No. 14-538

IN THE

Supreme Court of the United States

STOCKBRIDGE-MUNSEE COMMUNITY,

Petitioner,

v.

THE STATE OF NEW YORK; MARIO CUOMO, as Governor of the State of New York; NEW YORK STATE DEPARTMENT OF TRANSPORTATION; FRANKLIN WHITE, as Commissioner of Transportation; MADISON COUNTY, NEW YORK; ONEIDA COUNTY, NEW YORK; TOWN OF AUGUSTA, NEW YORK; TOWN OF LINCOLN, NEW YORK; VILLAGE OF MUNNSVILLE, NEW YORK; TOWN OF SMITHFIELD, NEW YORK; TOWN OF STOCKBRIDGE, NEW YORK; TOWN OF VERNON, NEW YORK,

Respondents,

- and -

ONEIDA INDIAN NATION OF NEW YORK,

Respondent.

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

BRIEF FOR THE STATE AND COUNTY AND MUNICIPAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether this Indian land claim is properly barred by laches, acquiescence and impossibility under this Court's decision in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), because the remedies arising out of petitioner's claims to a 36-square mile tract of land in central New York—ceded to New York State in a series of transactions conducted 150 years ago—would be "disruptive" and barred by the passage of time and the justifiable expectations of ownership and sovereignty.

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A. Introduction

In this action, petitioner Stockbridge-Munsee Community ("petitioner" or "the Tribe"), a tribe residing in Wisconsin, seeks a declaration that it retains valid Indian title to a 36-square-mile tract of land in central New York, notwithstanding its cession of this land to the State of New York in a series of transactions between 1818 and 1842. For more than a century and a half, non-Indians have owned and occupied this land and New York State and its counties and municipalities have exercised jurisdiction and sovereignty there. In 1986, the long-settled status of the subject land was abruptly thrown into question when petitioner sued the State of New York and State officials as well as several counties and municipalities that possess and exercise regulatory control over the land.

The Tribe now challenges the validity of its ancient land cessions, seeking a declaration that they were "void *ab initio*," that its "Treaty recognized Indian title" to the land "has never been extinguished," and that it retains a current right of possession. In addition to declaratory relief, petitioner also seeks an order restoring possession of these lands to the Tribe. As to the non-State respondents that are not protected by the immunity from suit provided by the Eleventh Amendment, the Tribe additionally requests an award of money damages for bad-faith trespass and the disgorgement of unjustly received benefits. Pet. App. 47.

Petitioner's ancient land claim is barred. This Court held in *City of Sherrill v. Oneida Indian Nation of N.Y.*,

544 U.S. 197 (2005), that "standards of federal Indian law and federal equity practice" precluded the Oneida Indian Nation of New York ("OIN") from reviving its sovereignty over alleged ancestral lands long owned by others based on its recent open market purchase of these lands. Invoking doctrines of laches, acquiescence and impossibility, the Court explained that the equitable relief sought by the OIN —immunity to real property taxes conferred by its claim to sovereignty—was a "disruptive remedy" that was barred by the "long lapse of time" since the tribe's cession of the land in question, the continuous government of the territory by "New York and its county and municipal units" during that time, the attendant changes in the character of the land, and the impossibility of returning the land to Indian control without "seriously burdening" State and local administration. *Id.* at 216-17, 220.

After *Sherrill* was decided, the United States Court of Appeals for the Second Circuit held that the rule announced in that case barred land claims, including those for damages, brought by the Cayuga Indian Nation and the OIN, both joined by the United States (which refused the Tribe's request to intervene here). The court found the tribal claims for restoration of possession and damages for dispossession to be as (or more) disruptive to settled expectations as the recognition of tax immunity in *Sherrill.* These ancient tribal claims directly challenged all current non-Indian title in the lands, undermining core principles of private land ownership undisturbed since the early days of the Republic, and sought restoration of possession of the lands coupled with explicit demands or implicit threats to eject current landowners. By challenging title, possession and occupancy of lands held by non-Indians for generations, the Second Circuit held,

these ancient tribal land claims invoked all the concerns articulated in *Sherrill* and are properly barred by the same principles of laches, acquiescence and impossibility recognized in *Sherrill*. And these principles applied equally to bar the tribes' possessory claims even where the relief they sought had been recast as monetary relief instead of ejectment.

This Court denied the tribes' and the United States' petitions for certiorari in both cases. *See Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005), *cert. denied, United States v. Pataki*, 547 U.S. 1128 (2006), and *Cayuga Indian Nation of N.Y. v. Pataki*, 547 U.S. 1128 (2006); *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 137 (2d Cir. 2010), *cert. denied*, *United States v. N.Y.,* 132 S. Ct. 452 (2011), and *Oneida Indian Nation of N.Y. v. County of Oneida,* 132 S. Ct. 452 (2011). The Second Circuit summarily dismissed a subsequent land claim brought by the Onondaga Nation, and this Court again denied the tribe's petition for certiorari. *Onondaga Nation v. N.Y.*, 500 Fed Appx. 87 (2d Cir. 2012), *cert. denied*, 134 S.Ct. 419 (2013).

