No. 03-855

In the Supreme Court of the United States

CITY OF SHERRILL, NEW YORK, PETITIONER

v.

ONEIDA INDIAN NATION OF NEW YORK, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

In 1997 and 1998, respondent Oneida Indian Nation of New York purchased certain parcels of property in Sherrill, New York through open market transactions. The parcels are situated within the boundaries of the Oneida Indian Nation reservation secured by the 1794 Treaty of Canandaigua, but in the early 1800s were the subject of conveyances involving the State of New York that violated the federal prohibition on the sale of Indian lands without federal approval. The question presented is whether the parcels reacquired by the Tribe are immune from state and local taxation.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States. The position of the United States is that the petition for a writ of certiorari should be denied.

STATEMENT

1. a. Respondent Oneida Indian Nation of New York (Tribe) is a federally recognized Indian Tribe and a direct descendant of the Oneida Indian Nation (Oneida Nation), a member of the Six Nations of the Iroquois Confederacy. The Oneida Nation's aboriginal homeland comprised some six million acres that formed a 50-miles-wide swath extending in a north-south direction through what is now east-central New York. See *County of Oneida* v. *Oneida Indian Nation* (*Oneida II*), 470 U.S. 226, 230-231 (1985); *Oneida Indian Nation* v. *County of Oneida* (*Oneida I*), 414 U.S. 661, 664 (1974).

After the Revolutionary War, the United States entered into the Treaty of Fort Stanwix of October 22, 1784, with the Six Nations. 7 Stat. 15. That Treaty gave peace to the four Nations that had sided with the British and provided that

the Oneida and Tuscarora Nations—which had sided with the colonists—"shall be secured in the possession of the lands on which they are settled." Arts. 1, 2, 7 Stat. 15. In 1785 and 1788, the State of New York—without the approval of the federal government—obtained cessions of certain of the Oneida Nation's lands. In the 1788 Treaty of Fort Schuyler, the Oneida Nation ceded the bulk of their lands—some 5 million acres—"to the people of the State of New York forever," but "reserved" for the Oneida Nation, also "forever," a tract of approximately 300,000 acres near Oneida Lake. Pet. App. 136a-137a (quoting treaty).

b. In 1790, Congress passed the first of the Trade and Intercourse Act that have long embodied essential features of federal Indian policy. Ch. 33, 1 Stat. 137. Section 4 of that Act provided that "no sale of lands made by any Indians * * * 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. 138. Section 8 of the Trade and Intercourse Act of 1793, ch. 19, 1 Stat. 319, carried forward the substance of that prohibition. The 1793 prohibition was then carried forward by Congress without change in the Trade and Intercourse Acts of 1796, 1799, 1802, and 1834, and it remains in effect today. See 25 U.S.C. 177.

c. Following the passage of the 1793 Act, the United States and the Six Nations entered into the Treaty of Canandaigua of November 11, 1794. 7 Stat. 44. In Article 2 of the 1794 Treaty, the United States "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," including the 300,000 acres reserved to the Oneida Nation under the 1788 Treaty of Fort Schuyler. 7 Stat. 45. The United States further stipulated that "the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." *Ibid.* See Pet. App. 141a-143a.

In 1795, the State of New York—without federal approval—negotiated directly with the Oneida Nation to purchase some of the lands that were secured by the Treaty of Canandaigua. *Oneida II*, 470 U.S. at 232. The federal government warned that title to the Six Nation's land could be extinguished only by a treaty entered into under the authority of the United States. *Ibid.*; see also Resp. Br. App. 1a-4a (Attorney General opinion forwarded to Governor of New York). The State ignored those warnings and, in the summer of 1795, purchased approximately 100,000 acres of land from the Oneida Nation for an annual cash payment of about $3000 (or about $.03 per acre). 470 U.S. at 232. The State later subdivided and resold the land to private parties at significantly higher prices than it had paid the Oneida Nation for the land. See Pet. App. 9a.

The State subsequently engaged in numerous additional transactions—also without federal approval—in which it purchased land from New York Indians. All told, during the late eighteenth and early nineteenth centuries, New York negotiated more than 30 treaties with the Oneida Nation. By 1846, the Oneida Nation retained only a few hundred acres in New York. Pet. App. 9a.

d. Beginning as early as 1815, the State urged the removal of the New York Indians to the West. See *New York Indians* v. *United States*, 170 U.S. 1, 5 n.1 (1898). In 1816, the President gave the New York Indians permission to negotiate with western Tribes for the purchase of land. In 1821, the Menominee Indians ceded some of their land in Wisconsin to several New York Tribes, including the Oneida Nation. A portion of the Oneida Indians moved to Wisconsin, but others remained in New York. Because of a dispute between the New York Indians and the Menominees, the United States entered into the Treaty of February 8, 1831 with the Menominees to purchase some of the Menominees' lands for the New York Indians. 7 Stat. 342-343, 346. However, few additional New York Indians moved from New York to Wisconsin. See Pet. App. 10a & n.8.

