No. ___

IN THE

Supreme Court of the United States

CAYUGA INDIAN NATION OF NEW YORK, *ET AL.*,
Petitioners,
v.
GEORGE PATAKI, AS GOVERNOR OF 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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February 3, 2006

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QUESTION PRESENTED

In the test case considered in *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661 (1974), and *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985), this Court held that claims for monetary damages brought by Indian tribes for land acquired by the State of New York 200 years ago in violation of federal law – the Nonintercourse Act (25 U.S.C. § 177) and federal treaties – could proceed, in part because those claims were timely under 28 U.S.C. § 2415, the governing federal statute of limitations. This Court expressly left that result undisturbed last Term when it decided *City of Sherrill v. Oneida Indian Nation of New York*, 125 S. Ct. 1478 (2005). In addition, cases from this Court and the courts of appeals have uniformly held that the United States is not subject to laches when it enforces public rights, such as those at issue in the instant tribal land claim.

The question presented is whether the Second Circuit erred in interpreting *Sherrill* to require "dismissal *ab initio*" of claims that are timely under § 2415 and are brought by Indian tribes and the United States to obtain monetary damages from the State for lands taken in violation of the Nonintercourse Act and federal treaties.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties appearing here and before the United States Court of Appeals for the Second Circuit.

The petitioners here and plaintiffs-appellees/cross-appellants below are two federally recognized Indian tribes: the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma.

The United States of America was an intervenor and plaintiff-appellee below.

The principal respondents here and the defendants-appellants/cross-appellees below are George Pataki, as Governor of the State of New York; the State of New York; the County of Cayuga, New York; Ralph A. Standbrook, Chairman of the County Legislature for County of Cayuga, New York; the County of Seneca, New York; Robert W. Hayssen, Chairman, Board of Supervisors for County of Seneca, New York; and the Miller Brewing Company, representing itself and a class of landowners.

In addition, a number of state and local officials, agencies, and other entities, as well as private landowners, were identified as defendants-appellants/cross-appellees below, including AT&T; Harry F. Amidon; Town of Aurelius, New York; Village of Aurora, New York; Floyd Baker; Marjorie Baker; William H. Bancroft; Mary Barnes; John Bartow, Director, New York State Environmental Facilities Corp.; Howard Bellman; Norma Bilack, Clerk, Town of Springport, New York; Howard Birdsall; Jeanne Birdsall; Joseph H. Boardman, Commissioner of Transportation; David Brooks, Clerk, Town of Ledyard, New York; Nancy E. Carey, Member of the Board of

Directors, New York State Thruway Authority; Timothy S. Carey, Trustee, Power Authority for the State of New York; Bernadette Castro, Commissioner of Parks and Recreation; Village of Cayuga, New York; Louis P. Ciminelli, Trustee, Power Authority for the State of New York; Consolidated Rail Corp.; John J. Conway; Willis M. Cosad; Erin M. Crotty, Commissioner of Environmental Conservation and Chairman of Board of Directors, New York State Environmental Facilities Corp.; Leo Davids, Jr., Supervisor, Town of Varick, New York; Randy Deal; Lawrence F. DiGiovanna, Director, New York State Environmental Facilities Corp.; Gerard D. DiMarco, Trustee, Power Authority for the State of New York; Division of General Services of the Executive Department of the State of New York; Eisenhower College of the Rochester Institute of Technology; Dorothy Engst; Wesley Engst; Town of Fayette; John H. Fenimore, Adjutant General, New York State Division of Military and Naval Affairs; Earl E. Fox; Robert Freeland, Mayor of Village of Seneca Falls, New York; Jeanne Freier; Louis Freier; Frederick Gable; Kenneth Gable; Glenn S. Goord, Commissioner of Correctional Services; Frank A. Hall, New York State Division of Youth; William C. Hennessy; Willis M. Hoster; J. Souhan & Sons, Inc; John A. Johnson, Commissioner, Office of Children and Family Services; Edwin Kelly; Ellen Kelly; Victoria S. Kennedy, Director, New York State Environmental Facilities Corp.; John L. King; Gail Kirk; William J. Kirk; David L. Koch; Henry Wm. Koch; Gordon Lambert; Grace Lambert; Town of Ledyard; Lehigh Valley Railroad; George G. Markel; Grace Martin; Leon Martin; Thomas B. Masten, Jr; William F. McCarthy, Director, New York State Environmental Facilities Corp.; Frank S. McCullough, Trustee, Power Authority for the State of New York; James W. McMahon, Superintendent, Division of the New York

State Police of the Executive Department of the State of New York; Frank P. Milano, Director, New York State Environmental Facilities Corp.; Richard P. Mills, Commissioner, New York State Education Department and Commissioner, State University of New York; Town of Montezuma; Mari B. Mosher; Ralph E. Mosher; Thomas J. Murphy, Executive Director, Dormitory Authority of the State of New York; New York State Department of Corrections; New York State Department of Health; New York State Department of Mental Hygiene; New York State Department of Transportation; New York State Department of Environmental Conservation; New York State Division for Youth; New York State Division of Military and Naval Affairs; New York State Division of State Police; New York State Education Department; New York State Electric & Gas Corp.; New York State Environmental Facilities Corp.; New York State Facilities Development Corp.; New York State Office of Parks and Recreation; New York State Thruway Authority; New York Telephone Co.; Ferdinard L. Nicandri; June Nicandri; Antonia C. Novello, M.D., Commissioner of Health and Director, New York State Environmental Facilities Corp.; Emerson O'Connor; Leah O'Connor; Ted W. O'Hara; Jessica Olsowske; William Olsowske; David G. Palmer; George E. Pataki, Governor of the State of New York; F.H. Patterson; W. W. Patterson, Jr; Paul Perkins; Power Authority of the State of New York; Marilyn Proulx, Clerk, Town of Aurelius, New York; R.N. Patreal Corp.; John R. Riedman, Member of the Board of Directors, New York State Thruway Authority; Anna Rindfleisch; Kenneth J. Ringler, Commissioner, Division of General Services of the Executive Department of the State of New York; Ann W. Ryan, Clerk of Village of Union Springs, New York; Marilyn Salato, Clerk of Village of Cayuga, New York; Frank A. Saracino, Supervisor, Town of Seneca Falls, New

York; Arlene Saxton; George Saxton; Joseph J. Seymour, Trustee, Power Authority for the State of New York; Jacqueline Smith, Clerk, Town of Montezuma, New York; James Somerville, Town Supervisor, Town of Fayette, New York; George G. Souhan; Eliot Spitzer, New York State Attorney General; Bruce Stahl; State University of New York; State of New York; John Strecker; Victoria Strecker; Alberta Stuck; Millard Stuck; Benjamin Swayze; Victoria Swayze; Henry Tamburo; Louis R. Tomson, Chairman and Member of the Board of Directors, New York State Thruway Authority; Town of Seneca Falls, New York; Town of Springport, New York; Ronald Tramontano, Director, New York State Environmental Facilities Corp.; Town of Varick, New York; Village of Seneca Falls, New York; Village of Union Springs, New York; W.W. Patterson, Inc; Clifford Waldron; Wells College; Robert E. White; and Lelia M. Wood Smith, Director, New York State Environmental Facilities Corp.

