No. 10-1420

IN THE

Supreme Court of the United States

ONEIDA INDIAN NATION OF NEW YORK, ONEIDA TRIBE OF INDIANS OF WISCONSIN, ONEIDA OF THE THAMES,
Petitioners,

v.

COUNTY OF ONEIDA, COUNTY OF MADISON, STATE OF NEW YORK,
Respondents.

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

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

TABLE OF AUTHORITIES—Continued

STATUTES

TREATIES

LEGISLATIVE MATERIALS

Blank Page

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The court of appeals ordered the dismissal, based on "equitable considerations" (Pet. App. 28a), of damages claims that are just like the claim that this Court held meritorious in *County of Oneida, New York* v. *Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*), and that Congress determined in the Indian Claims Limitation Act (ICLA) should be allowed to proceed. The court concluded that allowing such claims to be heard on the merits would be impermissibly "disruptive" of settled interests, even though both this Court and Congress had already considered the potential implications of allowing claims like the Oneidas' to proceed.

The court of appeals' rejection of this Court's and Congress's judgments about the propriety of adjudicating such claims by itself warrants this Court's review. But in addition, the court of appeals called into doubt several other important principles of law. It erased the fundamental distinction between claims and remedies by transforming this Court's decision in *City of Sherrill* v. *Oneida Indian Nation of New York*, 544 U.S. 197 (2005), from a decision about the practical consequences of permitting particular forms of equitable *relief* into one requiring the dismissal of *claims* that a court considers to be "disruptive of significant and justified societal expectations." Pet. App. 42a. It also departed from this Court's decisions holding uniformly that equity will not bar a claim filed within a statute of limitations prescribed by Congress. And, as explained by the United States (Pet. 17-22), it broke with the settled principle that the United States is not subject to laches when acting in its sovereign capacity.

Respondents devote two-thirds of their brief (Opp. 1-20) to relitigating the history of the Oneidas' dispossession and their efforts to secure relief. Whatever the merits of Respondents' historical account—and it is pervasively flawed[1]—this is not new ground that they

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[1] Respondents' recitation of the historical record contains many inaccuracies; we address a few of the more egregious here: (1) The Oneidas did not "cede[]" (Opp. 1, 5) to New York the lands that formed their reservation. The Second Circuit expressly rejected that contention in *Sherrill*, and this Court left that holding undisturbed. *See Oneida Indian Nation of New York* v. *City of Sherrill*, 337 F.3d 139, 160-165 (2d Cir. 2003); *Sherrill*, 544 U.S. at 215 n.9; U.S. *Sherrill* Amicus Br. 11-16. (2) Under the Treaty of Buffalo Creek, the consideration for the Kansas lands reserved for the Oneidas was not the cession of any New York land, but Wisconsin land jointly owned by the New York Indians (7 Stat. 550

seek to tread. Both Congress and this Court have encountered this history before and determined that these claims should proceed on their merits. The court of appeals was in no position to reject those judgments, and certiorari is therefore warranted.

I. THE COURT OF APPEALS' DISMISSAL OF THE ONEIDAS' ACTION FOR DAMAGES CONFLICTS WITH *ONEIDA II* AND *SHERRILL*

In *Oneida II*, this Court affirmed a judgment for the Oneidas for damages caused by the unlawful dispossession of their former lands, rejecting several arguments based on the passage of time since the events giving rise to the claim and on related claimed equities. *See* 470 U.S. at 240-244. The Court preserved that holding twenty years later in *Sherrill*. In so ruling, the Court necessarily concluded that an award of money damages presupposing the invalidity of old transactions but unaccompanied by any relief against current landowners would not be impermissibly disruptive. Those decisions dictate that the Oneidas' current claims—which also seek damages only—should have been allowed to proceed.

