

16-53-CV

IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

CENTRAL NEW YORK FAIR BUSINESS ASSOCIATION; CITIZENS EQUAL RIGHTS ALLIANCE; DAVID R. TOWNSEND, New York Assemblyman; MICHAEL J. HENNESSY, Oneida County Legislator; D. CHAD DAVIS, Oneida County Legislator and MELVIN L. PHILLIPS,

Plaintiffs-Appellants,

—against—

KENNETH L. SALAZAR, individually and in his official capacity as Secretary of the U.S. Department of the Interior; P. LYNN SCARLETT, in her official capacity as Deputy Secretary of the U.S. Department of Interior, JAMES CASON, in his official capacity as the Associate Deputy Secretary of the Interior, FRANKLIN KEEL, the Regional Director for the Eastern Regional Office of the Bureau of Indian Affairs, JAMES T. KARDATZKE, Eastern Regional Environmental Scientist, ARTHUR RAYMOND HALBRITTER, as a real party in interest as the Federally Recognized Leader of the Oneida Indian Nation,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

**REPLY BRIEF FOR PLAINTIFFS-APPELLANTS CENTRAL
NEW YORK FAIR BUSINESS, INC.; CITIZENS EQUAL RIGHTS
ALLIANCE; DAVID R. TOWNSEND, NEW YORK ASSEMBLYMAN;
MICHAEL J. HENNESSY, ONEIDA COUNTY LEGISLATOR; D. CHAD
DAVIS, ONEIDA COUNTY LEGISLATOR AND MELVIN L. PHILLIPS**

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Introduction

The Secretary spends the majority of their brief trying to twist the reasoning of the plaintiffs to prevent this Court from reconsidering the incorrect facts presented in the land claim litigation that preceded this fee to trust case. The incorrect facts deemed precedential by this Court have not only prevented the plaintiffs from having a fair forum in which to litigate their claims but as will be explained in this reply brief would now allow a result that could seriously fracture the structure of the Constitution affecting all Americans adversely. Plaintiffs opening brief described in detail why the prior precedents of this Court were wrong and how they prejudiced the plaintiffs right to contest the records of decision to place land into trust that is the subject of this case. Plaintiffs will address the attempt to twist their reasoning by the Secretary and address the brief of Mr. Halbritter but will begin their argument in this case by applying a precedent from a double jeopardy case decided by the Supreme Court in June.

In order to decide if double jeopardy applies to a criminal conviction under the dual sovereignty doctrine, the original source of sovereignty must be determined. By going back to the fundamental constitutional law on sovereignty, it is the hope of these plaintiffs that this Court will understand

why there could not have been a federal Indian reservation in New York and it could therefore not have ever been federal Indian country. These plaintiffs hope this will enable this Court to correct its own precedents.

Argument

Justice Kagan in writing the opinion of the court in the double jeopardy case of *Puerto Rico v. Sanchez Valle*, 136 S.Ct. 1863 (2016) laid out the fundamentals of our system of original sovereignty under the Constitution. Her clear analysis applies to all aspects of constitutional law and will likely serve as the cornerstone precedent for discussing the structure of the constitution with its multiple sovereigns to decide questions of separation of powers, checks and balances and issues of federalism for many years to come. Plaintiffs will apply these fundamentals to demonstrate how this Court's prior precedents are incorrect and can be corrected by applying these fundamental principles.

- I. THE FUNDAMENTAL PRINCIPLES OF ORIGINAL SOVEREIGNTY CONTRADICT THIS COURT'S PRECEDENTS IN *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 167 (2d Cir. 2003) AND *Oneida Indian Nation v. Madison County*, 665 F.3d 408 (2d Cir. 2011).

As Justice Kagan explains in *Sanchez Valle*, to determine whether two prosecuting authorities are different sovereigns for double jeopardy purposes under the dual sovereignty doctrine this Court asks a narrow historically focused question. The issue is only whether the prosecutorial powers of the two jurisdictions have independent origins or said conversely whether those powers derive from the same “ultimate source” citing the Indian law decision of *United States v. Wheeler*, 435 U.S. 313, 320 (1978). *Valle* at 1867. It is these fundamental principles of original sovereignty that the United States and Oneida tribe so successfully displaced over 40 years of land claim litigation.

