No. 12-604

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IN THE

Supreme Court of the United States

MADISON COUNTY AND
ONEIDA COUNTY, NEW YORK,

Petitioners,

v.

ONEIDA INDIAN NATION OF NEW YORK,

Respondent,

STOCKBRIDGE-MUNSEE COMMUNITY,
BAND OF MOHICAN INDIANS,

Putative Intervenor.

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

REPLY BRIEF

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Cited Authorities

Page

INTRODUCTION

The Oneida Indian Nation of New York ("OIN") proclaims a deep commitment to its reservation (Opp. 32), does not deny that it is committed to reclaiming the "other" 280,000 acres that make up its "not disestablished" reservation (Pet. 22-23) but then minimizes the many concrete steps that it is taking – through litigation, federal agency action, and self-help – to convert its "not disestablished reservation" into tribal territory over which the OIN, and not New York State or Madison and Oneida Counties ("the Counties"), exercises sovereign authority.[1] The modern tribal plaintiff, buoyed by vast gaming profits, is in fact relentlessly seeking to displace the title and jurisdiction of New York State and the Counties throughout the historic reservation boundaries, even though these lands have been owned, developed and governed by non-Indians for nearly two centuries and non-Indians represent 99% of the area's population.

As set out below, concrete disputes exist with respect to the meaning and impact of the OIN's "not disestablished" reservation such that review is appropriate now, as it was in 2004 and 2010 (Reply Point I); this Court should resolve the anomalous meaning and status of a "not disestablished" reservation (Reply Point II); and,

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1. The OIN's claim that the only lands in question are the 17,000 acres it currently owns (Opp. 3), ignores the tribe's stated goal to reclaim the other 280,000 acres. The OIN's effective disavowal of its long-held goal to reclaim sovereignty over its historic reservation is reminiscent of the tribe's strategy before this Court in 2010 when the OIN waived its sovereign immunity from suit to state tax foreclosure actions, reversing a ten-year long course of litigation, to avoid review in this Court.

on the merits, the historical record in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), refutes the OIN's revisionist history as to the disestablishment or diminishment of the OIN's reservation (Reply Point III).

I. THIS COURT SHOULD GRANT CERTIORARI BASED ON THE CONCRETE DISPUTES THAT EXIST TODAY AND WILL BE RESOLVED BY A RULING.

A. Concrete Disputes Exist

Directly belying the OIN's contention that the Counties have "fail[ed] to identify any concrete, non-speculative grievance" that will be resolved by this case (Opp. 21) and "failed to identify any such consequential dispute that depends on continued federal recognition of the Oneida reservation" (Opp. 3), the Counties have identified four areas where the jurisdictional conflict and confusion are rampant today because of the OIN's assertion of a "not disestablished reservation" *and* where the pending "dispute depends on continued federal recognition of the Oneida reservation."

1. State Court Real Property Tax Litigation

If there is no federal reservation, the fee lands owned by the OIN necessarily will be found taxable under state law, i.e., the absence of a federal reservation will be dispositive on the issue of the tribe's liability for state real property taxes. Pet. 20. This state court litigation exists today only because of the court of appeals' mistaken ruling.

2. Federal Court Land in Trust Litigation

The OIN's reservation status is directly at issue in two respects. First, the Record of Decision in fact employed "on reservation" regulations, rather than more rigorous "off reservation" regulations under 25 C.F.R. Part 151. Pet. 21-22. Second, the OIN is now arguing that its federal reservation status establishes the tribe's eligibility under the IRA as construed by this Court in *Carcieri v. Salazar*. Pet. 21. While a determination here that the OIN's reservation has been disestablished or almost entirely diminished would not completely dispose of the litigation, the requested clarification would remove a significant confounding factor from the proceedings that is directly influencing the Secretary of the Interior's decision-making and subsequent litigation. Pet. 21-22.

