No. _____

In The
Supreme Court of the United States

ONONDAGA NATION,

Petitioner,

vs.

THE STATE OF NEW YORK, 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

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QUESTION PRESENTED

Whether the court of appeals' ruling that equitable considerations bar the Onondaga Nation's claim for a declaratory judgment for violations of the Trade and Intercourse Act, three federal treaties and the United States Constitution contravenes the fundamental right to a remedy, international legal norms, principles of federal equity and this Court's decisions in *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) and *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005).

PARTIES TO THE PROCEEDING

Petitioner Onondaga Nation was the plaintiff in the District Court and appellant in the Court of Appeals. Respondents State of New York; George Pataki in his individual capacity and as Governor of the State of New York; Onondaga County; City of Syracuse; Honeywell International, Inc.; Trigen Syracuse Energy Corporation; Clark Concrete Company, Inc.; Valley Realty Development Company, Inc.; and Hanson Aggregates North America were defendants in the district court and appellees in the court of appeals.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is unreported and reprinted in the Appendix at 1-7. The opinion of the district court is unreported and available at 2010 WL 38069492. It is reprinted in the Appendix at 8-28.

JURISDICTION

The court of appeals entered its summary order and judgment on October 19, 2012. (App. at 1-7). A timely petition for rehearing was denied on December 21, 2012. (App. at 29-30). Justice Ginsburg extended the time for filing this Petition to and including April 22, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case is based on 25 U.S.C. § 177 (the Trade and Intercourse Act), which provides that "no purchase" of Indian lands shall be "of any validity in law or equity" without the consent or authorization of Congress. This case also involves the Treaty of Canandaigua of 1794, 7 Stat. 44, which guaranteed to the Onondaga Nation their land rights and directs the United States to provide a remedy for the violation of those rights. The pertinent provisions of the

statute and the treaty are reprinted in the Appendix at 31-37.

STATEMENT OF THE CASE

In this case, Petitioner Onondaga Nation seeks a declaration that its treaty-guaranteed lands were taken by the State of New York in violation of federal law. The facts related to the Nation's loss of its lands at the hands of New York are not disputed. Fundamentally, the question this case presents is whether the federal courts are open to Indian nations seeking a remedy for acknowledged violations of federal law, federal treaties and the United States Constitution.

Petitioner Onondaga Nation is a member nation of the Haudenosaunee, or Six Nations Confederacy. Onondaga is the seat of the government of the Confederacy, or central council fire, under the governing law known as the Great Law of Peace. The Onondaga Nation has occupied and used its aboriginal territory in central New York State since time immemorial. Well before the founding of the United States, the Onondaga Nation was treated as a sovereign nation by the colonies, which sought to neutralize the Nation in the war with Great Britain. *See, e.g., Worcester v. Georgia,* 31 U.S. (6 Pet.) 515, 557 (1832) ("The confederation [of colonies] found [the Continental] Congress in the exercise of the same powers of peace and

war, in our relations with Indian nations, as with those of Europe.").

On May 10, 1775, after blood had already been spilled in Concord, Massachusetts, delegates from each colony met in Philadelphia and formulated the Articles of Confederation and Perpetual Union. As Franklin, Jefferson, Washington and others were preparing for war with England, they understood the critical importance of the role of the Six Nations. Proposed Article XI contemplated a "perpetual Alliance" with the Six Nations and protection of their lands against encroachment by "any private or Colony purchase" without the approval of the General Congress and "the Great Council at Onondaga." 2 *Journals of the Continental Congress* 196.

From the beginning of its relations with the United States, the Onondaga Nation and other nations of the Haudenosaunee sought guarantees against encroachment upon their territories by the colonies and then the states. In the late 1780s and early 1790s, the United States was militarily weak, and was therefore strongly motivated to grant such protection in order to prevent war caused by the states' designs on Indian land, and to prevent military alliances between the Six Nations and European nations.

The first treaty made with the Six Nations in 1784 expressly guaranteed that the Six Nations would be "secured in the peaceful possession of the lands they inhabit" within a defined territory. Article

III. 7 Stat. 15. "The central government attached considerable importance to the need for a federal treaty with the Six Nations, since it feared that any attempted expulsion of the Indians would produce a prolonged and costly war." *Oneida Indian Nation of New York v. State of New York,* 691 F.2d 1070, 1077 (2d Cir. 1982). Similarly, one of the most urgent items of business for the new Congress was to centralize control over Indian land transactions with states in order to maintain peace on the frontier of the new nation. Both the Constitution and federal statutes were means to accomplish this goal. "With the adoption of the Constitution, Indian relations became the exclusive province of federal law." *County of Oneida v. Oneida Indian Nation of New York State,* 470 U.S. 226, 234 (1985) ("*Oneida II*"); *see also, Worcester v. Georgia,* 31 U.S. at 557 ("The treaties and laws of the United States contemplate . . . that all intercourse with [the Indians] shall be carried out exclusively by the government of the union.").

In an exercise of this authority, the first Congress enacted the Trade and Intercourse Act in 1790. The Act unequivocally prohibited land transactions such as those challenged in this litigation without the prior authorization or subsequent ratification by Congress. The historical context of the 1790 Trade and Intercourse Act is relevant to the Act's interpretation. The fledgling United States and President George Washington were focused on maintaining peace and friendship with the Six Nations and the Onondaga Nation, in order to keep them from joining Indian nations in

the Ohio Indian wars, where Washington's armies had suffered difficult defeats.

