No. 10-206

IN THE
# Supreme Court of the United States

DAVID S. GOULD, SHERIFF, CAYUGA COUNTY, NEW YORK, ET AL.,
PETITIONERS,

*v.*

CAYUGA INDIAN NATION OF NEW YORK,
RESPONDENT.

On Petition for a Writ of Certiorari to the Court of Appeals of New York

## BRIEF IN OPPOSITION


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## QUESTIONS PRESENTED

Whether the decision of the Court of Appeals of New York that Respondent Cayuga Indian Nation of New York has a "qualified reservation" within the meaning of New York Tax Law § 470(16) rests upon a determination of state law and therefore not suitable for review by this Court.

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## STATEMENT OF THE CASE

This case rests upon a determination of state law that is inappropriate for review by this Court and that would not warrant review in any event. Petitioners challenge the ruling of the New York Court of Appeals that Respondent Cayuga Indian Nation of New York ("Cayuga Nation" or "Nation") has a "qualified reservation" within the meaning of New York Tax Law § 470(16). But although the Court of Appeals held that the New York Legislature chose to include within the definition of a "qualified reservation" in § 470(16) tribally owned property that has been recognized as a "reservation" by the federal government, the scope of "qualified reservation" in § 470(16) of the state tax law is still a state law issue. For this and other reasons discussed below, the Cayuga Nation respectfully submits that the petition for certiorari should be denied.[1]

The background of this dispute, and the history of New York's treatment of the taxation of cigarette sales made by Indian nations in the State, is set forth at length in the comprehensive opinion of the Court of Appeals. *See* Pet. App. 2a-19a. Respondent will not repeat that background and history here. In a nutshell, the Cayuga Nation (and other Indian nations in the State), in reliance upon express

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[1] In its first question presented, Petitioners seek review of a "4-3 decision" of the Court of Appeals. In fact, the dissenting judges addressed an issue that Petitioners do not even raise. *See* Pet. App. 54a-58a. The dissenting judges did not address whether the Cayuga Nation has a "qualified reservation" within the meaning of the Tax Law.

pronouncements of the New York Department of Revenue and Taxation ("Department"), has made cigarette sales to both tribal members and non-members without collecting New York state excise taxes. At the time of the events in question, the State had not disputed the lawfulness of such sales. However, Petitioners here – local officials in Cayuga and Seneca Counties – seized "unstamped" cigarettes (*i.e.*, cigarettes not bearing New York State tax stamps) from two Cayuga Nation stores. Disclaiming any argument based on federal law immunity, the Nation immediately sought a declaratory judgment that its possession and sale of such cigarettes was lawful as a matter of state tax law. The Counties contended that (1) New York State tax law required Indian nations to collect state taxes on cigarettes sold to non-tribal members, and (2) even if state tax law did *not* require tribes to collect taxes on sales made on a "qualified reservation," the Cayuga Nation has no such reservation. After extensive state court proceedings, the Court of Appeals of New York ultimately ruled that (1) New York State tax law (as it existed at the time in question) did *not* require Indian nations to collect state taxes on any cigarette sales made on a "qualified reservation" to direct consumers, Pet. App. 41a-53a; and (2) the Cayuga Nation has such a "qualified reservation" as defined by New York Tax Law § 470(16), Pet. App. 23a-40a.

## REASONS FOR DENYING THE WRIT

This case does not warrant review in this Court for at least four reasons: (1) the decision of the New

York Court of Appeals rests upon a definition of "qualified reservation" that is a matter of state law; (2) the New York Legislature has recently overhauled the tax law requirements governing cigarette sales on such reservations, effectively changing the underlying circumstances that led to the instant dispute; (3) even if this Court were to perceive a still-relevant federal question in this case, Petitioners simply are wrong in contending that the decision of the Court of Appeals rests upon constructs of Indian *sovereignty* or *sovereign* land; and (4) the decision of the Court of Appeals that the Cayuga Nation has a "qualified reservation" as a matter of state tax law because the Nation still has a *reservation* that is recognized by the federal government is plainly correct and consistent with *every* other court to address the issue.