On January 15, 1838, the United States entered into the Treaty of Buffalo Creek with the New York Indians to exchange their land in Wisconsin for a new reservation comprising some 1.8 million acres in the Indian Territory, in what is now the State of Kansas. 7 Stat. 550. But the Oneida Indians residing in New York refused to relocate to Kansas. Hundreds of New York Oneidas moved instead to Wisconsin and to Ontario, Canada. "[A]s the exodus of [Oneida] members continued over the next half-century, reservation acreage inhabited by Oneidas shrank significantly, by some accounts to less than 100 acres." Pet. App. 14a. By 1848, only about 200 Oneidas still resided in New York. *Id.* at 13a.

After virtually no New York Indians moved to the Indian Territory, the reservation set aside for them in Kansas pursuant to the 1838 Treaty of Buffalo Creek was restored to the public domain and later disposed of by the United States. The Wisconsin lands ceded by the New York Indians under the Treaty of Buffalo Creek also were made part of the public domain and disposed of by the United States. *New York Indians*, 170 U.S. at 12-13 n.13.

e. In 1997 and 1998, the Tribe purchased in open market transactions from non-Indians fee simple title to certain parcels of land in the City of Sherrill in Oneida County, New York. It is undisputed that the parcels are within the historical boundaries of the 300,000-acre reservation secured by the 1794 Treaty of Canandaigua. Pet. App. 8a n.5, 19a, 85a, 90a-91a. The Tribe operates a gas station, convenience store, and textile facility on the parcels. *Id.* at 2a, 64a. Petitioner City of Sherrill assessed property taxes against the parcels. After the Tribe refused to pay the property taxes, petitioner initiated proceedings against the Tribe to collect the taxes, purchased three of the parcels at a tax sale, and then commenced eviction proceedings. *Id.* at 65a-66a.

2. In 2000, respondents—the Tribe and individual tribal members—brought this action in the United States District Court for the Northern District of New York, alleging that the parcels described above are immune from state and local taxation and seeking declaratory and injunctive relief. The

district court granted summary judgment for the Tribe. Pet. App. 61a-133a. The court held that the parcels are within the boundaries of the Oneida reservation acknowledged by the 1794 Treaty of Canandaigua, *id.* at 85a, 90a-91a; Congress has never disestablished that reservation, *id.* at 100a; and tribally owned land within the 1794 reservation "is Indian Country and is not taxable by Sherrill and the Counties," *id.* at 105a. The court stressed that its decision "appl[ied] narrowly to the parcels at issue in the lawsuit, which are currently possessed by the Nation," and not to "any private landowners." *Id.* at 102a.

3. The court of appeals affirmed the district court's judgment that the parcels at issue are not taxable. Pet. App. 1a-60a.

a. The court of appeals concluded the parcels at issue qualify as Indian country because they "are located on the Oneidas' historic reservation land set aside for the tribe under the Treaty of Canandaigua." Pet. App. 24a. The court explained that "reservation land" is "by its nature * * * set aside by Congress for Indian use under federal supervision," and thus qualifies as Indian country as discussed in *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). Pet. App. 24a. The court rejected petitioner's argument that Congress had disestablished the 1794 reservation in the 1838 Treaty of Buffalo Creek and concluded instead that Congress "has never changed" the reservation status of the land. *Id.* at 26a; see *id.* at 33a-41a.

The court of appeals noted that much of the reservation land had been conveyed to New York and then to private parties without federal approval, but explained that "when Indian land has been alienated in ways inconsistent with federal law [*i.e.*, the Trade and Intercourse Act], Indian title remains with the tribe." Pet. App. 25a. The court noted that "[t]he Indian-country status of the alienated land is irrelevant for tax purposes when non-Indians hold fee title, since they pay state taxes," but "when the tribe holding Indian title reacquires former reservation land, both forms of title coexist" (*i.e.*, Indian title and fee title). *Id.* at 27a-28a. In

those circumstances, the court concluded, "the state cannot tax [the land] and the tribe can no longer legally alienate it, at least without federal approval." *Id.* at 28a.

