No. 05-982

IN THE

# Supreme Court of the United States

CAYUGA INDIAN NATION OF NEW YORK, *ET AL.*,
*Petitioners*,
v.
GEORGE PATAKI, AS GOVERNOR OF THE STATE OF NEW YORK, *ET AL.*,
*Respondents*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## REPLY BRIEF


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## REPLY BRIEF

The brief in opposition seeks principally to distract the Court from the actual question presented in this case and the obvious import of the Second Circuit's decision. But no amount of misdirection can obscure that the Second Circuit invoked laches to extinguish a claim identical to the claim this Court approved in *Oneida II* – a claim "for damages for the occupation and use of tribal land allegedly conveyed unlawfully in 1795." *Oneida County v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 229 (1985). Indeed, the Cayugas' right to proceed is even more secure than was that of the Oneidas, because the Cayugas are joined by the United States, and this Court has consistently held that laches cannot bar a claim by the United States in its sovereign capacity. The Second Circuit's decision is thus a direct repudiation of both *Oneida II* and the firmly established law of laches.

Respondents nevertheless contend that certiorari should be denied because the Second Circuit divined that the reasoning in *Sherrill* would dictate a different outcome in *Oneida II* were it to arise today. Even if respondents were correct (and they are not), that would be a reason for granting certiorari, not denying it. Only this Court can overrule one of its prior decisions. And the need for review by this Court is all the more compelling in view of the reliance interests engendered by *Oneida II*, pursuant to which the Cayugas, other New York Tribes, and the United States have devoted substantial resources in decades of litigation.

Even more to the point is that respondents' effort to paper over the conflict with *Oneida II* and bring this case within the holding of *Sherrill* is implausible. Contrary to respondents' hyperbole, the Tribes recognize that, after *Sherrill*, they can no longer obtain actual "possess[ion]" of the land at issue or "eject the thousands of current landowners." Opp. at 1. Nor can they obtain "reinstatement of sovereignty" over the land (except through the statutory process established by

Congress). Opp. at 11. The Tribes are here seeking only monetary damages. And they seek those damages only from the State (the original wrongdoer) and not from individual landowners or municipalities. The relief awarded by the district court thus poses no threat of disruption of the kind respondents warn against, much less the kind of disruption that led the Court in *Sherrill* to limit the courts' remedial authority to restore tribal sovereignty prospectively. The Second Circuit stretched *Sherrill* – which expressly preserved the damages remedy in *Oneida II* – far beyond its carefully circumscribed confines in holding that the decision renders the Cayugas' damages claims here void *ab initio*. By the same token, respondents are flat wrong in their contention that the Second Circuit's decision can coexist with the congressional judgments set forth in 28 U.S.C. § 2415, which respondents erroneously contend has no application here. Consistent with the text of the statute, *Oneida II* holds precisely the opposite. 470 U.S. at 241-43.

A grant of the writ of certiorari is therefore appropriate.

1. Respondents' attempt to dispel the conflict with *Oneida II* in fact underscores its existence. Respondents acknowledge the Court's statement in *Sherrill* that it did "not disturb" *Oneida II*, which held that a tribe was entitled to damages for the wrongful eighteenth-century taking of its lands. *City of Sherrill v. Oneida Indian Nation of N.Y.*, 125 S. Ct. 1478, 1494 (2005); *see* Opp. at 18. Yet the Second Circuit's decision rendered this Court's careful limitation of *Sherrill* meaningless by ruling that all Indian land claims based on ancient treaty violations are inherently disruptive and thus void as a matter of law – even when the sole remedy is a retrospective damages award. Pet. App. 16a, 21a-22a.[1]

[1] The Second Circuit's decision likewise renders meaningless Congress' declaration in the Nonintercourse Act that transactions in violation of the Act are of "[no] validity in law or equity." 25 U.S.C. § 177.

Respondents contend that the Second Circuit was free to disregard *Sherrill*'s explicitly narrow scope by contending that because the question of money damages "was not at issue" in *Sherrill*, *Sherrill* therefore cannot have reaffirmed *Oneida II*. Opp. at 18. On this point, however, respondents contradict themselves: They maintain both that *Sherrill* did not address damages at all, and that *Sherrill* mandated the Second Circuit's dismissal of the Tribes' damages claims.