This case presents a straightforward application of *Sherrill* to yet another—now the fourth—central New York Indian land claim based on similar 19th-century land transfers. Although this case involves the claim of a tribe that has not resided in New York since the mid nineteenth century, and a small tract of land, the relief petitioner seeks is no less disruptive to the long-settled expectations of defendants and landowners in the region than the relief sought in cases that have come before: restoration of Indian title to and possession of lands owned and occupied by non-Indians for 150 years, and trespass

damages, based on the alleged illegality of ancient land transactions. Accordingly, the court of appeals properly affirmed the dismissal of petitioner's claims in accordance with its precedents applying *Sherrill* to bar Indian land claims. In each of these cases, this Court has declined to review these precedents, even where the tribes' claims and petitions for certiorari were joined by the United States. In this case, where the United States has refused to intervene, there is even less reason for this Court to grant review of this now well-settled law.

Contrary to petitioner's argument, no aspect of this Court's recent decision in *Petrella v. Metro-Goldwyn Mayer, Inc.*, 134 S.Ct. 1962 (2014), undermines the decision below or marks a change in the applicable principles of federal Indian law. *Petrella* addressed the statute of limitations applicable to claims for copyright infringement and held that the traditional equitable defense of laches could not be applied to bar legal relief on a claim brought within the Copyright Act's three-year statute of limitations. *Petrella* is inapposite because (i) Congress has fixed no statute of limitations for Indian land claims, and (ii) *Sherrill* and the Second Circuit have held that ancient land claims are barred by "standards of federal Indian law and federal equity practice," invoking a variety of doctrines not limited to traditional laches. The holding below, therefore, does not conflict with *Petrella* or any other decision of this Court and petitioner has not identified any other conflict with any other appellate decision. This case does not warrant this Court's review.

B. Petitioner's Amended Complaint

In 2004, petitioner filed an amended complaint, alleging that it is a federally recognized Indian Tribe whose primary reservation and principal situs is in the State of Wisconsin. Pet. App. 43. Petitioner seeks a declaration of its "ownership and right to possess its reservation lands in the State of New York known as New Stockbridge." Pet. App. 42. The claimed reservation lands consist of a 36-square-mile tract. The amended complaint excludes from this tract and does not assert title to 7.25 acres comprising the right of way for N.Y.S. Route 46, while reserving the Tribe's right in the future to assert title to that parcel. Pet. App. 45-46.

The amended complaint alleged that the State of New York owns 0.91 acres within the subject tract. Pet. App. 45. The other State respondents[1]—the Governor and the Commissioner of Transportation—are State officials allegedly "empowered to hold title and other interests in real property on behalf of the State" and "responsible for regulation of the use and occupancy thereof." By "keeping [petitioner] out of possession of the lands and natural resources that are the subject of this action," these officials are allegedly acting outside the scope of their authority and in violation of federal law. Pet. App. 43-44. The county and municipal defendants are local governments who own and occupy portions of the subject lands. Pet. App. 44. The amended complaint alleges that the OIN, also a respondent here, possesses property within the subject lands. Pet. App. 43, 45.

[1] As the district court noted, petitioner withdrew its claims against the State of New York and the New York State Department of Transportation. Pet. App. 12.

According to petitioner, the Tribe's right to the subject tract dates back to the eighteenth century. Following the American Revolutionary War, the OIN allegedly transferred the subject tract, which was part of the OIN's aboriginal territory, to the Tribe. Amended Complaint ("AC") ¶ 16. Petitioner asserts that its right to the tract was recognized by the 1788 Treaty of Fort Schuyler between the OIN and the State of New York, then operating under the Articles of Confederation. Petitioner alleges that in 1789, when the Constitution of the United States became effective, the federal government assumed the sole right, which it had formerly shared with the states, to obtain and extinguish Indian title. AC ¶ 19.

Petitioner then alleges that, in 1790, the United States passed the Nonintercourse Act, which petitioner alleges "expressly forbade and declared void *ab initio* any sale of land, or any title or claim thereto, by any Indian nation or tribe without the consent of the United States." AC ¶ 20. And it alleges that in 1794, the United States entered into the Treaty of Canandaigua with several New York Indian tribes, including petitioner, and "thereby stepped into the shoes of the State respecting obligations under the 1788 Treaty of Fort Schuyler and its 1789 implementing act." AC ¶ 21. Petitioner claims that the State of New York purported to obtain title to the subject lands through fifteen transactions with the Tribe conducted between 1818 and 1842, without the consent or subsequent ratification of the United States, and that such transactions were therefore void. AC ¶¶ 25-44.

The amended complaint enumerates three causes of action: first, a claim under federal common law "to exclusive use and possession of the lands of New Stockbridge" which

defendants are violating by continuing to use, occupy and derive benefits from the subject lands, AC ¶ 47; second, a claim under the Nonintercourse Act that petitioner has a continuing right of possession and ownership in the subject tract, AC ¶¶ 49-50; and third, a claim of a continuing right of possession based on the 1788 Treaty of Fort Schuyler and 1794 Treaty of Canandaigua, AC ¶ 52.

As to remedy, petitioner seeks declarations that the early nineteenth century transfers to the State of New York were void *ab initio*, and that "[petitioner's] Treaty-recognized Indian title to the lands of New Stockbridge has never been extinguished and that [petitioner] therefore has a right of current possession to every portion of the subject lands." Pet. App. 47. Petitioner also seeks an order restoring to it possession of the subject lands. And as to the county and municipal defendants, petitioner seeks trespass damages and disgorgement of all benefits unjustly received. Pet. App. 47.