It is uncontestable that the whole purpose of the Oneida tribe and the United States in pursuing the land claim cases was to attempt to restore tribal sovereignty. But not to restore tribal sovereignty as it was considered in the 1830’s but as it was considered under the Nixon Indian policy as announced in 1970 with his message to Congress. Under the Nixon Indian policy this meant that the Indian tribes were supposed to possess major inherent sovereign powers of self-government protected by federal sovereignty. Frankly, fee to trust is just an extension of this same Nixon Indian policy, a fact Justice Ginsberg herself missed in the *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) Supreme Court ruling.

As plaintiffs explained to the trial court and in their opening brief the United States never asserted the Non-intercourse Act, 25 U.S.C. § 177, or the Treaty of Canandaigua to the sales of Indian land in New York before 1970. The United States and Oneida tribe in revisiting the historical land sales of the Oneida lands by the State of New York applied the Non-Intercourse Act and Treaty of Canandaigua using indicia of sovereignty as was accepted in 1970 and thereafter to alter what state, federal and tribal sovereignty was considered before 1838.

A. This Court's prior precedent in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 167 (2d Cir. 2003) incorrectly applied current indicia of sovereignty to incorrectly conclude that a federal Indian reservation had existed before 1838 in the State of New York and that it was federal Indian country.

Plaintiffs point out that this Court started out its discussion in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139 (2d Cir. 2003), by listing the three basic principles that control how the Court must dispose of the case. The three basic principles listed are 1) the Indian right of occupancy mixed with the definition of Indian country; 2) federal preeminence over the disposition of Indian land and; 3) federal preemption over state law under the

Indian Commerce Clause. *Id.* at 152-153. As described by Justice Kagan for double jeopardy purposes, the common indicia of sovereignty as designated in *Wheeler* was the extent of control that one prosecuting authority wields over the other. *Valle* at 1870-71. She continues with the degree to which an entity exercises self-governance citing *Puerto Rico v. Shell Co.*, 302 U.S. 253, 261-262, 264-266 (1937). Lastly, another common indicia of sovereignty is the ability to enact and enforce its own criminal laws. *Valle* at 1871.

Just as in this case the question for Puerto Rico was whether these powers were theirs inherently or were delegated by the federal government. *Valle* at 1872. Of the three basic principles listed by this Court in its 2003 opinion only the first principle has some aspect of protecting inherent tribal sovereignty by protecting Indian occupancy. Indian country is a federal law designation that has changed significantly from its inception. The other two are direct assertions of federal sovereignty over Indians. Any way it is considered, all three basic principles to dispose of the case are indicia of sovereignty as defined in 2003 and are not based on principles of original sovereignty. *City of Sherrill* at 152-3.

To determine the double jeopardy question in *Puerto Rico v. Sanchez Valle*, Justice Kagan comes to an express conclusion on the authority of

Congress under the Territory/Property Clause. “But one power Congress does not have, just in the nature of things: It has no capacity, no magic wand or airbrush, to erase or otherwise rewrite its own foundational role in conferring political authority. Or otherwise said, the delegator cannot make itself any less so-no matter how much authority it opts to hand over.” *Id.* at 1876. She then concludes that because Congress was the ultimate source of the authority to make the Puerto Rican constitution that under the ultimate sovereignty analysis double jeopardy applies to protect Mr. Valle from a second prosecution.

Puerto Rico v. Sanchez Valle is the first case that has said that there is a limitation on the authority of Congress under the Territory/Property Clause and that the limitation is that it cannot retroactively alter what has already been conferred as political authority. Justice Kagan has said what the Supreme Court has been toying with since its decision in *Nevada v. Hicks*, 533 U.S. 353 (2001) denying that a state official could be sued in tribal court. The decision in *Valle* comports with this terms earlier decisions in *Sturgeon v. Frost*, 136 S.Ct. 1061 (2016) limiting the application of the reserved rights doctrine and the decision in *Nebraska v. Parker*, 136 S. Ct. 1072 (2016) but goes beyond both of them in imposing a limit on Congressional authority.

These plaintiffs have specifically alleged that this retroactive authority to alter the land status using the Property/Territory Clause is unconstitutional in their Amended Complaint and throughout this litigation because of the disruption of the justifiable expectations of the people in the area affected by the Secretary's decision to place land into trust for the Oneida Indian Nation. From the beginning of the litigation plaintiffs have claimed that the original sovereignty analysis must apply otherwise there is no limit to the Property/Territory Clause authority either in Congress or in the Secretary.

