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

BRIEF OF AMICI CURIAE CAYUGA NATION OF NEW YORK, MOHAWK COUNCIL OF AKWESASNE, MOHAWK NATION, ONEIDA TRIBE OF INDIANS OF WISCONSIN, ONEIDA OF THE THAMES, ONONDAGA NATION, ST. REGIS MOHAWK TRIBE, SENECA NATION OF INDIANS, AND TONAWANDA BAND OF SENECA INDIANS, IN SUPPORT OF RESPONDENTS ONEIDA INDIAN NATION OF NEW YORK, ET AL.

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INTEREST OF AMICI[1]

Amici are federally recognized and/or traditional Indian nations or tribes that are indigenous to/or historically connected to New York State.[2] Amici Oneida Tribe of Indians of Wisconsin and the Oneida of the Thames are plaintiffs in the Oneida land claim along with the Oneida Nation of New York, respondent here. *See Oneida Indian Nation of New York v. County of Oneida,* 434 F. Supp. 527, 532 (N.D.N.Y.), *aff'd*, 270 U.S. 226, 230 (*Oneida II*) (1985). All amici's experiences with New York respecting tribal lands parallels that of the Oneida: persistent trading in their lands without the required approbation of the United States, giving rise to claims against New York similar to that asserted by the Oneida. *See Report of Special Committee Appointed by the Assembly of 1888 to Investigate the "Indian Problem" of the State,* State of New York, No. 51, Albany 1889 [Whipple Report].[3]

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[1] In accordance with this Court's Rule 37.6, amici state that no counsel for any party authored part or all of this brief and that no entity other than amici made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief and letters showing such are filed with this brief in accordance with Rule 37.3.

[2] *See* 68 Fed. Reg. 68180 (Dec. 5, 2003) (Cayuga Nation of New York) and 68182 (Oneida Tribe of Indians of Wisconsin, Onondaga Nation, St. Regis Mohawk Tribe, Seneca Nation of Indians, and Tonawanda Band of Seneca Indians.)

[3] *See Cayuga Indian Nation of New York. v. Pataki,* No. 02-6111(L) (2d Cir., argued March 31, 2004) (amicus Cayuga Nation); *Oneida Indian Nation of New York v. State of New York,* 74-CV-187 (N.D.N.Y.) (amici Oneida Tribe of Indians of Wisconsin and Oneida of the Thames); *St. Regis Mohawk Tribe v. State of New York,* 82-CV-783, 82-CV-1114 & 89-CV-829 (N.D.N.Y.) (amici Mohawk Council of Akwesasne, Mohawk Nation, and St. Regis Mohawk Tribe); *Seneca Nation v. State of New York.,* 85-CV-0411 (W.D.N.Y.) (amicus Seneca Nation of Indians); and *Seneca Nation v. State of New York,* 2004 WL 2008521 (2d Cir., Sept. 9,

(Continued on following page)

Amici include tribal signatories to early treaties with the United States, including the 1794 Treaty of Canandaigua, 7 Stat. 44, which confirmed reservations for them. The Treaty of Canandaigua remains the cornerstone of relations between the signatory tribes and the United States, with federal annuities under it having been paid continuously since 1794. Felix S. Cohen, *Handbook of Federal Indian Law* at 419 (1942 ed.): "These several treaties guaranteed to the Iroquois (Six Nations) the right of occupancy of their well-defined territories and had the effect of placing the tribes and their reservations beyond the operation and effect of general state laws." Amici also include tribal signatories to the Treaty of Buffalo Creek, Treaty of January 15, 1838, 7 Stat. 550.

Many amici continue to occupy reservations that were the subject of one or both these treaties, reservations that are acknowledged by all as Indian country today. In this proceeding, Petitioner City of Sherrill [Sherrill] disputes that the Treaty of Canandaigua established the reservations confirmed there as Indian country and asserts that any such reservations were abolished by the Treaty of Buffalo Creek. Pet. Br., at 17-31, 31-39. By reason of similar histories and treaty protected rights, amici have a direct and profound interest in this proceeding.

STATEMENT OF THE CASE

The Statement of the Case made by Sherrill fails to present the complete historical context for the issues presented here. A more complete historical context is set out below, which shows a consistent and longstanding

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2004) (amici Seneca Nation of Indians and Tonawanda Band of Seneca Indians.)

disregard by New York for federal treaty and statutory protections for Six Nations' territories.

Early federal-state conflict over relations with Six Nations

On July 13, 1775, Congress took control over relations with the Six Nations Confederacy and approved a speech to the Six Nations urging their neutrality in the impending war. *See* 2 Journals of the Continental Congress 93, 174-81 (Library of Cong. ed.). Ultimately, Congress failed to persuade the Six Nations to stand neutral. The Six Nations split internally, with significant factions of the Seneca, Mohawk, Onondaga and Cayuga Nations joining the British cause and the Oneida and Tuscarora Nations joining the American cause. *See generally* Barbara Graymont, *The Iroquois in the American Revolution,* chap. v (Syracuse U. Press, 1972). Major campaigns were fought in Oneida territory,[4] which was rendered virtually uninhabitable, and most Oneidas took refuge with the Americans at Schenectedy. *Id.* at 241-44.

The 1783 Treaty of Paris did not address relations with tribal participants in the Revolutionary War and Congress authorized federal treaty commissioners to do so. The treaty commissioners were instructed to confirm boundaries and terms of peace with the Six Nations and give particular assurances to the United States' allies:

> Sixthly, And whereas the Oneida and Tuscarora tribes have adhered to the cause of America and

[4] Oneida aboriginal territory was the frontier in New York, its eastern boundary being the same as the 1768 Line of Property division between Indian territory and white settlements. *Proceedings of the Commissioners of Indian Affairs, appointed by law for the Extinguishment of Indian Titles in the State of New York* (Albany 1861) [Hough Report], at 45.

> joined her arms in the course of the late war, and Congress have frequently assured them of peculiar marks of favour and friendship, the said commissioners are therefore instructed to reassure the said tribes of the friendship of the United States and that they may rely that the lands which they claim as their inheritance will be reserved for their sole use and benefit until they may think if for their own advantage to dispose of the same.