C. This Court Bars "Disruptive" Relief in *Sherrill*

In 2005, this Court decided *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), the last in a series of cases where this Court had considered the OIN's invocation of its aboriginal title to lands in Central New York. First, in *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 675 (1974) ("*Oneida I*"), this Court held that the OIN's ancient land claim arose under federal law so that the federal courts had jurisdiction over it. Then, in *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S.226, 236 (1985) ("*Oneida II*"), this Court held that the OIN's claim could be maintained as a matter of federal common law and was not otherwise barred by

a statute of limitations. Although four dissenters would have rejected OIN's claim based on laches, *id.* at 255-73, the majority "[did] not reach this issue," finding that it was not preserved. *Id.* at 244-45; *see also id.* at 253, n. 27 (expressing no opinion whether other equitable considerations may limit available relief).

In *Sherrill*, the Court held that "standards of Indian law and federal equity practice" barred the OIN's assertion of sovereignty over lands that were allegedly part of its ancient reservation and that the tribe had recently purchased on the open market. 544 U.S. at 202, 211. As in this case, the tribe claimed that the transactions that purported to extinguish the OIN's title violated the Nonintercourse Act.[2] The Court held that an adjudication of "present and future" sovereignty would be a "disruptive remedy" that is precluded by equitable principles underlying the doctrines of laches, acquiescence and impossibility. *Id.* at 216-17, 221.

As to laches, the Court observed that the wrongs of which the OIN complained "occurred during the early years of the Republic," and that the OIN "did not seek to regain possession of their aboriginal lands by court decree until the 1970's." *Id.* at 216. The "long lapse of time during which the Oneidas did not seek to revive their sovereign control *through equitable relief in court*, and the attendant dramatic changes in the character of the properties, preclude[d] [the tribe] from gaining the disruptive remedy it [sought]." *Id.* at 216-17 (emphasis added).

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[2] The OIN intervened as a defendant in this case to dispute petitioner's Indian title to the subject land on the basis of its claim that it is the true title-holder of the land, which was allegedly part of the OIN's original reservation.

In addition, *Sherrill* rested on the doctrine of acquiescence. The Court noted the long acquiescence by the tribe and the United States in the State's dominion and sovereignty over the lands and the "justifiable expectations" of the residents of the area, "grounded in two centuries of New York's exercise of regulatory jurisdiction." *Id.* at 215-16, 218. The Court explained that "given the extraordinary passage of time," granting the relief the OIN sought "would dishonor the historic wisdom in the value of repose." *Id.* at 218-19 (internal quotation marks omitted). And it observed, "[f]rom the early 1800s into the 1970s, the United States largely accepted, or was indifferent to, New York's governance of the land in question and the validity *vel non* of the Oneidas' sales to the State," and, indeed, that national policy in the early 1800s "was designed to dislodge east coast lands from Indian possession." *Id.* at 214.

Finally, the Court also relied on the equitable doctrine of impossibility, noting that "returning to Indian control land that generations earlier passed into numerous private hands" is fundamentally impracticable and would "seriously burden the administration of state and local governments" and "adversely affect" neighboring landowners. *Id.* at 219-20. For all these reasons, the Court held that the OIN was barred from "rekindling embers of sovereignty that long ago grew cold." *Id.* at 214.

D. The Second Circuit Follows *Sherrill*, Dismissing the *Cayuga*, *Oneida* and *Onondaga* Land Claims

Shortly after *Sherrill* was decided, the United States Court of Appeals for the Second Circuit applied these equitable principles to bar a 64,000-acre land claim brought

by the Cayuga Indian Nation. *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005). There, the tribe asserted claims to its alleged historic lands and sought ejectment of the current occupants of those lands. 413 F.3d at 274-75. The district court ruled that the tribe's desired remedy of ejectment was inappropriate given the impact it would have on many innocent landowners far removed from the alleged acts of dispossession, but nonetheless awarded the tribe money damages. *Id.* at 275. The Second Circuit reversed, holding that the equitable principles recognized in *Sherrill* barred all remedies, including damages, flowing from ancestral land claims because such claims themselves, when raised long after the events which gave rise to them, are inherently disruptive.[3] *Id.* at 275, 277. In so holding, the court cited the same factors that this Court relied on in *Sherrill*, such as the time during which non-Indians have owned and developed the land, the residence of the tribe elsewhere, and the tribe's long delay in seeking relief. *Id.* at 277. This Court denied the petitions for a writ of certiorari filed by both the tribal plaintiffs and the United States. *See United States v. Pataki*, 547 U.S. 1128 (2006); *Cayuga Indian Nation of N.Y. v. Pataki*, 547 U.S. 1128 (2006).