Just like the double jeopardy question in *Puerto Rico v. Sanchez Valle*, the result of this case is dictated by whether the Court applies the ultimate original source of sovereignty analysis or the current indicia of sovereignty analysis. The current indicia of sovereignty includes the federal territorial war power under the Property Clause or as Justice Kagan calls it the Territory Clause, Art. IV, Sec. 3, Cl. 2 as this Court applied them in its 2003 decision that allows the land status to be retroactively altered changing the political authority that was originally conferred to the State of New York under the constitution. Conversely, applying the original analysis of sovereignty as laid out in the structure of the constitution as protected by the 10th Amendment

and applied in *Puerto Rico v. Sanchez Valle* protects New York's status as one of the original 13 colonies.

The structure of the constitution and many precedents have concluded that states are independent sovereigns that preexisted the constitution and that New York as one of the original 13 colonies possessed all of its lands including the preemptive rights over those lands. *See Fletcher v. Peck*, 10 U.S. 87 (1810) and *Puerto Rico v. Sanchez Valle* at 1821, Footnote 4. Under this analysis, as the plaintiffs have consistently argued from their complaint forward, there never was any federal Indian reservation or federal territory or federal Indian country in New York. As its own sovereign it all belonged to New York before the constitution went into effect.

It is a reality of this case that the basis of the analysis is the factor that has caused the total prejudice to the plaintiffs in not having any of their factual allegations accepted as true in the trial court. The historical facts indicate how the sovereignty was considered at the time they happened. By definition the historical facts contradict the current indicia of sovereignty dominated by the federal power over Indians. The same is true of the documents found in the national archives. They not only prove what was intended with the Treaty of Buffalo Creek in 1838 but how that intent had not changed in the Congress

even though Indian policy had taken a major turn in 1871 contradicting the current version of the United States and tribe.

B. This Court can resolve the judicial review problem.

This Court ruled in *Oneida Indian Nation v. Madison County*, 665 F.3d 408 (2d Cir. 2011) that this Court itself does not have the authority to overrule a prior panel of Judges that concluded that the Oneida Indian reservation was subject to federal jurisdiction and was never diminished or disestablished by Congress. *Id.* at 443. This Court can change the result and protect judicial review just by changing its analysis from the current indicia of sovereignty back to the ultimate original source analysis. Similarly, this same change would straighten out the problem in applying *Carcieri v. Salazar*, 555 U.S. 379 (2009).

Justice Ginsberg in *City of Sherrill* upheld the historical fact that in the 1788 Treaty of Fort Schuyler all of the Indian lands had been ceded to New York before the constitution was in effect but then by acknowledging 25 U.S.C. § 465 as the proper course did not actually decide that the original sovereignty analysis controlled. This attempt to make a hybrid analysis applying original sovereignty but allowing current indicia of sovereignty to modify it by adding the Section 465 language ended the land claims but left

great confusion. By leaving the major constitutional question of whether the United States had the authority to retroactively change the law regarding Indian land status open, the Supreme Court invited the political branches to challenge its holdings. Specifically, the original case opening the door to this retroactive authority was *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*) and this Court properly concluded that it was not overruled with the *laches* holding in *City of Sherrill*.

Then came *Carcieri v. Salazar* with its attempt to confine the Secretary and Congress' authority to what they said and did in adopting the Indian Reorganization Act in 1934 and limiting its benefits to only those Indian tribes "now recognized and under federal jurisdiction." The Secretary has kept changing the indicia of sovereignty in her records of decision and legal opinions to avoid the majority opinion. There are two records of decision in this case with different versions of sovereignty and the M- 37029 opinion of March 12, 2014 which totally rewrote the sovereignty position again and is supposed to be the binding major legal analysis of the Department of Interior until another court ruling forces another version. The new M- 37029 opinion was issued for this case after Judge Kahn agreed with these plaintiffs and remanded the case back to the Secretary to make the direct determination of

whether *Carcieri v. Salazar* foreclosed her authority to take the Oneida lands into trust.

One week after *Carcieri* the Supreme Court issued *Hawaii v. Office of Hawaiian Affairs*, 556 U.S. 163 (2009) with its major warning that there are major constitutional implications if Congress attempts to retroactively change the land cessions to Hawaii. The *Hawaii* Court identified the problem but did nothing to change the law to correct it.