October 15, 1783, 25 Journals of the Continental Congress 680, 687.

In March 1783, the New York Legislature adopted its first plan to acquire Iroquois territory. State commissioners were instructed to remove the Oneida and Tuscarora to western New York and displace the Seneca, Cayuga, and Onondaga from the State altogether. *See* Henry Manley, *The Treaty of Fort Stanwix*, *1784,* at 28 (N.Y. 1932). The State abandoned its plan to expel the Iroquois when Congress was made aware of its plan by the federal Indian agent for the northern district. *Id.* at 31-32.

On October 3, 1784, the federal treaty commissioners appointed by Congress to negotiate for peace with the Six Nations opened the federal negotiation at Fort Stanwix. New York's Governor Clinton ordered two state commissioners to attend the negotiation, for the expressed purpose of obstructing the federal proceedings. Hough Report, at 63. Within a few days, the federal commissioners, who had been advised of the state commissioners' instructions, ordered the military officers present to refuse the admission of the state commissioners to the treaty proceedings. Manley, at 86.

The federal treaty commissioners concluded the Treaty of Fort Stanwix with the Six Nations on October 22, 1784, 7 Stat. 15. The treaty accomplished three objectives: first, it confirmed boundaries and established peace

on specified terms with the Seneca, Mohawk, Onondaga and Cayuga nations; second, it provided that "The Oneida and Tuscarora nations shall be secured in the possession of the lands on which they are settled";[5] and third, it exacted a cession of Seneca territory as retribution for the Seneca's part in the war. Graymont, at 282. The United States confirmed all the terms of the Treaty of Fort Stanwix in the 1789 Treaty of Fort Harmar, Treaty of January 9, 1789, 7 Stat. 33.

New York persisted in its efforts to obtain Iroquois land, meeting with spectacular success in 1788 and 1789. The New York Genesee Company of Adventurers had obtained long term leases of Six Nations territories and, on the pretext of protecting them from such arrangements, the State called for the Six Nations to treat at Fort Schuyler in March 1788. The State representatives met first with the Onondaga Nation and extracted a cession; next, the State representatives met with the Oneida Nation, recommended a cession on the same terms as that just concluded with the Onondaga, and obtained the second cession.[6] "The Deeds of Cession finally obtained were upon nearly the same Basis as the Leases, in regard to Annuities and Reservations." Hough Report, at 126. The State commissioners recommended the same terms to the

[5] At the time, the Tuscarora were guests of Oneida, residing at Oneida territory, but with no proprietary interest in Oneida territory, and with the Seneca near Fort Niagara. *Federal Power Comm'n v. Tuscarora Indian Nation*, 362 U.S. 99, 121 n.18 (1960). The Tuscarora had emigrated from North Carolina and acquired territory in New York between 1798 and 1804. *Id*. at 106 n.10.

[6] The Indian Claims Commission found that the 1788 Oneida cession to the State was obtained by deceit and fraud. *See Oneida Indian Nation of New York v. United States,* 37 Ind. Cl. Comm. 522, 530 (1978).

Cayuga Nation, which concluded a very similar cession of its lands to the State in 1789. Hough Report, at 251.

Constitutional period federal relations with the Six Nations

Shortly after adoption of the Constitution, Congress asserted its authority over the protection of Indian lands. With the passage of the Indian Trade and Intercourse Act on July 22, 1790, the Congress provided:

> That no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, *or to any state, whether having the right of pre-emption to such lands or not,* unless the same shall be made and duly executed at some public treaty, held under the authority of the United States.

1 Stat. 137, § 4 (emphasis supplied) (hereafter "Nonintercourse Act"). In a speech to the Seneca leader Cornplanter, President Washington made plain that the Nonintercourse Act applied to Six Nations' territories:

> Here, then, is the security for the remainder of your lands. No State, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States . . .
>
> If . . . you have any just cause of complaint against [a purchaser] and can make satisfactory proof thereof, the federal courts will be open to you for redress, as to all other persons.

4 American State Papers, Indian Affairs [ASPIA], Vol. 1, at 142 (1832); *see generally* Francis Prucha, *American Indian Policy in the Formative Years: The Indian Trade and Intercourse Acts, 1790-1834* (University of Nebraska Press 1970).

Following the passage of the 1790 Act, federal officials frequently noted the necessity of federal approval for transfers of tribal lands in New York. For example, writing in 1791, Secretary of War Henry Knox, in whom the administration of Indian affairs was vested at the time, wrote that "[t]he right of the State of New York, to the preemption of the Cayuga lands is unquestioned, and also that the right embraces all possible alienations of said lands by the Indians, *with the concurrence of the United States, according to the constitution and laws*." I ASPIA, at 169 (emphasis supplied.) And, in 1791, federal treaty commissioner Timothy Pickering repeated President Washington's earlier statement to all the Six Nations. Pickering Papers Vol. 60, at 79 (Massachusetts Historical Society).

These assurances were repeated directly to the Oneida at the negotiations on the 1794 Treaty of Canandaigua. Meeting first with the Oneida, federal treaty commissioner Pickering reiterated that the Nonintercourse Act declared that no sale of Indian lands would be valid, "unless made at a public treaty held under the authority of the United States." *Id.* at 224. Pickering then proceeded to negotiate necessary and final terms of peace with the Six Nations, because the Seneca had continued to object to the extent of land ceded to the United States at the Treaty of Fort Stanwix and threatened to join the western tribes in a general uprising against the United States. The necessary terms required a re-cession to the Seneca Nation of some portions of those lands ceded to the United States in 1784 and confirmation of all tribes' reservations. *See generally* Edward Phillips, *Timothy Pickering at His Best: Indian Commissioner, 1790-1794*, CII Essex Institute Historical Collections, No. 3, at 190-202 (1966).

