No. 16-1320

IN THE

Supreme Court of the United States

UPSTATE CITIZENS FOR EQUALITY, INC., *et al.*,

Petitioners,

v.

THE UNITED STATES OF AMERICA, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

DAVID B. VICKERS, ESQ.
Counsel of Record
244 Salt Spring Street
Fayetteville, New York 13066
(315) 637-5130
vickersd@earthlink.net

Attorney for Petitioners

272670

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

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QUESTIONS PRESENTED

1. Can Congress in the exercise of its Article 1 powers infringe, reduce or diminish the territorial integrity of a State without its prior consent?

2. Does Congress possess plenary power over Indian affairs and if so does it expand the Indian Commerce Clause to authorize the displacement of State rights to territorial integrity?

3. Does the land acquisition in this case via the mechanism of 25 USC § 465 (now 25 USC § 5108), represent a violation of the limits inherently expressed in the Indian Commerce Clause that limit Congress' power to 'regulate' 'commerce?'

4. Does the 300,000-acre ancient Oneida Indian reservation in New York still exist?

RULE 14.1(B) STATEMENT

Petitioners (plaintiffs below) are Upstate Citizens for Equality, Inc., David Brown Vickers, Richard Tallcot, Scott Peterman, Daniel T. Warren.

Respondents (defendants below) are United States of America, Individually, and as Trustee of the Goods, Credits and Chattels of the Federally Recognized Indian Nations and Tribes Situated in the State of New York, Sally M.R. Jewell, in her Official Capacity as Secretary of the U.S. Department of the Interior, Michael L. Connor, in his Official Capacity as Deputy Secretary of the U.S. Department of the Interior and Exercising his Delegated Authority as Assistant Secretary of the Interior for Indian Affairs, Elizabeth J. Klein, in her Official Capacity as the Associate Deputy Secretary of the U.S. Department of the Interior and Exercising her Delegated Authority as Assistant Secretary of the Interior for Indian Affairs, United States Department of the Interior

RULE 29.6 STATEMENT

Upstate Citizens for Equality, Inc. is organized as a not-for-profit corporation and states that it has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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The opinion of the United States Court of Appeals for the Second Circuit is reported as Upstate Citizens for Equal., Inc. v. United States at 841 F.3d 556 (2d Cir. 2016) and appears at Petitioners' Appendix ("Pet. App.") 1a to 41a to the Petition.

The opinions of the United States District Court for the Northern District of New York are as follows: (i) Upstate Citizens for Equal., Inc. v. Jewell, (Pet. App. 42a to 71a), unpublished and available at 2015 U.S. Dist. LEXIS 38101 (N.D.N.Y. Mar. 26, 2015); and (ii) State v. Salazar, (Pet. App. 72a to 129a), unpublished and available at 2012 U.S. Dist. LEXIS 136086 (N.D.N.Y. Sep. 24, 2012) and (iii) Upstate Citizens for Equal., Inc. v. Salazar, (Pet. App. 130a to 169a), unpublished and available at 2010 U.S. Dist. LEXIS 19787 (N.D.N.Y. Mar. 4, 2010).

JURISDICTION

The judgment of the Second Circuit was entered on November 9, 2016. Petitioner's motion for panel rehearing and rehearing en banc was denied on January 27, 2017, (Pet. App. 170a to 173a). This court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional and Statutory provisions are involved and due to their length are included in the Appendix:

Article I, Section 8, Clause 3 of the U.S. Constitution

Article I, Section 8, Clause 17 of the U.S. Constitution

Article IV, Section 3, Clause 1 of the U.S. Constitution

10th Amendment to the U.S. Constitution

25 USC § 465 (now 25 USC § 5108)

1788 Treaty of Fort Schuyler, September 22, 1788

Treaty of Buffalo Creek, 7 Stat. 550

Treaty of Canandaigua, 7 Stat. 44

INTRODUCTION

In *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 214 (2005) ("Sherrill") this Court held that standards of federal Indian law and federal equity practice precluded the Oneida Indian Nation of New York ("OIN"), the same tribe at issue here, from unilaterally reviving its ancient sovereignty, in whole or in part, over recently-purchased property that had been owned and governed by non-Indians for 200 years. In so holding, this Court stated (in dicta): "Section 465 provides the proper avenue for OIN to reestablish sovereign authority over territory last held by the Oneidas 200 years ago." *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197, 221 (U.S. 2005). This suggestion was never meant to be construed as a foregone conclusion that 25 USC 465 was appropriate in this case and under these specific circumstances; it was merely pointing out the legal failure of the OIN's theory

that fee ownership combined with the status of "ancient reservation" combined to create sovereign Indian land, outside of the reach of State jurisdiction.