Therefore, shortly after the Act was enacted, President Washington explained the legal effect of the new statute to the Six Nations:

> Here, then is the security for the remainder of your lands. No state, nor person, can purchase your lands, unless at some public treaty, held under the authority of the United States. The General Government will never consent to your being defrauded, but will protect you in all your just rights. . . . If, however, you should have just cause of complaint . . . the federal courts will be open to you for redress.

Oneida II at 238, n.8. As this Court has noted, the purpose of the Act was to "prevent unfair, improvident or improper disposition by Indians of lands owned or possessed by them to other parties, except the United States, without the consent of the Congress, and to enable the Government . . . to vacate any disposition of their lands without its consent." *Federal Power Commission v. Tuscarora Indian Nation,* 362 U.S. 99, 119 (1960). The basic terms of the 1790 Act were affirmed by Congress in the Trade and Intercourse Acts of 1793, 1796, 1799, 1802, and 1834, and the Act remains in effect today. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661, 667-668 & n.4 (1974) (*Oneida I*).

Because New York State would "stop[ ] at nothing" to acquire Six Nations land, additional measures were required. *Oneida Indian Nation of New York v. State of New York,* 691 F.2d at 1077 (internal citation omitted). In 1794, in the face of an aggressive land acquisition policy of New York State, the Six Nations entered into the Treaty of Canandaigua with the United States and again insisted on legal protection for their lands. 7 Stat. 44. In article II, the United States acknowledged the lands of the Onondaga Nation to be their "property" and promised never to claim the same. Moreover, in article VII, the United States agreed to provide "prudent measures" as necessary to preserve "peace and friendship" when harmonious relations between the Six Nations and the United States were jeopardized by individuals in their dealings with the Six Nations.

As this Court has observed, the Treaty contains "guarantees given by the United States, and which her faith is pledged to uphold." *The New York Indians,* 72 U.S. 761, 768 (1866). The Treaty gave no power to New York to deal with Indian lands. *Id.* at 769 (Neither New York nor Massachusetts possessed any power to "deal with Indian rights or title.").

Thus, by treaties and by federal statute, the Onondaga Nation's land was to be protected against efforts by the State of New York to acquire the Nation's land without federal approval. However, even in the face of these strong federal legal protections, New York State through more than two decades of deceit and chicanery acquired all but about 6,900 acres of

the Onondagas' land between 1788 and 1822. Court of Appeals Appendix at 84, ¶ 27 ("C.A. App."). The historical record demonstrates that New York State acquired this land in willful and knowing violation of the Treaty of Canandaigua and the Trade and Intercourse Act. The Onondaga Nation brought this lawsuit to obtain redress for these violations of federal law, in keeping with President Washington's promise that "the federal courts will be open."

The decision of the court of appeals in this case ignores the merits and denies the Onondaga Nation any remedy for these violations of treaties and the Trade and Intercourse Act. This Court, rather than the court of appeals, should decide whether judicial remedies should be available to redress New York State's decades-long defiance of a federal statute and Indian treaties. This is an important question of federal law generally and federal Indian law more particularly warranting this Court's review. Equally significant is the question of whether the grave wrongs committed by the State, that decimated the Onondaga Nation for generations and deprived it of the lands and resources necessary to thrive as a self-sufficient people, are beyond the reach of the federal courts to remedy. For the Onondaga Nation, the fundamental question of whether federal legal rights have remedies has never been, and is not now, an abstract legal question.

Prior to *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005) ("*Sherrill*"), the Onondaga Nation framed this suit to avoid disruption to its neighbors

who own and occupy the lands taken by the State of New York. The Nation's complaint in the District Court articulated the goal of the lawsuit to "bring about a healing between [the Onondagas] and all others who live in this region that has been the homeland of the Onondaga Nation since the dawn of time." C.A. App. at 30-31. Having suffered from the disruption caused by the loss of their lands at the hands of New York State, the Onondagas chose not to visit the same hardship on their neighbors. Accordingly, the Onondagas were careful to select a remedy that would not disrupt the rights and expectations of their non-Indian neighbors regarding the security of their lands. Only a declaratory judgment was sought, and then only against the State of New York, the original wrongdoer, and a small group of governmental and corporate defendants.

No individual private landowners were named. The corporate defendants were named because they bear principal responsibility for the despoliation and degradation of lands and waters that are sacred and particularly important to the Onondagas, including Onondaga Lake, where the Peacemaker united the five Haudenosaunee nations thousands of years ago, and Onondaga Creek, which flows into the Onondaga Territory or Reservation. Naming these defendants reflects a primary purpose of this lawsuit: to establish a legal basis for the environmental restoration of sacred land and waters adjacent and near to the Onondaga Territory.

The scope of the relief was likewise narrowly drawn. The Nation does not seek in this lawsuit, and has never sought, any remedy that dispossesses, evicts or ejects any person, government, corporation or entity owning land within the area taken by the State. This is not a possessory action. The Onondagas did not assert any legal theory that could be the basis for an award of money damages in any form. They did not ask for additional compensation or restitution. They did not ask for rent. They did not ask to be compensated for the widespread and serious environmental damage associated with the "development" of these lands by persons tracing their titles to the State.

Rather, the Onondagas sought a declaratory judgment that New York State violated the Trade and Intercourse Act and that the land taken remains the property of the Nation under a form of Indian title that could be harmonized with the continuing possession of the defendants and other landowners. As a result, the Onondagas sought the least disruptive means to resolve their claims even before the court of appeals decided that "disruption" is one factor that should be taken into account in determining whether Indian land claims are viable today. *Cayuga Indian Nation v. Pataki,* 413 F.3d 266 (2d Cir. 2005), *cert. denied,* 547 U.S. 1128 (2006).