The modified Seneca boundaries were set out in a separate article in the final treaty, with the other nations

or tribes' existing reservations acknowledged in another. The Seneca leaders also demanded a fresh confirmation of their lands from the United States. Pickering agreed, placing the confirmation at the close of each of the separate articles. Pickering Papers, Vol. 60, at 206A-209. In its final form, the Treaty of Canandaigua confirmed the Oneida, Onondaga and Cayuga reservations in article II, confirmed the modified Seneca boundary in article III, and gave the United States' assurance that all the signatory nations' or tribes' lands would remain theirs in the same terms at the end of both articles II and III. Finally, the treaty obligated the United States to pay an annual annuity to the Six Nations of $4,500.00, "[i]n consideration of the peace and friendship hereby established." 7 Stat. 44, art. VI.[7] The United States has continuously since 1794 made the annuity payment required by the Treaty of Canandaigua to the Six Nations members and successors. *Tuscarora Indian Nation*, 362 U.S at 118 n.17.

New York acquisition of Six Nations' reservation land

Even after adoption of the Constitution and passage of the Nonintercourse Act, New York continued its practice of acquiring Iroquois territory without regard to federal policy or law. In 1793 and again in 1795, the State legislature authorized its commissioners to treat for Oneida, Onondaga, and Cayuga lands. Act of March 11, 1793, 1793 N.Y. Laws, ch. 51; Act of April 9, 1795, 1795 N.Y. Laws, ch.

[7] As noted above, the Tuscarora reservation was formally established between 1798 and 1804, after the Treaty of Canandaigua. Similarly, the St. Regis Mohawk Reservation, originally excepted from a sale from the State to a private pre-emption holder, was also confirmed later by federal treaty in 1796. *See* Treaty with the Seven Nations of Canada, May 31, 1796, 7 Stat. 55; *Handbook of Federal Indian Law,* at 423 n.69.

70. Under authority of these acts, state commissioners purported to acquire portions of the Onondaga, Oneida, and Cayuga Reservations, all without approval by the United States Senate or proclamation by the President. *See* Whipple Report, at 195, 199, 224 & 244.

From these early transactions until the mid-nineteenth century, the State entered into other transactions with nations and tribes in its borders to acquire tribal lands. *See generally* Whipple Report, Index. The majority of these transactions involved Oneida territory, but others involved Cayuga, Mohawk, Onondaga, and Seneca reservations.[8] Most of these transactions were not ratified and proclaimed as federal treaties, although a few were when particular State officials decided to comply with the Nonintercourse Act. *Id.* at 22, 249.

New York had actual knowledge of the applicability and requirements of federal law at the time it engaged in these transactions. In 1795, then Secretary of War Pickering (who had just concluded the Treaty of Canandaigua for the United States) was advised by the federal Indian agent for the northern department that New York had authorized its commissioners to meet with the

[8] There were relatively few State treaties with Seneca, even though the Treaty of Canandaigua confirmed a large territory for the Nation. This is because New York State ceded its right of pre-emption to most Seneca territory to Massachusetts in the 1786 Hartford Compact, and Massachusetts in turn sold it to private investors. As a result, the 1797 Treaty of Big Tree, in which the Seneca lost possession of the majority of their territory reserving certain reservations, was a transaction among these private investors, the Seneca Nation, and the United States. Agreement with the Seneca, September 15, 1797, 7 Stat. 601. However, New York did acquire two, small portions of Seneca territory to which it had retained the right of pre-emption and authorized the sale of other portions to private individuals who had purchased the right of pre-emption from Massachusetts. *See* Whipple Report, at 17-25.

Oneida, Onondaga, and Cayuga for the purpose of acquiring tribal land. Pickering sought an opinion from the United States Attorney General William Bradford as to whether the Nonintercourse Act applied to such state transactions. Bradford responded that it did:

> The language of this act [of March 1, 1793] is too express to admit of any doubt . . . It is true, that by treaties made by the State of New York with the Oneidas, Onondagas and Cayugas, previous to the present Constitution of the United States, those nations ceded all their lands to the people of New York, but reserved to themselves and their posterity forever (for their own use & cultivation, but not to be sold, leased or in any other manner disposed of to others,) certain tracts of their said lands, with the free right of hunting & fishing &c. So far therefore as respects the lands thus reserved the treaties do not operate further than to secure to the State of New York the right of preemption, but subject to this right they are still the lands of those nations, and their claims to them, it is conceived cannot be extinguished but by a treaty holden under the authority of the United States, and in the manner prescribed by the laws of Congress.

Resp. App. 1a-4a; *accord* President Jefferson's response to Handsome Lake, 1802, *Avalon Project,* available at www.yale.edu/lawweb/avalon/jeffind2.htm ("when you desire to sell, even to a State, [that] an agent from the United States should attend the sale, see that your consent is freely given, a satisfactory price paid, and report to us what has been done, for our approbation.") Pickering took the precaution of sending the Attorney General's opinion to Governor Clinton, the same governor who had attempted to thwart the 1784 Treaty of Fort Stanwix. *See* page 4, *supra*; Pickering Papers, vol. 60, at 209. The State

concluded this particular and the subsequent transactions nonetheless.

Attempted removal of the Six Nations from New York

By the early nineteenth century, the holdings of the Six Nations had been reduced by New York from millions to less than two hundred thousand acres. Many of those Indians who were displaced as a result relocated to other reservations in the State of New York, while others looked to Indian territory outside the State. In 1815, Six Nation chiefs inquired in a formal memorial of the President whether he would agree to their acquisition of land in the Ohio territory among Indian friends and whether, in that event, "existing treaties [would] still remain in force, and annuities paid as heretofore." *Emigrant Indians v. United States,* 5 Ind. Cl. Comm. 560, 562-63 (1957). In 1816, Secretary of War Crawford responded that "removal shall in no manner change your friendly relations and existing treaties with the Government," including annuities thereunder. *Id.*; *see also* Letter of Secretary of War Calhoun to Jasper Parrish, Sub-Agent, Six Nations, May 14, 1818, W. Hemphill, ed., *The Papers of John C. Calhoun*, *1817-1818*, Vol. III (1967) (Six Nations assured that land acquired in the West not intended by the United States to be in exchange for tribal lands in New York.)