The court of appeals rejected petitioner's argument that the Tribe is not entitled to enjoy the rights that long ago were secured to its reservation lands—and that protect the land from alienation without federal approval today—on the ground that the Tribe itself has not continuously existed. Pet. App. 42a-45a. The court explained that there is "no requirement in the law that a federally recognized tribe demonstrate its continuous existence in order to assert a claim to its reservation land." *Id.* at 42a. In the alternative, the court found that the record demonstrates that the Tribe has continuously existed as "a direct descendant of the original Oneida Indian Nation." *Id.* at 44a.

b. Judge Van Graafeiland dissented in part. Pet. App. 53a-60a. He concluded that "[t]he record presents significant, unresolved questions of fact as to whether the Oneida Indian Nation of New York has been in existence continuously over the last century and a half." *Id.* at 60a.

DISCUSSION

The petition for certiorari should be denied. Applying settled principles of federal Indian law to the unique historical and factual circumstances of the Oneida Indians and their treaty-protected lands, the court of appeals correctly held that the parcels at issue are immune from state and local taxation. The parcels are located within the boundaries of the reservation that was recognized by the United States in the 1794 Treaty of Canandaigua as belonging to the Oneida Nation. Although much of that reservation land was subsequently conveyed by the Tribe to the State of New York and then to private parties, petitioner does not dispute that those transactions violated the Indian Nonintercourse Act, 25 U.S.C. 177. Nor was the reservation otherwise lawfully disestablished, by Act of Congress or Treaty. Accordingly, when property within the reservation is reacquired by the Tribe, the land is entitled to the same immunity from

state and local taxation that tribal land in a reservation presumptively enjoys. Moreover, when the parcels were reacquired by the Tribe, they again became subject to the federal restraint on alienation imposed by 25 U.S.C. 177. That restraint independently renders the parcels immune from state and local taxation.

The court of appeals' decision in this case does not conflict with any decision of this Court or of another court of appeals. The parcels at issue represent only a tiny fraction of the roughly 250,000 acres of Oneida land that were allegedly acquired by New York without the approval of the federal government between 1795 and the early 1800s. Those lands are the subject of ongoing litigation in the lower courts, including a lawsuit—in which the United States has intervened on behalf of the Tribe—seeking compensation for the illegal deprivation of the Tribe's possessory rights to those lands. This case—involving only immunity from state and local taxation of lands the Tribe has reacquired—presents no occasion to consider issues arising in those other cases concerning rights of possession in lands that the Tribe has not reacquired.

A. The Court Of Appeals Correctly Concluded That The Parcels At Issue Are Immune From State And Local Taxation

1. The Court has long held that "Indian tribes and individuals generally are exempt from state taxation within their own territory." *Montana* v. *Blackfeet Tribe*, 471 U.S. 759, 764 (1985). The States and their political subdivisions are thus "without power to tax reservation lands," except in those rare instances when Congress authorizes such taxation. *County of Yakima* v. *Confederated Tribes and Bands of Yakima Indian Nation*, 502 U.S. 251, 258 (1992); see *Cass County* v. *Leech Lake Band of Chippewa Indians*, 524 U.S. 103, 110-112 (1998); *New York Indians*, 72 U.S. (5 Wall.) 761 (1867) (holding that Seneca land protected by 1794 Treaty was exempt from state taxation). The Court has "consistently declined to find that Congress has authorized such

taxation unless it has 'made its intention to do so unmistakably clear.'" *Cass County*, 524 U.S. at 110 (quoting *County of Yakima*, 502 U.S. at 258). The court of appeals correctly held that the parcels at issue here are immune from taxation under that well-settled rule on the ground that they are owned by the Tribe and located within the boundaries of a federally recognized reservation that has never been abrogated by Congress. Pet. App. 20a.

In *Oneida II*, the Court recognized that, after the Revolutionary War, "the *National Government* promised that the Oneidas would be secure 'in the possession of the lands on which they are settled,'" and that the United States "reaffirmed this promise," *inter alia*, in the Treaty of Canandaigua. 470 U.S. at 231 (emphasis added). Petitioner suggests (Pet. 16) that the 1794 Treaty of Canandaigua did nothing more than acknowledge the 1788 Treaty of Fort Schuyler that was entered into between the State of New York and the Oneida Nation *without* the approval of the federal government. That argument is contradicted by both the text of the 1794 Treaty and the context in which it was negotiated.