This case challenges the Secretary of Interior's action to take these lands into trust. The Secretary's exercise of his unbridled discretion encroaches directly on a State's right to territorial integrity, its taxing authority, and its ability to exercise police powers. Where such "fundamental aspects of state sovereignty" are concerned, mere "administrative convenience" is insufficient to overcome the States' interests. *FMC v. S.C. State Ports Auth.*, 535 U.S. 743, 769 (2002). Few, if any, other delegated powers have such direct, fundamental and negative impacts on the people who call this region "home" as well as on state sovereignty, particularly where the Secretary is processing large number of applications, involving millions of acres of land, then deeding those lands to a competing sovereign without a State's consent. The jurisprudential significance of this case is heightened dramatically by the Secretary's extraordinary ability "to oust state jurisdiction in favor of government by the beneficiaries he chooses." *Mich. Gambling Opposition v. Kempthorne*, 525 F.3d 23 at 40 (D.C. Cir. Apr. 29, 2008) (Brown, J. dissenting). If the current position taken by the federal government is allowed to become "court-made" law, there will be no limits to the "Indian Commerce Clause." Virtually any time any tribe acquires any land anywhere on the open market and desires to have the federal government transfer the status of that land into federal trust, the state in question becomes a helpless witness to this gross and unconstitutional abuse of land acquisition outside of the traditional safeguards of the Enclaves Clause, Article I, Section 8, Clause 17.

STATEMENT OF THE CASE

In *Carcieri v. Salazar*, 555 U.S. 379 (2009), this Court held that the Secretary of the Interior is authorized to take land into trust for Indian tribes only if the tribe in question was under federal jurisdiction in 1934, when the Indian Reorganization Act was enacted. The case was decided exclusively on statutory grounds. But lurking beneath the surface was a major question of constitutional dimension: does the federal government have the power to alter unilaterally a state's historic territorial jurisdiction? That very issue was raised in the trial court in *Carcieri* (*Carcieri v. Norton*, 290 F. Supp. 2d 167, 187-89 (D.R.I. 2003)), as well as before the First Circuit (*Carcieri v. Norton*, 398 F.3d 22, 34-35 (1st Cir. 2005) and *Carcieri v. Kempthorne*, 497 F.3d 15, 39-41 (1st Cir. 2007)(en banc)). One of the dissenters in the First Circuit cogently observed that:

> As Indian tribes evolve in modern society, old legal rules tend to blur. The controversy that divides our court today is vexing and of paramount importance to both the State and the Tribe. Thus, the issue--as well as the underlying principles of Indian law--doubtless would benefit from consideration by the Supreme Court.

Carcieri v. Kempthorne, 497 F.3d at 52 (Selya, J., dissenting).

The underlying constitutional issue that eluded review in Carcieri has resurfaced in this case. In this case the United States Court of Appeals for the Second Circuit

elevated the Congressional authority under the Indian Commerce Clause (Article I, Section 8, Clause 3) over the Territorial Integrity of the State of New York as embodied in Article IV, Section 3, Clause 1 of the U.S. Constitution and recognized by this Court in *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). When the Second Circuit issued its opinion in the decision below, it was in violation not only of this Court's ruling in *Sherrill*, but also of this Court's unequivocal statement that "the Constitution . . . must be regarded as one instrument, all of whose provisions are to be deemed of equal validity." *Prout v. Starr*, 188 U.S. 537, 543, 47 L. Ed. 584, 23 S. Ct. 398 (1903).

The Court below held that outside the 11th Amendment "No equivalent constitutional provision shields the states' exercise of jurisdiction over Indian land within their borders." *Upstate Citizens for Equal., Inc. v. United States, 841 F.3d 556*, this is simply incorrect.