Moreover, respondents all but concede that the Second Circuit's decision implements the reasoning of the *Oneida II dissent*, not the opinion of the Court. Opp. at 18; *see also id.* at 19 (listing *Sherrill*'s citations to the dissent in *Oneida II*). But inferior courts must follow this Court's opinions, not its dissents. In this case, the impact of the court of appeals' action is particularly severe: Because the remaining Indian land claims are in the Second Circuit, the court of appeals' determination to overrule *Oneida II* is the death knell for all such claims, rendering decades of litigation an empty gesture, and leaving the aggrieved tribes with no recourse at all.

The Second Circuit's drastic departure from *Oneida II* is all the more improper because the district court presciently anticipated the equitable limitations that *Sherrill* imposed. *Oneida II* left open whether equitable factors should be taken into account in fashioning appropriate relief once liability is established. 470 U.S. at 253 n.27. *Sherrill* answered that question, drawing a line between monetary relief, which it had approved in *Oneida II*, and forward-looking injunctive relief that might disrupt present-day expectations of current landowners who were not party to the original transgressions. Judge McCurn faithfully followed the clear and workable roadmap for resolving Indian land claims set forth in *Oneida II* and *Sherrill*, refusing to allow the Tribes to threaten the title or occupancy of current landowners. The court of appeals' decision runs roughshod over the ability of district

courts, sanctioned by this Court, to fashion appropriate and fair relief for ancient but egregious violations.[2]

2. Respondents also defend the result below with a parade of horribles, suggesting that vindicating the Tribes' retrospective damages claims against the State will cause massive prospective disruption akin to that at issue in *Sherrill*. That is nonsense. The Tribes recognize that, after *Sherrill*, they cannot obtain the remedies of actual possession of, or sovereignty over, the lands in question (and the district court denied the Tribes those remedies in any event). Moreover, the Tribes have conceded that an award of damages against the State will resolve all of the Tribes' claims against all of the respondents.[3] There is thus no prospect of a "large damages award against individual landowners and local municipalities," Opp. at 17, and a victory for the Tribes would in no way "jeopardize local mortgages and inhibit investment in local real estate and businesses," *id.* at 16. Indeed, respondents ultimately concede that the dire consequences they predict would flow not from the relief the district court actually awarded but from "the broad-based declaratory relief in [the Tribes'] complaints." *Id.*

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[2] Respondents contend, citing *United States v. Mottaz*, 476 U.S. 834 (1986), that the Tribe's damages claim must fail because it is in essence "possessory." Opp. at 16. That case applied the 12-year statute of limitations under the Quiet Title Act to a suit against the United States. Even assuming *Mottaz* has any relevance here, characterizing a land claim as "possessory" does not render it void "*ab initio*," as the Second Circuit held. *Oneida II* explicitly held that tribes could obtain damages in an "action for violation of their *possessory* rights based on federal common law." 470 U.S. at 236 (emphasis added). *Sherrill* did not disturb that holding.

[3] In response to an inquiry at oral argument, the Tribes stated that if "the judgment below is affirmed, becomes final and is satisfied, this will conclude all land claim litigation by the Nation against the State of New York and the other defendants." Letter from Martin R. Gold to Hon. Jose Cabranes, Hon. Rosemary Pooler & Hon. Janet C. Hall of Apr. 7, 2004.

The only practical consequence even theoretically possible is that an award of damages here "would have a dramatic impact on the State's budgetary and fiscal planning and place an extraordinary burden on the State's taxpayers." Opp. at 17. In reality, that contention is wildly overblown. But even if valid to some extent, this Court has already considered and rejected such an argument in *Oneida II*, in circumstances indistinguishable from this case. Respondents engage in startling revisionism in reducing *Oneida II* to a dispute over a few trifling parcels and $18,000 in damages. Opp. at 17. All sides regarded *Oneida II* as a "test case," *Sherrill*, 125 S. Ct. at 1486, and the governmental parties in the case warned that affirmance could lead to "judgments of staggering proportions." County of Oneida Br. at 10; *see also Oneida Indian Nation of N.Y. v. Oneida County*, 719 F.2d 525, 545 (2d Cir. 1983) (Meskill, J., dissenting) (noting "potentially staggering claims"). The Court "recognized . . . the potential consequences of affirmance" but nevertheless upheld the Tribe's right to damages. 470 U.S. at 253.[4] Indeed, the Court has consistently recognized that the prospect of a substantial damages award paid out of the public fisc is not a principled reason for refusing to acknowledge an otherwise valid claim.[5] If anything, the amount at stake underscores the importance of the case and supports a grant of certiorari.