Article 2 of the 1794 Treaty does not merely "acknowledge" the existence of a previous agreement with the State; it "acknowledge[s]" the 300,000 acres "reserved to the Oneida" in the 1788 Treaty "*to be their property*" and stipulates that "the said reservation[] *shall remain theirs*, until they choose to sell the same to the people of the United States, who have the right to purchase." Pet. App. 141a (emphasis added). Petitioner concedes (Pet. 16) that Article 3 of the Treaty "expressly establishes a reservation for the Senecas" (who had not previously entered into a treaty with New York). See *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 122-123 n.18 (1960). Article 3 uses virtually the same language as Article 2 to recognize and guarantee the Senecas' rights to certain of their lands. See Pet. App. 142a. There is no reason to conclude that Article 3 confers any more rights with respect to the land reserved by the Treaty

for the Seneca Nation than Article 2 does with respect to the land reserved for the Oneida Nation.[1]

Article 4 of the 1794 Treaty, referring to both Articles 2 and 3, recites that "[t]he United States have thus *described and acknowledged what lands belong to* the Oneidas, Onondagas, Cayugas, and Senecas." Pet. App. 142a (emphasis added). In addition, Article 4 promises that the United States will "never * * * claim the same" and "not disturb them * * * in the free use and enjoyment thereof." *Ibid.* In return, the Tribes stipulated "that they will never claim *any other lands*, within the boundaries of the United States." *Id.* at 142a-143a (emphasis added). That quid pro quo identified which of the Tribes' lands would continue to be subject to federal protection and supervision going forward, and effectively ratified the Tribes' relinquishment of their other lands to the State.

The historical context in which the 1794 Treaty was ratified also supports the court of appeals' interpretation of the Treaty. The 1794 Treaty was the third in a series of treaties over ten years (1784, 1789, and 1794) in which "the National Government promised that the Oneidas would be secure" in the possession of their lands. *Oneida II*, 470 U.S. at 231. The 1794 Treaty is thus naturally read in context as providing a "reaffirm[ation]" of the promise first made in 1784. *Ibid.* More important, under the newly ratified Constitution, Indian relations became "the exclusive province of federal law." *Id.* at 234. Only the United States could deal with the Tribes on a sovereign-to-sovereign basis or extinguish Indian title. *Ibid.*; *Oneida I*, 414 U.S. at 667, 670-674; see also *New York Indians*, 72 U.S. (5 Wall.) 761, 769 (1867) (noting that, after Constitution, New York "possessed no power to deal with Indian rights or title").

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[1] In *Oneida I*, this Court recognized that the State's attempt to tax the reservation land referred to in Article 3 of the Treaty of Canandaigua with respect to the Seneca Nation was an invalid "interference with Indian possessory rights guaranteed by the Federal Government." 414 U.S. at 672. The same conclusion follows with respect to the reservation land referred to in Article 2 with respect to the Oneida Nation.

2. Although the general rule is that reservation land is immune from state and local taxation, Congress may abrogate that immunity and, indeed, Congress may revoke the land's reservation status altogether. See *Cass County*, 524 U.S. at 110-111, 113. However, this Court has refused to conclude that Congress has authorized taxation of reservation land "unless it has 'made its intention to do so unmistakably clear.'" *Id.* at 110; see *County of Yakima*, 502 U.S. at 258. And the Court has likewise refused to find that Congress has disestablished a reservation unless its intent to do so is "clear and plain." *South Dakota* v. *Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998); see *Solem* v. *Bartlett*, 465 U.S. 463, 470 (1984). Petitioner argues that the 1838 Treaty of Buffalo Creek abrogated the reservation recognized by the 1794 Treaty of Canandaigua and revoked the federal protection accorded reservation lands. The court of appeals correctly rejected that argument.[2]

The 1838 Treaty of Buffalo Creek was negotiated by Commissioner Ransom H. Gillet on behalf of the United States with "the several tribes of the New York Indians" (Pet. App. 148a), including the Oneida Nation. In Article 1 of the 1838 Treaty, the New York Indians "cede[d] and

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[2] In its amicus brief in *Oneida II*, the United States articulated a possible argument that the Treaty of Buffalo Creek diminished the reservation that was recognized by the Treaty of Canandaigua, but the United States stated that it had not "reached a concluded view on the relinquishment question," and noted that the issue "would require further examination of the circumstances surrounding the Treaty of Buffalo Creek and subsequent events, including the Indians' understanding of the transaction." Nos. 83-1065 & 83-1240 U.S. Br. at 33. The United States' position in this case is based on further consideration of the historical record, including the written assurances made to the Tribe by Commissioner Gillett (see p. 12, *infra*), which the United States did not consider in preparing its brief in *Oneida II*. That position is consistent with the position that the Bureau of Indian Affairs has previously expressed with respect to this case. In January 2001, the Acting Assistant Secretary of the Interior for Indian Affairs of the United States Department of the Interior informed the Mayor of the City of Sherrill that the parcels at issue are situated within an Indian reservation that "has never been disestablished or diminished." C.A. App. 1340 (reproducing letter).

relinquish[ed] to the United States all their right, title and interest to the lands secured to them at Green Bay by the Menomone treaty of 1831," save with respect to one tract. *Id.* at 149a. In Article 2, the United States in turn agreed —"[i]n consideration of the above cession and relinquishment"—to set apart 1,824,000 acres of lands in Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes." *Ibid.*