## A. The Decision Of The Court Of Appeals Rests On State Law.

In its decision, the Court of Appeals ruled that, at the time of the events in question, New York state law contained no legislative or regulatory scheme that required Indian nations selling cigarettes on a "qualified reservation" to collect state excise taxes on sales made to Indian or non-Indian consumers. Pet. App. 41a-52a.[2] This holding applied, however, only

[2] The Court noted that, while the appeal was pending, "the Department of Taxation and Finance has announced a change in policy." Pet App. 13a n.6; *see also* Pet. App. 37a n.13. As discussed *infra*, the Legislature and the Department have overhauled both the legislative and regulatory scheme in New

to sales made on a "qualified reservation" as defined by New York Tax Law § 470(16), quoted in full at Pet. App. 24a. *See* Pet. App. 25a (noting that neither party disputed the applicability of § 470(16)); Pet. App. 23a-40a (interpreting and applying § 470(16)). As defined in § 470(16) of the Tax Law, a "qualified reservation" includes, under subsection (a), "Lands held by an Indian nation or tribe that is located within the reservation of that nation or tribe in the State." Pet. App. 24a. But "qualified reservation" also includes, under subsection (c) of § 470(16), "Lands held by the Shinnecock Tribe or the Poospatuck (Unkechauge) Nation within their respective reservations." Pet. App. 24a. Significantly, at the time § 470(16) was enacted, both the Shinnecock and the Poospatuck tribes were recognized by New York State, but *not* by the federal government. Pet. App. 26a-27a & n.10. Thus, § 470(16) sets forth a uniquely New York definition of "qualified reservation," reflecting a deliberate choice by the New York Legislature to "borrow" concepts of federal law in some respects but not in others. Pet. App. 26a.

In selling cigarettes without collecting state taxes, the Cayuga Nation relied on § 470(16)(a), quoted above, to maintain that its sales were made on a "qualified reservation" as defined by state law. In interpreting that provision, the Court of Appeals ruled that "when the Legislature used the term 'reservation' in Tax Law § 470(16)(a), it intended to

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York governing sales of cigarettes by Indian nations since the date of the Court of Appeals' decision.

refer to any reservation recognized by the United States government." Pet. App. 25a-26a. And it therefore followed in the case that "[w]hether the [Nation's two convenience store properties] sit on reservation land presents a critical threshold consideration." Pet. App. 23a.

Although state law incorporated concepts of federal law in defining "qualified reservation," the meaning and scope of § 470(16) remains a state law issue. Because state law extended certain privileges to sales made on a "qualified reservation" as defined by § 470(16), there was no need to litigate in the case anything other than the state law meaning of "qualified reservation." The Cayuga Nation did not contend that federal law rendered the Nation's sales immune from state taxation. It was enough that the New York Legislature had chosen to afford "qualified reservation" status to any "reservation" recognized by the federal government, just as the Legislature had chosen to afford "qualified reservation" status to land of the Shinnecock and Poospatuck tribes that were only recognized as a matter of New York state law.

As such, the two Cayuga convenience stores at issue qualified as a "qualified reservation" simply because they were "held by an Indian nation or tribe" and "located within the reservation of that nation or tribe in the state." New York Tax Law § 470(16)(a). As discussed *infra*, and as the Court of Appeals recognized, *every* court to consider the question has ruled that the Cayuga federal treaty "reservation" still exists today because it has never been

disestablished by Congress. Pet. App. 29a-30a. But the critical fact is that this definition of "qualified reservation" in § 470(16)(a) is what the Court of Appeals determined "the Legislature . . . intended." Pet. App. 25a. The meaning of § 470(16)(a) remains a state law issue, despite the Legislature's voluntary decision to "borrow," Pet. App. 26a, a federal construction of the word "reservation" and to include such reservation land (along with other land) in the state tax law definition of "qualified reservation."

### B. The State Law Consequences Giving Rise To The Instant Dispute Have Changed.

The instant case arose out of a longstanding dispute in New York regarding sales of cigarettes by Indian nations, recounted at length by the Court of Appeals. Pet. App. 2a-19a. Already at the time of the Court of Appeals decision, however, the Tax Department had "announced a change in policy." Pet. App. 13a n.6. Even more significant, on June 21, 2010, the New York Legislature changed provisions of the Tax Law governing sales of cigarettes by Indian nations, *see* 2010 N.Y. Laws 134, Part D, and on June 22, 2010, the Tax Department issued emergency regulations implementing the new statute, *see* 20 N.Y.C.R.R. § 74.6 (2010). The new statutory and legislative scheme is scheduled to take effect on September 1, 2010.

Although the new statutory and regulatory scheme has been challenged by several Indian nations, including the Cayuga Nation, the instant case arose as the result of an official policy of

"forbearance" of the Tax Department that the Department now has repealed. *See* Pet. App. 6a-11a, 13a n.6. The instant dispute therefore is of limited significance. To be sure, Petitioners still seek to prosecute Cayuga Nation leaders for the Nation's previous possession and sale of unstamped cigarettes, even though the Nation acted in reliance upon the Tax Department's explicit policy of forbearance that existed at the time of those sales. Pet. App. 6a-11a. But the instant case concerns a statutory and regulatory framework that since has been changed. It is of little moment to this Court whether county officials in New York may prosecute leaders of the Cayuga Nation for alleged violations of state tax law that the State itself had refused to pursue, and that the Court of Appeals of New York has ruled would be inconsistent with the court's construction of the then-applicable New York Tax Law. *Even if* the Court of Appeals interpreted the State's tax law incorrectly because it misconstrued federal law that the New York Legislature had chosen to "borrow," Pet. App. 26a, there hardly is a compelling need for this Court to correct that error so that local officials can prosecute leaders of the Cayuga Nation for making the same mistake as the State's highest court.