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The opinion of the U.S. Court of Appeals for the Second Circuit is reported at 413 F.3d 266, and is reprinted in the Appendix to the Petition ("Pet. App.") at 1a-48a. The district court opinions most relevant to this petition are those reported at 667 F. Supp. 938 (N.D.N.Y. 1987), 730 F. Supp. 485 (N.D.N.Y. 1990), 758 F. Supp. 107 (N.D.N.Y. 1991), 771 F. Supp. 19 (N.D.N.Y. 1991), and 165 F. Supp. 2d 266 (N.D.N.Y. 2001), and an unreported decision available at 1999 WL 509442, all of which are reprinted at Pet. App. 51a-379a. A complete list of the district court's opinions is provided at 49a-50a.

JURISDICTION

The court of appeals entered its judgment on June 28, 2005. Timely petitions for rehearing filed by petitioners and the United States were denied on September 8, 2005. Pet. App. 382a. Justice Ginsburg extended the time to file this petition to and including February 6, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves 25 U.S.C. § 177 (the "Nonintercourse Act"), which provides that "no purchase" of Indian lands that occurs without the consent of the United States "shall be of any validity in law or equity"; the statute of limitations contained in 28 U.S.C. § 2415, in which Congress addressed the timeliness of certain Indian claims; and the 1794 Treaty of Canandaigua, 7 Stat. 44, which guaranteed to the Cayugas a 64,015-acre federal reservation in central New York. The pertinent provisions are reproduced at Pet. App. 384a-394a.

STATEMENT OF THE CASE

The Cayuga Indian Nation of New York, the Seneca-Cayuga Tribe of Oklahoma (the "Tribes"), and the United States have for decades litigated land claims seeking compensation from the State of New York for 64,015 acres of reservation land the State unlawfully acquired from the Cayugas in 1795 and 1807 in violation of the federal Nonintercourse Act and the federal Treaty of Canandaigua. The Tribes' claims are identical to the claims this Court endorsed in the "test case" decided in *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661 (1974) ("*Oneida I* "), and *County of Oneida v. Oneida Indian Nation of New York State*, 470 U.S. 226 (1985) ("*Oneida II* ").

The district court in the present case rejected all claims for relief that would eject current owners from the disputed lands, holding that such relief would be inequitable to present landowners. Consistent with *Oneida II*, however, the district court allowed the Tribes' damages claims to proceed. In March 2002, after more than twenty years of litigation (including two full trials on issues related to damages), the district court awarded the Tribes and the United States a monetary judgment against the State for $247.9 million as compensation for the State's unlawful acquisitions.

A sharply divided panel of the Second Circuit reversed. The panel majority held that this Court's decision last term in *City of Sherrill v. Oneida Indian Nation of New York*, 125 S. Ct. 1478 (2005), had "dramatically altered the legal landscape" and compelled the conclusion that the doctrine of laches barred all ancient tribal land claims, even those solely for money damages, regardless of whether the United States was also a plaintiff in the litigation. Pet. App. 13a.

The Second Circuit's decision merits immediate review. In its 1985 decision in *Oneida II*, this Court affirmed an Indian tribe's right to damages under circumstances

indistinguishable from those presented here, holding that "neither petitioners nor we have found any applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims are barred." 470 U.S. at 253. Indeed, noting that the Oneidas' suit was timely under 28 U.S.C. § 2415 – the governing statute of limitations – the Court concluded that the application of an additional time bar would constitute a "violation of Congress' will." 470 U.S. at 244. Two decades later, in *Sherrill*, this Court carefully preserved the damages remedy upheld in *Oneida II*, drawing a clear distinction between "disruptive" forward-looking equitable relief to re-establish actual sovereignty over land (at issue in *Sherrill*) and damages awards to remedy past wrongs (at issue here and in *Oneida II*). The Court stated in *Sherrill* that its decision "d[id] not disturb" its prior ruling in *Oneida II*. 125 S. Ct. at 1494.

The district court's decision in this case, which declined to give the Tribes current possession of the land but preserved the availability of damages, is faithful to *Oneida II* and presciently anticipated *Sherrill*. In contrast, the Second Circuit's decision runs roughshod over the carefully crafted limitations in *Sherrill* and effectively overrules *Oneida II*. Under the panel's decision, this Court's decisions in the *Oneida* test case and the decades of litigation that ensued were mere sport, as the Tribes' claims for compensation were "subject to dismissal *ab initio*." Pet. App. 21a.

Compounding its error, the Second Circuit extended its novel laches holding to claims for monetary damages brought by the United States, creating a square conflict with decisions of this Court and other courts of appeals that have consistently rejected application of laches to the United States when, as here, it is litigating as a sovereign to vindicate public rights or national policy. The decision to apply laches to the United States here thus upends the judgments of both Congress and the Executive Branch that

the passage of time does not bar the Tribes from recovering damages for the unlawful dispossession of their lands. Congress made that judgment when it enacted (and repeatedly amended) § 2415, under which the claims here are undeniably timely, and the Executive Branch made a similar judgment when it intervened below.

The impact of the Second Circuit's incautious decision is substantial and pernicious. By foreclosing any monetary recovery, even when the United States sues alongside a tribe, the decision below leaves tribes such as the Cayugas without any judicial remedy, despite decades of case law from this Court stating that such a remedy is available for undisputed violations of the federal Nonintercourse Act – an Act that was designed to protect tribes from one-sided land deals such as those at issue here. Likewise, by foreclosing the Tribes' claim here, the decision below eliminates any realistic prospect that the New York tribal land claims will be resolved by a negotiated settlement of the sort that has ended land claim litigation in virtually every other State.

Moreover, there is no ground to delay review. There is no significant tribal land claim litigation pending outside the Second Circuit, and thus no Circuit split is ever likely to develop. And, of course, any split will come too late for New York tribes such as the Cayugas, who have sought recompense for New York's unlawful acquisition for more than two centuries.

The Second Circuit's disregard for this Court's careful preservation of tribal claims for monetary damages, its rejection of the judgment of the political branches, and the conflict between the Second Circuit's decision and decisions of this Court and other courts of appeals regarding the application of laches against the United States provide ample justification for granting a writ of certiorari.

A. Factual Background.

The Cayuga Indian Nation was one of the Six Nations of the Iroquois Confederacy and, from time immemorial, had occupied three million acres of land centered around what is now known as Cayuga Lake in central New York.