In the 1838 Treaty, the United States consented to, and thus consummated, the sale of the New York lands occupied by the Seneca and Tuscarora Nations to non-Indians. See Pet. App. 153a-156a (Articles 10 and 14). In exchange, the Seneca and Tuscarora Nations also appeared to agree to remove to the Kansas reservation within a specified period. See *ibid.* The Treaty did not, however, effect any immediate cession or sale of the Oneida Nation's New York lands. Nor did the Oneidas agree to remove to the Kansas reservation within any fixed period. Rather, in Article 13, the Oneidas "agree[d] 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." *Id.* at 155a.

Petitioner's effort to analogize the situation faced by the New York Oneidas in 1838 to the situation faced by the Walapais Indians (now denominated as the Hualapai Indian Tribe) in *United States* v. *Santa Fe Pacific Railroad*, 314 U.S. 339 (1941), is flawed. The Hualapais had requested that a reservation be *created* for them because settlers had entered onto their aboriginal lands, and such a reservation was established by Executive Order. After discussing the "long standing attempt to settle the [Hualapais'] problem by placing them on a reservation," the Court found that "their acceptance of this reservation must be regarded in law as the equivalent of a release of any tribal rights which they may have had in lands outside the reservation." *Id.* at 358. The historical setting of the treaty at issue in this case differs in an important respect from that in *Santa Fe*,

because the Oneida Nation—in contrast to the Hualapais, which initially possessed only aboriginal land—already had reservation land in 1838, *i.e.*, the reservation secured by the 1794 Treaty of Canandaigua.

The negotiating history of the 1838 Treaty of Buffalo Creek confirms that the Oneida Nation did not agree to relinquish its possessory rights in the Nation's New York homeland in exchange for the new Kansas lands. In June 1838, the Senate amended the Treaty and directed a federal commissioner to return to each of the signatory Tribes to gain their assent to the Treaty after "fully and fairly explaining" its terms. *New York Indians*, 170 U.S. at 21. Pursuant to that directive, Commissioner Gillet met with the Oneidas on August 9, 1838. Pet. App. 173a. Gillet provided the Oneidas and their attorney with a written "assurance" to quell "their fears that they might be compelled to remove, even without selling their land to the State." Resp. Br. App. 7a. The assurance stated that "the treaty was not, & is not intended to compel the Oneidas to remove from their reservations in the state of New York," and that the Oneidas could "choose to * * * remain where they are forever." *Id.* at 10a. The Oneidas' assent to the 1838 Treaty refers to Gillet's declaration, includes Gillet's affirmation that the assent was voluntary, and was annexed to the ratified document. Pet. App. 35a n.18.

Amicus State of New York argues (at 8) that the court of appeals erred in relying on the Gillet declaration because it "is not annexed to the treaty as reproduced in Statutes at Large and there is no evidence that it was ever approved by the Senate or the President." That argument is misguided. It is undisputed that the President transmitted Gillet's written declaration to the Senate during the Senate's deliberations over ratification, and that the declaration was communicated to the Tribe. See Resp. Br. App. 5a-9a. The declaration is therefore strong contemporaneous evidence of how the Senate, the negotiating parties, and the Tribe in particular understood the Treaty. See *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999) ("[W]e

interpret treaties to give effect to the terms as the Indians themselves would have understood them.").

Petitioner argues that the court of appeals' construction of the 1838 Treaty is inconsistent with *New York Indians*. In that case, the Court held that the New York Indians (including the Oneidas) were entitled to compensation for the government's decision to dispose of the lands set aside for them in Kansas. That holding was based on a finding that the 1838 Treaty conveyed an immediate grant of title in the Kansas lands to the New York Indians. Article 2 of the 1838 Treaty provides, however, that the Kansas lands were set aside "[i]n consideration of the *above* cession and relinquishment," Pet. App. 149a (emphasis added), *i.e.*, the surrender of the New York Indians' *Wisconsin* lands in Article 1.

In *New York Indians*, the Court observed that the primary inducement for the United States to enter into the 1838 Treaty "[p]robably" was the removal of all Indians from their eastern lands. 170 U.S. at 15. But that does not mean that the government attained that objective as a legal matter with respect to every Tribe that signed the Treaty, and the Court recognized that achieving the Oneida Nation's relinquishment of the Wisconsin lands (which the government did achieve) was also an important objective of the United States. *Id.* at 14. Therefore, the fact that the 1838 Treaty immediately granted to the Oneidas title to the Kansas lands—expressly in exchange for lands in *Wisconsin*—does not demonstrate a "clear and plain" congressional intent to disestablish the Oneidas' reservation land *in New York*, which was nowhere mentioned in the Treaty. Much less does the 1838 Treaty manifest an intent to abrogate the New York reservation regardless of whether the Oneidas in fact removed from New York to Kansas.