### C. Petitioners Blatantly Mischaracterize The Decision Of The Court Of Appeals.

The thrust of Petitioners' argument is that the Court of Appeals has issued a significant decision that undermines this Court's decision in *City of Sherrill v. Oneida Indian Nation of New York*, 544

U.S. 197 (2005), by affording "sovereign reservation" status to the Cayuga Nation's two parcels of reacquired reservation land. But Petitioners' contentions are belied by a simple reading of the Court of Appeals' decision. *See* Pet. App. 23a-40a. All the Court of Appeals ruled is that the parcels are located on *reservation* land, because that is all that state tax law required. The court was careful *not* to state that its conclusion rested upon any notions of sovereign status. Indeed, the court noted that a *separate* provision of the Tax Law, § 470(16)(b), afforded "qualified reservation" status to parcels of land that have attributes of sovereignty. Pet. App. 35a-36a. In an effort to make this case appear interesting to this Court, Petitioners simply mischaracterize what the case is about.

The decision of the Court of Appeals could not be clearer. As the court emphasized: "In this case, however, the Nation does not suggest that its reacquisition of the convenience store parcels revives its ability to exert full sovereign authority over the property. *Rather than seeking immunity from state tax laws, it is actually relying on state tax laws*; the Nation contends that, under the plain language of Tax Law § 470(16)(a), the property it reacquired constitutes 'qualified reservation' property." Pet. App. 33a (emphasis added). Consistent with that description of the Nation's claim, the court also noted that the "Cayuga Indian Nation acknowledges its obligation to pay real property taxes and comply with local zoning and land use laws on these parcels and

it is undisputed that the Nation has, to date, fulfilled those obligations." Pet. App. 35a n.11.

The Court of Appeals also gave careful and lengthy consideration to this Court's decision in *City of Sherrill*. Pet. App. 31a-37a. Most significant, the court observed that *City of Sherrill* itself suggests that land may retain "reservation" status even if an Indian nation cannot fully exercise sovereign power over it. Pet. App. 35a. And that is precisely the situation here: the Cayuga Nation did *not* assert any sovereign immunity from tax, but simply contended that the land in question remained "reservation" land. As noted below, *every* court to consider the question has agreed that a Cayuga "reservation" still exists because it was never disestablished by Congress. Thus, the New York Legislature's definition of "qualified reservation" in Tax Law § 470(16) – which separately includes "reservation" land in the State, § 470(16)(a); land with attributes of Indian sovereignty in the State, § 470(16)(b); and even certain Shinnecock and Poospatuck land in the State that has *no* status as Indian land under federal law, § 470(16)(c) – included the Cayuga Nation's two parcels as a matter of New York tax law. There is nothing in this case, or in the Court of Appeals' discussion of *City of Sherrill*, that warrants review by this Court.

### D. There Is No Reason For This Court To Review Whether The Cayuga Nation Continues To Have A "Reservation."

Lastly, Petitioners contend, in their second question presented, that the Court of Appeals erred

in concluding that the Cayuga Nation still has a "reservation" under this Court's well-settled test for reservation status, independent of what consequences or privileges may flow from "reservation" status. According to Petitioners, the Nation *never* had a reservation – and if it did, that reservation was disestablished by Congress. The point was barely pressed below. But in any event, as the Court of Appeals noted, "[i]t appears that every federal court that has examined whether the Cayuga reservation was disestablished or diminished by Congress has answered that question in the negative." Pet. App. 29a-30a (citing cases); *see also* Pet. App. 33a-34a. Petitioners' argument to the contrary in this Court relies upon a construction of old treaties and historical materials, *see* Pet. 18-28, that not a single court has ever endorsed. The United States filed an *amicus curiae* brief in the Court of Appeals in which it argued and demonstrated that the Cayuga Nation "retains a reservation in New York State that was acknowledged as a federal reservation in the 1794 Treaty of Canandaigua. Only Congress can disestablish the Cayuga reservation, and it has not done so." Brief of United States as *Amicus Curiae* in Support of Respondent at 1, *Cayuga Indian Nation of New York v. Gould*, 930 N.E.2d 233 (N.Y. 2010) (No. 74). There is no reason for this Court to grant review of that issue.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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