No. 05-978

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

GEORGE E. PATAKI, GOVERNOR OF THE STATE OF NEW YORK, ET AL.

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

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

Respondents contend that the suits filed by the Cayugas and the United States warrant dismissal under *City of Sherrill* v. *Oneida Indian Nation*, 125 S. Ct. 1478 (2005), because they are disruptive of settled expectations; that no statutory or other barrier exists to the application of laches in this setting; and that the issues presented here are not of sufficient importance to warrant this Court's review. Those arguments lack merit. Because the relief awarded by the district court was limited to money damages, this case is controlled not by *City of Sherrill* but by *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*), in which this Court allowed functionally indistinguishable damages claims to go forward. The court of appeals' disposition of this case is contrary to *Oneida II*, to Acts of Congress specifically designed to govern the timeliness of claims like these, and to the settled principle that the United States is not subject to laches when it sues in its sovereign capacity. The practical effect of the court's decision is to render nugatory extended litigation (in this and similar cases) that has proceeded in reliance on *Oneida II*, even though the Cayugas' claims were endorsed by the United States and both the tribal and governmental complaints were timely filed under the applicable statutes of limitations. Furthermore, the result of the decision below is to preclude *any* redress for "grave" wrongs by the State of New York, *City of Sherrill*, 125 S. Ct. at 1491 n.11, in violation of treaty and statutory protections of the Tribes' lands. In light of the court of appeals' broad ruling, only review by this Court can now ensure that the United States will be able to fulfill its obligations to obtain redress for the Cayugas and other New York Indians whose lands

were obtained from them in violation of explicit treaty and statutory provisions. See *Heckman* v. *United States*, 224 U.S. 413, 437 (1912); Pet. 26. For all these reasons, the petition for a writ of certiorari should be granted.

A. This Court's Decision In *City Of Sherrill* Does Not Support Respondents' Position

Respondents contend (Br. in Opp. 13-17) that judicial consideration of the land claims filed by the Cayugas and the United States entails unacceptably disruptive consequences, and that the court of appeals' decision in this case therefore follows logically from *City of Sherrill*. Respondents' reliance on *City of Sherrill* is misplaced.

1. Respondents emphasize (*e.g.*, Br. in Opp. 15) that the Cayugas have pursued an ejectment remedy throughout this litigation. As our petition for a writ of certiorari explains (at 19-20), however, it is an established principle of federal civil procedure that, if a plaintiff's claim is meritorious and the district court can identify *some* form of appropriate relief, the plaintiff's own failure specifically to request that remedy in its complaint provides no basis for dismissal of the suit. Respondents do not address that point; they make no effort to ground their argument in generally applicable procedural rules; and they cite no case holding that a plaintiff's request for relief that a court later declines to award on equitable grounds justifies dismissal of its complaint.

Thus, if the district court had determined at the outset of this case that equitable considerations would bar ejectment of the current landowners, the court could not have dismissed the suit on that ground. Although the district court did not rule definitively on that remedial question until 1999 (see Pet. App. 359a-387a), the court made clear as early as 1983 that an order ousting current landholders would not necessarily follow from a favorable ruling on the merits of the Cayugas'

claims, and that an award of money damages might ultimately be found to be an appropriate substitute. See *id.* at 485a; Pet. 20 n.2. As a practical matter, the suit thus proceeded in the same way as if the Cayugas' complaints had included prayers for damages for the value of the land as an alternative to the preferred remedy of ejectment. This Court's decision in *City of Sherrill* supports the district court's reliance on equitable factors as a basis for denying the Cayugas their preferred remedy, but it in no way suggests that the suit should have been dismissed *ab initio*.

2. Respondents also contend (Br. in Opp. 14) that the district court's damages award is disruptive because it "flow[s] directly from the finding that the Cayugas are entitled to possession" of the relevant lands. Respondents further suggest (*id.* at 16) that the damages award, if not reversed, could serve as a predicate for additional relief that "could jeopardize local mortgages and inhibit investment in local real estate and businesses." Those arguments are misconceived.

The district court held that the Cayugas had never lawfully been divested of title to the relevant lands, and that their right to possession had therefore been violated. The court took pains, however, to fashion a remedy that would *finally* resolve the Cayugas' claims *without* calling into question the right of current occupants to remain on the land or to sell the property to others. In light of the care taken by the district court to avoid the disruptive consequences that respondents hypothesize, the court's decision could not reasonably be invoked to support a future order that would cast doubt on current patterns of land occupancy and ownership in the region.