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[4] This Court stated its strong hope for a non-judicial resolution of these claims. 470 U.S. at 253. Since then, virtually every State but New York has settled with its dispossessed tribes pursuant to agreements enacted into legislation by Congress. *See* Tr. Pet. at 14-15 & n.4, 20 n.5.

[5] *See, e.g.*, *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 113 (1993) (requiring refunds of unlawful state taxes despite concerns of "crushing" liability, "staggering" implications, and the need to protect "blameless . . . taxpayers" from billions of dollars in liability); *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (same); *United States v. Winstar Corp.*, 518 U.S. 839 (1996); *United States v. Sioux Nation of Indians*, 448 U.S. 371 (1980) ($100 million takings claim).

3. Respondents also assert that the careful congressional scheme reflected in § 2415 is irrelevant because "[t]he statutes of limitations established in section 2415 do not apply" to the claims here. Opp. at 19. That contention strains credulity.

*Oneida II* addressed these provisions at length, *see* 470 U.S. at 241-43, and expressly concluded that the Oneidas' claims were timely under the congressional scheme, *see id.* at 243 & n.15; *see also id.* at 270 n.26 (Stevens, J., dissenting) (acknowledging the Court's holding that § 2415 applied to the Oneidas' claims). The Cayugas are identically situated to the Oneidas for the purposes of § 2415, and respondents do not contend otherwise.

Moreover, respondents do not contest that the claims of the United States are timely under § 2415. Nor could they. Section 2415(b) by its terms directly governs actions for "money damages . . . founded upon a tort," including claims regarding "Indian lands," and specifically including "damages resulting from a trespass" (one of the theories of relief advanced by petitioners).

In light of that, respondents' contention that the Second Circuit's action is not "at odds with the congressional policy," Opp. at 19, is impossible to justify. The text is the best indicator of that policy, and the text makes clear that the claims here are timely. By the same token, this Court held in *Oneida II* that the imposition of other judge-made time bars – there, the borrowing of a state statute of limitations – "would be a violation of Congress' will." 470 U.S. at 244. Imposing a laches time bar would violate the will of Congress in precisely the same way. Thus, the fact that the Court technically did not decide the issue of laches in *Oneida II* (because it was not properly before the Court) does not mean that the laches issue can be decided now without regard to the Court's interpretation of § 2415 in *Oneida II*. That interpretation controls and is entitled to *stare decisis* effect.

And if that were not enough, the legislative history makes clear that ancient Indian land claims, *including the Cayugas' claim*, were among the claims that Congress preserved. *See* Tr. Pet. at 18, 27-28; Mohawk Amicus Br. at 7-10.

Respondents' remaining efforts to harmonize the decision below with § 2415 all miss the mark. For example, respondents err in contending that the claims here are governed only by § 2415(c), not § 2415(b). *Oneida II* held that § 2415(b) "imposed a statute of limitations on certain tort . . . claims for damages brought by individual Indians and Indian Tribes," 470 U.S. at 242-43, and the damages claims here (like those in *Oneida II*) are encompassed within the category of claims the Court described. But even assuming that § 2415(c) applies, respondents have it exactly backwards. Congress concluded that certain claims – claims "to establish the title to, or right of possession of, real or personal property" – were sufficiently important that Congress exempted those claims from the comprehensive scheme set forth in § 2415(a) and (b), leaving those claims subject to no time limitation at all. That is unsurprising, because § 2415(c) applies to all land claims by the United States, not just those relating to Indian lands, and Congress naturally wanted to allow the government to protect federal land.[6] *See Oneida II*, 470 U.S. at 243 n.15. The Second Circuit's decision to bar as too old claims that Congress exempted from any time limit is judicial overreaching.