In *Solem* v. *Bartlett*, this Court observed that "[o]nce a block of land is set aside for an Indian reservation and no matter what happens to the title of individual plots within the area, the entire block retains its reservation status until Congress explicitly indicates otherwise." 465 U.S. at 470. Because Congress has not unambiguously revoked the reser-

vation that was recognized and secured by the 1794 Treaty of Canandaigua, land that is reacquired by the Tribe within the boundaries of that reservation retains its reservation status for purposes of immunity from state and local taxation "until Congress explicitly indicates otherwise." *Ibid.*[3]

3. The court of appeals' conclusion that the parcels at issue are immune from state and local taxation independently follows from the fact that the parcels are today subject to the restraint on alienation imposed by the Indian Nonintercourse Act, 25 U.S.C. 177. See Pet. App. 25a-28a. In *Oneida I*, the Court held that the Oneidas' possessory rights in their aboriginal lands were guaranteed by the Trade and Intercourse Acts of 1790 and 1793, which codified the principle "that the extinguishment of Indian title required the consent of the United States." 414 U.S. at 678. It is undisputed that the parcels at issue in this case are within the aboriginal homeland of the Oneida Nation that were conveyed to the State of New York in violation of the Trade and Intercourse Acts. See *Oneida II*, 470 U.S. at 232. Most of the land that was the subject of those improper conveyances was purchased by non-Indians. The proper remedy for those conveyances remains the subject of ongoing litigation. See Part C, *infra*. Whatever the ultimate disposition of that litigation, the court of appeals correctly concluded in this case that the restraint on alienation applies to land that was

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[3] The court of appeals' decision is limited to the question "whether the [parcels at issue] are subject to taxation." Pet. App. 2a; see *id.* at 5a, 45a, 101a-102a. The court did not consider, and therefore did not decide, what, if any, additional consequences might flow from the fact that the tribally owned parcels in this case fall within a federally recognized reservation. In any event, non-Indians remain subject to state and local taxation within Indian country, and the tribal sovereign immunity doctrine "does not excuse a tribe from all obligations to assist in the collection of validly imposed state * * * taxes." *Oklahoma Tax Comm'n* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 512 (1991); see also *Department of Taxation & Fin.* v. *Milhelm Attea & Bros.*, 512 U.S. 61 (1994). Moreover, this Court's precedents substantially limit the jurisdiction that a Tribe may assert over non-Indians on reservation lands. See, *e.g.*, *Nevada* v. *Hicks*, 533 U.S. 353 (2001).

the subject of such improper conveyances, when it is reacquired by the Tribe. Pet. App. 27a-28a. And, as this Court has recognized, state and local taxation of property subject to the Indian Nonintercourse Act is an improper "interference with Indian possessory rights guaranteed by the Federal Government." *Onieida I*, 414 U.S. at 672.

4. Petitioner does not dispute that the parcels at issue historically have been subject to the Indian Nonintercourse Act. Instead, petitioner argues (Pet. 24) that the Indian Nonintercourse Act does not apply to the parcels today because the Tribe has not been in continuous existence since the parcels became subject to that Act. See Pet. Reply Br. 8-9. The court of appeals correctly rejected that contention, which is at odds with the Executive's own tribal-recognition determination. See Pet. App. 42a-45a.

"[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that [the Court has] consistently described as 'plenary and exclusive.'" *United States* v. *Lara*, 124 S. Ct. 1628, 1633 (2004); see *Venetie*, 522 U.S. at 531 n.6. Congress has assigned authority to govern Indian relations to the Secretary of the Interior, including the responsibility to determine tribal existence. See 25 U.S.C. 2, 9; 43 U.S.C. 1457. In exercising that authority, the Department of the Interior has promulgated regulations governing tribal recognition, and those regulations have always included the element of continuous existence. 43 Fed. Reg. 39,361 (1978), revised 59 Fed. Reg. 9280 (1994), currently codified at 25 C.F.R. Pt. 83.