1. The decision below cannot be justified as a "straightforward application of *Sherrill*[.]" Opp. 3. The Oneidas' damages claims do not implicate *Sherrill*'s concern with the potentially "disruptive practical con-

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(Jan. 15, 1838)); and in any event, the Oneidas never moved to Kansas. (3) The statement of Senator Platt (Opp. 8), made some six decades after the Treaty was enacted, does not alter the Treaty's plain text, and in any case, is not authoritative, as he prefaced his cited remarks by saying, "I had not thought this measure was coming up at this time, and perhaps I may not be able to recall the facts[.]" 24 Cong. Rec. 585, 588 (1893).

sequences" of particular remedies. 544 U.S. at 219. The equitable considerations that controlled in *Sherrill* concerned the specific *relief* sought in that case—restoration of tribal sovereignty—and do not bar any claims outright. The court of appeals' ruling that *Sherrill* bars the Oneidas' suit altogether disregards the fundamental distinction between rights and remedies, which are "separate, analytically distinct issue[s]." *Davis* v. *United States*, 131 S. Ct. 2419, 2431 (2011); *see also Lewis* v. *Lewis & Clark Marine, Inc.*, 531 U.S. 438, 445 (2001) ("The distinction between rights and remedies is fundamental."). *Sherrill* preserved that distinction, 544 U.S. at 213; the Second Circuit's decision obliterates it.

Respondents' repeated contention (Opp. 5, 23) that the Oneidas' damages claims are "inextricably" linked to the relief barred in *Sherrill* and to possession-based relief ignores the fact that the Court in *Sherrill* expressly left the holding of *Oneida II* undisturbed. In doing so, the Court contrasted the permissible award of "money damages only" in *Oneida II* with the impermissible restoration of tribal sovereignty in *Sherrill*. 544 U.S. at 211-213; *see also* Pet. 18 & n.6. It ruled that, unlike an award of retrospective monetary relief, the latter would disrupt the governance of the region and adversely affect current landowners in a way that would be inequitable. 544 U.S. at 220-221.

Instead of confronting the Oneidas' claims as they are actually presented, Respondents suggest that "[t]his case is and always has been about the validity of title and the Oneidas' current right to possession of lands sold to New York." Opp. 27. In fact, this case has not been about those issues for more than a decade.

Pet. 9-10 & n.1.[2] The *only* relief the Oneidas now seek is monetary, and the Oneidas have repeatedly disclaimed any intent to demand possession of their former lands or to eject current landowners. There is nothing impermissibly disruptive about awarding damages when recovery of possession is foreclosed on equitable grounds. Thus, in *Yankton Sioux Tribe of Indians* v. *United States*, 272 U.S. 351 (1926), *Felix* v. *Patrick*, 145 U.S. 317 (1892), and *United States* v. *Minnesota*, 270 U.S. 181 (1926), the Court recognized that damages from the wrongdoer are available as a remedy even when it would be inequitable to disturb the rights of third parties who acquired land after an invalid transaction. The Oneidas' claims for damages stand on the same ground.

To be sure, the courts below and the parties have referred to one set of the Oneidas' claims as "possessory." Those claims, however, are identical to the damages claim in *Oneida II* upon which this Court affirmed the Counties' liability—and Respondents do nothing to distinguish them. The claims are "possessory" only in the sense that they presuppose a right of possession that survived the challenged transactions. Pet. 9-10. As in *Oneida II*, however, the *remedy* for the illegal transactions is an award of damages, not a transfer of possession.

Moreover, the Oneidas also assert "non-possessory" claims for damages to recover the differ-

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[2] The Oneidas did not appeal the district court's 2000 ruling that "no private landowners will be evicted from property upon which they are currently residing." Pet. App. 176a. As they explained below (2d Cir. Br. 34), they asserted a present possessory interest in the amended complaint filed thereafter only to preserve a basis for recovering trespass damages.

ence between the price New York paid for the Oneidas' lands and their actual market value at the time. Those claims do not presuppose a possessory interest as a premise for recovery, but instead seek to remedy the substantive unfairness of the original transactions—an unfairness that was exactly the type of harm the Non-intercourse Act was designed to prevent. Respondents say almost nothing about these claims—other than to suggest wrongly that they were raised "for the first time" (Opp. 18) in opposition to Respondents' post-*Sherrill* motion for summary judgment. In fact, the Oneidas included the claim in the operative complaint filed in 2000. *See* C.A.J.A. A230 (Am. Comp. 26) (seeking "disgorgement" of "the difference in value between the price at which New York State acquired or transferred each portion of the subject lands from the Oneida Indian Nation and its value").[3]

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[3] Respondents also do not dispute that the Oneidas' non-possessory claims are distinct from the possessory claims at issue in *Cayuga Indian Nation of New York* v. *Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006), as explained in the Oneidas' petition (Pet. 25-26) and Judge Gershon's dissent below (Pet. App. 62a-68a). For this and other reasons set forth in the petition (Pet. 25-26), the denial of certiorari in *Cayuga* does not counsel against review here.