Having received the requested assurances, certain of the Six Nations, denominated New York Indians in these transactions, negotiated with the Menominee and Winnebago Nations to purchase land in Wisconsin, eventually acquiring 500,000 acres. *See* Treaty with the Menominee, February 8, 1831, 7 Stat. 342. After the 1831 treaty, the United States expressed concern that Wisconsin was not well suited as a new home for the New York Indians. Department of War officials repeatedly warned that

non-Indian settlers would increase in the vicinity of Green Bay in the coming years and urged the New York Indians to relocate west of the Mississippi. *See* Report of the Secretary of War, S. Rep. No. 220, 24th Cong., 1st Sess. (1836).

To exchange the territory acquired in Wisconsin for territory in Kansas, the United States concluded the 1838 Buffalo Creek Treaty with the New York Indians. 7 Stat. 550. In its preamble, the treaty summarized the memorial sent by the Six Nations to the President in 1815 and the President's response, including the United States' commitment that existing treaties would remain in full force, as the premise for the 1838 treaty. The purpose of the treaty was to exchange land acquired by New York Indians in Wisconsin for land in the Kansas territory. Thus, article 1 ceded the Wisconsin land, except for a tract at Green Bay, and article 2 described the new tract set aside for the New York Indians. Articles 10 and 14 approved certain sales of Seneca and Tuscarora lands in New York to private holders of the right of pre-emption. No other sales of New York reservations were approved in the treaty.

The Buffalo Creek Treaty did not compel the removal of the New York Indians to the Kansas territory and the New York Indians did not, in fact, remove. *New York Indians v. United States,* 170 U.S. 1, *modified on other grounds*, 170 U.S. 614 (1898). The Seneca reservations ceded in article 10 of the treaty were restored by later federal treaties with the Seneca Nation and the Tonawanda Band of Seneca. *See* Treaty with the Seneca, May 20, 1842, 7 Stat. 586; Treaty with the Seneca, Tonawanda Band, November 5, 1857, 11 Stat. 735. The Tuscarora sale approved by the treaty was cancelled later, leaving the Tuscarora continuously in possession. *Handbook of Federal Indian Law,* at 423 n.79.

SUMMARY OF ARGUMENT

Before adoption of the Constitution, New York aggressively asserted its so-called legislative right and extinguished title to literally millions of acres of Iroquois territory in 1788 and 1789. *See Worcester v. Georgia,* 31 U.S. 515, 559 (1832) (federal authority at the time shackled by ambiguous proviso that legislative power of any state within its own limits shall not be infringed or violated); *United States v. Forty Three Gallons of Whiskey,* 93 U.S. 188, 194 (1876). The Founding Fathers stripped the legislative rights proviso from Congress' authority over Indian affairs in the Constitution, believing the proviso to be "absolutely incomprehensible." The Federalist No. 42, at 284 (Madison) (J. Cooke, ed. 1961). Thus, the whole power of regulating affairs with tribes, including the exclusive power to extinguish tribal title, was vested in the Congress. This exclusive federal power extends to tribal lands in New York, even though New York rather than the United States held the fee title, or right of pre-emption, to those lands. *Oneida Indian Nation v. County of Oneida (Oneida I),* 414 U.S. 661, 667, 670 (1974).[9]

Nonetheless, "New York State continued to take the same position concerning its superiority over Indian affairs after the Consitution (sic) was adopted, and after the Trade and Intercourse Act was passed." *Oneida Indian Nation of New York v. United States,* 43 Ind. Cl. Comm. 373, 377-78 (1978). The State persisted in dispossessing tribes of their lands without federal approbation, including

[9] Amici Madison and Oneida Counties argue here that the Nonintercourse Act did not apply to the individual states. *See* Amici Madison & Oneida Counties Br., at 13. New York made this identical argument as amicus before the Supreme Court in *Oneida I* and the Supreme Court squarely rejected it. Amicus Curiae State of New York, at 10-22; *Oneida I,* 414 U.S. at 670.

an 1805 transaction with the Oneida Nation that purported to cede the land that Sherrill asserts it can tax.

Now, Sherrill argues that the Oneida Reservation is a state, not a federal, reservation, and for this and other reasons is not subject to the protection of federal law. These arguments come far too late in the day of Iroquois/New York relations to be credible. The literal language of the Treaty of Canandaigua and the admitted federal reservation status of the similarly created Onondaga Reservation disprove the claimed state law status of the Oneida Reservation. Further, this Court's *Oneida II* decision forecloses Sherrill's construction of the Nonintercourse Act as inapplicable to the Oneida Reservation. Holding that federal common law principles codified in the Act precluded the alienation of Oneida land without the approbation of the United States, the Court effectively determined that the Act applied to New York reservations. *Oneida II,* 270 U.S. at 240 (1985). Federal officials, including President Washington, so stated at the time. Thus, Sherrill's claimed authority to tax the subject land runs squarely into the federal reservation status and restraints against alienation of the subject land.

The status of the federal Indian reservations in New York was not altered by the 1838 Buffalo Creek Treaty. The Buffalo Creek Treaty did not compel removal and did not abolish the tribes' reservations in New York. Instead, the treaty contemplated that, were the New York Indians to remove, separate transactions respecting their lands in New York would take place, which transactions would comply with the Nonintercourse Act. These events did not occur and the New York nations and tribes remain in New York today. *See New York Indian v. United States,* 170 U.S. 1 (1898).

ARGUMENT

I. The Six Nations and successor tribes occupy Indian country in New York State that is subject to federal treaty and statutory restraints against extinguishment.