3. Excess Land Transfers Under 40 U.S.C. § 523

As noted in the Counties' Petition, the Department of the Interior ("DOI") accepted the transfer of 18 acres for the benefit of the OIN in 2008. That transfer is being challenged in the land in trust litigation. Pet. 22. The General Services Administration notified the Counties on January 18, 2013 that it has placed into the transfer pipeline another 494 acres of federal excess land "*within the bounds of the Oneida Reservation*" for the benefit of the OIN.[2] DOI considers the transfers non-discretionary. Those transfers are lawful, however, only if the OIN's "not disestablished" reservation meets the definition

2. *See* Notice of Receipt of Report of Excess, *New York v. Salazar*, No. 08-cv-644 (N.D.N.Y. Jan. 18, 2013), ECF No. 277.

of a "reservation" under Section 523. It does not.[3] The language of Section 523 and its legislative history make clear that federal excess land transfers are available only to tribes that have physically-existing reservations over which they exercise governmental authority. *See Shawnee Tribe v. United States*, 423 F.3d 1204, 1207 (10th Cir. 2005) (analyzing whether the Shawnees had a present-day, actual, existing reservation – not just a "historic" one – which would entitle tribe to a transfer of excess property under § 523).[4] In any event, a determination that there is no reservation will be dispositive and avoid all such transfers and associated litigation.

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3. Section 523 provides for transfer of excess real property to tribes where the land is "*located within the reservation of any group, band, or tribe of Indians* that is recognized as eligible for services by the Bureau of Indian Affairs." 40 U.S.C. § 523(a) (emphasis added). Its legislative history shows Congress intended to give tribes excess federal lands that are located within a physically-existing reservation under tribal governmental authority since "[t]ribal governments are in a position to determine the best possible use of the land located within their reservations." H. R. Rep. No. 93-1339, at 4 (1974) (quoting DOI statement in support). In the view of the House Committee on Government Operations, "no other applicant would appear to have as great a right of possession of land located within a reservation as the Indians located thereon." *Id.*

4. Oneida County, by virtue of exercising governmental jurisdiction immediately adjacent to the federal excess property, has standing to challenge the legality of the Section 523 transfers. This is demonstrated by *City of Sausalito v. O'Neill*, 386 F.3d 1186, 1197-1199 (9th Cir. 2003) and other intervention cases that recognize the protectable interests of adjacent sovereigns. The district court in the land in trust litigation concluded otherwise; that ruling will be brought up on appeal at the conclusion of that litigation.

4. Census Maps

The high profile dispute over the legal boundaries of the Oneida reservation as depicted on U.S. Census maps squarely presents the question of the OIN's reservation. If there is no reservation, then the Census Bureau will not continue with this major re-mapping of central New York which it otherwise has committed to pursue if this Court denies review. Pet. 25. The OIN suggests the redrawn reservation boundaries "had no legal effect" and have been withdrawn. Opp. 3, 20. The Census Bureau did not say the redrawn map had "no legal effect." Indeed, a remarkable range of federal programmatic benefits are directly determined by Census maps and related population figures. Pet. 27-28. Rather the Census Bureau cautioned that governmental jurisdiction over the lands in question is not established by the redrawn borders. Pet. 27. Notwithstanding the Census Bureau's caution, the OIN remains free to use the official recognition of its borders as further evidence of its claimed reservation, including in the pending state and federal litigation, in agency actions relating to the transfer of excess federal lands, and in future litigation where Census maps and data may provide important evidence as to jurisdictional authority, as this Court's decision in *Sherrill* demonstrates. Pet. 20-22. The OIN also can use the legal boundaries to try to assert sovereign authority over lands that it now owns (as it does with respect to zoning, policing and other governmental matters) or in the future owns, as it pursues its goal to reclaim the remaining 280,000 acres. Pet. 22-23.[5] The Census Bureau's recognition of the reservation's

5. The OIN has an almost unlimited amount of cash with which to keep purchasing lands within the historic boundaries,

boundaries also supports the OIN's efforts to obtain federal benefits that are available to Indians living "on or near" a reservation. It is not clear what that means in the case of the OIN's not disestablished reservation. Pet. 30-32.

B. This Court Should Grant Certiorari Now As It Did In 2004 And 2010

These points of real conflict and confusion in 2013 amply illustrate the many kinds of practical, real-world problems that arise when an Indian tribe lays claim to an intact 307,000 acre reservation that swallows up whole communities of non-Indians. The several pending conflicts are typical of border disputes where competing jurisdictional authorities battle for primacy. Pet. 7-8. A decision here will efficiently resolve the fundamental legal issue underlying these jurisdictional conflicts. Pet. 7 (citing *Polar Tankers, Inc. v. City of Valdez*, 557 U.S. 1, 14 (2009)). This Court can eliminate a legal fiction that is unprecedented in the law and fosters uncertainty, conflict, and litigation – the disruption that *Sherrill* sought to prevent. The mistaken pre-*Sherrill* ruling by the court of appeals merits review now because "it continues to have an impact on the parties" and "continue[s] to affect the relationship of litigants." *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 569 (1984); *id.* at 585 (O'Connor, J., concurring).