The Second Circuit again applied the principles underlying *Sherrill* to dismiss a subsequent tribal land claim involving 250,000 acres in *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 137 (2d Cir. 2010). The court reiterated its holding in *Cayuga* that any claims "premised on the assertion of a current, continuing right to

[3] The Court rejected the Cayugas' claim for trespass damages because possession is an element of trespass, and therefore, the trespass claim "is predicated entirely upon plaintiffs' possessory land claim." 413 F.3d at 278. As that claim was barred, the plaintiffs' trespass claim failed as well. *Id.*

possession as a result of a flaw in the original termination of Indian title—are by their nature disruptive." 617 F.3d at 125. The court explained that while in *Cayuga* it had used the term "laches" as a "convenient shorthand for the equitable principles" at issue in these cases, the equitable doctrines underlying *Sherrill* and *Cayuga* did not require a defendant to establish the elements of traditional laches. *Id.* at 127. "Rather," the court recognized, the proper equitable analysis focuses "more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to plaintiff's injury." *Id.* at 127. The court dismissed the tribe's possessory claims as well as its non-possessory claims for damages. Because all of plaintiffs' claims depended on a declaration that the original land transfers were void *ab initio*, they were inherently disruptive and barred by the equitable principles underlying *Sherrill*. *Id.* at 129-31. Again this Court denied both the tribe's and the United States' petitions for certiorari. *See United States v. New York*, 132 S. Ct. 452 (2011); *Oneida Indian Nation of N.Y. v. County of Oneida*, 132 S. Ct. 452 (2011).

More recently, the Second Circuit held a third ancient Indian land claim (involving 2.5 million acres in central New York) barred by *Sherrill's* equitable principles. *Onondaga Nation v. N.Y.*, 500 Fed Appx. 87 (2d Cir. 2012). Based on the *Sherrill-Cayuga-Oneida* trilogy of precedent, the court affirmed in a summary order the dismissal of the Onondagas' claims, this time on the pleadings. In *Onondaga*, the district court had dismissed the tribe's land claim for failure to state a claim under Federal Rule 12(b)(6), despite the tribe's argument that

factual allegations rendered *Sherrill's* equitable doctrines inapplicable. The Second Circuit affirmed, rejecting the tribe's argument that it was entitled to discovery to establish that it had "strongly and persistently protested" the population and development of its ancestral lands because, regardless, "the standards of federal Indian law and federal equity practice" would nonetheless bar the claim. *Id.* at 90. This Court denied the tribe's petition for certiorari. *Onondaga Nation v. N.Y.*, 134 S.Ct. 419 (2013).

E. The Decisions Below

Respondents moved to dismiss the Tribe's amended complaint as failing to state a claim on the ground that this 150-year-old land claim is foreclosed by the same equitable considerations that foreclosed the OIN's claim in *Sherrill*. The State respondents also sought dismissal based on Eleventh Amendment immunity. The United States District Court for the Northern District of New York dismissed the amended complaint. Pet. App. 10-20. On the issue of the *Sherrill* defense, the district court agreed, as petitioner had conceded, that *Cayuga* and *Oneida* would bar petitioner's claims if the court were to follow them. Declining petitioner's invitation to disregard these cases as wrongly decided, the court dismissed the claims against the county-municipal respondents. The court also stated that *Cayuga* and *Oneida* would have likewise compelled dismissal as to the State respondents, except that the court had already determined that it did not have jurisdiction over the State respondents under the *Ex Parte Young* doctrine.[4] Pet. App. 18-19, 20 n. 6.

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[4] Based on petitioner's statement that it had been informed by officials from respondent Madison County that the State of New York no longer owned the .91 acre parcel it was alleged to

The Second Circuit affirmed, holding that petitioner's land claim was, on its face, barred by the equitable doctrines discussed in *Sherrill* and applied to dismiss similar claims in *Cayuga*, *Oneida* and *Onondaga*. *Stockbridge-Munsee Community v. State of N.Y.*, 756 F.3d 163, 165 (2d Cir. 2014). As a result of this precedent, the court stated, "it is now well-established that Indian land claims asserted generations after an alleged dispossession are inherently disruptive of state and local governance and the settled expectations of current landowners, and are subject to dismissal on the basis of laches, acquiescence and impossibility." *Id.* at 165. The claims at issue here shared these characteristics, and were therefore barred by *Sherrill's* equitable principles. *Id.* at 165-66.

In reaching this result, the court rejected petitioner's argument—which is the basis of its petition for certiorari—that this Court's recent decision in *Petrella v. Metro-Goldwyn Mayer, Inc.*, 134 S.Ct. 1962 (2014),[5] somehow

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have possessed, the court concluded that "the alleged violation of federal law by the relevant state officials necessarily has ceased" and there is no basis to seek prospective relief in the form of ejectment against those officials. Accordingly, the court held, petitioner's claims against the State respondents were barred by the Eleventh Amendment. Pet. App. 15-16. On appeal, the State respondents informed the Second Circuit that in the absence of further investigation, they could not confirm that the State no longer owns or has an interest in any portion of the subject tract. Although in that court the State respondents did not rely on lack of ownership as a basis for affirmance, they argued that petitioner's claims against them were barred under the Eleventh Amendment.