If the Second Circuit's ruling stands, that would mean that Congress has passed an act (25 USC § 465, now codified as 25 USC § 5108) that allows an executive branch federal agency to team up with a willing Indian tribe to effectively diminish a State's sovereignty to the point of near non-existence (See *Id.* at p. 6: "The IRA therefore authorized the secretary of the Interior, in her discretion, to acquire land and other property interests 'within or without existing reservations ... for the purpose of providing land for Indians.' Pub. L. No. 73-383, Sec 5, 48 Stat. 984, 985 (1934) (codified at 25 USC Sec. 465). The Second Circuit will have granted near tyrannical power to the unelected federal government agencies and to tribes; the only "check" on this system

would be the internal checks that are present in the CFR rules for trust acquisition. The Second Circuit will have expanded the concepts of "regulating" "commerce" well beyond their original meaning to the point where no limits would exist on this power. The second Circuit will have made tribal entities the beneficiaries of legislative favoritism to the point where tribes would be allowed to operate virtually any business in any state and avoid that state's employment law, health and safety law, tax law, environmental protection law and on and on. It is up to the Supreme Court to correct this blatant and unconstitutional injustice.

The Second Circuit's holding also ignores the warning of this Court that the expansion of congressional power through an "increasingly generous . . . interpretation of the commerce power of Congress," for example, creates "a real risk that Congress will gradually erase the diffusion of power between State and Nation on which the Framers based their faith in the efficiency and vitality of our Republic." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 583-584, 105 S. Ct. 1005, 83 L. Ed. 2d 1016 (1985).

Petitioners contend that the holding below violates the bright line rules of federal law as expressed by this Court, e.g., *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525, 538-39 (1885), and raise profound constitutional and statutory questions that go to the heart of the federal-state relationship.

REASONS FOR GRANTING THE PETITION

The Second Circuit's decision below has decided important questions of federal law that has not been, but should be, settled by this Court, and has decided important federal questions in a way that conflicts with relevant decisions of this Court. As detailed below the decision below conflicts with, inter alia, this court's treatment of state sovereignty under the constitution. The decision below also raises a question of whether or not the 300,000 acre Oneida reservation still exists, a question that this Court granted review on a number of times but has never reached on the merits.

Can Congress in the exercise of its Article 1 powers infringe, reduce or diminish the territorial integrity of a State without its prior consent?

To construe the Indian Commerce Clause as trumping Article IV, Section 3, Clause 1 and the Enclave Clause's express limitations on federal power to displace state sovereignty impermissibly reallocates the balance of power between state and federal sovereigns, undoes the carefully negotiated principles of federalism and states' rights that the Constitution specifically embraces in the state territorial sovereignty "guaranteed" by Article IV, Section 3, Clause 1, and violates the very concept of states as robust sovereigns that joined the union with their sovereignty intact.

The United States Constitution, and this Court's jurisprudence interpreting state-federal sovereignty under it, does not permit the federal government to displace state sovereign lands by somehow "creating"

an Indian reservation, and thereby displacing state territorial jurisdiction, without the consent of the state. As an initial matter, Article IV, Section 3, Clause 1 of the United States Constitution guarantees "state territorial integrity." *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550 (1985). Such express guarantees are rare in the Constitution and this particular guarantee means that "Congress may not employ its delegated powers to displace" state territorial integrity. Id. Thus, lands that fall within a state's borders, over which the state exercises its territorial sovereignty in the form of taxing and regulatory authority, are protected by the Constitution against federal land acquisitions that would seek to displace state governance in any respect. That core aspect of federalism is hard-wired into Article IV, Section 3, Clause 1.

Territorial sovereignty is any state's most prized possession. In a case involving a different aspect of state sovereignty, this Court observed "the well-established principle that States do not easily cede their sovereign powers." *Tarrant Regional Water Dist. v. Herrmann*, 133 S. Ct. 2120, 2132 (2013). Territorial sovereignty embodies the state's ability to apply its own law to land within its borders. The federal Constitution establishes a system of dual sovereignty. "The powers delegated by the proposed Constitution to the federal government are few and defined. Those which are to remain in the State governments are numerous and indefinite." The Federalist, No. 45, p. 292 (Rossiter ed. 1961).), see also *Nat'l Fed. of Indep. Bus. v. Sebelius*, 567 U.S. 519, 132 S. Ct. 2566, 2577-80 (2012); U.S. Const., Amend. X. Judicial precedent and governing statutes have erected high barriers to protect that vital power. This Court has