At the time the Onondagas filed this suit, more than 30 years of federal court decisions, including two seminal decisions of this Court, had established a coherent and reasonable legal foundation for resolution

of Indian land claims. In 1974, in *Oneida I,* this Court held that a suit seeking trespass damages for the taking 100,000 acres of Oneida land in 1795 in violation of treaties and the Trade and Intercourse Act presented a federal question for purposes of federal court jurisdiction. That decision, for the first time in our Nation's history, opened the federal courts to hear such claims by Indian nations. The courts had been closed to such claims for four decades following the second circuit court of appeals' ruling in 1929 that such suits do not raise federal questions. *See Deere v. St. Lawrence River Power Co.,* 32 F.2d 550 (2d Cir. 1929).

Although *Oneida I* is principally a ruling on jurisdiction, this Court acknowledged the force of the applicable federal rule of decision in such claims, observing that the Trade and Intercourse Act "put in statutory form [the rule] . . . that extinguishment of Indian title required the consent of the United States." *Oneida I* at 678. The Oneidas in that case characterized their claim as possessory in nature, which this Court accepted for purposes of the jurisdictional determination. There is no suggestion in this Court's opinion that only possessory actions are viable theories for relief under the Act.

In 1985, in *Oneida II*, this Court affirmed a trespass damages judgment that New York State's acquisition of 100,000 acres in 1795 was invalid because the transaction violated the Trade and Intercourse Act and the Treaty of Canandaigua. In affirming the judgment, this Court ruled that the Oneidas and

other Indian nations could sue on a federal common law right of action to vindicate rights to land protected by federal treaties and the Act, even if the cause of action arose more than 175 years before. Especially pertinent here, the Court also held that the Oneida Nation's suit was not barred by any applicable state or federal statute of limitations. 470 U.S. at 240-244. This Court concluded that because the suit was timely under the terms of the Indian Claims Limitation Act of 1982, it would be inappropriate to borrow a state statute of limitations period when Congress had affirmatively determined that such suits are timely.

Although this Court did not decide the question of whether the doctrine of laches could be applied to these claims, it identified various statutory and doctrinal principles weighing against subjecting the claims to that defense. This Court concluded that "the application of laches would appear to be inconsistent with established federal policy." *Id.* at 244-245 n.16.

Neither *Oneida I* nor *Oneida II* suggested that equitable considerations are relevant to the viability of land claims by Indian nations under federal treaties or the Trade and Intercourse Act. This Court in *Oneida II* observed that equitable considerations may limit the relief available, but it was careful to distinguish between claims, which are not subject to equitable considerations, and remedies, which may under certain circumstances be so limited. Regarding equitable considerations related to the passage of time

between the taking of the Oneidas' land and the assertion of their claims, this Court concluded that "we have found [no] applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied." *Id.* at 254. With regard to the remedy, this Court noted that equitable considerations may be "relevant to the final disposition of this case . . . ," but declined to rule on the issue. *Id.* at n.27.

Several weeks after the Onondagas filed this lawsuit, this Court decided *Sherrill*. In that case, the Oneida Nation sought to establish an exemption from the imposition of real property taxes by the City on parcels of land the Nation had purchased within the boundaries of the reservation established for it by the Treaty of Canandaigua of 1794. Characterizing the claim as seeking to "rekindle the embers of sovereignty that long ago grew cold," this Court concluded that the Oneidas' suit was barred by equitable considerations grounded in the doctrines of laches, acquiescence and impossibility. 544 U.S. at 214. This Court denied the Oneidas the injunctive relief they sought, giving weight to the general principle that where a party seeks to challenge sovereign authority over land, the "settled expectations" of those affected are "prime considerations." *Id.* at 218. Because of New York State's long history of formal jurisdiction over these lands, and the Oneidas' purportedly long delay in seeking relief, these expectations were given controlling weight.

This Court in *Sherrill* did not alter the crucial distinction between claims and remedies. It was the extraordinary remedy sought in *Sherrill* – transfer of jurisdiction over lands that had long been governed by New York State – that was found to be disruptive in that case, not the claim to tax exemption itself. The Court emphasized that it was not modifying the central ruling of *Oneida II* that Indian land claims are not subject to the weighing of equities that might be appropriate in determining the remedy. Following *Sherrill,* the Oneida Nation's federal common law cause of action for damages remained viable: "the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*." 544 U.S. at 214.

Despite the controlling authority of *Oneida II* and *Sherrill,* the district court and the court of appeals dismissed the claim of the Onondaga Nation seeking a declaration that New York State violated the Treaty of Canandaigua and the Trade and Intercourse Act when it acquired the Nation's land in multiple transactions during the first decades of the history of the United States. Like its treatment of the Oneidas, New York State's treatment of the Onondagas brazenly violated federal law. New York State's violation of federal law was knowing and willful. *See Oneida II*, 470 U.S. at 232 (noting Secretary of War Timothy Pickering's warning to New York State Governors Clinton and Jay about the requirements of the Trade and Intercourse Act). New York's violation of federal law is not disputed here inasmuch

as the State's motion to dismiss assumes the truth of the allegations by the Onondagas.

Perhaps acknowledging this historical record, the district court observed that the Onondagas' claims may have been valid "at the time of filing," but, based on this Court's decision in *Sherrill,* the court concluded that "the legal ground on which Plaintiff's claims rest has undergone profound change" since then. App. at 16. Relying on *Sherrill* and two court of appeals decisions extending that decision to Indian land claims, the district court dismissed the Onondaga claims as "equitably barred on their face" because they are inherently disruptive of significant and justified societal expectations of the non-Indian landowners. App. at 24-25 [citing *Cayuga Indian Nation v. Pataki,* 413 F.3d 266 (2d Cir. 2005), *cert. denied,* 547 U.S. 1128 (2006) ("*Cayuga*") and *Oneida Indian Nation v. County of Oneida,* 617 F.3d 114 (2d Cir. 2010), *cert. denied,* 132 S.Ct. 452 (2010) ("*Oneida 2010*")].