In July 1788, New York ratified the U.S. Constitution, which reserved to Congress the exclusive right to enter into treaties. Despite that action, in 1788 and 1789 New York enacted legislation authorizing state commissioners to enter into treaties to obtain land from the Oneidas, Onondagas, and Cayugas, all members of the Six Nations. Pet. App. 135a-136a.

On February 25, 1789, New York entered into a treaty with a small faction of the Cayugas. That treaty transferred to New York all of the Cayugas' land except for the 64,015 acres that are the subject of the current litigation. New York concluded similar treaties with the Oneidas and the Onondagas. *Id*. at 135a-137a.

These land grabs sparked unrest among the tribes and threatened to rekindle tribal hostilities against the States. That prompted the federal government to intervene to protect the tribes. In July 1790, Congress enacted the original version of the Nonintercourse Act. It provided that "no sale of lands made by any Indians, or any nation or tribe of Indians within the United States, shall be valid to any person or persons, or to any State . . . , unless the same shall be made or duly executed at some public treaty, held under the authority of the United States." 1 Stat. 137, 138 (1790) (Pet. App. 384a-385a). President Washington expressed the policy of the United States in passing the Act: "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

it will protect you in all your just rights." 4 *American State Papers: Indian Affairs* 142 (1832), *quoted in* Pet. App. 149a. In 1793, Congress enacted a stronger version of the Act, providing for additional fines and penalties, and providing that "no purchase" made in violation of the Act "shall be of any validity in law or equity." 1 Stat. 329, 330 (1793) (Pet. App. 385a); *see Oneida II*, 470 U.S. at 231-32.

On November 11, 1794, at Canandaigua, New York, the United States entered into a "peace treaty" with the Six Nations. That treaty formally recognized the Cayugas' remaining 64,015 acres as a federally protected reservation. Pet. App. 390a; *see also id.* at 162a.

In brazen disregard of the Nonintercourse Act and the Treaty of Canandaigua, New York set out to purchase the lands that the federal government had reserved for the Cayugas. In April 1795, the state Legislature empowered state commissioners to acquire the remaining Cayuga lands for not more than 50 cents per acre, and, in the very same legislation, it provided that the land was to be sold by the State for not less than two dollars per acre. *Id*. at 167a. The State's Council of Revision vetoed the act because it promoted the interest of the State rather than that of the Indians, *see id*. at 167a-168a, 198a-199a, 205a-206a, but the Legislature overrode the veto, *id.* at 167a-169a.

Upon learning of the State's intentions, Secretary of War Timothy Pickering sought the opinion of Attorney General William Bradford as to whether the Nonintercourse Act would preclude the State's planned purchases. The Attorney General issued an opinion, which Pickering forwarded to the State, confirming the obvious – the State's purchase without federal consent would violate the Act. *See id*. at 173a, 178a-179a.

Nevertheless, on July 27, 1795, the State executed a treaty with a faction of the Cayugas and purported to acquire

all but a few square miles of the Cayugas' 64,015-acre reservation for an $1,800 annuity. *Id*. at 169a. That treaty was never ratified or approved by Congress as the Nonintercourse Act requires. The State sold the land at auction in November 1796 for an average price of $4.50 per acre – more than *nine times* the 50 cents per acre paid to the Cayugas. *Id*. at 199a-201a.

On February 26, 1807, New York purchased almost all of the remaining Cayuga reservation for the equivalent of $1.50 per acre, even though the land was appraised at several times that figure. Pet. App. 211a. As with the 1795 treaty, the state treaty was never ratified or approved by the federal government. *Id*. at 210a, 356a. These transactions left the Cayugas landless.[1]

Over the next 175 years, the Cayugas pressed repeatedly to obtain fair compensation for their lands. Indeed, within weeks of the 1795 Treaty, Cayugas who were not part of the faction that sold the reservation lands to New York complained to federal authorities that their lands had been sold in violation of federal treaties.

Judicial relief was, however, unavailable. New York law precluded suits by Indians in state court to recover lands in the absence of a specific state statute granting jurisdiction. *See, e.g.*, *Johnson v. Long Island R.R.*, 162 N.Y. 462, 467-68 (1900); *Seneca Nation of Indians v. Appleby*, 196 N.Y. 318, 320-21 (1909). Nor could the Tribes' claims be heard in federal court. General federal question jurisdiction did not exist until 1875 (except for a brief period from 1801-02). *See Oneida II*, 470 U.S. at 255 n.1 (Stevens, J., dissenting). Even after Congress conferred such jurisdiction, the Second Circuit expressly held that tribal claims for ejectment did not fall

[1] The 1789 Treaty had reserved a one-square-mile lot for the Cayuga Chief Fish Carrier. The State purchased that lot in 1841. *See* Pet. App. 210a n.23.

within the jurisdictional grant, *see, e.g.*, *Deere v. St. Lawrence River Power Co.*, 32 F.2d 550 (2d Cir. 1929), a position the Second Circuit maintained until reversed by this Court in *Oneida I*. *Cf. Cherokee Nation v. Georgia*, 30 U.S. 1, 17-18 (1831) (holding that tribes could not invoke this Court's original jurisdiction to sue a State).

Lacking a judicial forum, the Cayugas sought redress from the state Legislature. In 1853 and in 1861, a Grand Sachem of the Six Nations presented the Legislature with a "memorial" seeking compensation for their lands. A state Senate Committee on Indian Affairs recognized the State's "large profit" on the Cayuga transactions and recommended further compensation for the Cayugas, but the state Legislature rejected the resulting bill, as well as similar bills in 1890, 1891, and 1895. Pet. App. 201a-202a, 212a-214a.

The Tribes' efforts through the middle of the twentieth century eventually resulted in some nominal payments from the State, but it was not until this Court's decision in *Oneida I*, reversing the Second Circuit's longstanding jurisdictional bar and holding that tribal land claims may be brought in federal court, that the Tribes had any real prospect of remedying the State's unlawful actions. *Id*. at 214a-215a.[2]

B. District Court Proceedings.

In the wake of *Oneida I*, the Tribes sought to reach a negotiated resolution of the land claims before filing suit. Only after it became clear that the negotiations would not produce a final resolution did the Tribes turn to federal court. The ensuing district court proceedings spanned nearly twenty-five years.

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[2] The Seneca-Cayuga Tribe of Oklahoma sought and obtained compensation of roughly $70,000 directly from the United States under the Indian Claims Commission. Pet. App. 371a-372a. The Cayuga Indian Nation of New York did not participate in those proceedings, and the State was not a defendant in that action.