established that the federal government cannot take a state's legislative (territorial) jurisdiction without the state's clear consent. *Fort Leavenworth R.R. v. Lowe*, 114 U.S. 525, 538-39 (1885) ("the state shall freely cede the particular place to the United States for one of the specific and enumerated objects. This jurisdiction cannot be acquired tortiously or by disseizin of the state; much less can it be acquired by mere occupancy, with the implied or tacit consent of the state...."). It is undisputed that the State of New York did not consent to the taking of this land into trust since they also sued to prevent this from happening.

In recognizing that the limited nature of the Indian Commerce Clause the Supreme Court has stated that "[t]he power of Congress over Indian affairs may be of a plenary nature, but it is not absolute." *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 84 (1977), (quoting *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946)). In *United States v. Lara*, 541 U.S. 193, 205 (2004), the Court suggested that Congress could run up against "constitutional limits" if its Indian legislation "interfere[d] with the power or authority of any State." Just as the Commerce clause has been found to have limits (See *U.S. v. Lopez*, 514 U.S. 549, 567: "To uphold the government's contention here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general ... power of the sort retained by the States." See Also *U.S. v. Morrison*, 529 U.S. 598, 607-619: "Gender-motivated crimes of violence are not, in any sense, economic activity."), so too does the Indian Commerce Clause have limits. If "commerce" has come to mean "sovereign state land acquisition," then there are no

protections left to a State or its residents from a federal government intent on using tribes to achieve whatever goals are desired – all outside of the legislative process and outside of the expressed guidelines of the Constitution.

This auspicious specter of unfettered federal power-power that would be used to create a virtually lawless checkerboard of OIN tribal "jurisdiction," was the subject of the Madison County Attorney as he wrote to the Bureau of Indian Affairs in January of 2006:

> Recognizing the role of the people, the importance of their rights, and the need to protect both, the New York Constitution established, in Article IX, a bill of rights for local governments. With respect to the territory of a local government, the provisions of Article IX Section 1 (d) are telling, providing in part: "No local government or any part of the territory thereof shall be annexed to another until the people, if any, of the territory proposed to be annexed shall have consented thereto by a majority vote on a referendum and until the governing board of each local government, the area of which is affected, shall have consented thereto upon the basis of a determination that the annexation is in the over-all public interest."

The Madison County Attorney went on:

> "Our citizens lost their fundamental right to govern their own communities. It was OIN's position that their checker-board of parcels was not subject to any local regulation,

> including local zoning, planning, building or environmental controls – and they acted in that fashion. ... The acquisitions have been predatory. Although receiving the benefit of services and municipal infrastructure on Which their enterprises and people depend for Their extraordinary success, the OIN and its Enterprises paid no real property taxes, Refused to collect and remit sales taxes on Sales to non-Indians, and made no other Binding contributions."

This specter raises an important nationwide question of Constitutional and Federal Law. This question was lurking in *Carcieri*, supra, as detailed above. This question was also present in *Stop the Casino 101 Coal. v. Brown*, 135 S. Ct. 2364 (U.S. 2015) and *Citizens Against Casino Gambling v. Chaudhuri*, 136 S. Ct. 2387 (U.S. May 31, 2016) where Certiorari was denied.

> **Does Congress have Plenary Power over Indian Affairs and if so does it authorize the displacement of State rights to territorial integrity?**

Recently, Justice Thomas stated in his concurring opinion in *United States v. Bryant*, 136 S. Ct. 1954, 1967 (U.S. June 13, 2016):