[5] This Court decided *Petrella* after the briefing in the Second Circuit on this case was complete, but before oral argument. Petitioner filed a Rule 28(j) letter concerning *Petrella*, to which respondents submitted a response.

reversed this settled precedent. Noting that *Petrella* concerned whether the traditional defense of laches could be used to defeat a claim filed within the Copyright Act's express three-year statute of limitations, the court concluded that it stood only for the proposition that "in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." *Id.* at 166 (quoting *Petrella*, 134 S.Ct. at 1974). *Petrella* is therefore of no relevance to this case because Congress did not fix a statute of limitations for Indian land claims. *Id.* (citing *Oneida II*, 470 U.S. at 253). Moreover, even had there been a statute of limitations here, *Petrella* would still be inapposite because the *Sherrill* equitable defense did not focus on traditional laches, as *Petrella* did. Rather, laches was only one of several equitable doctrines, along with acquiescence and impossibility, that more broadly informed the "fundamental principles of equity that precluded plaintiffs from rekindling embers of sovereignty that long ago grew cold." *Id.* at 166 (quoting *Sherrill*, 544 U.S. at 214).

REASONS FOR DENYING THE PETITION

I. The Decision Below Follows a Well-Settled Line of Cases In Which the Second Circuit Has Applied *Sherrill* to Bar Ancient Indian Land Claims, and Which This Court Has Repeatedly Declined to Review.

In dismissing the Tribe's challenge to its ancient land sales, the court below followed a now well-settled line of Second Circuit cases which have applied *Sherrill* to bar such claims as inherently disruptive, regardless of the type of relief requested. These cases are consistent with

and follow from *Sherrill*, and this Court has declined to review them, despite petitions from both the tribes and the United States seeking their review. This case was brought by a tribe that has resided on its reservation in Wisconsin for generations, and the United States has refused to join it. The Tribe challenges ancient transactions concerning a relatively small 36-square-mile tract of land. Accordingly, this case presents an even less compelling vehicle to review this well-settled precedent governing New York land claims.

Petitioner asserts that the court below should not have dismissed its claims because *Sherrill* did not address the availability of legal relief in the form of money damages.[6] Pet. 18. This argument, which both the tribes and the United States also made in *Cayuga* and *Oneida*, lacks merit. *Sherrill* did not address monetary relief because the OIN did not seek damages there, but only declaratory and injunctive relief. *See* 125 S.Ct. at 1489. As a result, the Court was not required to revisit its holding in *Oneida II* that the OIN could maintain a federal common law cause of action for damages for a violation of its possessory right. The Court's statement in *Sherrill* that it did "not disturb our holding in *Oneida II*" meant only that *Sherrill* did not present "the question of damages for [the OIN]'s ancient dispossession." 125 S.Ct. at 1494; *see also Oneida II*, 470 U.S. at 230.

On the contrary, petitioner's attempt to limit *Sherrill* to the specific relief at issue there cannot be reconciled

[6] We address at Point II below petitioner's argument that the Second Circuit's dismissal of this claim conflicts with this Court's decision in *Petrella*.

with the broad equitable principles, premised on laches, acquiescence and impossibility, supporting that decision. *Sherrill's* principles are designed to prevent disruptions of settled expectations that are centuries in the making and they apply equally to bar all disruptive ancient land claims that seek redress for distant historic wrongs without regard to whether the claims seek damages or equitable relief. Indeed, because there is no fixed statute of limitations—no end date by which such claims must be brought—the *Sherrill* equitable principles are needed to protect the long-settled property interests and other reliance-based interests that have developed over the past two centuries of non-Indian ownership and occupation, whether the cause of action is deemed legal or equitable. Indeed, in the context of ancient land claims the damage to settled expectations from either type of claim is the same.[7]

The Second Circuit's decisions barring monetary relief flow directly and logically from this Court's reasoning in *Sherrill*, which focused on the disruptive nature of the *claim* of ancient dispossession rather than the specific form of relief requested. As in *Sherrill*,

[7] Even outside the context of federal Indian law and *Sherrill*'s unique formulation of "laches, acquiescence and impossibility," courts have recognized the need for the defense of laches to be applied to limit legal claims for damages when Congress fails to set a fixed statute of limitations. *See Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1395 (7th Cir. 1990) (J. Posner, concurring)(in the absence of a statutory limitations period "court will apply the equitable doctrine of laches even if the cause of action is legal rather than equitable. . . [t]here is precedent for applying laches in cases at law") (citation omitted). *See infra*, at 19. Applying the *Sherrill* equitable doctrines to bar actions at law is not novel.

petitioner's extraordinary delay in pursuing its land claim "cannot be ignored here as affecting only a remedy to be considered later; it is, rather, central to [its] very claims of right." *See Sherrill*, 544 U.S. at 222 (Souter, J., concurring). In holding that equitable principles underlying laches, acquiescence and impossibility barred the OIN's claim of renewed sovereignty over its former lands, this Court invoked the tribe's inordinate delay in asserting its claim, the disruptive practical consequences any relief would entail, and the justifiable expectations of current landowners. Because the OIN's belated claim was inherently disruptive, this Court held, it was "best left in repose." *Sherrill*, 544 U.S. at 221 n.14 (quoting *Oneida II*, 470 U.S. at 273 (Stevens, J., dissenting)).

Following this reasoning, the Second Circuit has repeatedly held that the *Sherrill* equitable considerations bar ancient Indian land claims regardless of the relief requested. Thus, in *Cayuga*, the Second Circuit held that the rule of *Sherrill* barred not only injunctive relief but also damages, because the Cayugas' claim, whether for immediate possession or damages in lieu of possession, was just as disruptive as the OIN's request for reinstatement of sovereignty in *Sherrill*, 413 F.3d at 274-75, and therefore equally subject to the *Sherrill* bar. In their petitions to this Court, the Cayuga Nation and the Solicitor General on behalf of the United States contended, among other things, that the court erred in finding a claim for monetary damages disruptive. Cayuga Pet. 19 (No. 05-982). This Court denied review.