A. The Treaty of Canandaigua confirmed federal Indian reservations for the tribal signatories thereto.

By its express terms, the Treaty of Canandaigua "acknowledge[d] 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;" 7 Stat. 44, art II. A plainer expression of federal intent to recognize an Indian reservation is difficult to imagine. *Compare Northwestern Bands of Shoshone Indians v. United States,* 324 U.S. 335, 350 (1945) (treaty provision acknowledging territory to be that of signatory tribe recognizes reservation); *United States v. Shoshone Tribe,* 304 U.S. 111, 113 (1938) (treaty providing territory "shall be and the same is set apart for the absolute and undisturbed occupation . . . ")

As to the Oneida Nation in particular, the federal purpose in securing the reservation was pointed and powerful. The Oneida had fought as an American ally in the Revolutionary War and had suffered grievously as a result. In the trilogy of treaties concluding with the Treaty of Canandaigua, Congress made clear that it secured the Oneida Nation in its territory out of gratitude for Oneida loyalty during the Revolution. This was appropriate in light of the displacement of the Oneida from their territory during the war and the obvious and continuing designs of New York State upon Oneida territory. *See* page 3, *supra*. Notwithstanding Sherrill's contrary conclusion, Congress' "peculiar marks of favour and friendship" for its Oneida

ally constitutes sufficient federal purpose for the set aside in the Treaty of Canandaigua. *See* Pet. Br., at 23-24.

Were there any doubt, the similar historical origin of the Onondaga Reservation, an admitted federal Indian reservation, with that of the Oneida Reservation concludes the matter. In March 1788, New York invited the Six Nations to meet with state commissioners to consider leases of Six Nations territory obtained by private individuals. *See* Hough Report, at 118-128. The meeting took place in August 1788 at Fort Schuyler. Because Onondaga arrived first, the State negotiated first with the Onondaga Nation, concluding a treaty on September 12. Whipple Report, at 190. Article I of the Onondaga treaty purported to cede all Onondaga lands to New York State and article II described an area reserved for exclusive Onondaga use and occupation out of the so-called ceded lands. *Id.*

The State commissioners then turned their attention to Oneida. The State commissioners described the Onondaga treaty to the Oneida and recommended that the Oneida enter into a similar arrangement. Hough Report, at 212-13. The Oneida did so on September 28, 1788. Whipple Report, at 237. As had the Onondaga treaty, the Oneida treaty purported to cede all Oneida land to the State in article I and article II described an area reserved for exclusive Oneida use and occupation out of the so-called ceded land. *Id.*[10]

[10] Sherrill relies on these articles as having established a state reservation that is not subject to federal supervision. Pet. Br., at 20-22. This construction is not credible on its face, inasmuch as it runs counter to the basic understanding of aboriginal title. However it might be labelled, the Oneida retained the exclusive right of possession to the reservation in the 1788 state treaty, a right sufficient to invoke the protection of federal common law. *Oneida I,* 414 U.S. at 667-68, (right of occupancy recognized in Indians, a right sometimes called Indian title, which right could only be terminated by the United States. It is the

(Continued on following page)

Despite its first appearance in a 1788 state treaty, the Onondaga Reservation has since appeared as a federal Indian reservation on authoritative maps. *See, e.g.,* United States Department of the Interior, Bureau of Land Management, Cadastral Survey, American Indian Reservations and BIA Regional, Agency and Field Offices.[11] It has since been treated as a federal Indian reservation by the United States. *See* 1935 Memorandum for Assistant Attorney General Blair, Re: Onondaga Reservation ("The Reservations within the State of New York are in the same status as other Indian Reservations in the United States.") And it has since been treated as a federal Indian reservation by the courts of New York. *See Pierce v. State Tax Commission,* 286 N.Y.S.2d 162 (N.Y., App. Div. 1968) (application of state sales tax on Onondaga Reservation pre-empted by federal authority); *Andrews v. New York,* 79 N.Y.S.2d 479 (N.Y. Ct. Cl. 1948) (state court jurisdiction over land disputes on Onondaga Reservation pre-empted by federal law); and *Lyons v. Lyons,* 149 Misc. 723 (Sup. Ct. Onondaga Co. 1933) (state probate law on Onondaga Reservation pre-empted by federal law.)[12] These same rules of

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possessory interest that federal law protects, even where that right of occupancy is not based on action by the United States. *Oneida II,* 470 U.S. at 236.

[11] This map is available at the agency's official web-site: http://www.blm.gov/cadastral/biamaps/biaoffices.htm. This map also shows the St. Regis Mohawk Reservation as a federal Indian reservation, notwithstanding the fact that it was originally reserved in a sale by New York to a private individual and later confirmed by federal treaty, similar to the Onondaga and Oneida reservations. *See* n.7, *supra.*

[12] In *People ex rel. Cusick v. Daly,* 212 N.Y. 183 (1914), the New York Court of Appeals explicitly rejected the state reservation distinction with regard to the Tuscarora Reservation, created largely by purchase by the Indians:

> "The fact remains, however, that Congress has always asserted and exercised the right to legislate in all Indian affairs, and its power to do so has been upheld by the Supreme Court in a case involving the validity of the very

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federal pre-emptive authority also apply to the federal treaty confirmed Oneida Reservation, notwithstanding its historical origin in a 1788 state treaty.

B. Federal common law and statutory restraints against alienation apply to the Oneida and other treaty confirmed reservations in New York.

This Court resolved the question of the applicability of federal common law restraint against alienation to the Oneida Reservation in *Oneida II*. In that action, the Oneida plaintiffs challenged the legality of the 1795 transaction between New York and the Oneida based on federal common law and the Nonintercourse Act. The plaintiffs sought trespass damages for the two years preceding the filing of the complaint, 1968 to 1970. *Id.* at 229. Initially, the action was dismissed for lack of federal question, a holding that was ultimately reversed by this Court unanimously. *Oneida I, supra.* On remand and after further proceedings, the district court entered judgment for the Oneida plaintiffs and awarded trespass damages in the amount of $16,694. *Oneida II*, 470 U.S., at 230.

In its second consideration of the case, this Court in *Oneida II* acknowledged that the Oneida Reservation had been reserved in a 1788 treaty with New York State. *Id*. at 231. Nonetheless, the Court held that the reservation was protected by federal common law against state

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statute now under consideration. (*U.S. v. Kagama, supra*.) *It is said that there is a difference between the Indians whose reservations are the direct gift of the Federal government and those whose reservations have been derived from the state or from other sources. We find no such distinction in the statute, and we can think of none that logically differentiates one from the other.*"

(emphasis supplied.) *Id.* at 371.

extinguishment of Oneida possessory rights without federal consent, principles codified in the Nonintercourse Act. *Id.* at 236, 240. The Court further held that the defenses asserted against the Oneida claim lacked merit and affirmed the judgment in favor of the Oneida under federal common law. *Id.* at 240, 253.[13]

By affirming a judgment based on federal common law principles codified in the Nonintercourse Act, this Court clearly implied that the statute applied to the Oneida and other reservations in New York State. This statutory policy was carried forward in all subsequent re-enactments without major change, including the 1802 version of the Act that was in effect when New York purported to extinguish Oneida title to the subject land here. *See Oneida I,* 414 U.S. at 668 n.4.