> Congress' purported plenary power over Indian tribes rests on even shakier foundations. No enumerated power — not Congress' power to "regulate Commerce . . . with Indian Tribes," not the Senate's role in approving treaties, nor anything else — gives Congress such sweeping

authority. See Lara, supra, at 224-225, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (Thomas, J., concurring in judgment); Adoptive Couple v. Baby Girl, 570 U. S. ___, ___-___, 133 S. Ct. 2552, 186 L. Ed. 2d 729, (2013) (Thomas, J., concurring). Indeed, the Court created this new power because it was unable to find an enumerated power justifying the federal Major Crimes Act, which for the first time punished crimes committed by Indians against Indians on Indian land. See Kagama, supra, at 377-380, 6 S. Ct. 1109, 30 L. Ed. 228; cf. ante, at ___, 195 L. Ed. 2d, at 323. The Court asserted: "The power of the General Government over these remnants of a race once powerful, now weak and diminished in numbers, is necessary to their protection .... It must exist in that government, because it has never existed anywhere else." Kagama, supra, at 384, 6 S. Ct. 1109, 30 L. Ed. 228. Over a century later, Kagama endures as the foundation of this doctrine, and the Court has searched in vain for any valid constitutional justification for this unfettered power. See, e.g., Lone Wolf v. Hitchcock, 187 U. S. 553, 566-567, 23 S. Ct. 216, 47 L. Ed. 299 (1903) (relying on Kagama's race-based plenary power theory); Winton v. Amos, 255 U. S. 373, 391-392, 41 S. Ct. 342, 65 L. Ed. 684, 56 Ct. Cl. 472 (1921) (Congress' "plenary authority" is based on Indians' "condition of tutelage or dependency"); Wheeler, supra, at 319, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (Winton and Lone Wolf illustrate the "undisputed fact that Congress has plenary authority" over tribes); Lara, supra, at 224,

> 124 S. Ct. 1628, 158 L. Ed. 2d 420 (Thomas, J., concurring in judgment) ("The Court utterly fails to find any provision of the Constitution that gives Congress enumerated power to alter tribal sovereignty").

There is no Congressional plenary power over Indian Nations and Tribes, let alone one that provides Constitutional authority for the taking of land from a States without its express prior consent for an Indian Nation or Tribe.

The Second Circuit in its decision below erroneously held that this plenary power somehow expands the limitations of the Indian Commerce Clause as more fully detailed below (*Upstate Citizens for Equal., Inc. v. United States*, 841 F.3d 556 at 567).

The Second Circuit relies on the most elastic of definitions of "plenary" power in its decision below to interpret 25 USC § 465 as being allowable under the guidelines of the Indian Commerce Clause. In *U.S. v. Sandoval*, 231 U.S. 28 (1913), the Supreme Court expanded the concept of "regulating" "commerce" to mean something far more than simply "regulating" "commerce: "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and duty of exercising a fostering care and protection over all dependent Indian communities within its borders" (231 U.S. at 45-46 (1913)). The Second Circuit cites to subsequent cases in which this standard has been

employed (See *Washington v. Confederated Bands and Tribes of Yakima Nation,* 439 U.S. 463, 470-71 (1979), *Seminole Tribe v. Florida,* 517 U.S. 44, 62 (1996), *Cotton Petroleum Corp. v. New Mexico,* 490 U.S. 163, 192 (1989). But, "plenary," in obviously contradictory language, does not mean "absolute." (*Delaware Tribal Business Committee v. Weeks,* 430 U.S. 73, 84 (1977) (quoting *United States v. Alcea Band of Tillamooks*, 329 U.S. 40, 54 (1946). How can "plenary" mean both 'absolute' and 'not absolute' at the same time? When passing laws, Congress may be deemed to have "plenary power" over tribes, but that "plenary" power does not seamlessly bleed into the scope of either individuals' rights or States' rights. It is uncontested that Congress can terminate any and all 'sovereignty' that any Indian tribe asserts (See Menominee Termination Act, 25 USC 564, etc. See also *South Carolina v. Catawba Indian Tribe,* 476 U.S. 498 (1986)). From the tribes' perspective, this is as "plenary" as power can get.

However, Congress could not pass any laws that would infringe on the tribes' members' First Amendment freedoms of practicing traditional tribal religions or of peaceable assembly. Congress could not pass laws that would empower a tribal government to trample on its own members' Fifth Amendment rights of due process or uncompensated confiscation of property.

Just as Congress cannot rely on "plenary" power to abuse individual Constitutional rights, so too is Congress prohibited from passing laws that infringe on any given State's Constitutional guarantees, one of which is the State's right to territorial integrity (see *Garcia, Tarrant Regional Water Dist.* and other citations, *infra.*) which is

enshrined not only in this Court's precedent as detailed above, but also in the Enclaves Clause.