Then in *Oneida*, where the OIN sought compensation based on allegations that the State had illegally acquired 250,000 acres between 1795 and 1846, the Second Circuit

again held that any claims premised on the assertion of a current, continuing right to possession as result of a flaw in the original termination of Indian title, whether seeking ejectment or money damages, are by their nature disruptive. The equitable defenses recognized in *Sherrill* therefore bar such claims, the court held, notwithstanding the presence of the United States as a party. The tribe and the Solicitor General again filed petitions for certiorari, which again emphasized the purportedly retrospective nature of the relief sought. U.S. Pet. 16 (No. 10-1404). This Court again denied review. The Tribe's request for money damages in this case, based on over 150 years of alleged "bad-faith trespass," would be just as disruptive to settled expectations as the requests for money damages in the earlier cases, even aside from the ramifications it would have for state and local sovereignty.[8]

This Court does not lightly deny petitions filed by the Solicitor General, much less twice on one subject within a few years. It did so in *Cayuga* and *Oneida* because the Second Circuit's application of *Sherrill* creates no circuit conflict and is consistent with this Court's decision in that

[8] In this respect, petitioner's argument that its assertion of Indian title with respect to the .91 acres allegedly possessed by the State of New York would not be disruptive (Pet. 32) is misplaced because it is the long delay in bringing the claim rather than the size or use of the tract of land at issue that makes the claim disruptive. Moreover, petitioner's assertion of unextinguished Indian title as to the entire 36 square miles is inconsistent with the State's regulatory jurisdiction over these lands, even aside from the State's possessory interest. *See Sherrill*, 544 U.S. at 219-220. Petitioner's attempt to disclaim any challenge to the State's regulatory authority (Pet. 32) should also be rejected, given that Indian title inherently opens the door to such challenges.

case. And here the Second Circuit merely applied its prior precedent to dismiss the Tribe's claims and broke no new legal ground. Despite petitioner's request,[9] the United States has refused to intervene in support of petitioner's claim, although it did intervene as a plaintiff in *Cayuga* and *Oneida*. Thus, this case is even less deserving of review than the earlier cases in which review was denied.

II. *Petrella* Does Not Alter the Analysis of Such Claims or Otherwise Warrant Review of This Settled Law.

Unable to identify any factual circumstance distinguishing this case from prior Indian land claims where this Court has denied review, petitioner argues that the Court's recent decision in *Petrella* altered the analysis applicable to such claims. Pet 14. According to petitioner, *Petrella* answered the question left open in *Oneida II*—"whether the equitable doctrine of laches could bar the Oneida land claim." Pet. 18. *Petrella* responded to this question, petitioner argues, by holding that "the equitable defense of laches may not be applied to bar an action at law filed within a time period prescribed by Congress." Pet. 18-19.

The Second Circuit correctly rejected the Tribe's argument, and certiorari is not warranted. *Petrella* concerned whether a traditional laches defense could bar a copyright infringement claim for money damages brought within the Copyright Act's three-year statute of limitations. At most, *Petrella* stands for the proposition that "in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." *Id.*

[9] *See* Docket 3:86-cv-1140, nos. 213, 237.

at 1974. The rationale for this rule is that a fixed statute of limitations "itself already takes account of delay," *id.* at 1983; indeed, laches "originally served as a guide *when no statute of limitations controlled the claim*," *id.* at 1975 (emphasis added).

Petrella is inapposite because the decision did not involve principles of federal Indian law and federal equity practice and Congress has fixed no statute of limitations for Indian land claims. In holding ancient Indian land claims to be disruptive of settled expectations and barred under *Sherrill's* equitable doctrines, the Second Circuit has applied "standards of federal Indian law and federal equity practice," not traditional laches, and has done so in the absence of a statute of limitations. The decision below does not conflict with *Petrella*, which accordingly does not support certiorari.

A. Congress Has Not Fixed a Statute of Limitations for Indian Land Claims.

Petitioner is simply incorrect in contending that the lower court's ruling "that Congress has not established a limitations period for Indian land claims is wrong and conflicts with this Court's opinion in *Oneida II*." Pet. 21. Indeed, the Tribe does not even articulate what statute of limitations applies to such claims. While the Tribe points generally to the limitations scheme enacted in 28 U.S.C. § 2415 (Pet. 21), that provision *exempts* claims to enforce property rights from the limitations periods that it otherwise imposes on suits concerning Indian rights. Specifically, 28 U.S.C. § 2415(c) provides 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."