The criminal provisions of the 1802 Act encompassed lands allotted to, belonging to, *or secured by treaty with the United States* – plainly including reservations such as those secured by articles II and III of the Treaty of Canandaigua. *See* Act of March 30, 1802, 2 Stat. 390, §§ 2, 3, 4 & 5. The all-important prohibition against purchase of tribal lands included a criminal provision for violation of the prohibition with the following proviso:

> Provided, nevertheless, that it shall be lawful for the agent or agents of any state, who may be

[13] This Court also explicitly rejected the notion that tribal land transfers could be ratified absent a plain and unambiguous expression of Congress' intent to extinguish tribal title. *Oneida II*, 470 U.S. at 247-48. The suggestion by amici, then, that there has been implicit approval of state treaties acquiring Oneida land is wrong as a matter of law. *See* Brief of Amici Town of Lenox *et al.*, at 8 n.10. And as noted above, this Court expressly affirmed the judgment holding the 1795 state treaty void, the counties liable for trespass, and awarding monetary damages for the counties' trespass. *Oneida II,* 470 U.S. at 253. Thus, the argument of amici that the *Oneida II* decision did not resolve issues of present day rights and remedies is also wrong. *See* Brief of Amici Town of Lenox *et al.*, at 11.

> present at any treaty held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United States, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made, for their claims to lands within such state, which shall be extinguished by the treaty.

Id. § 12. This proviso effectively lays out how states that hold claims to tribal lands (the right of pre-emption) can proceed to acquire such lands, i.e., through a treaty held under authority of the United States, thereby indicating tribal lands cannot be acquired by states otherwise.[14]

Neither do any terms of the Treaty of Canandaigua constitute pre-approval of tribal land by the State for purposes of the Nonintercourse Act. *See* Pet. Br., at 27. Articles II and III of the treaty provide that the reservations secured for the nations or tribes "shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." This merely refers to the entities who have the right to make the purchase-private interests in the case of Seneca land and the State in the case of other reservations. It does not indicate that the confirmed reservations have been exempted from the statutory restraint against alienation. To the contrary, federal treaty commissioner Pickering advised the Oneida at the Canandaigua negotiation that a sale of their land required a public treaty under the

[14] Amici Madison and Oneida Counties argue that post-1790 versions of the Nonintercourse Act did not apply within the jurisdiction of individual states because of the so-called surrounded by settlements proviso. Brief of Amici Madison and Oneida Counties, at 12-13. This Court rejected this limited construction of the Act in *Oneida I,* holding that the federal principles embodied in the Act applied to the original thirteen states. 414 U.S. at 670.

authority of the United States – in other words, compliance with the Nonintercourse Act.

It is undisputed here that New York did not comply with federal common law or the Nonintercourse Act in 1805 when it purported to extinguish Oneida title to the subject lands, a portion of the federally confirmed Oneida Reservation. As a result, Oneida title to the subject lands has not been extinguished and those lands are part of the federally confirmed Oneida Reservation, or Indian country.[15]

II. The 1838 Buffalo Creek Treaty was not a mandatory removal treaty and did not result in removal of the New York Indians.

The hallmark of mandatory removal treaties under the 1830 Indian Removal Act, 4 Stat. 411 (May 28, 1830), was the extinguishment of Indian title in the treaty by the United States. While removal served as the backdrop to the Buffalo Creek Treaty, its structure was different from that of mandatory removal treaties. Extinguishment of Indian title under Buffalo Creek would occur, if at all, in separate voluntary agreements between the Indians and New York or individual purchasers of the right of preemption, subject to the requirements of the Nonintercourse Act. The treaty, however, never actually effected removal of the New York Indians.

[15] *See* 18 U.S.C. § 1151(a), which by its express terms includes reservations under the jurisdiction of the United States as Indian country. This Court has adopted this statutory definition for all purposes, including the availability of the per se rule against state taxation of Indian property within Indian country. *Oklahoma Tax Commission v. Chickasaw Nation,* 515 U.S. 450, 458 (1995).

A. Mandatory removal was generally accomplished by extinguishment of title by the United States.

The roots of the removal policy are found in the 1802 Compact between Georgia and the United States, by which Georgia ceded its claims to western lands in exchange for the United States' agreement to "extinguish, for the Use of Georgia, . . . peaceably . . . and on reasonable terms, the indian Title" to lands in Georgia. Articles of Agreement and Cession, art. 1 (April 24, 1802), *reprinted in Territorial Papers,* V, at 142-144. Almost without exception, the removal treaties that followed, both in the southern and "northwest" states, provided for the extinguishment of Indian title by the United States in exchange for new lands in the west. The Cherokees, for example, "cede[d] to the United States" certain of their "lower town" lands in exchange for lands on the Arkansas and White Rivers. Treaty with the Cherokee, July 8, 1817, art. 1, 7 Stat. 156. The Delawares agreed to "cede to the United States all their claim to land in the state of Indiana." Treaty with the Delawares, October 3, 1818, art. 1, 7 Stat. 188.[16]

Many of the early treaties lacked a date certain for removal, and the slow pace of actual removal frustrated the southern states, particularly Georgia. In response, Congress, with strong encouragement from President Jackson, sought to legislatively enforce the removal policy. *See* Message of President Jackson, Dec. 8, 1929, *reprinted in* Richardson, *Messages and Papers of the President,* II, 456-59; Prucha, *American Indian Policy,* at 237-44. The

[16] *See also, e.g.,* Treaty with the Kickapoo, July 30, 1819, art. 1, 7 Stat. 200 (the Tribe agreed to "cede and relinquish to the United States for ever, all their right, interest, and title of, in, and to, the following tracts of land . . . "); Treaty with the Creeks, January 24, 1826, art. 2, 7 Stat. 286 ("The Creek Nation of Indians cede to the United States all the land belonging to the said Nation in the State of Georgia . . . ").