The Second Circuit's decision below effectively allows for an end-run around the Enclaves Clause by way of an ever-expanding elasticity of the "Indian Commerce Clause." The Second Circuit was aware that its ruling would be subject to this analysis and defensively pointed out that "States may, for instance, require Indians to collect state sales taxes on goods sold on the reservation to nonmembers. *Washington v. Confederated Tribes of Colville Indian Reservation,* 447 U.S. 134, 151, 159-60 (1980)." And, "Their (ie: the states') agents may enter the reservation to execute a search warrant related to off-reservation conduct. *Hicks,* 533 U.S. at 364-65." Naturally, the Second Circuit omitted from its analysis the role that "tribal immunity" might play should the State desire to enforce any of its federally 'permitted' remaining powers. Apparently, so long as the State is in a position to at least attempt to exercise the most trivial aspects of its sovereign jurisdiction, an Enclaves Clause crisis is averted, in the opinion of the Second Circuit.

Does the land acquisition in this case via the mechanism of 25 USC § 465 (now 25 USC § 5108), represent a violation of the limits inherently expressed in the Indian Commerce Clause?

Justice Thomas in his concurring opinion in *Adoptive Couple v. Baby Girl*, 133 S. Ct. 2552 at 2567 noted that commerce has a limited definition. Specifically, "At the time the original Constitution was ratified, 'commerce' consisted of selling, buying, and bartering, as well as transporting for these purposes." *United States v. Lopez*,

514 U. S. 549, 585, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (1995) (Thomas J., concurring). See also 1 S. Johnson, A Dictionary of the English Language 361 (4th rev. ed. 1773) (reprint 1978) (defining commerce as 'Intercourse; exchange of one thing for another; interchange of anything; trade; traffick'). "[W]hen Federalists and Anti-Federalists discussed the Commerce Clause during the ratification period, they often used trade (in its selling/bartering sense) and commerce interchangeably." Lopez, supra, 514 U.S. at 586, 115 S. Ct. 1624, 131 L. Ed. 2d 626 (Thomas, J., concurring). The term "commerce" did not include economic activity such as 'manufacturing and agriculture,' ibid.," or as in this case the Oneidas' need "'for cultural and social preservation and expression, political self-determination, self-sufficiency, and economic growth by providing a tribal land base and homeland.'" (May 20, 2008 ROD at 8)

There is also a textual limitation within Indian Commerce Clause as noted by Justice Thomas. "Congress is given the power to regulate Commerce 'with the Indian tribes.' The Clause does not give Congress the power to regulate commerce with all Indian persons any more than the Foreign Commerce Clause gives Congress the power to regulate commerce with all foreign nationals traveling within the United States. A straightforward reading of the text, thus, confirms that Congress may only regulate commercial interactions — "commerce" — taking place with established Indian communities — "tribes." That power is far from 'plenary.'" *Adoptive Couple v. Baby Girl*, supra at 2567

25 USC § 5108 as applied in this case exceeds Congress's Indian Commerce Clause power and

violates the Tenth Amendment. The Second Circuit's interpretation of these Constitutional provisions permits the BIA through 25 USC § 5108 to unilaterally take State territory, deem it an Indian reservation, and oust the State from control over the land. The Indian Commerce Clause cannot be construed to allow Congress such unfettered power to oust States from territorial control. If it were, there would be no stopping point – Congress could take any land, anywhere, in any quantity, and convert it into a sovereign reservation for a separate sovereign. That is an exceedingly aggressive, and ultimately improper, interpretation of a constitutional provision that merely empowers Congress "[t]o regulate Commerce . . . with the Indian Tribes." U.S. Const. Article I, Section 8, Clause 3.

Pieced together, the current expansive interpretation of the Indian Commerce Clause combined with a Court-created principle of plenary power together with an expansive interpretation of previous rulings of this Court, creates a power that the founders would never have imagined and certainly never encoded in the Constitution: namely, the power of the federal government to strip a state of all its meaningful territorial jurisdiction and taxing authority in order to "benefit a tribe or an individual Indian." Only this Court can correct this unbalanced set of interpretations of language and intent.

Does the 300,000-acre ancient Oneida Indian reservation in New York still exist?