In 1980, the Cayuga Indian Nation of New York filed the instant litigation in the U.S. District Court for the Northern District of New York against state officials and agencies, the counties of Cayuga and Seneca, and various commercial and individual landowners. In 1981, the Seneca-Cayuga Tribe of Oklahoma intervened as a plaintiff, and, in 1992, the United States also intervened as a plaintiff. The Tribes and the United States alleged principally that New York's purchases from the Cayugas were void under the Nonintercourse Act, and they sought relief that included ejectment and damages.

After twelve years of litigation, Judge Neal P. McCurn – who presided over all of the district court proceedings – granted the plaintiffs summary judgment on liability. Judge McCurn recognized, as Attorney General Bradford had 200 years earlier, that New York's purchases were invalid under the Nonintercourse Act: The federal government had "conferred recognized title to the Cayugas concerning the subject property" in the 1794 Treaty of Canandaigua, Pet. App. 333a, and New York's subsequent acquisitions of the land were "never properly ratified by the federal government as required by the Nonintercourse Act," *id*. at 337a.

Judge McCurn also rejected defendants' argument that laches barred all of the claims. Because the Tribes' claims were timely under 28 U.S.C. § 2415, he found laches was simply inapplicable. *Id*. at 307a-311a.

After mediation failed, the district court considered appropriate remedies. Anticipating this Court's decision in *Sherrill*, Judge McCurn held that the Tribes could not recover actual possession of their lands because vindication of the Tribes' rights "cannot come at the expense of the current landowners." *Id*. at 287a; *see also id.* at 299a-300a. Consistent with *Oneida II*, however, the district court allowed the damages claims to proceed.

In 2000, the court conducted a six-week jury trial to determine damages against the State, which the court held was liable for all of the damages. The jury placed the present value of the land at issue – 64,015 acres in central New York – at only $35 million, and it found the total fair rental value for the entire area to be just $17,156.86 per year for each of the 204 years at issue. *Id*. at 52a, 55a-56a.[3]

Thereafter, the court conducted a 5-week bench trial to determine prejudgment interest. Remarkably, the State's expert presented an analysis that resulted in the Tribes' *owing the State* approximately $7.6 million. *Id*. at 224a. The district court rejected that testimony, as well as that of the Tribes' economist, and chose instead to credit the testimony of the United States' expert. That expert calculated prejudgment interest at approximately $527 million, applying the lowest "risk-free" interest rate for each year. *Id*. at 226a-229a.

The district court then applied "equitable considerations" to determine the final amount of prejudgment interest. Judge McCurn made an express factual finding that any delay in the Tribes' filing suit to seek compensation "was not unreasonable, insofar as the actions of the Cayuga are concerned." *Id*. at 219a; *see also id.* ("The court cannot find that the Cayuga are responsible for any delay in bringing this action."). He nonetheless reduced the amount of interest by 60% to reflect principally "the passage of 204 years" and the United States' failure to take affirmative steps to protect the Tribes. The court ultimately awarded prejudgment interest of $211,000,326.80, for a total judgment against the State of $247,911,999.42. *Id*. at 236a-237a.

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[3] As a point of comparison, the Counties had previously assessed the land at issue in its unimproved condition at $156 million, even excluding tax exempt property worth at least $25 million.

C. Second Circuit Proceedings.

A sharply divided panel of the Second Circuit reversed. The panel majority believed that this Court's decision in *Sherrill*, which had been decided while the appeal was pending, had "dramatically altered the legal landscape against which we consider plaintiffs' claims." Pet. App. 13a. According to the majority, "what concerned the [*Sherrill*] Court was the disruptive nature of the claim itself," *id*. at 14a, rather than the disruptiveness of the particular relief (restoring tribal sovereignty over the land) at issue in *Sherrill*. The Second Circuit did not acknowledge the repeated statements in *Sherrill* emphasizing the distinction between rights and remedies and expressly limiting the opinion in *Sherrill* to the latter.

In the majority's view, the Tribes' "'possessory claim'" for damages was "indisputably disruptive," even if monetary damages against the State of New York were the only relief available. *Id.* at 16a. According to the Second Circuit, "this disruptiveness is inherent in the claim itself – which asks this Court to overturn years of settled land ownership – rather than an element of any particular remedy which would flow from the possessory land claim." *Id*. Based solely on this misreading of *Sherrill*, the majority interposed a judge-made time bar, concluding that "equitable defenses apply to possessory land claims of this type," *id*. at 19a, even when all that is at issue is a "monetary remedy," *id*. at 21a.

The panel majority also rejected the argument that its decision could not be squared with *Oneida II*. Again conflating right and remedy, the panel stated that *Oneida II* had "reserv[ed] 'the question whether equitable considerations should limit the relief available,'" *id*. at 19a, and it concluded that *Sherrill* had directly "addresse[d] the question reserved in *Oneida II*," *id.*

For similar reasons, the majority concluded that the Tribes' claim for trespass damages was "likewise subject to dismissal," *id*. at 21a-22a, even though trespass (unlike ejectment) does not require any current possessory interest, and thus would not appear to be "disruptive" even under the Second Circuit's approach. According to the panel majority, the Tribes' trespass claim was "based on a violation of their constructive possession," and thus "it follows that plaintiffs' inability to secure relief on their ejectment claim alleging constructive possession forecloses plaintiffs' trespass claim." *Id*. at 22a.

Finally, the majority held that laches barred the claims asserted by the United States. The majority conceded that "the United States has traditionally not been subject to the defense of laches," and that laches is not available against the federal government "when it undertakes to enforce a public right or protect the public interest." *Id*. at 22a, 24a n.8. The majority nevertheless concluded, without citation or analysis, that "this case does not involve the enforcement of a public right or the protection of the public interest." *Id*. at 24a n.8.

Judge Hall dissented. Addressing first the majority's application of laches to the Tribes' claims, Judge Hall cited settled law from this Court holding that "[t]he defense of laches pertains only to the remedy sought, not to the claim itself." *Id*. at 33a. She noted that "where a plaintiff seeks ejectment damages, rather than restoration of a possession interest, application of the doctrine of laches to such a money damage claim is rarely if ever justified." *Id*. at 34a.

Judge Hall recognized that nothing in *Sherrill* was to the contrary: "the clear language of . . . *Sherrill* confines its holding to the use of laches to bar certain relief, not to bar a claim or all remedies." *Id*. at 43a.

Judge Hall also dissented from the majority's dismissal of the trespass claim, concluding that the claim "is not

predicated upon the plaintiffs' possessory claim, nor is there any relationship between the two claims that necessitates dismissal." *Id*. at 36a.

Finally, Judge Hall took the majority to task for its unprecedented application of laches to the United States acting as a sovereign. Judge Hall underscored that the United States had "pursue[d] a right created by a federal statute and proceed[ed] in its sovereign capacity," *id*. at 38a, citing this Court's cases repeatedly holding that, "insofar as it acts on behalf of Indian tribes, the United States acts to protect a public interest, entirely dissimilar from the private interest served where the United States pursues an action based on its purely commercial endeavors." *Id*. at 42a-43a.