Likewise, Respondents are incorrect to suggest that this Court's review is not warranted because the United States has agreed to take 13,000 acres (roughly 5% of the land at issue in this case)—which the New York Oneidas purchased on the open market—into trust for the tribe (Opp. 25). The trust action addresses the sovereignty issues before the Court in *Sherrill*, 544 U.S. at 220-221, but does nothing to compensate any of the Oneida tribes for the wrongful dispossession of 250,000 acres of the Oneidas' historic lands.

2. The court of appeals' decision cannot be reconciled with *Oneida II* by casting the decision below as an application of laches. *Oneida II* left open (at most) the possibility that laches may apply where the defense is properly established and preserved (the Counties had waived it in *Oneida II*). 470 U.S. at 244 n.16. But the traditional doctrine of laches focuses on inequitable conduct by the plaintiff and "requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello* v. *United States*, 365 U.S. 265, 282 (1961). Here, the district court expressly found no undue delay by the Oneidas (Pet. App. 83a), and the Second Circuit did not disturb that finding.[4] Instead, the court of appeals found the absence of undue delay "not ultimately important" because it determined not to apply the established laches doctrine at all. Pet. App. 25a. Rather, as Respondents themselves characterize the decision, the court "crafted and applied an equitable bar peculiar to the particular historical context here." Opp. 30. Nor, indeed, did the court of appeals even suggest

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[4] The district court's ruling that laches was inapplicable here (Pet. App. 83a) was unequivocally supported by the summary-judgment record. There was no basis for charging the Oneidas with undue delay, as it would have been entirely futile for the Oneidas to seek redress in state or federal court before *Oneida Indian Nation of New York* v. *County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*). *See* Pet. 12 n.2. Further, as the court of appeals had previously recognized, the Oneidas pressed their claims outside the courts for over two centuries. *See Oneida Indian Nation of New York State* v. *Oneida County*, 719 F.2d 525, 529 (2d Cir. 1983) ("Shortly after the 1784, 1787, and 1788 land purchases, the Oneidas contacted the federal government in protest over what they perceived as improper, deceitful, and overreaching conduct by the State. Their protest continued, especially between 1840 and 1875, and between 1909 and 1965." (internal citation omitted)).

it was applying laches as this Court left open in *Oneida II*.

Respondents imply (Opp. 2) that *Sherrill* can be read to resolve the laches question reserved in *Oneida II*. But there was no suggestion in *Sherrill* that traditional laches furnished the basis for this Court's determination that a tribe may not "rekindl[e] the embers of sovereignty," 544 U.S. at 214, over its lands through judicial action. Rather, this Court stressed that the remedy proposed for vindication of the tribe's governance claims would disrupt the settled expectations of state and local governments, as well as landowners. *Id.* at 219-221. No such contention could be made in this case, which involves *only* a request for damages and does not implicate either the rights of current landowners or the governance of the region.[5] Further, as this Court noted repeatedly, *Sherrill* did not involve a request for money damages like the one at issue in *Oneida II* (or here). *See, e.g., id.* at 221 ("[T]he 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*."). Therefore, it is *Oneida II*, not *Sherrill*, that controls these claims.[6]

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[5] There is no support for Respondents' assertion that a ruling in the Oneidas' favor "could jeopardize local mortgages and inhibit investment in local real estate." Opp. 24. The Oneidas submitted evidence in opposition to summary judgment regarding the availability of title insurance and the lack of disruption to the local real estate market in the decades following this Court's affirmance of the Counties' liability for wrongful possession in *Oneida II*. C.A.J.A. A629-A634. Respondents offered no evidence to the contrary.