Does the 300,000 acre "ancient" Oneida Indian State reservation in New York still exist, neither dis-established nor diminished, despite (1) the federal government's actions taken in furtherance of disestablishment

(including, but not limited to, the 1838 Treaty of Buffalo Creek, 7 Stat. 550); (2) this Court's holding in *City of Sherrill v. Oneida Indian Nation of New York,* 544 U.S. 197, 214 (2005) ("*Sherrill*") that the Oneida Indian Nation of New York (hereinafter "OINNY") cannot exercise sovereignty over lands it purchases in the "ancient" reservation area; and (3) this Court's finding in that case that land in the "ancient" reservation area has not been treated as an Indian reservation by the federal, state or local governments for nearly two centuries?

This question has been presented to this Court on several occasions; it is just as important today as it was when this Court granted certiorari on this question before, in *Madison County v. Oneida Indian Nation of New York,* Docket No. 10-72, 131 S. Ct. 459, October 12, 2010 and in *City of Sherrill v. Oneida Indian Nation of New York,* Docket No. 03-855, 542 U.S. 936, June 28, 2004 and in *Madison County and Oneida County, New York v. Oneida Indian Nation, Docket* No. 12-604, 134 S. Ct. 1582, (Mar. 26, 2014) (dismissing petition).

The historical record has been less than completely accurate, dating back to *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974) ("Oneida II"). The result of key factual omissions from the judicial record has created an unintended re-writing of history, which has ongoing and dramatic negative consequences and only this Court can correct this situation.

The Second Circuit has concluded that this ancient reservation is "Indian Country" and therefore "is subject to federal jurisdiction" because it was never "diminished or dis-established by Congress." (See *Oneida Indian*

Nation v. Madison County, 665 F. 3d 408, 443 (2d Cir. 2011). This conclusion directly contradicts the ruling in the Sherrill decision in which the OINNY was altogether barred from exercising sovereignty over the lands in question (*Sherrill*, 544 U.S. at 203-204 and 214-221). The *Sherrill* Court concluded that the OINNY could not exercise any sovereignty over this non "Indian Country" land after an extensive review of documented history (Id. at 203-206).

The result of these two existing pieces of judicial analysis and contemporaneous sources of contradictory and competing authority is chaos. What the Courts have created is some 300,000 acres of land that is a non-disestablished Indian Reservation (2nd Cir. Decision below at p. 10), created by the State in the Treaty of Fort Schuyler in 1788 (Sherrill, p. 216-217), but that somehow mysteriously fell under federal jurisdiction (2d Circuit decision below at p. 9), but upon which the federal government never exercised and never contemplated exercising any jurisdiction (*Sherrill* at p. 216-217). The State and the localities have exercised jurisdiction for over 200 years (*Sherrill* at p. 221). The existence of this "reservation" means that the State of New York will have no jurisdiction (See *Citizens Against Casino Gambling v. Chaudhuri*, 802 F.3d 267 (2d Cir. 2015), cert denied, LEXIS 3506 (2016) if the land is taken into federal "trust" status while at the same time the State will retain some jurisdiction (See *Upstate Citizens for Equality v. United States*, 841 F.3d 556).

The practical result of this Court-created chaos is that the federal government, by and through the Secretary of the Interior, the Bureau of Indian Affairs and a

questionable *Chevron* notion that federal government executive branch agencies are owed almost unchallenged deference of crucial statutory interpretation, can treat a sovereign State as a mere fiction when the federal government executive branch agency and a willing Indian tribe team up to decide that the State should no longer exist. The status quo, left unchecked, would allow the federal government to simply take land (either under federal jurisdiction, or perhaps, according to how the Second Circuit decision gets interpreted, any land – regardless of whether or not it is or ever has been under federal jurisdiction) and allow the tribe to exercise here-to-fore unfathomable "super-citizen" status to engage in any activity they like - all while paying no heed to the obligations that all other citizens must abide by. Since the Courts created this mess, This Supreme Court has the duty and obligation to end it.