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using untaxed revenue from its highly successful Turning Stone Casino and Resort, which has an enterprise value in excess of $2.4 billion and generates in excess of $100 million annually in net profits. The OIN's argument that the only lands in question are the 17,000 acres it currently owns (Opp. 3) is misleading.

This case is postured to permit full review of the question presented.[6] The historical record regarding disestablishment and diminishment was fully developed in *Sherrill* and remains just as compelling today. The OIN's claimed reservation status cannot be reconciled with the historical facts and it fails under this Court's jurisprudence regarding disestablishment or diminishment of Indian reservations (Pet. 10-16) and under *Sherrill* given the disruption of settled expectations when an "extant" 307,000 acre reservation is imposed on top of non-Indian communities. Pet. 9, 16-29.[7]

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6. The OIN's restatement of the question presented unnaturally restricts the analysis to the Treaty of Buffalo Creek. The Counties' arguments on disestablishment/diminishment consider the totality of the historical record developed in *Sherrill* with respect to the removal of the Oneidas from New York and subsequent non-Indian settlement, development, and governance of the Oneidas' former reservation. Pet. 10-16.

7. The OIN is wrong in claiming this is just another non-certworthy disestablishment case. Opp. 21 n.9. Recent denials have mostly involved a single Western tribe and its allotted lands. Not one involved a "not disestablished" fictional reservation that exists because of a conflict between a court of appeals' decision and a subsequent decision by this Court in the same case (i.e. *Sherrill*). While this Court denied certiorari in *Cayuga* involving another New York tribe, that case highlights the fact that other litigants and courts in New York are struggling to determine the status, meaning, and legal significance of historic Indian reservations and are looking to this Court for guidance. Pet. 32-34.

II. CERTIORARI IS WARRANTED TO ADDRESS THE CONFUSING AND ILLOGICAL LEGAL FICTION OF A RESERVATION OVER WHICH NO TRIBAL SOVEREIGNTY EXISTS.

At the heart of this dispute is an illogical legal construct found nowhere else in federal Indian law – which the OIN hardly addresses (Opp. 31). The OIN leaves the key issue to the final page because it cannot bring its "not disestablished reservation" within any accepted definition of an Indian reservation. While this Court's jurisprudence recognizes that "limits may exist on tribal sovereign authority within the bounds of a recognized reservation" (*id.* 2, 31) nowhere in the annals of federal Indian law has this Court (or any other court) recognized an Indian reservation to exist where the tribe cannot exercise sovereignty "in whole or in part" over the subject lands, as this Court held in *Sherrill.* 544 U.S. at 202-203; *see* Pet 16-18. This is not a case of "diminished tribal authority as to non-Indian land and non-Indians within reservation boundaries." Opp. 31. The quintessential defining characteristic of a reservation – tribal governance – is altogether missing. Calling these distinctly non-Indian lands an "intact" "not disestablished reservation" is wildly out step with historical fact and current reality, and amounts to a prescription for confusion, uncertainty, jurisdictional conflict and litigation.

III. THE OIN MISCHARACTERIZES THE HISTORY AND FINDINGS IN *SHERRILL.*

As an initial matter, the OIN's recurring incomplete quotation of a footnote from *Sherrill* ("only Congress can divest a reservation of its lands and diminish

its boundaries") (Opp. 2, 21, 31 n.14) is affirmatively misleading. In the sentences leading up to that footnote, this Court recognized the importance of the treatment of the land after the Treaty of Buffalo Creek and cited to de facto disestablishment principles in *Solem* and other cases decided by this Court. 544 U.S. at 215. In the very same footnote, this Court openly questioned the continued recognition of the reservation by quoting Justice Stevens' 1985 opinion in which he noted "[t]here is ... a serious question whether the Oneida did not abandon their claim to the aboriginal lands in New York when they accepted the Treaty of Buffalo Creek of 1838." *Id.* at 215 n.9.

