principles support this Court's review. Respondents aim to obscure this issue by arguing that relevant treaties fail to create independent causes of action and by claiming that failure to raise the issue below precludes its consideration here. Opp. at 25. There is no bar to this Court's consideration of Petitioners' argument that the rule created by the lower courts conflicts with international law.

Indeed, this Court is uniquely situated to review and decide cases in which lower court interpretations of its precedents clash with international legal principles the United States is bound to uphold. Whether or not the treaties in question are self-executing is irrelevant, as Petitioner does not ask for judicial review of any international treaty-based claim, but instead seeks review by this Court to ensure that neither its precedents nor those of the lower courts conflict with United States treaty obligations. It is beyond cavil that the United States must uphold the commitments it makes in congressionally-approved treaties, regardless of whether or not those treaties are self-executing.

8. Neither Rule 19 nor the Eleventh Amendment provides support for Respondents' position that this Court should decline review. The lower courts were presented with but did not decide these questions, which are mixed questions of law and fact requiring significant factual development. Should the Court consider either Rule 19 or the Eleventh Amendment relevant to the Petition, it should remand for lower court consideration. "The doctrine of judicial restraint teaches us that patience in the judicial resolution of conflicts may sometimes produce the most desirable result." *Lebron v. National R.R. Passenger Corp.,* 513 U.S. 374, 407 (1995) (Justice O'Connor dissenting).

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CONCLUSION

For the reasons stated, the Petition should be granted.

Respectfully submitted,

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