REASONS FOR GRANTING THE PETITION

The New York Indian land claims are a matter of great importance. On three separate occasions over the past three decades, this Court has granted a petition for a writ of certiorari to address significant questions of federal law involving New York's unlawful purchase of lands from the Six Nations at the end of the eighteenth century. In each decision, the Court emphasized that federal law preserves for the tribes the right to meaningful retrospective relief for the ancient wrongs done to them.

After unanimously establishing federal jurisdiction over such claims in *Oneida I*, this Court in *Oneida II* effectively settled the question whether any time bar precluded the New York tribes' claims for damages. This Court held that "neither petitioners *nor we* have found any applicable statute of limitations *or other relevant legal basis* for holding that the Oneidas' claims are barred," 470 U.S. at 253 (emphasis added), and it concluded that imposing such a time bar "would be a violation of Congress' will," *id.* at 244, as expressed in 28 U.S.C. § 2415. Although the defendants in *Oneida II* had waived laches in the court of appeals, this

Court made clear that it would have rejected the laches defense had the issue been squarely presented. *Id.* at 244 n.16. For nearly two decades, the New York tribes have litigated their federal claims and untold resources have been expended on that understanding, which this Court in *Sherrill* pointedly "d[id] not disturb." 125 S. Ct. at 1494.

The Second Circuit has now taken it upon itself to terminate all of this litigation in one stroke, insisting that *Sherrill* forecloses the Tribes' claims for monetary damages – indeed, that the district court should have dismissed the Tribes' claims "*ab initio*." Pet. App. 21a.

Review of the Second Circuit's decision is urgently needed. The Second Circuit has shut down not only petitioners' land claims, but almost certainly those of the Oneidas (which are still pending in district court) and other members of the Six Nations. The decision thus returns the New York tribes to where they stood prior to *Oneida I*, without any judicial remedy for their ancient dispossessions. To reach that result, the Second Circuit not only ignored the careful, express limitations in *Sherrill*; it effectively overruled *Oneida II*. The decision below is, at the very least, an important pronouncement of federal law on which this Court, and not the Second Circuit, should have the last word.

Furthermore, the Second Circuit reached its result despite the presence of the United States as a plaintiff. The application of laches to bar a claim of the United States when it acts in its sovereign capacity flies in the face of decisions of this Court and conflicts with decisions of the courts of appeals. The application of laches is also irreconcilable with 28 U.S.C. § 2415, the statute of limitations under which the claims of the Tribes and the United States are timely.

Review is also appropriate because the consequences of the Second Circuit's decision are severe. The decision eliminates any realistic possibility for the sort of negotiated

solution – blessed by Congress – this Court has long encouraged. *See Oneida II*, 470 U.S. at 253; *cf. Wagnon v. Prairie Band Potawatomi Nation*, 126 S. Ct. 676, 698 (2005) (Ginsburg, J., dissenting) (discussing the importance of resolving disputes on a sovereign-to-sovereign basis). If the decision below stands, the State will have little incentive to negotiate, and the Cayugas will remain dispossessed of their homeland and uncompensated for their losses.[4]

Finally, this is manifestly not a situation in which further percolation is necessary or appropriate. Virtually all of the *Oneida II*-related land claim litigation is pending in the Second Circuit, and the vast sweep of the opinion below effectively mandates dismissal of all of those claims. No other court of appeals will have the opportunity to resolve these issues, and any resolution will come too late to help the New York tribes. Only this Court can restore the New York land claims that it carefully preserved in its prior decisions, and only this Court can vindicate the judgment of Congress and the Executive Branch that the passage of time is no bar to judicial resolution of the Tribes' claims here.

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[4] Congressional resolution of a tribal land dispute generally extinguishes the affected tribe's claims in exchange for a monetary award and land for a modest but culturally and economically significant reservation. *See, e.g.*, 25 U.S.C. §§ 1701-1779g (setting forth a dozen Land Claims Settlement Acts covering claims in Rhode Island, Maine, Massachusetts, and elsewhere). Importantly, however, Settlement Acts generally "ratify" agreements reached by the affected tribe, the State, and the United States, which means that the State's willingness to engage in meaningful negotiations is as a practical matter a prerequisite to any resolution. *See* Katherine A. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power*, 39 Vill. L. Rev. 525, 528-29, 588-89 (1994); *see also* Chris Lavin, *Responses to the Cayuga Land Claim*, and William A. Starna, *Epilogue*, in *Iroquois Land Claims* 87, 163 (Christopher Vecsey & William A. Starna eds., 1988) (describing state and local officials' slow responses to settlement efforts).

I. THE SECOND CIRCUIT'S DECISION IS IRRECONCILABLE WITH *ONEIDA II* AND *SHERRILL*.

Twenty years ago in *Oneida II*, the Court confronted the question whether New York Indians could obtain monetary relief in federal court for their ancient land claims. It answered that question "yes." Seizing on the Court's recent decision in *Sherrill*, the Second Circuit majority has now *re*-answered the same question "no." As Judge Hall explained in her well-reasoned dissent, the panel majority's decision ignores "centuries of precedent with regard to both Indian land claims and foundational distinctions between rights and remedies, coercive relief and damages, and legal claims and equitable relief." Pet. App. 32a.

1. In *Oneida II*, this Court affirmed a Tribe's right to damages for a land claim indistinguishable from the Cayugas' claim in this case. The Oneidas, like the Cayugas here, were awarded money damages for land that New York obtained from the tribe at the end of the eighteenth century in violation of the Nonintercourse Act and federal treaties. All parties viewed *Oneida II* as a "test case" that would establish the viability of judicial relief for New York's ancient violations. *Sherrill*, 125 S. Ct. at 1483; *see also* Argument Transcript at 1, *Oneida II* (No. 83-1965) ("This case is a test case . . . ."). The Court in *Oneida II* framed the question presented as "whether an Indian tribe may have a live cause of action for a violation of its possessory rights that occurred 175 years ago." 470 U.S. at 230. The Court held that the passage of time posed no obstacle, and it affirmed the tribe's right to an award of money damages. *Id.* at 253.

Oneida II did not have to hold directly that the defense of laches was inapplicable to the tribe's claims because the defendants had waived the defense. Nevertheless, the Court could hardly have been more clear that laches did not bar the claims. In a lengthy footnote responding to the dissent –

which contended that laches should bar the Oneidas' claim – the Court observed that, at common law, ejectment was a legal (rather than an equitable) claim, and it noted that "application of the equitable defense of laches in an action at law would be novel indeed." *Id.* at 244 n.16. The Court then cogently explained why laches did not apply.