Jacksonian view was that Indian tribes were no more than tenants at will who could be removed from their lands at any time deemed appropriate by the states. *See, e.g.,* H.Rep. No. 227, 21st Cong., 1st Sess. (1830). The congressional debate on the Removal Act focused on the issue of the nature of the Indians' property right, with senators and congressmen from the south arguing in favor of the Jacksonian view and in support of the removal policy, and those from the northeast arguing passionately in support of Indian title and against removal. *Compare* Statement of Sen. Forsyth (Ga.), 6 Cong. Deb. 325-39 (1830) *with* Statement of Mr. Huntington (Conn.), *id.* at 4-18 (Omitted Speeches). *See also* Prucha, *American Indian Policy,* at 239-40. Within two years, the Supreme Court had repudiated the view that Indian tribes held no more than a tenancy at will subject to defeasance by the states. *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 561 (1832); *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831). Implementation of the removal policy, therefore, continued to be carried out through extinguishment of Indian title by treaty.

Virtually all of the approximately thirty Removal Act treaties included a clear extinguishment of title to the lands from which the Indians were being removed, except for lands specifically reserved therein. For example, soon after passage of the Removal Act, the Choctaw Nation "consent[ed] and . . . cede[d] to the United States, the entire country they own[ed] and possess[ed], east of the Mississippi River. . . . " Treaty with the Choctaw, September 27, 1830, art. III, 7 Stat. 333. Similarly, the Winnebago Nation "cede[d] to the United States, forever, all the lands, to which said nation have title or claim . . . " Treaty with the Winnebago, September 15, 1832, art. I, 7 Stat. 370. In 1835, the Cherokees "cede[d] relinquish[ed] and convey[ed] to the United States all the lands owned claimed or possessed by them east of the Mississippi River . . . "

Treaty with the Cherokee, December 29, 1835, art. 1, 7 Stat. 478.[17] No similar cessions of land in New York were obtained in the Buffalo Creek Treaty.

B. Unlike mandatory removal treaties, the Buffalo Creek Treaty did not compel removal through extinguishment of title by the United States and did not abolish the reservations in New York.

1. The treaty was intended and understood as setting aside lands in Kansas for voluntary removal.

The Buffalo Creek Treaty was not considered a mandatory removal treaty by either the New York Indians or the United States. As stated by the Oneida in a memorial to President Monroe on November 11, 1818: "your petitioners assented to the said memorial, not intending or understanding that they had in any way committed themselves as to the time they might elect to remove to the west – for your practitioners considered the

[17] *See also, e.g.,* Treaty with the Creeks, March 24, 1832, art. 1, 7 Stat. 366 ("The Creek tribe of Indians cede to the United States all their land, East of the Mississippi River."); Treaty with the Chickasaw, October 20, 1832, art. I, 7 Stat. 381 ("the Chickasaw nation do hereby cede, to the United States, all the land which they own on the east side of the Mississippi River, including all the country where they at present live and occupy."); Treaty with the Chippewa, September 26, 1833, art. 1st, 7 Stat. 431 ("the United Nation of Chippewa, Ottawa, and Potawatomie Indians, cede to the United States all their land, along the western shore of Lake Michigan, and between this Lake and the land ceded to the United States by the Winnebago nation . . . supposed to contain about five millions of acres."); Treaty with the Potawatomi, February 11, 1837, art. 1, 7 Stat. 532 ("hereby cede to the United States all their interest in said lands, and agree to remove to a country that may be provided for them by President of the United States, southwest of the Missouri River . . . ").

western lands more as a retreat for their children than as a present residence for themselves." Memorial of Oneida Indians to President of the United States, National Archives RG279, *Records of the Indian Claims Commission*, Docket No. 301, Box 2674, Claimant's Exh. 2083. In May of that same year, Secretary Calhoun wrote to Jasper Parrish, Sub-Agent of the United States that "certain persons from interested motives have induced the Indians of the Six Nations to believe, that should they emigrate and settle on lands belonging to some of the Indians to the West, the lands which they would acquire, would be in lieu, or exchange of that which they now hold in New York. This is not intended by the President. . . . " Letter of Secretary of War Calhoun to Jasper Parrish, Sub-Agent, Six Nations, May 14, 1818, W. Hemphill, ed., *The Papers of John C. Calhoun*, *1817-1818*, Vol. III (1967); *see also Oneida Indian Nation of New York v. United States,* 43 Ind. Cl. Comm. at 447.[18]

The voluntary nature of removal under the Buffalo Creek Treaty is directly reflected in the instructions to R.H. Gillet, the federal commissioner who negotiated the treaty. The instructions provide that "[a]s fast as any considerable number are prepared to go, they shall be removed & subsisted, & a district of the reservation west, assigned to them, & a just proportion of their lands in New York, yielded to the persons entitled thereto." Brief of Instructions for Meeting with New York Indians, National Archives Microfilm Collection, M234, reel 583, frames 540-41. Thus removal was to occur only when the Indians

[18] Calhoun consistently made it clear that while he believed removal to be advantageous, it would be accomplished only with the consent of the Indians. *Id.*

"[were] prepared to go," and only when they yielded their lands "to the persons entitled thereto."[19]

The treaty as presented to the Senate was amended, necessitating the further consent of the New York Indians. *New York Indians,* 170 U.S. at 5 n.1, Finding of Fact 10. In seeking the consent of the Oneida, Commissioner Gillet again confirmed the voluntary character of the treaty:

> the treaty does not and is not intended to compel the Oneidas to remove from their reservation in the State of New York to the west of the State of Missouri or elsewhere unless they shall hereafter voluntarily sell their lands where they reside & agree to do so. They can if they choose to do so remain where they are forever. The treaty gives them lands if they go to them & settle there but they need not go unless they wish to. When they wish to remove they can sell their lands to the Governor of the State of New York & then emigrate. But they will not be compelled to sell or remove.