Yet, the district court denied the Onondagas even the opportunity meet the new legal standard, ruling that "further development of the record would be inappropriate and superfluous" because the "dispositive [equitable] considerations which compel" dismissal are "self-evident." App. at 27. As a result, the voluminous evidence submitted by the Onondagas to show that they protested the loss of their lands and sought redress over many generations was deemed irrelevant to the question of whether the governmental and corporate landowners' expectations about the

security of their lands were justified under the new standard.

The court of appeals affirmed in a summary order. The court purported to distill three governing equitable considerations from this Court's decision in *Sherrill* and its own decisions in *Cayuga* and *Oneida 2010*: 1) the length of time at issue between an historical injustice and the present day; 2) the disruptive nature of the claims long delayed; and 3) the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiff's injury. App. at 4 (internal quotation marks and citations omitted). The court of appeals failed to articulate a doctrinal basis for the new equitable defense, observing only that the equitable considerations appear to be "similar" to the doctrines of laches, acquiescence and impossibility and that in some unspecified manner they "grew from" standards of federal Indian law and federal equity practice. App. at 4.

Nonetheless, the court of appeals applied these three factors to conclude that the Onondagas' claim was barred as a matter of law. The court of appeals rejected the Onondagas' request to treat the expectations of the defendants as a factual issue to be resolved through the traditional means of factual development, including discovery, the presentation of evidence and findings by the trier of fact.

The court of appeals concluded that "even if the Onondagas showed after discovery that they had strongly and persistently protested, the standards of federal Indian law and federal equity practice stemming from *Sherrill* and its progeny would nonetheless bar their claim." App. at 6 (internal quotation marks omitted). Thus, the court of appeals relied exclusively on judicial notice to find that the expectations of uncontested ownership on the part of the defendants were justified under the *Sherrill* disruptiveness standard, as extended by *Cayuga* and *Oneida 2010*. Finding no factual dispute, the court of appeals concluded that the "disruptive nature of the [Onondagas'] claims is indisputable as a matter of law." App. at 5. The fact that the Onondagas sought only a declaratory judgment and had expressly disclaimed any other remedy was deemed irrelevant to the disruptiveness determination. App. at 5.

REASONS FOR GRANTING THE PETITION

Are the doors of the federal courts permanently closed to Indian nations whose federally-protected land rights have been violated? Such a result would radically depart from longstanding precedent. This Court has long played a leading role in ensuring that the land and treaty rights of Indian nations are effectively enforced under federal law. The *Oneida* cases are the most prominent examples, but this Court's commitment to protecting the land rights of Indian nations has historical roots. *See, e.g., Cherokee Nation v. Georgia,* 30 U.S. 1, 32 (1831) ("the Indians

are acknowledged to have an unquestionable, and heretofore unquestioned, right to the lands they occupy, until that right shall be extinguished by a voluntary cession to our government."); *Holden v. Joy,* 84 U.S. 211, 244 (1872) (the discovery of America "could not affect the rights of [the Indians] already in possession," because Indian nations retained "their original, natural rights as undisputed possessors of the soil, from time immemorial, subject to the conditions imposed by the discoverers of the continent, which excluded them from intercourse with any other government than that of the first discoverer of the particular section claimed."). These early cases reflect the federal courts' struggle to find an equitable basis for addressing the early settlers' thirst for Indian land, in light of the rights of Indian nations to their homelands.

Moreover, this Court has assumed a special responsibility for interpreting and enforcing Indian treaties. *See, e.g., The New York Indians,* 72 U.S. 761 (1866) (real property taxes cannot be applied to Six Nations' lands protected by the Treaty of Canandaigua of 1794); *Washington v. Washington State Commercial Passenger Fishing Vessel Association,* 443 U.S. 658, 675 (1979) ("When Indians are involved, this Court has long given special meaning to [the] rule" that the intention of the parties controls interpretation of treaties). By denying *any* remedy to the Onondaga Nation, the court of appeals has arrogated to itself the final word on whether federal law affords a remedy to Indian nations for violations of their land and treaty rights. That is the historic and constitutional

role for this Court, and, as a result, review is warranted.

Whether Indian nations should be provided a remedy for violations of rights protected by the Trade and Intercourse Act and congressionally-ratified treaties is a substantial and important question of law that this Court should review. If the court of appeals' decision is allowed to stand, the United States' commitment to the Six Nations and the Onondaga Nation in the Treaty of Canandaigua will not be honored, and the federal obligation, enshrined in the Trade and Intercourse Act, to protect them against the designs of states to take their land in violation of federal law will not be fulfilled.

By refusing the give effect to the guarantees of the federal treaties that protect the Onondaga Nation's land, the court of appeals' decision also undermines the constitutional principle that treaties are the supreme law. Much of the land involved in this action is protected by the Treaty of Canandaigua, inasmuch as the government promised the Onondagas that they would enjoy the "free use and enjoyment" of their land. Unless the decision below is reviewed, this treaty commitment will be broken. Moreover, the court of appeals' decision will stand as an unexamined exception to the fundamental principle that the federal courts can devise fair remedies for violations of Indian treaty rights to land.