First, the Court invoked the statement in *Ewert v. Bluejacket*, 259 U.S. 129 (1922), that

> "the equitable doctrine of laches, developed and designed to protect good-faith transactions against those who have slept on their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions."

470 U.S. at 244 n.16 (quoting *Ewert*, 259 U.S. at 138).

Second, the Court found it "questionable whether laches properly could be applied" to validate the State's unlawful purchases of tribal land in light of settled law that "extinguishment of Indian title requires a sovereign act." *Id.*; *see, e.g.*, *United States ex rel. Hualpai Indians v. Santa Fe Pac. RR.*, 314 U.S. 339, 345-46 (1941); *Johnson v. M'Intosh*, 21 U.S. 543, 586 (1823); *see also* Felix S. Cohen, *Handbook of Federal Indian Law* 1022-23 (2005 ed.) ("Tribal title can be extinguished only by an express and unambiguous act of Congress.").

Third, the Court held that the application of laches to bar the Oneidas' claim "appear[ed] to be inconsistent with established federal policy" as embodied in the Nonintercourse Act. 470 U.S. at 244 n.16. That policy – that tribal land cannot be sold without the approval of the federal government – is (as the Court pointedly noted) "still the law." *Id.*

The Court also ruled that Congress's decision to impose a federal statute of limitations in 28 U.S.C. § 2415 precluded application of a judge-made time bar. Section 2415 was enacted in 1966 and, for the first time, imposed a six-year limitations period, effective from the date of the statute, on certain claims brought by the United States, including claims involving Indian land. As the newly enacted limitations period for these pre-1966 suits approached expiration, Congress extended the deadline several times for the express purpose of preserving tribal suits that the government had not yet decided to pursue. *See Oneida II*, 470 U.S. at 244; *see also, e.g.*, S. Rep. No. 92-1253 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3592. In 1982, Congress broadened the statutory scheme to cover damages suits brought by tribes themselves, and it directed the Secretary of the Interior to compile a list of recognized pre-1966 Indian claims. *See Oneida II*, 470 U.S. at 242-43; *see also* 48 Fed. Reg. 13698, 13920 (1983) (listing, *inter alia*, the Cayuga land claim). Claims set forth on that list remain timely until the Department of the Interior formally takes specified types of action on them. *See* 28 U.S.C. § 2415(b)-(c); *Oneida II*, 470 U.S. at 243.

The Court in *Oneida II* held that the 1982 amendments to 28 U.S.C. § 2415 "presume[] the existence of an Indian right of action [in a land claim case] not otherwise subject to any statute of limitations," 470 U.S. at 244; *see also infra* at 27-28 (discussing § 2415), and reflect Congress' intention to "give the Indians one last opportunity to file suits covered by § 2415(a) and (b) on their own behalf." 470 U.S. at 244. Application of any additional judge-made time bar thus "would be a violation of Congress' will." *Id.* at 244.

This Court's decision in *Oneida II* can only be understood as rejecting the argument that laches or other time bars require dismissal "*ab initio*" of Indian land claims for money damages. It would have been illogical (and unfair to

the lower courts and litigants alike) for the Court to resolve the "test case" by affirming the award of damages and holding that the Indians' "common-law right to sue is firmly established," *see* 470 U.S. at 233, if it contemplated that the doctrine of laches or some other common law time bar would – as a matter of law – obliterate all such "firmly established" claims. The Court underscored the substantive significance of its laches analysis in the conclusion to its decision: "[N]either petitioners *nor we* have found any applicable statute of limitations *or other relevant legal basis* for holding that the Oneidas' claims are barred or otherwise have been satisfied." *Id.* at 253 (emphases added). *Oneida II* makes clear that the Court purposefully and finally resolved the pressing question whether these claims were viable, and was not merely engaging in an interesting but ultimately pointless legal exercise as some sort of interim measure.

2. In one awkward swipe, the Second Circuit has effectively overturned *Oneida II*, undoing the three decades of litigation that followed the blueprint this Court approved in *Oneida I* and *II* and returning the Tribes to where they stood before this Court's *Oneida* decisions. The very claims that the Court in *Oneida II* characterized as "firmly established," the Second Circuit has now *re*-characterized as never viable. And while this Court sustained a cause of action despite a 175-year lapse of time, the court of appeals relied entirely on the passage of time to dismiss the Cayugas' case. According to the Second Circuit, the "category" of "possessory land claims" by a tribe is inherently "disruptive" and "forward-looking," and thus barred by laches, even if the sole remedy sought is the retrospective remedy of damages. Pet. App. 21a-22a; *see id.* at 16a-17a. But as this Court has repeatedly observed, the court of appeals cannot overrule a prior decision of this Court. *See Eberhart v. United States*, 126 S. Ct. 403, 407 (2005) (per curiam); *Agostini v. Felton*, 521 U.S. 203, 237 (1997).

The Second Circuit's belief that *Oneida II* is no longer good law is all the more troubling because it defies the determinations of the political branches. By enacting 28 U.S.C. § 2415, under which the claims here are indisputably timely, Congress decided that the Tribes' claims should be decided on the merits, notwithstanding the passage of time. Moreover, over the past two decades, Congress has embraced this Court's holding in *Oneida II* that § 2415 "presum[es] the existence of an Indian right of action not otherwise subject to any statute of limitations." 470 U.S. at 244. Although Congress amended § 2415 repeatedly in the years leading up to *Oneida II*, it has not sought to amend further § 2415 to limit such claims in the wake of that decision; nor has it expressed disagreement with *Oneida II*'s ruling that § 2415 was intended to preserve even ancient Indian land claims. The Second Circuit's judge-made time bar flouts this congressional judgment. *See Oneida II*, 470 U.S. at 244 (stating that "[i]t would be a violation of Congress' will," as reflected in § 2415, to impose a time bar on the Oneidas' claims). It is thus irreconcilable not only with *Oneida II*, but with decisions of this Court holding that principles of stare decisis have special force in the area of statutory interpretation, especially when the Court's interpretation of the statute "has been accepted as settled law for several decades." *IBP, Inc. v. Alvarez*, 126 S. Ct. 514, 523 (2005); *see generally Patterson v. McLean Credit Union*, 491 U.S. 164, 172-73 (1989).[5]

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[5] Other federal legislation similarly reflects Congress' intent to let tribes pursue their ancient land claims. For example, Congress has passed numerous acts ratifying agreed settlements of such claims by providing compensation to the tribes. *E.g.*, Maine Indian Claims Settlement Act, 25 U.S.C. § 1721 *et seq.*; Rhode Island Indian Claims Settlement Act, 25 U.S.C. § 1701 *et seq.*; Mohegan Nation (Connecticut) Land Claims Settlement Act, 25 U.S.C. § 1775 *et seq.* The decision to take land into trust and to appropriate federal money for the tribes is hard to explain if Congress intended the Indian claims to have been extinguished long ago.