As originally enacted in 1966, section 2415 only addressed claims brought by the United States on behalf of Indians and subjected contract and tort claims for damages to an express statute of limitations of six years and 90 days, but section 2415(c) excluded from the limitations period actions to establish title to real property. *Oneida II*, 470 U.S. at 242. The contract and tort suits subject to the limitations period were deemed to have accrued as of 1966. *Id.* The 1982 amendments to section 2415 addressed for the first time claims brought directly by tribes and not just through the United States. *Id.* at 243. These amendments still did not impose a statute of limitations on land claims, however, but instead carried forward the exclusion from the limitations period for any action "to establish title, or right of possession of, real or personal property" set forth in section 2415(c). *Id.* at 242. In this way, the 1982 amendments to section 2415 retained the status quo ante whereby Indian claims relating to aboriginal title and possession fell outside any state or federal statute of limitations. *Id.* at 242-243. Examining this limitations scheme in *Oneida II*, this Court found that "[t]here is no federal statute of limitations governing federal common-law actions to enforce property rights." *Id.* at 240; *see also United States v. Mottaz*, 476 U.S. 834, 848 n. 10 (1986) (same).

Thus, unlike the Copyright Act that subjects claims to a three-year statute of limitations, section 2415 does not impose a limitations period on Indian land claims reflecting a Congressional choice about when tribes must commence ancient land claims. *See Petrella*, 134 S.Ct at

1967. In the absence of a Congressionally-prescribed fixed statutory bar date, courts are free to apply the equitable principles invoked in *Sherrill,* which are designed to address situations, as here, where a tribe's claims to lands ceded over 150 years ago are not barred by a statute of limitations.

Petitioner vaguely suggests that its claims fall under 28 U.S.C. § 2415(b) concerning trespass actions, apparently relying on its request for "bad-faith" trespass damages (Pet. 22), but that is not so. In order to obtain any of its requested remedies, the Tribe must first "establish title to" and "right of possession of" real property. *See* 28 U.S.C. § 2415(c). Indeed, its primary request is for a declaration of its unextinguished Indian title, from which the rest of its requested relief flows. Pet. App. 47. Petitioner cannot transform its action into one for trespass merely by adding a request for "bad-faith trespass" damages to its prayer for relief. Because the Tribe does not assert a right of possession apart from its claim of Indian title, its request for trespass damages is wholly dependent on an adjudication of its title. *See Cayuga Indian Nation of N.Y.*, 413 F.3d at 278 (tribe's trespass claim is predicated entirely on its possessory land claim). Without first "establishing" its title to, and thereby its right to possession of, the subject tract, *see* 28 U.S.C. § 2415(c), the Tribe could not sustain an indispensable element of a claim for trespass damages.

Accordingly, the Second Circuit correctly concluded that *Sherrill*—not *Petrella*—answered the question left open in *Oneida II*, and forecloses *all* claims challenging these ancient conveyances as "disruptive," regardless of the type of relief sought.

The Tribe's alternative argument that the *Sherrill* equitable defense is precluded because the Tribe's claims are not barred by any limitations period (Pet. 24) fares no better. The Tribe attempts to infer a Congressional intent to preclude a laches defense to ancient land claims from the *absence* of a federal statute of limitations applicable to these claims. But this argument is not premised on *Petrella*, which concerned a claim brought within an expressly circumscribed limitations period. Indeed, long before *Petrella* was decided, the Cayugas and the United States made this argument in their petitions for certiorari. Cayugas Pet. Reply 7-8 (No. 05-982); U.S. Pet. 24-25 (No. 05-982). It remains erroneous. Where Congress has intended to bar laches as a defense to Indian claims, it has said so. *See* Indian Claims Commission Act, ch. 959 § 2, 60 Stat. 1049, 1050 (1946) (the ICC may hear and determine specified claims against the United States "notwithstanding any statute of limitations or laches"); 25 U.S.C. § 640d-17(b) (act settling certain Indian land claims provides that "[n]either laches nor the statute of limitations shall constitute a defense to any action authorized by this subchapter for existing claims if commenced within" specified periods). Nor is there any indication that in enacting or amending section 2415, Congress intended to revive ancient Indian claims seeking possession of or title to land that were barred by laches over a century before. *See Oneida* II, 470 U.S. at 271-72 (Stevens, J., dissenting) (§ 2415[c] merely reflects an intent to preserve the law as it existed on the date of enactment). Thus, the absence of a statute of limitations in section 2415 does not support a finding that Congress enacted a federal policy to disallow delay-based equitable defenses to ancient land claims.

B. The Holding and Reasoning in *Petrella* Is Limited to Traditional Laches And Does Not Apply To *Sherrill's* Broader Equitable Defense.

Petrella is further inapposite because it concerned only the traditional laches defense, whereas the *Sherrill* defense reflects "standards of federal Indian law and federal equity practice," and draws from several equitable doctrines—laches, acquiescence and impossibility. As the Second Circuit correctly explained:

> The equitable defense recognized in *Sherrill* and applied in *Cayuga* does not focus on the elements of traditional laches but rather more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiff's injury… The Supreme Court [in *Sherrill*] discussed laches not in its traditional application but as one of several preexisting equitable defenses, along with acquiescence and impossibility, illustrating fundamental principles of equity that precluded the plaintiffs from 'rekindling embers of sovereignty that long ago grew cold.'

Oneida Indian Nation of N.Y., 617 F.3d at 127-28 (citations omitted). As *Petrella* did not discuss *Sherrill* or the equitable principles that pertain to these special types of Indian land claims, the Second Circuit rightly found it inapplicable.