The court of appeals' decision is also inconsistent with the emerging international legal consensus that

indigenous peoples, including American Indian nations, have certain fundamental rights that all nations should respect. Violation of international legal principles applicable to the United States creates an important federal question warranting review. Finally, the court of appeals applied the equitable considerations of *Sherrill* to the Onondagas' claim despite this Court's explicit decision not to disturb the ruling in *Oneida II* that Indian claims are viable even if the scope of the remedy may be limited. Review is necessary in order to correct the court of appeals' misapplication of *Sherrill*, to reaffirm the continuing validity of *Oneida II* and to ensure that this Court controls the final interpretation of its precedents.

I. The Court of Appeals' Decision Conflicts with the Fundamental Principle that Violations of Rights Protected by Federal Law Should Have A Remedy.

The court of appeals' decision departs from this Court's longstanding and traditional approach to deciding whether a remedy is necessary to vindicate important rights established by treaty and federal statute. As the Court has noted, "from the beginning" the rule has been that "where federally protected rights have been invaded, . . . courts will be alert to adjust their remedies so as to grant the necessary relief." *Bell v. Hood,* 327 U.S. 678, 684 (1946). Further, when a federal statute provides for a "general right to sue for [the] invasion" of legal rights, "federal courts may use any available remedy to make good

the wrong done." *Id.* This principle has an ancient pedigree traceable to the laws of England. Sir William Blackstone in his Commentaries declared that "it is a settled and invariable principle in the laws of England, that every right when withheld must have a remedy, and every injury its proper redress." 3 *William Blackstone, Commentaries* at 116.

The notion that the most significant rights should have corresponding remedies for their violation is so deeply rooted in the history and traditions of the United States that it may be regarded as fundamental. *See, e.g., Marbury v. Madison,* 5 U.S. 137, 163 (1803) ("The very essence of civil liberty certainly consists in the right of every individual to claim protection of the laws, whenever he receives an injury."); *Kendall v. United States ex rel. Stokes,* 37 U.S. 524, 623 (1838) (where a "clear and undeniable right should be shown to exist," it would be a "monstrous absurdity in a well organized government, that there should be no remedy."); *Franklin v. Gwinnett County Public Schools,* 503 U.S. 60, 74 (1992) (giving judges the power to "render inutile causes of action authorized by Congress through a decision that *no* remedy is available" would violate separation of powers principles) (emphasis in original).

The Court's review is warranted to ensure that this fundamental principle is applied consistently to Indian land claims brought under the Trade and Intercourse Act and federal treaties. The court of appeals traveled an uncharted path in dismissing the Onondaga Nation's claim, distorting this Court's

decision in *Sherrill,* ignoring this Court's decision in *Oneida II* and flouting Congress's expressed intent in the Trade and Intercourse Act that violations of the Act should have legal consequences for offending states. The effect of the decision was to deny the Onondagas any remedy for undisputed violations of the Trade and Intercourse Act and the Treaty of Canandaigua.

This case thus implicates the fundamental right of Indian nations to a remedy for violation of their land rights. This case presents an ideal vehicle for reviewing this issue, because, based on *Oneida I*, the jurisdiction of the federal courts over these kinds of claims is well established, and based on *Oneida II*, the cause of action to enforce rights under the Act and the Treaty is clear. The remaining question, then, is whether the federal courts should be open to provide a remedy "to make good on the wrong done." *Bell v. Hood,* 327 U.S. at 684.

The fundamental right to a remedy cannot be vindicated unless this Court reviews the decision of the court of appeals. If the State of New York can acquire the Onondagas' land in violation of the Trade and Intercourse Act and the Treaty of Canandaigua without any legal consequence, the State's unlawful conduct will be immunized, contrary to this Court's decisions holding governments accountable for violating Indian land rights. *See, e.g., Ward v. Board of County Com'rs of Love County,* 253 U.S. 17 (1920) (To say that the county could collect unlawful taxes on Indian allotments with no obligation to return them

is "nothing short of saying that it could take or appropriate the property of these Indian allottees arbitrarily and without due process.").

The Trade and Intercourse Act is perhaps the earliest expression of what this Court has acknowledged to be Congress's "unique obligation towards the Indians." *Morton v. Mancari,* 417 U.S. 535, 555 (1974) (cited in *Oneida II* at 253). This Court's role in ensuring that remedies are available to redress violations of Indian land rights protected by statute and treaty will not intrude on the traditional prerogatives of Congress in regulating relations with Indian nations. *See, e.g., United States v. Lara,* 541 U.S. 193, 200 (2004) (noting that the Constitution grants Congress "broad general powers to legislate in respect to Indian tribes."). As this Court has observed, "it is entirely appropriate for Congress, in creating [statutory] rights and obligations, to determine in addition, who may enforce them and in what manner." *Davis v. Passman,* 442 U.S. 228, 241 (1979). In the case of the Trade and Intercourse Act, however, Congress did not specify the remedy to be provided, leaving that determination to the courts.

The Act "does not speak directly to the question of remedies" nor does it "establish a comprehensive remedial plan for dealing with violations of Indian property rights." *Oneida II,* 470 U.S. at 237. As a result, this Court ruled that the Act does not preempt common law remedies available to Indian nations alleging violations of the Act, and that, despite the passage of time, there is no "applicable statute of

limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied." *Id.* at 240, 253.

Contrary to the court of appeals' decision, the federal courts are free to provide appropriate remedies to enforce the requirement of the Trade and Intercourse Act that land transactions with Indian nations must be authorized or approved by Congress. The court of appeals has ignored settled principles of law by denying that the federal courts may provide remedies for violation of legal rights. Review is warranted to correct the court of appeals' missteps and to ensure that its misapplication of fundamental principles does not extend to other circuits.