The Department of the Interior has determined that the respondent Tribe is federally recognized and has continuous existence. See 68 Fed. Reg. 68,180 (2003). The Department also has recognized that the Tribe is a political successor-in-interest to the Oneida Indian Nation that signed treaties with the United States in 1784, 1789, 1794, and 1838. See C.A. App. 1520a. That executive determination is entitled to substantial if not conclusive weight. See *Lara*, 124 S. Ct. at 1635; *United States* v. *Sandoval*, 231 U.S. 28, 47 (1913); *United States* v. *Holliday*, 70 U.S. 407, 419 (1866). More-

over, in *Oneida II*, this Court itself recognized that respondent is a "direct descendant[] of members of the Oneida Indian Nation," and it affirmed a decision in favor of respondent based on the Tribe's assertion of a claim that a 1795 conveyance of the Oneida Nation's land violated of the Indian Nonintercourse Act. 470 U.S. at 230.[4]

Petitioner claims that the Oneida Indians ceased to exist as a Tribe around the turn of the twentieth century. Pet. 27-29. At most, the documents cited by petitioner indicate that there has been "fluctuations [in] tribal activity during various years." 43 Fed. Reg. at 39,363. But such fluctuations do not foreclose the conclusion that a Tribe has continuously existed, cf. *United States* v. *John*, 437 U.S. 634, 652-653 (1978), much less provide a basis for a court to override the Executive's determination that a Tribe *has* continuously existed. In any event, ample evidence demonstrates that the United States continued its historic course of dealings with the Oneida as a Tribe during the late nineteenth and early twentieth centuries. For example, during this period, the United States continued to honor its obligations under the 1794 Treaty of Canandaigua to pay annuities and deliver "treaty cloth" to the Oneida Nation. See C.A. App. 1506a-1518a; *Oneida Indian Nation*, 434 F. Supp. at 538. In addition, in the early 1900s the United States brought an ejectment action, in its trust capacity, on behalf of the Oneidas against private parties who had claimed title to a 32-acre tract of land within the boundaries of the reservation recognized by the Treaty of Canandaigua that the government asserted had never lawfully been alienated from the Oneida Nation's 1794 reservation. See

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[4] The lower courts have uniformly treated the Tribe as having standing to enforce rights established in treaties signed by its historic predecessor, the Oneida Nation. See, *e.g.*, *Oneida Indian Nation* v. *United States*, 26 Ind. Cl. Comm. 138, 149 (1971), aff'd, 201 Ct. Cl. 546 (1973); *Oneida Indian Nation* v. *County of Oneida*, 434 F. Supp. 527, 532-533, 538, 540 (N.D.N.Y. 1977); *Oneida Indian Nation* v. *County of Oneida*, 719 F.2d 525, 527-528, 539 (2d Cir. 1983); *Oneida Indian Nation* v. *New York*, 194 F. Supp. 2d 104, 118-119 (N.D.N.Y. 2002).

United States v. *Boylan*, 256 F. 468, 478 (N.D.N.Y. 1919), aff'd, 265 F. 165 (2d Cir. 1920); Pet. App. 44a-45a. It is undisputed that the Tribe lawfully occupies that reservation land today. See Pet. App. 43a; Resp. Br. in Opp. 8-9.

B. The Court Of Appeals' Decision Is Consistent With *Alaska* v. *Native Village of Venetie Tribal Government*

Petitioner argues (Pet. 13-19) that the decision below conflicts with *Alaska* v. *Native Village of Venetie Tribal Government*, 522 U.S. 520 (1998). That is incorrect. In *Venetie*, the Court considered whether land owned in fee by the Native Village of Venetie—which lacked reservation status and was not subject to a federal restraint on alienation—"falls within the 'dependent Indian communities' prong of the [Indian country] statute, [18 U.S.C.] § 1151(b)." 522 U.S. at 527. The Court held that Section 1151(b) "refers to a limited category of Indian lands that are neither reservations nor allotments, and that satisfy two requirements —first, they must have been set aside by the Federal Government for the use of the Indians as Indian land; second, they must be under federal superintendence." *Ibid.*

In concluding that the tribally owned land at issue in *Venetie* did not fall into that "limited category," the Court focused on the Act of Congress—the Alaska Native Claims Settlement Act (ANSCA)—that resulted in the transfer of the land at issue first to unique state-chartered Native corporations and then by those corporations to the Native Village of Venetie. The Court emphasized that "it is significant that ANSCA, far from designating Alaskan lands for Indian use, *revoked* the existing Venetie Reservation, and indeed revoked all existing reservations in Alaska * * * save one." 522 U.S. at 532 (emphasis added). As the Court explained, "[i]n no clearer fashion could Congress have departed from its traditional practice of setting aside Indian lands." *Ibid.* The Court also explained that the former reservation lands that were transferred pursuant to ANSCA

were transferred "without any restraints on alienation or significant use restrictions." *Ibid.*