III. Other Considerations Warrant Denial of Review.

A. Independent Grounds Preclude Petitioner from Obtaining Relief.

Certiorari should be denied for the additional reason that this case presents a poor vehicle to address whether *Petrella* limits the scope of the *Sherrill* defense. A decision in petitioner's favor would not affect the ultimate outcome here. The case would have to be dismissed on alternative grounds: as to the State respondents, sovereign immunity mandates dismissal; as to the other respondents, dismissal is required by the consequent absence of the State respondents, required parties. Because the case must in any event be dismissed, the question whether the complaint is barred by the equitable doctrines addressed in *Sherrill* is ultimately an abstract question and for that reason alone does not warrant this Court's review. *See, e.g.*, *DTD Enters., Inc. v. Wells*, 130 S. Ct. 7, 8 (2009) (statement of Justice Kennedy respecting the denial of certiorari) (a "procedural obstacle unrelated to the question presented" is a reason to deny certiorari).

The Eleventh Amendment bars suit in federal court by an Indian tribe against a State. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). There is no basis for finding the Eleventh Amendment inapplicable here. The United States has not intervened in this case despite the Tribe's request. Nor was New York's sovereign immunity abrogated by Congress in the Nonintercourse Act, 25 U.S.C. § 177. *See Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress lacked the power to abrogate the States' Eleventh Amendment immunity under its Indian Commerce Clause or its other Article I

powers). And the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), does not defeat New York's sovereign immunity here because Indian land claims are essentially actions to "quiet title," which are not subject to that exception. *Idaho v. Coeur d'Alene*, 521 U.S. 261, 296-97 (1997); *accord Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18, 20-23 (2d Cir. 2004). Thus, the courts would have to dismiss the claims against the State respondents on the ground of Eleventh Amendment immunity.

Moreover, because the State respondents are required parties in whose absence the action cannot proceed, the complaint must be dismissed against all remaining respondents. *See* Fed. R. Civ. P. 12(b)(7) and 19. Indeed, this Court has held that "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008); *see also Seneca Nation of Indians v. New York*, 383 F.3d 45 (2d Cir. 2004) (claims against non-State defendants dismissed under Rule 19 where Indian land claims against the State were barred by sovereign immunity), *cert. denied*, 547 U.S. 1178 (2006).

Specifically, petitioner would be unable to obtain complete relief without the State and its officials as parties. Petitioner's claim is premised on allegations that the State was the original wrongdoer, but the State would not be bound by any ruling that its acquisition of the lands was illegal with respect to any portion of the subject lands it may still own or over which it has sovereign control. Notwithstanding petitioner's attempted disclaimer to the contrary (Pet. 3, n. 1), a judgment rendered in the State's

absence declaring that petitioner has possessory rights in these lands would necessarily implicate the State's sovereignty interests. *Coeur d'Alene*, 521 U.S. at 281. As the original owner of the lands, and the source of record title for it, the State has a sovereign interest in protecting the rights that it acquired on behalf of the people of New York. *See, e.g.,* N. Y. State Law § 10 (McKinney 2003) (governor is obligated to provide for the legal defense of any action to recover lands instituted against any person deriving title from the State). And the State's interest in the challenged treaties, to which it was a party, would be adjudicated in its absence.

In light of the State's sovereign immunity, this case cannot proceed against either the State respondents or any of the remaining respondents. Accordingly, even if this Court were to review the court of appeals' holding that equitable considerations bar relief, petitioner still could not win the judgment it seeks. This case therefore would be unsuitable for plenary review even if petitioner had presented a question that otherwise merited review.

B. Petitioner's Adverse Claim against the OIN, Itself Precluded by the *Sherrill* Defense from Pursuing Its Own Ancient Land Claim, And the Refusal of the United States to Intervene, Further Render the Decision Unsuitable for Review.

Petitioner, a Wisconsin tribe, seeks a remedy previously denied to three New York tribes (the Cayugas, the OIN, and the Onondagas) who brought lawsuits seeking possession and damages arising from a series of eighteenth and nineteenth century treaties ceding their

lands. And the Cayugas' and the OIN's land claims were held to be barred by these equitable principles despite the intervention of the United States as a plaintiff supporting them. A grant of the Tribe's petition in this case would have the anomalous result of permitting petitioner, unsupported by the United States despite the Tribe's request, to pursue relief on their far smaller claim to 36 square miles.

In addition, this case is not a suitable vehicle for review because the Tribe's amended complaint asserts that its purported Indian title to the subject tract allegedly arose when it relocated to the OIN's aboriginal territory and the OIN transferred the subject land to the Tribe. AC ¶ 17. The Tribe also alleges that the OIN currently owns and occupies portions of the tract. AC ¶ 10. And the OIN intervened in this case as a defendant to contest the Tribe's allegation that the OIN conveyed the subject tract to petitioner. Thus, if petitioner were afforded relief, it would result in either the ejectment of the OIN or their payment of damages to the Tribe, when according to the Tribe the OIN were the alleged grantors of the land. This result would be all the more anomalous if the OIN were denied the protections of the *Sherrill* defense to petitioner's land claim, where the OIN itself was precluded by the *Sherrill* defense with respect to its own ancient land claims.

In short, petitioner attempts to reopen issues related to an equitable defense that, after decades of litigation, has finally resolved major Indian land claims against the State of New York, its local governments, and its citizens and businesses. This case presents no occasion to unsettle this well-considered repose.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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