The court of appeals could identify no countervailing interest that would trump the principle that Indian nations, including the Onondagas, should be provided a remedy for violations of the Trade and Intercourse Act. With no factual support other than questionable reliance on judicially noticed facts, the court of appeals ruled that the Onondagas' declaratory judgment would upset the justified expectations of society at large that their land titles would never be challenged, even if such titles are traceable to an action of the State that plainly violates federal law.

This is a suitable case to determine whether federal courts should exercise their discretion to fill in the remedial gap in the Trade and Intercourse Act because the declaratory judgment remedy sought by the Onondagas is among the least disruptive

remedies that could conceivably be fashioned to uphold the requirements of the Act. Unlike the Oneida Nation, which pursued remedies based on possessory rights until the final stages of its case, and unlike the Cayuga Nation, which was awarded damages based on possessory rights, the Onondaga Nation has never asserted claims, and disavowed any claims, predicated on ejectment, possession, trespass or other legal theories implicating possessory rights. *See Oneida Indian Nation v. State of New York,* 617 F.3d 114 (2d Cir. 2010), *cert. denied,* 132 S.Ct. 452 (2011); *Cayuga Indian Nation v. Pataki,* 413 F.3d 266 (2d Cir. 2005), *cert. denied,* 547 U.S. 1128 (2006).

The Onondagas sought a declaratory judgment that New York State violated the Trade and Intercourse Act and that the small parcels of land held by the named defendants remained the property of the Nation under a concept of ownership separate and distinct from possession. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho,* 521 U.S. 261, 291 (1997) (O'Connor, J., concurring) (noting distinction between title and possession for certain purposes related to state officials' control of land). Because of the narrow scope of the relief sought by the Onondagas and the small number of landowners affected by the Nation's lawsuit, this is an ideal case for this Court to decide whether the requirements of the Trade and Intercourse Act and the promises made in federal treaties have legal efficacy today, or whether, as the court of appeals would have it, those legal instruments have become dead letters.

II. The Court of Appeals' Decision is Inconsistent with International Legal Standards.

This Court has long recognized the relevance of the law of nations to its elucidation of the contours of domestic law. *See, e.g., Sosa v. Alvarez-Machain,* 542 U.S. 692, 729 (2004) ("For two centuries we have affirmed that the domestic law of the United States recognizes the law of nations"); *Grutter v. Bollinger*, 539 U.S. 306, 344 (2003) (Ginsburg, J., concurring) (noting relevance of International Convention on the Elimination of All Forms of Racial Discrimination on norms underlying Court's consideration of affirmative action cases); *Lawrence v. Texas*, 539 U.S. 558 (2003); *Atkins v. Virginia*, 536 U.S. 304 (2002). International law holds special relevance in cases – such as this one – concerning Indian nations, which possess attributes of sovereignty recognized both domestically and internationally. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515 (1832); *see also United States v. Lara*, 541 U.S. 193, 204-205 (2004) (affirming Supreme Court's "traditional understanding" of each Indian nation as "a distinct political society"). A court of appeals ruling that violates international law recognized by the United States creates an important federal question justifying this Court's review.

Binding treaty commitments made by the United States require the federal courts to respect the equal rights of Indian nations to seek redress from the federal courts for violations of their rights to property. The content and meaning of these international commitments should be interpreted in light of the

standards set forth in the United Nations Declaration on the Rights of Indigenous Peoples. United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, Annex, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) ("UNDRIP"). Absent review by this Court, the court of appeals decision would establish a legal rule in derogation of Indian nations' rights protected by international law.

The United States is a party to the International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXXI), 999 U.N.T.S. 171 (Dec. 16, 1966) ("ICCPR"). The ICCPR requires state parties to take measures necessary to protect the rights enshrined in it and to provide, on an equal basis, remedies for violations of those rights. ICCPR art. 2, art. 26. The United States is also a party to the International Convention on the Elimination of All Forms of Racial Discrimination, G.A. Res. 2106 (XX), 660 U.N.T.S. 195 (Jan. 4, 1969) ("CERD"). Through this treaty, the United States and other state parties have committed to take effective measures to secure the right to equal treatment by judicial tribunals, CERD art. 2, art. 5.

The legal force of these commitments is reinforced by nonbinding instruments to which the United States is a party. The Universal Declaration of Human Rights, adopted by the United Nations General Assembly in 1948 with strong support from the United States, establishes the right to equality under the law, art. 7, and the right to an effective remedy by a competent tribunal art. 8. Universal

Declaration on Human Rights, G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948). The Universal Declaration also confirms the right to hold property, both individually and collectively, art. 17.

Similarly, the American Declaration on the Rights and Duties of Man confirms the right to equality before the law, art. 2; the right to "resort to the courts to ensure respect [for] legal rights," art. 18, and the right to property, art 23. American Declaration on the Rights and Duties of Man, OAS Res. XXX (1948), www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm. Together, these human rights instruments evidence United States' and widespread international acknowledgment of rights to property, equality before the law, and access to judicial remedies. They underscore the importance of this Court's review of the court of appeals' decision to ensure conformity with these standards.

UNDRIP, adopted nearly unanimously by the United Nations General Assembly in 2007 and now supported as well by the four nations that voted against it, provides the most detailed explication of the international legal principles at issue here. The United Nations Special Rapporteur on Indigenous Peoples has noted that UNDRIP "does not affirm or create special rights separate from the fundamental human rights that are deemed of universal application, but rather elaborates upon these fundamental rights in the specific cultural, historical, social and economic circumstances of indigenous peoples." *See Report of the Special Rapporteur on the situation of*

human rights and fundamental freedoms of indigenous people, S. James Anaya, UN Doc. A/HRC/9/9 of 11 August 2008, para. 40, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G08/149/40/PDF/G0814940.pdf?OpenElement.