[6] To the extent that equitable considerations are applicable here, it is with regard to the appropriate remedy—not the viability

II. THE COURT OF APPEALS IMPERMISSIBLY INTRUDED ON CONGRESS'S AUTHORITY BY USING EQUITY TO BAR CLAIMS CONGRESS ALLOWED

In dismissing the Oneidas' claims on equitable grounds based on the passage of time, the court of appeals did not even cite ICLA. Respondents do not dispute that ICLA embodies Congress's determination that old Indian claims brought within the statutory limitations period should be allowed to proceed. Nor do they dispute that Congress considered precisely the same facts and circumstances that the court of appeals considered in determining that the Oneidas' claims were too disruptive too proceed. Respondents are thus left to argue that courts nonetheless may invoke equity to bar such claims. That argument is contrary to this Court's decisions.

As the Oneidas showed in their petition (Pet. 27), the appropriate length of time in which a claim for damages may be brought is "quintessentially the kind of judgment to be made by a legislature." *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 169 (1987) (Scalia, J., concurring in the judgment). For that reason, this Court has long held 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 also* U.S. Pet. 21-22.[7] That is especially so where, as here, there has been no unreasonable delay.

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of the claims themselves. As the Oneidas have long acknowledged, equitable considerations may bear on the relief ultimately awarded in this case. *See* Pet. 17 & n.5.

[7] None of the cases Respondents cite supports the contention that laches may bar a claim brought within the statute of limitations. *See* Opp. 29. Rather, they all stand for the principle that a

The court of appeals failed to respect this elemental separation-of-powers principle by determining—contrary to nearly a century of explicit decisions by this Court—that equity can bar a claim brought within a statute of limitations established by Congress. Assessing "the particular historical context" (Opp. 30) to determine the timeliness or staleness of legal claims is Congress's job, not the courts'. *See United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 491 n.4 (2001) (availability of defenses to statute implicate the sort of "social balancing that is better left to Congress"); *cf. American Elec. Power Co.* v. *Connecticut*, 131 S. Ct. 2527, 2535-2537 (2011) (citing *Oneida II*, and holding that courts may not "create the controlling law" where Congress has enacted a regime "to deal comprehensively" with the covered claims). The intrusion on Congress's prerogative is particularly pronounced here, where the court considered the precise interests that were balanced by Congress in enacting ICLA and then invoked a quasi-laches doctrine to dismiss the claims that Congress had seen fit to allow. *See* Pet. 28-30.

Respondents also argue that ICLA does not apply to the Oneidas' action at all because it falls within an exception for claims that seek "'to establish the title to, or right of possession of, real or personal property.'" Opp. 27 (quoting 28 U.S.C. § 2415(c)). But the Oneidas

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court's application of laches need not refer to a statute of limitations as a benchmark for exercise of the court's equitable discretion. *See, e.g., Gardner* v. *Panama R.R. Co.*, 342 U.S. 29, 31 (1951) (rejecting argument that court's application of laches in admiralty was constrained by statute of limitations for similar action at law). Indeed, *Holmberg* v. *Armbrecht*, upon which Respondents rely, states clearly that a statute of limitations enacted by Congress is "definitive" and, for the courts' purposes, the "end of the matter." 327 U.S. 392, 395 (1946).

do *not* seek to establish a current title to or right of possession of their former lands—only to recover money damages. Respondents suggest that, in *Oneida II*, this Court agreed that "these claims involving litigation over the continued vitality of aboriginal title, even those for damages, may be construed as suits 'to establish the title to, or right of possession of, real or personal property' that would be exempt from the statute of limitations in [ICLA]." Opp. 27. That is wrong. The Court in *Oneida II* simply observed that "*if* claims like the Oneidas' ... are to be construed to be suits 'to establish the title to, or right of possession of, real or personal property,' they would be exempt from the statute of limitations" in ICLA. 470 U.S. at 243 n.15 (emphasis added).

CONCLUSION

The court of appeals' decision cannot be reconciled with this Court's decisions in *Oneida II* and *Sherrill*, or with ICLA. The petition for a writ of certiorari should therefore be granted.

Respectfully submitted.

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