The apparent thrust of respondents' argument is that, because equitable considerations precluded the district court from following its core merits ruling (*i.e.*, that the Cayugas were unlawfully divested of their lands in 1795 and 1807) to its logical remedial conclusion, the court could not order any

relief at all—or even determine that the Cayugas' rights were violated. *City of Sherrill* provides no support for that all-or-nothing conception of the district court's remedial authority. To the contrary, the Court in *City of Sherrill* praised the district judge who presided over this case for "transcend[ing] the theoretical" and adopting "a pragmatic approach" in his conduct of the parallel Oneida land-claim litigation, in which the judge (as here) denied an ejectment remedy while determining that damages from parties other than private landowners would remain available. 125 S. Ct. at 1488 (quoting *Oneida Indian Nation* v. *County of Oneida*, 199 F.R.D. 61, 92 (N.D.N.Y. 2000)); see Pet. 16. This Court quoted with approval the district court's observation that there "is a sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right." 125 S. Ct. at 1489 (quoting *Oneida Indian Nation*, 199 F.R.D. at 90). Respondents' contention that the unavailability of actual ejectment requires dismissal of the underlying claims is the antithesis of the "pragmatic approach" that the *City of Sherrill* Court endorsed.[1]

3. Respondents contend (Br. in Opp. 17) that "the potential award of billions of dollars in money damages in this case and the other New York land claim cases would have a dramatic impact on the State's budgetary and fiscal planning and place an extraordinary burden on the State's taxpayers." It is perverse, however, to suggest that the magnitude of the Cayugas' injury—which reflects the magnitude of the State's wrong—is a basis for denying the United States and the Cayugas any

[1] As respondents observe (Br. in Opp. 13), this Court in *City of Sherrill* "noted approvingly the refusal of the same district judge who handled this case to eject 20,000 landowners in the Oneida land claim." It surely did not escape this Court's attention, however, that the district court in the Oneida land-claim suit noted the potential availability of damages from other defendants and allowed the suit to continue even after holding ejectment to be inappropriate.

relief whatever. The district court relied on various equitable considerations in reducing by 60% the amount of prejudgment interest that it awarded. Pet. App. 320a; see Pet. 8, 27 n.7. If this Court grants certiorari and reverses the judgment of the Second Circuit, respondents are free to argue on remand (to the extent that the issue has been properly preserved) that further reduction of the prejudgment interest award would be appropriate. The size of the award cannot, however, properly be treated as a justification for dismissal of the suits filed by the United States and the Cayugas.[2]

B. The Court Of Appeals' Decision Conflicts With Congress's Judgment That Claims Like These Should Be Permitted To Go Forward

As the certiorari petition of the United States explains (at 21-25), the court of appeals' dismissal of these suits on the ground of laches is particularly inappropriate because Congress, in 28 U.S.C. 2415(b) and in the Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, 96 Stat. 1976 (1982 Act), enacted provisions governing the timeliness of the damages claims at issue here. Respondents contend (Br. in Opp. 19-20) that Section 2415(b) and the 1982 Act are inapplicable because 28 U.S.C. 2415(c) states that "[n]othing herein shall be deemed to limit the time for bringing an action to establish the title to, or right of possession of, real or personal property." Respondents' reliance on Section 2415(c) is misplaced.

By its terms, 28 U.S.C. 2415(b) encompasses "every action for money damages brought by the United States or an officer or agency thereof which is founded upon a tort." Section

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[2] Respondents seek (Br. in Opp. 17) to distinguish this Court's decision in *Oneida II* on the ground that *Oneida II* culminated in a relatively modest damages award. The suit in *Oneida II*, however, was understood to be a "test case" brought to clarify the legal principles that would govern litigation involving much larger tracts of land. *City of Sherrill*, 125 S. Ct. at 1486.