UNDRIP holds that "Indigenous peoples have the right to the full enjoyment, as a collective or as individuals, of all human rights and fundamental freedoms as recognized in the Charter of the United Nations, the Universal Declaration of Human Rights, and international human rights law." art. 1. In addition, UNDRIP provides that "Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned," art. 26, and that "Indigenous peoples have the right to redress" for violation of their land rights, art. 28. *See also* art. 8 (articulating responsibility of states to provide effective mechanisms for the prevention and redress of land rights violations); art 37 ("Indigenous peoples have the right to recognition, observation and enforcement of treaties . . . with States . . . and to have States honor and respect such treaties").

In voicing its support for UNDRIP, the United States has "underline[d] its support for the Declaration's recognition in the preamble that indigenous individuals are entitled without discrimination to all human rights recognized in international law, and that indigenous peoples possess certain additional, collective rights." *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, United States State Department

(Jan. 12, 2011) at 2, http://www.state.gov/documents/organization/154782.pdf. Further, the United States has "recognize[d] that some of the most grievous acts committed by the United States and many other States against indigenous peoples were with regard to their lands, territories, and natural resources" and "stresse[d] the importance of the lands, territories, resources and redress provisions of the Declaration." *Id.* at 6.

The court of appeals affirmed the district court decision declining to review the Onondaga claims that their treaty-protected rights to land were violated. The court applied "equitable doctrines" and held that a court ruling on the claim – not any particular remedy – would be unduly disruptive to the expectations of non-Indian landowners. App. at 5-6. Indeed, the appeals court affirmed the district court's finding that the claims were "equitably barred on their face." App. at 24.

The rule crafted by the court of appeals in this case could thus prevent any Indian plaintiff from successfully appealing to the federal courts for redress of a longstanding land rights violation expressly protected by federal law. Because the rule is specific to "Indian land claims," it applies only to Indians. *See, e.g.*, *Oneida* at 124 (quoting *Cayuga* for the proposition that equitable doctrines could be applied to bar "Indian land claims [ ] even when such a claim is legally viable and within the statute of limitations"). Exclusion of Indian nations alone from access to any court remedy for such violations contravenes the rights to property, equality, and judicial review

protected by international law applicable to the United States, particularly where such exclusion is premised on the "disruptive" effect vindication of those rights would have upon the expectations of non-Indians. *See Oneida* at 127. The court of appeals ruling thus raises an important federal question deserving of review by this Court.

III. The Court of Appeals' Decision Conflicts with Settled Federal Equitable Principles.

The Onondagas' request for a declaratory judgment under the Trade and Intercourse Act is "essentially an equitable cause of action." *Samuels v. Mackell,* 401 U.S. 66, 70 (1971). As this Court has observed, in the Declaratory Judgment Act of 1934, Congress "explicitly contemplated that the courts would decide to grant or withhold declaratory relief on the basis of traditional equitable principles." *Id., see also, Webster v. Doe,* 486 U.S. 592, 604 (1988) (traditional equitable principles control the granting of declaratory or injunctive relief in the federal courts). By applying the equitable considerations identified in *Sherrill* to the Onondagas' claim, the court of appeals strayed from traditional equitable principles applicable to declaratory judgment actions. Review is necessary to ensure that the federal courts remain faithful to a fair and reasonable application of federal equity practice to lawsuits by Indian nations designed to vindicate rights under the Trade and Intercourse Act and federal treaties.

In denying the Oneidas' claim for a real property tax exemption in *Sherrill,* this Court relied on "standards of federal Indian law and federal equity practice" to identify certain equitable considerations that barred relief. 544 U.S. at 214. There is nothing in the Court's decision in *Sherrill* that suggests that the federal courts should depart from traditional equitable principles, as confirmed by earlier decisions of the Court, in evaluating viability of Indian claims under the Trade and Intercourse Act and federal treaties. On the contrary, the Court expressly disclaimed any intention to disturb its holding in *Oneida II*, which upheld a trespass damages claim under the Act and limited the consideration of equitable principles to the formulation of a remedy. *Sherrill,* 544 U.S. at 221.

Review is warranted in order to clarify and confirm that under the general principles of equity espoused by the Court in *Sherrill*, the equitable circumstances of both parties should be considered and weighed. Under this traditional approach, "[t]he essence of equity jurisdiction has been the power of the [court] to do equity and to mould each decree to the necessities of the particular case." *Hecht Co. v. Bowles,* 321 U.S. 329 (1944). In that case, the Court explained that "traditional equity practice" consists of "[f]lexibility rather than rigidity" and includes "qualities of mercy and practicality." *Id.*

The court of appeals' evaluation of the Onondaga Nation's claim cannot be squared with these traditional equity principles. The court ignored undisputed evidence that the Nation has experienced disruption

and hardship for generations resulting from New York State's violations of the Trade and Intercourse Act and the Treaty of Canandaigua. The court paid no heed to the persistent efforts of the Nation to protest the loss of its lands and to seek a fair and just remedy for such loss. New York's conduct as the original wrongdoer was not taken into account. In short, the court of appeals' application of legal principles was rigid and one-sided, rather than flexible and balanced, and decidedly not equitable.

Fealty to this Court's doctrine of federal equity practice would require the lower federal courts to take into account the fact that the loss of Onondaga lands has deprived them of traditional hunting, fishing and gathering sites and nearly eradicated these traditional practices. Access to significant cultural, burial and ceremonial sites has been denied to Onondaga people for generations. The lands of the Onondaga Nation have been polluted and degraded, and the Nation has been largely powerless to stop this despoilation because others control those lands. C.A. App. at 156 (pollution of Onondaga Lake and surrounding areas where the Haudenosaunee was formed).