This Court owes the residents of this land in question (who are represented by the Petitioners herein) a clear and decisive decision that puts this chaos to rest once and for all. In order to do that, a thorough review of history and a thoughtful consideration of the case below is all that is needed. It is beyond dispute that the ancient Oneida Indian reservation of some 300,000 acres was created by New York State in the 1788 Treaty of Fort Schuyler after the Oneidas had ceded all its lands to the State of New York. This Court has acknowledged this fact (*Sherrill*, at 203-204). This fact makes it a State reservation with no special federal jurisdiction. When the 1794 Treaty of Canandaigua,7 Stat. 44 was signed, that treaty established no federal jurisdiction; it created no federal presence; it changed nothing about the 1788 Treaty with New York: "The United States acknowledge the lands reserved to the

Oneida, Onondaga and Cayuga Nations, in their respective treaties with the State of New York ... and the United States will never claim the same." 'Not claiming the same' means not having the capacity to exercise jurisdiction over that land and this Court needs to clarify this.

In early land claim cases, this Court misapplied 25 U.S.C. § 177 (See Oneida II). This 1790 act, often badly referred to as the Indian Non-Intercourse Act, established the principle that Indian lands, such as those reserved to the Oneidas by the State of New York in the 1788 treaty, could be sold to the State, which had pre-emption rights only if said land sale was overseen and approved by the federal government (See 1 Stat. 137, 138). In fact, this legislative act had three central incarnations: 1790, 1793 and finally 1834. Unfortunately, the language of the 1790 act has survived into subsequent court decisions even though that language ceased being operative and valid as early as March of 1793: "Nothing in this Act shall be construed to prevent any trade or intercourse with Indians living on lands surrounded by settlements of citizens of the United States, and being within the jurisdiction of any of the individual States." (1 Stat. 329, 330-331, March 1, 1793 replacing the expired 1790 Act). This language was in effect during virtually all of the land sales between the Oneidas and the State of New York from 1793-1846, when the last sale took place involving the "Missionary Lot" that was sold to Andrew I. Bell, et al. In fact, 25 U.S.C. § 177 was never violated because the language in 25 U.S.C. § 177 was changed from what the Courts have mistakenly accepted as valid to what really was valid at law. (See *United States v. Cisna,* 25 F. Cas. 422 (C.C.D. Ohio July 1, 1835)) in which Justice McLean ruled that a small Indian tribe had become surrounded by citizens of the State of

Ohio and the land in question was clearly surrounded by land that was under Ohio's ordinary jurisdiction, and therefore State law was deemed to have jurisdiction over the tribe, not federal law).

Treaty of Buffalo Creek

The earlier requests from other litigants to analyze the Treaty of Buffalo Creek should result in certiorari being granted to the case at bar. Petitioners herein borrow heavily from preceding petitions for certiorari: (1) *Sherrill*, Docket No. 03-855, 542 U.S. 936, June 28, 2004 in which Petitioners asked "Whether the 1838 Treaty of Buffalo Creek, which required the New York Oneidas to permanently abandon their lands in New York, resulted in the disestablishment of the Oneidas' alleged New York reservation?" (2) *Madison County v. Oneida Indian Nation of New York*, Docket No. 10-72, 131 S. Ct. 459, October 12, 2010 in which the petitioners asked, "Whether the ancient Oneida reservation in New York has been disestablished or diminished?" (3) *Madison County and Oneida County, New York v. Oneida Indian nation of New York*, Docket No. 12-604. In all three cases, this Court granted certiorari so that this ongoing and pressing question could be answered; twice a maneuver by either the OINNY or the tribe acting with the State of New York's governor prevented this Court from actually being able to address this question directly; and once – in Sherrill, this Court decided the case without answering the question presented. It is beyond time that this question be addressed and answered with clarity and firmness so that all parties know the exact nature of the land that hundreds of thousands of New Yorkers call "home."

If the land that has been the subject of the trust acquisition never was federal land and if the Treaty of Buffalo Creek, as well as many other significant historical occurrences, function in such a manner as to have "disestablished" any federal recognition of what was clearly a New York State "reservation," then the land in question is, and always was, New York State fee land and the trust acquisition must fail.

CONCLUSION

The Court should grant the petition for a writ of certiorari in order to declare that the land in question is New York State sovereign land and not in any way under special "federal jurisdiction" and to put meaningful and necessary limits on the scope of the Indian Commerce Clause.

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Respectfully submitted,

DAVID B. VICKERS, ESQ.
Counsel of Record
244 Salt Spring Street
Fayetteville, New York 13066
(315) 637-5130
vickersd@earthlink.net

Attorney for Petitioners