Statement of Ransom H. Gillet at Oneida Castle, August 9, 1838, JA 146.

Consistent with the voluntary terms of the treaty, the Government never took steps to compel removal of the New York Indians to Kansas. *See State of New York ex rel. Cutler v. Dibble*, 62 U.S. 266, 370 (1858) ("by this case, it is admitted that the Indians have not been removed by the United States"); *see also New York Indians*, 170 U.S. 1. Removal under the treaty, if such was to occur, required

[19] *See also* Article 3 of the treaty: "such of the tribes of the New York Indians as do not accept and agree to remove to the country set apart for their new homes within five years, or such other time as the President may, from time to time, appoint, shall forfeit all interest in the lands so set apart, to the United States."

extinguishment of title through separate transactions which either did not occur or were never effectuated.

2. The treaty contemplated separate transactions to extinguish title which never occurred or were modified; as a result, the New York Indians were never removed and remain in New York today.

At the time of the 1838 treaty, the Seneca, Onondaga, Oneida, Cayuga, Tuscarora, and St. Regis Mohawk each possessed a reservation in New York. *See New York Indians*, 170 U.S. at 5 n.1, Finding of Fact 7. Unlike the mandatory removal treaties discussed in part A, removal under Buffalo Creek required a two-step process: the setting aside of the Kansas lands by the United States in the treaty; and extinguishment of title in separate agreements with the State or private land speculators who held the right of pre-emption subject to the requirements of the Nonintercourse Act. Two separate transactions involving the Seneca and Tuscarora, which are referenced in and annexed to the Buffalo Creek Treaty, illustrate the additional steps contemplated by the treaty as necessary to extinguish title and effect removal. But even these separate agreements proved ineffectual to extinguish those nations' interests and no removal occurred.

In the Seneca agreement, which was negotiated before and approved by a federal commissioner, the remaining Seneca reservations at Buffalo Creek, Tonawanda, Cattaraugus and Allegany, were purchased by Thomas Ogden and Joseph Fellows, the pre-emption right holders. Almost immediately, however, the Seneca protested the treaty as a fraud engineered by Ogden and Fellows. *New York Indians* at 543, Finding 11. *See also* Frederick Houghton, "The History of the Buffalo Creek Reservation," in Frank H.

Severance, ed., *Publications of the Buffalo Historical Society*, Vol. 24, 1920. The Seneca continued their protests until a compromise was negotiated in 1842 by which Ogden and Fellows purchased the Buffalo Creek and Tonawanda Reservations, but the Cattaraugus and Allegany Reservations were retained by the Seneca. Treaty with the Seneca, May 20, 1842, 7 Stat. 586.[20] *See Fellows v. Blacksmith*, 60 U.S. 366, 370 (1856). The Tonawanda Reservation was subsequently restored in the Treaty with the Seneca Tonawanda Band, November 5, 1857, 11 Stat. 735. *See State ex rel. Cutler v. Dibbler,* 62 U.S. at 370. Today, the Seneca continue to reside on the Cattaraugus, Allegany, and Tonawanda Reservations.

In the Tuscarora agreement, Ogden and Fellows also purchased the Tuscarora Reservation in Niagara County. This agreement was similarly made in the presence of and approved by a federal commissioner. Like the Seneca, the Tuscarora almost immediately protested the treaty as fraudulent. *See New York Indians*, 170 U.S. at 5 n.1, Finding 11. In 1849, the Tuscarora Chiefs brought a lawsuit in state court against the successors to Ogden and Fellows seeking a surrender and cancellation of the deed because the expected removal under the 1838 treaty never occurred. The state court canceled the deed, *see* H. Doc. No. 1590, 63rd Cong., 3rd Sess. 12-13 (1915); Cohen, *Handbook of Federal Indian Law* at 423, n.79, and the Tuscarora continue to reside on the Tuscarora Reservation. *See F.P.C. v. Tuscarora Indian Nation*, 362 U.S. 99.

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[20] The remaining provisions of the 1838 Treaty continued to be applicable to the Senecas, *see Fellows v. Blacksmith*, 60 U.S. at 370, but the time for removal was extended until 1846, *see The New York Indians*, 72 U.S. 761, 770 (1866). This interpretation confirms the voluntary (or non-mandatory) nature of the 1838 Treaty. The Senecas could retain their Allegany and Cattaraugus Reservations in New York, yet still choose to move to Kansas.

By 1846, few Indians had removed to the Kansas lands and the Indian commissioner called a council of the Seneca, Cayuga, Onondaga, and Tuscarora to "learn the final wishes of the Indians as to emigration." *See New York Indians,* 170 U.S. at 5 n.1, Finding 13. The commissioner reported that the chiefs were "unanimous in the opinion that scarcely any Indian who wished to emigrate remained." *Id.* By 1860, the United States returned the Kansas lands to the public domain, and surveyed and sold them, *id.*, Finding 15, making removal impossible after that time.

The Buffalo Creek Treaty undoubtedly established a process and the means for the New York Indians to move to Kansas, if the Indians chose to so move. As a factual matter, however, only a few individuals actually moved to Kansas, and the tribes continued to reside, and still reside on their New York reservations.[21] Thus, the reservations for the New York Indians secured by the Treaty of Canandaigua and similar federal treaties were not abolished by the Buffalo Creek Treaty.

CONCLUSION

For these reasons, amici support Respondents Oneida Indian Nation of New York *et al.* and urge the Court to affirm the judgment below.

[21] The treaty did not disturb the St. Regis Mohawks' title or occupancy of their reservation on the St. Lawrence River. In a supplement to the Treaty dated February 13, 1838, 7 Stat. 561, St. Regis assented to the Treaty provided: "that any of the St. Regis Indians who wish to do so, shall be at liberty to remove to the said country [Kansas] at any time hereafter within the time specified in this treaty, but under it the Government shall not compel them to remove." The Mohawks never removed and continue to reside on their reservation today.

Respectfully submitted,

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