A fair balancing of equities would have required the courts to take into account that New York State has unclean hands with regard to its conduct in depriving the Onondaga Nation and other Indian nations of their lands. Federal equity practice recognizes the unclean hands doctrine, which denies equitable relief to a party that has engaged in "reprehensible conduct." *McKennon v. Nashville Banner*

Pub. Co., 513 U.S. 352, 360 (1995). The record in the district court contained undisputed evidence of reprehensible conduct of the State of New York in its land dealings with the Onondagas.

For example, State officials deceived the Onondagas about the nature of the transactions to purchase their land, leading them to believe that they were leasing rather than selling their lands. C.A. App. at 217-226. The State knew that it was negotiating with individuals who had no authority from the Onondaga Nation to negotiate about land. *Id.* More generally, the State knew that it was breaching federal law by purchasing Onondaga land without congressional authorization. *Oneida II,* 470 U.S. at 232 (noting Secretary of War Pickering's warnings to New York Governors Clinton and Jay that federal law required prior authorization to make land deals with Indian nations). Finally, the transactions on their face were grossly unfair to the Onondagas, who were paid only about $33,000 for all of the thousands of acres of land – their most precious resource – lost between 1788 and 1822. C.A. App. at 190. Review by this Court is necessary to ensure that federal law does not sanction under the guise of "equity" such a blatantly inequitable result.

IV. The Onondagas' Claim is Distinct From the *Cayuga* and *Oneida* Cases That This Court Declined to Review.

Twice before, this Court has been presented with arguments that decisions of the second circuit court of

appeals barring claims by Indian tribes or nations under the Trade and Intercourse Act conflict with the Court's rulings in *Oneida II* and *Sherrill*. The Court declined to review either case. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006); *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010), *cert. denied*, 132 S.Ct. 452 (2011). Denial of review in those cases does not require denial of review of this case. Critical differences between the Onondaga Nation's claim and those cases justify review of this case.

Unlike the Onondaga claim, *Cayuga* was litigated on a legal theory predicated on possessory interests. The Cayuga Nation sought to regain possession by ejectment of thousands of record-title owners whose interests derived from the State's acquisition of Cayuga land. In the Cayuga court of appeals ruling, that fact supported a finding of disruption of the expectations of the non-Indian landowners. The Onondaga approach to redress for historic wrongs is far different from the Cayugas' possessory action. The Onondagas have never sought any remedy based on a possessory interest, and have publicly and in this litigation expressly disclaimed any intention of ever seeking ejectment of their neighbors. The Onondagas do not seek involuntary repossession of the land they lost. In fact, they do not seek coercive relief of any kind.

A judgment declaring the rights of the parties could serve as the basis for a mutually-satisfactory

and pragmatic resolution of the Onondagas' claims through a negotiated settlement that does not disrupt landownership of their neighbors. A declaratory judgment action, which by its nature does not include coercive relief, is well suited for this Court's review of the important issues presented by Indian claims under the Trade and Intercourse Act and federal treaties. *See Perez v. Ledesma,* 401 U.S. 82, 124 (1971) (a declaratory judgment is "merely a declaration of legal status and rights; it neither mandates nor prohibits action.").

Similarly, the denial of review in *Oneida 2010* does not point toward a denial of review of the court of appeals' decision here. Like the Cayugas, the Oneidas asserted a claim for damages based on a continuing right to possession of the land that was taken by the State. The court of appeals ruled that this claim was barred by the equitable considerations identified in *Sherrill* and applied in *Cayuga.* The Oneidas also asserted a purportedly "nonpossessory" claim based on a federal common law theory of contract law that the land transactions could be "reformed" to address the unconscionable consideration paid by the State for the land. As the court of appeals noted, that claim was "different . . . from any before considered by the Supreme Court, this Court, or the district court itself in this litigation's thirty-year history." 617 F.3d at 129. Because of the novelty of that claim and the paucity of decisions addressing its viability under federal common law generally and this Court's decisions in *Oneida II* and *Sherrill* in particular, further

percolation in the lower federal courts was deemed appropriate before this Court could review it.

The Onondagas' claim and the court of appeals' decision dismissing it present no such question of ripeness for review. There is no need to await further judicial developments before this Court may consider the important issues raised by the Onondagas' claim. If the court of appeals' decision stands, the Onondagas will be denied access to the Nation's courts to seek a remedy for a grave and historic injustice: the loss of most of their treaty-guaranteed land at the hands of the State of New York. In *Oneida II*, this Court upheld a cause of action for violations of the Trade and Intercourse Act that had occurred more than 175 years ago. The court of appeals dismissed the Onondagas' claim on equitable considerations tied exclusively to the passage of time. The court's decision cannot be reconciled with *Oneida II*.

This case presents the far-reaching question of whether the federal courts will be open to provide appropriate remedies to Indian nations in accordance with *Oneida II*, as preserved by *Sherrill*. The Onondaga Nation, a sovereign Indian nation existing long before the formation of the United States, deserves justice, which this Court is uniquely situated to provide. Disadvantaged minorities such as the Nation cannot reasonably be expected to secure relief from the political branches of government. Before the lower federal courts developed the equitable defense that led to dismissal, the Onondagas formulated a non-disruptive lawsuit designed to

establish a firm legal and factual basis for a reasonable and pragmatic resolution of their land rights action. Without justification and in derogation of this Court's decisions, the court of appeals has disregarded federal statutory guarantees and thwarted that goal. Review is necessary to confirm that Indian nations may seek redress in the federal courts, and to enable those courts to provide a fair and just remedy to the Onondaga Nation for the violation of its land rights.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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