2415(b) covers "action[s] to recover damages resulting from a trespass on lands of the United States" and "action[s] for conversion of property of the United States," as well as suits within those categories that are brought "for or on behalf of a recognized tribe, band or group of American Indians, including actions relating to allotted trust or restricted Indian lands." 28 U.S.C. 2415(b). Section 2415(c)'s reference to "action[s] to establish the title to, or right of possession of, real or personal property," 28 U.S.C. 2415(c), should not be read so broadly as to subvert Congress's intent that *damages* actions for trespass or conversion would be subject to defined statutory limitations periods. Subsections (b) and (c) are best reconciled by construing 28 U.S.C. 2415(c) as limited to suits seeking *prospective* relief establishing title or right of possession, not as extending to damages claims in which title to real or personal property is an element of the cause of action.[3]

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[3] Section 2415(c) was enacted in 1966 as part of the law that first established a statute of limitations governing suits by the United States. See Pub. L. No. 89-505, 80 Stat. 304; Pet. 21. The legislative history explains that Section 2415(c) "makes it clear that no one can acquire title to Government property by adverse possession or other means. This is done by providing that there is no time limit within which the Government must bring actions to establish title to or right of possession of real or personal property of the United States." S. Rep. No. 1328, 89th Cong., 2d Sess. 3 (1966); see H.R. Rep. No. 1534, 89th Cong., 2d Sess. 5 (1966) (identical language). Congress's intent to preclude the acquisition of government property through adverse possession is fully consistent with its decision to limit the time within which the United States may seek *damages* for *prior* trespasses or conversions.

At least with respect to the complaint filed by the United States on the Cayugas' behalf, moreover, 28 U.S.C. 2415(c) is particularly unhelpful to respondents' position, since the United States' suit clearly would not be time-barred if it were encompassed by Section 2415(c). In providing that government suits "to establish the title to, or right of possession of, real or personal property" are not subject to the limitations periods contained in other subsections of 28 U.S.C. 2415, Congress did not anticipate that such actions would be subject to *alternative* timing requirements. Rather, Congress

That reading of 28 U.S.C. 2415(b) and (c) is also consistent with the manner in which the Secretary of the Interior has administered the 1982 Act. The 1982 Act required the Secretary to publish, within 90 days of the law's enactment, a list of Indian claims "which, but for the provisions of [the 1982] Act, would be barred by the provisions of section 2415 of title 28, United States Code." 1982 Act, § 3(a), 96 Stat. 1977. The Secretary included the Cayuga land claim on the required list, see 48 Fed. Reg. 13,920 (1983); Pet. 22, and explained that "[t]he vast majority of the listed claims involve trespasses to Indian land," 48 Fed. Reg. at 13,698. Inclusion of the Cayugas' claim on that list would have been superfluous if, as respondents contend, the limitations period set forth in 28 U.S.C. 2415 were inapplicable to damages actions alleging trespass onto or conversion of tribal lands.[4]

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intended that there would be "no time limit" at all for such suits. S. Rep. No. 1328, *supra*, at 3; H.R. Rep. No. 1534, *supra*, at 5; see Pet. 25-27 (explaining that principles of laches do not apply when the United States sues in its sovereign capacity); pp. 8-9, *infra* (same). Respondents' contention that the United States' suit is encompassed by Section 2415(c) therefore undermines its argument that the suit should be dismissed. See *Oneida II*, 470 U.S. at 243-244 n.15.

[4] Respondents also contend (Br. in Opp. 20) that "laches may bar actions that are otherwise within the statute of limitations," but the cases they cite (*id.* at 20-21) do not support their position here. In *Holmberg* v. *Armbrecht*, 327 U.S. 392, 393-398 (1946), the Court held that a federal court sitting in equity should apply federal principles of laches rather than borrowing a state statute of limitations. *Alsop* v. *Riker*, 155 U.S. 448 (1894), also involved a potentially applicable state-law limitations period (*id.* at 460), and the Court, in holding that the plaintiff's suit for equitable relief should be dismissed on the ground of laches (*id.* at 460-461), stated that the dismissal would be "without prejudice to an action at law" (*id.* at 461). The Court in *Gardner* v. *Panama R.R.*, 342 U.S. 29, 30-31 (1951) held that, when the plaintiff's earlier timely-filed suit had been abated through an amendment to the Federal Tort Claims Act, her subsequent admiralty action was not barred by laches even though the applicable statute of limitations would have precluded any suit at law. None of