The Executive Branch has likewise given its approval to *Oneida II*: the United States intervened in the present case to pursue monetary relief, reflecting the judgment of the Executive Branch that the Tribes' suit is in the public interest. The Second Circuit had no warrant to overturn the judgments of the two political branches.

Nor can the Second Circuit evade Congress' judgment merely by invoking "equitable" considerations. As this Court has noted, "[o]nce Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is . . . for the courts to enforce them when enforcement is sought. Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) (internal quotation marks omitted; alteration in original); *see also Lonchar v. Thomas*, 517 U.S. 314, 327 (1996) (holding that once "the balancing of interests [has been] undertaken by Congress," the "courts may not undermine [that balance] through the exercise of background equitable powers"); *Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831-32 (2003) ("[T]he scope of permissible judicial innovation is narrower in areas where other federal actors are engaged.").

3. The Second Circuit's sole justification for its decision is the *ipse dixit* that *Sherrill* "altered the legal landscape." Pet. App. 13a; *see id*. at 21a (asserting that if the Tribes were to file an identical complaint today, the district court "would be required to find the claim subject to the defense of laches under *Sherrill*"). That is simply incorrect. *Sherrill* addressed an entirely different issue expressly left open in *Oneida II*: "the question whether equitable considerations should limit *the relief* available to the present day [Indians]." 125 S. Ct. at 1487 (quoting *Oneida II*, 470 U.S. at 253 n.27 (emphasis

added)). *Sherrill*, in other words, addressed *remedies*, not *rights*.[6]

The Court in *Sherrill* thus distinguished between tribal claims for money damages, which it had endorsed in *Oneida II*, and claims for equitable relief that would threaten the current balance of sovereignty between New York and the Oneidas, which it rejected. The Court rejected the Oneidas' effort to resurrect sovereignty, which would have "project[ed] redress for the Tribe into the present and future, thereby disrupting the governance of central New York's counties and towns." 125 S. Ct. at 1483. The Court made clear, however, that *Oneida II* had held "that [a tribe] could maintain a federal common-law claim for damages for ancient wrongdoing in which both national and state governments were complicit," *id.* at 1483, a holding that the Court in *Sherrill* "d[id] not disturb," *id.* at 1494.

Nor does *Sherrill*'s holding that the Oneidas' claims for restoration of sovereignty were "disruptive" support (much less require) dismissal of the Tribes' claims here. The Second Circuit made no serious effort to explain why a suit for money damages against the State has a disruptive force equal to a suit seeking to evict longtime residents from their property or to eliminate longstanding zoning and tax laws. In contrast, the Court in *Sherrill* acknowledged the enormous difference between the two, underscoring its earlier observation in *Oneida II* that the application of laches to an action for damages would be "novel." 125 S. Ct. at 1494 n.14 (quoting *Oneida II*, 470 U.S. at 244 n.16)). *Cf. Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357-59 (1926) (allowing claim for monetary compensation when restoration of tribal land rights was no longer possible).

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[6] As noted above, Judge McCurn expressly applied equitable factors in fashioning relief when he reduced the Cayugas' prejudgment interest (as calculated by the United States' expert) by more than $300 million.

The Second Circuit's revisionism is particularly misplaced because the district court's decisions in this case are consistent not only with *Oneida II*, but also with *Sherrill*, which was issued while this case was pending before the Second Circuit. *Sherrill* emphasized the need for pragmatic remedies that are sensitive to current, as well as historic, reality and that are commensurate with the "grave, but ancient, wrongs" suffered by the New York tribes. 125 S. Ct. at 1491 n.11; *see id.* at 1488, 1493 (discussing with approval a decision by Judge McCurn in *Oneida Indian Nation v. County of Oneida*, 199 F.R.D. 61, 92 (N.D.N.Y. 2000), which had observed that the case "cr[ied] out for a pragmatic approach"). Consistent with that approach, Judge McCurn ruled that actual removal of the land's current residents is "not an appropriate remedy in this case." *See* Pet. App. 299a. Moreover, the district court permitted the damages claims to proceed, but then applied equitable factors and reduced the Tribes' prejudgment interest by more than $300 million, in large part to account for the passage of time. Judge McCurn's careful, pragmatic exercise of remedial discretion demonstrates that *Oneida II* and *Sherrill* – properly read – can accommodate the interests of both the state governments that committed the ancient wrongs and the tribes that were their victims.

In sum, petitioners believe it is crystal clear that the law as enacted by Congress and articulated by this Court precludes adoption of a judge-made time bar to deny the Cayugas all relief. The Second Circuit thought differently, but this Court – and not a divided panel of the Second Circuit – must have the last word. Starting with *Oneida I* in 1974, this Court has granted certiorari three times to address whether and how Indians may obtain relief in federal court for the dispossession of their treaty-protected lands. The Court did so because of "the importance of the Court of Appeals' decision[s] not only for the Oneidas, but potentially for many eastern Indian land claims." *Oneida II*, 470 U.S. at

230. The same considerations apply here. Review of the Second Circuit's decision terminating all New York land claims is thus plainly warranted.

II. THE SECOND CIRCUIT'S APPLICATION OF LACHES TO BAR THE CLAIMS OF THE UNITED STATES CONFLICTS WITH DECISIONS FROM THIS COURT AND THE COURTS OF APPEALS AND DEFIES CONGRESSIONAL INTENT.

The Second Circuit's decision also warrants review because it conflicts with numerous decisions from this Court and other courts of appeals holding that the United States is not subject to laches when it sues in its sovereign capacity, including when it sues to enforce Indian land rights. Treating the United States like an ordinary private litigant, the Second Circuit ignored the substantial public interest at stake when the federal government sues to enforce federal statutes and treaty obligations and to fulfill the government's obligations as trustee for the Tribes.

This Court's decisions have repeatedly enforced the sound maxim *nullum tempus occurrit regi* – "the sovereign is exempt from the consequences of its laches, and from the operation of statutes of limitations." *Guaranty Trust Co. of N.Y. v. United States*, 304 U.S. 126, 132 (1938). "The principle that the United States are not . . . barred by any laches of their officers, however gross, in a suit brought by them as a sovereign government to enforce a public right or to assert a public interest," the Court has written, "is established past all controversy or doubt." *United States v. Insley*, 130 U.S. 263, 266 (1889) (quotation marks omitted); *see also INS v. Hibi*, 414 U.S. 5, 8 (1973) (per curiam); *Costello v. United States*, 365 U.S. 265, 281 (1961); *United States v. Summerlin*, 310 U.S. 414, 416 (1940).