The court of appeals' conclusion that the parcels at issue in this case are immune from state and local taxation was not based on a finding that they qualify as a dependent Indian community—*i.e.*, the "limited category of Indian lands" at issue in *Venetie*. 522 U.S. at 527. Rather, the court of appeals based that conclusion on the facts that the "[p]roperties are located on the Oneidas' historic reservation land set aside for the tribe under the Treaty of Canandaigua," Pet. App. 24a, and that "Congress has never changed" the reservation status of that land, *id.* at 26a. In *Venetie*, this Court reaffirmed the "not surprising[]" principle "that Indian reservations [a]re Indian country." 522 U.S. at 528 n.3; see *id.* at 527 n.2. The court of appeals' decision therefore dovetails with *Venetie*. Whereas the Court in *Venetie* based its determination that the land at issue was not Indian country on the fact that Congress had explicitly "*revoked* the existing Venetie Reservation," *id.* at 532 (emphasis added), the court of appeals here based its Indian-country determination on the fact that the parcels at issue "are located on reservation land, *a status which Congress has never changed*." Pet. App. 26a (emphasis added).[5]

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[5] Petitioner argues (Pet. 13-19) that the reservation land in this case does not meet the criteria discussed in *Venetie*. That is incorrect. In *Venetie*, the Court emphasized that "[t]he federal set-aside requirement * * * reflects the fact that * * * some explicit action by Congress (or the Executive, acting under delegated authority) must be taken to *create or to recognize* Indian country." 522 U.S. at 531 n.6 (citations omitted). As discussed above, the Treaty of Canandaigua explicitly recognized and guaranteed protection to the Oneida Nation's reservation. In addition, the *Venetie* Court recognized that federal government may superintend Indian lands through "federal restrictions on the lands' alienation." *Id.* at 528 & n.4 (discussing 25 U.S.C. 177). Whereas Congress had explicitly removed such restrictions from the fee land in *Venetie*, *id.* at 532-533, the parcels in this case remain subject to 25 U.S.C. 177. See *Venetie*, 522 U.S. at 531 n.5 (discussing, *inter alia*, *United States* v. *Pelican*, 232 U.S. 442, 447 (1914), in which the Court observed that the allotments that were subject to "restrictions upon alienation or provision for trusteeship on the part of the Government" were subject to federal supervision, *id.* at 449);

C. This Case Does Not Present The Broader Issues Raised By The Ongoing Oneida Land Claims Litigation

The parcels at issue here represent only a tiny fraction of the roughly 250,000 acres of Oneida land that allegedly were acquired by New York unlawfully—without the approval of the federal government—between 1795 and the early 1800s. The United States has intervened on behalf of the Tribe in a law suit seeking, *inter alia*, damages for the two centuries in which the Indians have been illegally deprived of their possessory rights to those lands. See, *e.g.*, *Oneida Indian Nation* v. *New York*, 194 F. Supp. 2d at 118-119. The United States has also intervened in similar suits by other New York Tribes, including two cases that are currently pending in the Second Circuit.[6]

This case does not present a number of issues being litigated in the land claims cases. For example, petitioner does not seek review of the lower courts' findings that New York's original acquisition of the parcels at issue was invalid under the Trade and Intercourse Act. That issue is being contested by the State and other defendants in the land claims litigation. In addition, petitioner has not pressed the argument, which has been made in other cases, that the New York Indians' present-day right to assert their land claims has been extinguished by laches or other equitable principles. Cf. *Oneida II*, 470 U.S. at 256-273 (Stevens, J., dissenting, joined by White, J., and Rehnquist, J.).

Even if the Court concluded that it may wish to revisit the complex issues surrounding the longstanding efforts of New

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United States v. *Candelaria*, 271 U.S. 432, 441 (1926) (Pueblo fee land subject to federal superintendence). The federal government's guardianship role with respect to tribally owned land within the reservation recognized by the Treaty of Canandaigua has been manifested in additional ways, including the government's support for the Tribe in land claims litigation (see Part C, *infra*). See Resp. Br. in Opp. 19 n.6; C.A. App. 1521-1524 (Department of Interior approvals under 25 U.S.C. 81).

[6] *Seneca Nation* v. *New York*, No. 02-6185 (2d Cir. argued Oct. 20, 2003); *Cayuga Indian Nation* v. *Pataki*, No. 02-6111(L) (2d Cir. argued Mar. 31, 2004).

York Indians to vindicate their possessory interests in their aboriginal lands, this case—which involves taxation of land that the Tribe has reacquired—would not be a suitable vehicle for resolution of the full range of those issues. Rather, in that event, it would be appropriate for the Court to await resolution of the ongoing litigation in the lower courts in which the United States and the New York are both parties, and in which the record is being fully developed on various matters that ultimately may bear on the status of land within the boundaries of the reservation recognized by the United States in the 1794 Treaty of Canandaigua.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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