It is therefore remarkable for the OIN to assert that the *Sherrill* Court "did not question the continuing existence of the reservation." Opp. 30. Likewise, given this Court's findings with respect to the 1838 Treaty – including that it authorized the sale of lands to New York and that most of the Oneidas who remained in New York in 1838 arranged to sell their lands and removed from New York as contemplated by the Treaty (*Sherrill*, 544 U.S. at 206-207) – it is equally remarkable for the OIN to argue that the 1838 Treaty "left the Oneidas where they were." Opp. 22.[8]

8. The OIN wrongly contends that the 1838 Treaty "did not displace the Nonintercourse Act" with respect to these land sales to New York, and that the statutorily required federal approval was never obtained. Opp. 6, 23. The 1838 Treaty expressly authorized the land sales to New York recognizing that New York, as the holder of the right of preemption to the underlying fee title, was the party the Oneidas were required to negotiate with for the sale of their lands. *See Sherrill*, 544 U.S. at 203-204 n.1, 206-207.

The OIN's recitation of the history surrounding the Treaty of Buffalo Creek (Opp. 5-8, 22-29) is not faithful to the historical facts as found by this Court in *Sherrill*. *See* 544 U.S. at 206-207. This Court referred to the Oneida reservation in New York as "ancient" and "historic," recognizing the reservation does not exist today with the possible exception of a 32-acre remnant. *Id.* at 202-203, 206-207, 213. It is of no consequence that the Oneidas did not remove to Kansas, or did not remove entirely from New York. Opp. 7, 22, 26-27. The record shows that most of the remaining Oneidas in New York sold their lands and left New York, unambiguously relinquishing their rights to the lands they left behind. *Sherrill*, 544 U.S. at 206-207. The record also shows the Oneidas accepted the Treaty of Buffalo Creek by later receiving compensation for the Kansas lands promised to them. *See id.* at 207 (citing *New York Indians v. United States*, 170 U.S. 1 (1898)).

Ransom Gillet's extra-Treaty promises (Opp. 6-7, 24-25) do not undermine this Court's conclusion in *Sherrill* that the reservation was reduced to 32 acres if not altogether disestablished. Gillet made no promise of a continuing reservation in New York; he simply assured the handful of non-removing Oneidas they would not be forcibly evicted and could remain "*where they reside*" – i.e., on the remnants of the last remaining 5,000 acres. *Sherrill*, 544 U.S. at 206. Even that conditional promise was limited to the generation then living. Pet. 15-16.

The OIN's reliance on *Boylan* (Opp. 8) is misplaced. This Court cited *Boylan* in observing that the reservation had been reduced to 32 acres by 1920. *Sherrill*, 544 U.S. at 210 n.3, 207. The record in *Boylan* documents the break-up of the ancient Oneida reservation through lands sales to

New York following the Treaty of Buffalo Creek. *United States v. Boylan*, 256 F. 468, 469-70 (N.D.N.Y. 1919).[9]

The OIN's contention that the historical record regarding the Treaty of Buffalo Creek can somehow be read to recognize an undiminished 300,000-acre reservation (Opp. 28-29) is a radical form of revisionist history that cannot be reconciled with the historical facts as found by this Court in *Sherrill*. At most, the reservation today consists of a 32-acre parcel.

The court of appeals' decision is factually irreconcilable with *Sherrill* and misapplies this Court's disestablishment precedent, which was developed in the context of Western tribes and reservations that were the subject of Surplus Land Act statutes passed by Congress during the Allotment Era. Separate disestablishment criteria need to be articulated for Eastern tribes and reservations that were the subject of federal treaties in the earlier part of the 19th century. Pet. 10-16. Contrary to what the court of appeals concluded (and the OIN again argues here (Opp. 22-29)) the 1838 Treaty could not have been any more definite about the sale of lands to New York since New York was not a party to the Treaty and New York held the right of preemption to the underlying fee. Pet. 15. The court of appeals thus erred in finding the Treaty lacked specific cession and fixed sum payment terms. Pet. 14-16.

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9. *Waterman v. Mayor*, 280 N.Y.S.2d 927, 930 (N.Y. Sup. Ct. 1967) (Opp. 8) likewise is unavailing since that court also documented the loss of reservation lands following the Treaty of Buffalo Creek and identified only a 32-acre remnant. Thus both *Boylan* and *Waterman* support the conclusion that the Oneida reservation was almost entirely diminished to 32 acres.

CONCLUSION

The petition should be granted.

Date: January 29, 2013

Respectfully submitted,

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