C. The United States Is Not Subject to Laches When It Sues In Its Sovereign Capacity

Relying on *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977), and *Heckler* v. *Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984), respondents contend (Br. in Opp. 21) that "an action by the United States may be precluded by laches, even when the United States is acting in its sovereign capacity." Respondents' reliance on those decisions is misplaced. In *Occidental Life*, the Court indicated that the Equal Employment Opportunity Commission's undue delay in seeking backpay may be relevant to the *amount* of any monetary remedy, but it did not suggest that such delay could provide a basis for dismissal of the suit *ab initio*. 432 U.S. at 372-373; Pet. 27 n.7. And *Community Health Services* involved estoppel against the government, not laches. The Court in *Community Health Services*, while noting the "substantial" arguments favoring a categorical ban on the application of estoppel against the United States, left open the possibility that exceptional cases might arise in which estoppel could appropriately be invoked against the government. 467 U.S. at 60-61. The Court made clear, however, that a party claiming estoppel against the government must demonstrate, at a minimum, that it reasonably relied to its detriment on the government's misrepresentations of fact. See *id.* at 59, 61. Respondents can make no such showing.

"As has been its strategy throughout this litigation, the State attempts to divert attention away from its own actions by pointing the finger at the Federal Government." Pet. App. 293a (district court opinion). Undoubtedly there have been lengthy periods of this Nation's history during which federal officials were less than vigilant in their enforcement of the

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those cases suggests that a claim for damages can be dismissed on the ground of laches when suit is filed within a limitations period established by Congress.

Trade and Intercourse Acts.[5] The federal government's prior failures to prevent or to obtain redress for illegal purchases of tribal land, however, cannot reasonably be equated with the State's deliberate violations of the law, through which New York derived a substantial profit.[6]

D. The Decision Below Warrants This Court's Review

More than 20 years ago, this Court in *Oneida II* allowed tribal land claims like these to go forward, rejecting the contention that the suits were time-barred. See Pet. 14. Respondents contend (Br. in Opp. 18) that the decision below does not conflict with *Oneida II* because this Court in *Oneida II* did not rule definitively on the availability of a laches defense. As our petition for a writ of certiorari explains (at 14), however, the Court was scarcely agnostic as to the applicability of

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[5] As the Court observed in *Oneida II*, the legislative history of the 1982 Act and its statutory predecessors (see Pet. 21-22) "is replete with evidence of Congress' concern that the United States had failed to live up to its responsibilities as trustee for the Indians." 470 U.S. at 244. Congress reacted to those prior failures, however, not by declaring ancient land claims to be extinguished, but by enacting a statute that *preserves* such claims. Under the limitations provisions of that statute, the suits filed by the Cayugas and by the United States are indisputably timely.

[6] Respondents note (Br. in Opp. 5-6 & n.7) that federal Indian agents were present and witnessed the agreements in 1795 and 1807 by which the State sought to purchase land from the Cayugas. Respondents do not seriously contend, however, that the federal government authorized the transactions as required by the Trade and Intercourse Acts, which required formal ratification by a Treaty of the United States. Indeed, the district court found that the 1795 and 1807 sales did not receive the requisite federal approval. See Pet. App. 442a. Respondents further suggest (*e.g.*, Br. in Opp. 1) that the Cayugas acquiesced in the dispossession of their land until the first of these suits was filed in 1980. The district court, however, described the Cayugas' sustained efforts from 1853 until 1980 to obtain additional compensation from the State (Pet. App. 294a-298a), and in any event inaction by a Tribe does not erase a violation of the Trade and Intercourse Acts.

laches. Rather, the Court observed that "application of the equitable defense of laches in an action at law would be novel indeed," 470 U.S. at 244 n.16—a point the Court reiterated in *City of Sherrill* with respect to damages claims, see 125 S. Ct. at 1494 n.14—and it identified various ways in which recognition of such a defense would be inconsistent with federal law and policy, see *Oneida II*, 470 U.S. at 244-245 n.16; Pet. 14.

The suit that was before the Court in *Oneida II*, moreover, was understood to be a "test case" (see note 2, *supra*) whose disposition would guide the lower courts in their adjudication of similar suits brought by other Tribes. The unmistakable import of the Court's decision was that the passage of time since the wrongs complained of did not provide a basis for dismissal of damages actions alleging illegal acquisitions of tribal lands. The litigation that has since proceeded in reliance on that decision has consumed an extraordinary amount of time and resources. The question whether all such lawsuits were subject to dismissal *ab initio* should be resolved by this Court, not by a divided panel of the court of appeals. That is especially so because the result of the decision below is to preclude any redress for the Cayugas and other New York Indians for grave wrongs committed by the State in clear violation of treaty and statutory provisions adopted by the Nation for the protection of the Indians.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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