Judicial review is going to be continually challenged until the Courts apply Justice Kagan's limitation on the Territory/Property Clause and use the original sovereignty analysis to overrule *Oneida I* and prevent the Congress and the Secretary from claiming retroactive authority to alter conferred grants of authority that disrupts the justifiable expectations of the people.

As plaintiffs explained to the trial court and in their opening brief, Indian law changed from a benevolent purpose before the Civil War to a means to preserve the territorial war powers after the Civil War in the Indian policy of 1871. The statute cited by the Trial Court to deny that the Secretary was acting beyond her authority was 43 U.S.C. § 1457 the reinstatement of the territorial war power authority from 1871. The use of the territorial war powers has resulted in a dramatic shift away from state power and individual

rights and towards greater and greater federal power. This is not just about land status as the United States and Secretary have attempted to argue. Land status is just one indicator of sovereign authority. This question is about whether the federal government can use the territorial war powers to change the structural limits that were placed into the constitution to control unlimited sovereignty that allow self-government. This shift has the potential to break the structure of the constitution just as President Nixon set out to do according to the Nixon Memorandum. Appendix at 176-199.

Claiming that this extra-constitutional power derives from the Indian Commerce Clause as argued by the United States and Secretary in their response would be laughable if the consequences were not so serious. But as Justice Thomas made very clear in his concurring opinion in *United States v. Bryant*, 136 S. Ct. 1954 (2016) the case that established the plenary power over Indian affairs in Congress was *United States v. Kagama*, 118 U.S. 375 (1886). *Id.* at 1968-69. And *Kagama* makes it very clear that the real source of the plenary authority is the territorial war powers that derive from the Property/Territory Clause. As the *Bryant* opinion makes plain, Congress may still legislate over the inherent sovereignty of the Indian tribes using the Indian Commerce Clause. If the authority of the Property/Territory Clause is

limited to prevent changes of political authority already made then there is no means for the United States and Secretary to assert authority over individual parcels of real property subject to state jurisdiction. Real property has always been very hard for the Commerce Clause to reach and the Indian Commerce Clause has the same problem.

II. TRIBAL SOVEREIGN IMMUNITY IS NOT ABROGATED BY ALLOWING THE TRIBAL LEADER TO BE SUED UNDER EX PARTE YOUNG

In *Michigan v. Bay Mills*, 134 S.Ct. 2024 (2014) the Supreme Court made it clear that an Indian tribe's sovereign immunity was not impinged using the same legal fiction that has been used to pierce state sovereign immunity since the ruling in *Ex parte Young*, 209 U.S. 123 (1908). Around 1908, there was a lot of chafing over the powers assumed by the United States during the Civil War that were still being used to limit individual rights and state authority. Justice Breyer cites one of the major cases where the Supreme Court in 1915 failed to bring the Civil War powers back under the constitution in his dissent in *Puerto Rico v. Sanchez Valle*. Id. at 1884, citing *United States v. Midwest Oil*, 236 U.S. 459 (1915).

The Supreme Court seemed afraid to directly confront the Civil War policies. Instead, the Court tried to find ways to preserve individual rights

without directly confronting the elected branches. *Ex Parte Young* succeeded in restoring individual rights to sue over government overreaching without directly confronting the Civil War authority that created the problem and the expansion of governmental sovereign immunity itself. Suing an individual in their official capacity to get around the sovereign immunity of the entity they represent was a very effective reaction to the changes in sovereignty created by the Civil War and the shift of power towards government authority.

Plaintiffs may not have explained all this about *Ex Parte Young* in their opening brief but very clearly cited *Michigan v. Bay Mills* as the case that created this change that they could sue Mr. Halbritter as the leader of the tribe. *Bay Mills* at 2035.

Since plaintiffs' position is that they did not get a fair and impartial forum and that the whole case has to be remanded if they are successful in getting this Court's precedents overturned, they are giving Mr. Halbritter and the Oneida Indians the ability to defend their own inherent sovereignty. Given the new limitation on the Territory/Property Clause this could turn out to be very important to protect tribal interests.

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Conclusion

This Court should apply an original sovereignty analysis and correct its own incorrect precedents, reverse the decisions of the lower court and remand this case back to the trial court.

Respectfully submitted,

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