The Second Circuit refused to apply that well-settled doctrine based on the unsupported assertion that the United

States' suit "does not involve the enforcement of a public right or the protection of the public interest." Pet. App 24a n.8. The Second Circuit thus believed that the United States' suit was governed by *Clearfield Trust Co. v. United States*, 318 U.S. 363, 369 (1943), and its progeny, which provide that laches may sometimes be available when the United States is acting as an ordinary market participant or to advance a private interest. Pet. App. 22a-23a.

That conclusion squarely conflicts with decisions of this Court that have held repeatedly that a suit to enforce Indian land rights is a sovereign suit to vindicate the public interest.

In *Heckman v. United States*, 224 U.S. 413 (1912), for example, which involved the right of the United States to sue in order to cancel conveyances of Indian lands that violated statutory restrictions on alienability, this Court explained that the government's relationship to the Indians implicated sovereign rights and duties:

> Out of its peculiar relation to these dependent peoples sprang obligations to the fulfillment of which the national honor has been committed.
> . . . A transfer of the allotments is not simply a violation of the proprietary rights of the Indian. It violates *the governmental rights of the United States*.

Id. at 437-38 (emphasis added; quotation marks omitted); *see also Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 657 n.1 (1979) (quoting *Heckman* and explaining that a suit to recover reservation land implicates "the governmental rights of the United States"); *Nevada v. United States*, 463 U.S. 110, 141 (1983) (same). The *Heckman* Court further explained that the government's right to sue "recognizes no limitations that are inconsistent with the discharge of the national duty." 224 U.S. at 445.

Because suits to enforce Indian land rights are sovereign suits, this Court has repeatedly held that such suits can be limited only by congressional enactment. In *United States v. Minnesota*, 270 U.S. 181 (1926), the United States sued Minnesota over wrongly issued land patents concerning lands that had been set aside by treaty for an Indian tribe. The United States sought to cancel the patents still held by the State and to recover the value of parcels that the State had transferred to private parties. The Court rejected the State's argument that the United States was acting as a "mere conduit" for the Indians' rights and instead ruled that the government had a "real and direct" interest in the suit, an interest "which is vested in it *as a sovereign*." *Id*. at 194 (emphasis added). And because the United States was suing "to enforce a public right or to protect interests of its Indian wards," the Court rejected the State's argument that the suit was barred by the state limitations period, even though the first land patent had been granted over fifty years before the complaint. *Id*. at 192, 196. The Court reached the same conclusion in *Board of Commissioners v. United States*, 308 U.S. 343, 351 (1939), stating that "state notions of laches and state statutes of limitations have no applicability to suits by the Government, whether on behalf of Indians or otherwise."

The decision below likewise conflicts with decisions of other courts of appeals that reject the application of laches in suits brought by the federal government to enforce ancient tribal rights. In *United States v. Washington*, 157 F.3d 630 (9th Cir. 1998), the United States and a group of tribes sued the State of Washington to restore shellfishing rights under 1854 and 1855 treaties. *Id*. at 638-40. Much of the tideland containing the shellfish beds had long since passed into private, non-Indian hands. *Id*. at 640. The court nevertheless expressly *rejected* the argument that the "extraordinary facts" of the case required application of "the doctrine of laches to defeat the Tribes' claim to shellfish." *Id*. at 649. To the contrary, notwithstanding the passage of 135 years, the court

held that "the law does not support" the use of laches to bar claims brought by tribes and the United States. *Id.*; *see also Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) (claims of United States and tribe are immune from laches despite a seventy-year delay in assertion of grazing rights); *Mt. Vernon Mortgage Corp. v. United States*, 236 F.2d 724, 725 (D.C. Cir. 1956) (stating in dicta that laches does not apply to suit "to enforce a right of an Indian tribe"). In short, "[i]t is well-settled that neither statutes of limitations nor the doctrine of laches bars actions by the United States unless Congress has clearly indicated otherwise." Cohen, *supra*, at 617-18.

Nor do any of the other grounds the Second Circuit invoked justify its decision or temper the direct conflict. The Second Circuit invoked the "egregious" passage of time. But as this Court has squarely held, laches is inapplicable against the United States, "however gross" the delay. *Insley*, 130 U.S. at 266; *see also Washington*, 157 F.3d at 649 (135-year delay).

For the same reason, the Second Circuit cannot make an end-run around 28 U.S.C. § 2415 by suggesting that the United States' cause of action had "lapsed" prior to passage of that provision. Pet. App. 24a. The very notion is flatly inconsistent with § 2415. That statute provides that claims that arose before its 1966 enactment (*i.e.*, when no limitation had existed) are "deemed to have accrued on the date of enactment of this Act," 28 U.S.C. § 2415(g), and there is no dispute that the United States' suit is timely under that provision. The legislative history confirms that Congress was well aware when it later extended the limitations period to preserve certain Indian land claims that the claims it was preserving dated back to the nineteenth or even eighteenth century. *See, e.g.*, *Statute of Limitations Extension for Indian Claims: Hearings on S. 1377 Before the S. Select Comm. on Indian Affairs*, 98th Cong. 24 (1977) (citing the Cayuga claim as one that would be barred absent an extension of the

limitation period); *see generally* S. Rep. No. 96-569, at 3 (1980); H.R. Rep. No. 95-375, at 6-7 (1977), *reprinted in* 1977 U.S.C.C.A.N. 1616, 1621-23. Thus, not only does the Second Circuit's decision conflict with the general principle that "[l]aches within the term of the statute of limitations is no defense at law," *United States v. Mack*, 295 U.S. 480, 489 (1935); *see Cross v. Allen*, 141 U.S. 528, 537 (1891), it nullifies Congress' considered policy judgment. *See supra* at 21 (courts cannot use "equitable" considerations to override congressional judgments). *Cf. Oneida II*, 470 U.S. at 244.

Even apart from the impact on New York land claims, the conflict created by the Second Circuit's decision merits this Court's review. Tribal claims often involve (for instance) essential hunting, fishing, or water rights based on nineteenth-century treaties, and federal courts have heretofore held correctly that laches could not bar suits by the United States to vindicate treaty rights, even where the result was undeniably "disruptive." *See, e.g.*, *Washington*, 157 F.3d at 649, 657. But under the Second Circuit's decision, breaching parties may have a ready defense to treaty violations, undermining the ability of tribes and the United States to enforce the government's express promises. That is an abandonment of the judicial function and a breach of trust that this Court should not countenance.

More broadly, the Second Circuit's decision is profoundly unwise. The decision of the United States here to sue on behalf of the Tribes and the decision of Congress to enact a statute of limitations preserving the United States' claims represents a balancing of the public interest by the branches most qualified to perform such a balance, and the branches that can be held politically accountable for their actions. By taking that decision from the political branches, the Second Circuit has exceeded its proper role, to the detriment of the United States, tribes, and justice alike.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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