Respondents next contend that even if the Tribes' claims are timely under § 2415, federal courts may yet invoke laches to negate Congress' judgment. Opp. Br. at 20. But the cases

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[6] *See* S. Rep. No. 89-1328 (1966), *reprinted in* 1966 U.S.C.C.A.N. 2502, 2505 ("Subsection (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 [government property].").

they cite say no such thing. In *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), for example, there was *no statute of limitations at all*. *Id.* at 395. And in *Alsop v. Riker*, 155 U.S. 448 (1894), the Court addressed only a claim in equity and dismissed "without prejudice to an action at law." *Id.* at 461. Those cases do not support the free floating use of equitable considerations to bar as too old damages claims that Congress deemed timely. *See* Tr. Pet. at 21; U.S. Pet. at 23-25.

Finally, invoking the dissent in *Oneida II*, respondents contend that § 2415 was of no effect, because the Tribes' claims lapsed centuries before § 2415 was enacted. Opp. at 20. This argument was addressed in the petition, *see* Tr. Pet. at 27, and respondents offer no response. That said, two points merit brief mention. First, as noted, the lengthy debate accompanying § 2415 and its various amendments makes clear that Congress understood that the land claims of the Cayugas and the other New York tribes would be timely under the new congressional scheme. This Court will not lightly presume that Congress engaged in a vain act. Second, whatever the merits of the dissent in *Oneida II*, it distinguished claims "brought by an Indian Tribe *on its own behalf*" from claims "brought *by the United States* on behalf of Indians or Indian tribes." 470 U.S. at 270-71 (emphasis in original). Given this Court's uninterrupted refusal to apply laches to claims of the United States, *see infra*, there is no basis for holding that the claims of the United States lapsed even under the dissent's view of the statute.

4. Similarly unpersuasive is respondents' contention that the application of laches to the United States does not merit review. Respondents do not deny that this Court has *never* applied laches against the United States when it sues, as here, in its sovereign capacity, or that the decision below creates a square Circuit conflict. *See* Tr. Pet. at 24; U.S. Pet. at 25. To

then say that foreclosing a $250 million claim of the United States "breaks no new ground," Opp. at 21, is implausible.[7]

Nor are respondents correct that *United States v. Beebe*, 127 U.S. 338 (1888) – a non-Indian case applying laches to a dispute between two private parties over a United States land patent in which the United States was joined as a nominal party – supports the application of laches against the United States here. This Court in *United States v. Minnesota*, 270 U.S. 181 (1926), squarely rejected application of *Beebe* when the United States sues on behalf of Tribes, even if it does so in part to overcome a jurisdictional bar. *See id.* at 194-95. The Court held that the United States is not a nominal party, but instead has a "real and direct interest" that "arises out of its guardianship over the Indians." *Id.* at 194; *see also Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 657 n.1 (1979) (suits on behalf of tribes implicate United States' "governmental rights" and "sovereign" interests); *see also* U.S. Pet. at 7 (United States sued both pursuant to its "trust relationship with the Cayugas" and "on its own behalf").

5. Finally, respondents do not dispute that this case is an ideal vehicle for addressing the question presented. The district court resolved all outstanding issues on liability, and it conducted two full trials – a jury trial on damages and a bench trial on pre-judgment interest in which the court made exhaustive findings. There are no contested facts for this Court to resolve, and the legal issues – which are undeniably important – are squarely presented.

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[7] The best respondents can manage is dicta stating that equitable estoppel "might" be available, *see Heckler v. Community Health Servs. of Crawford County, Inc,*, 467 U.S. 51, 60-61 (1984), and that laches might in some cases limit the ability of the EEOC to obtain full equitable relief for a private plaintiff, *see Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977). Neither case actually applied laches to the United States, and thus neither supports the Second Circuit's decision here.

That said, lest respondents' rendition of the facts leave a false impression, it is important to set the record straight. First, despite the suggestion implicit in respondents' statement of the case, Opp. at 3-6, the district court found that the transactions at issue here violated the Nonintercourse Act (as has every court to review New York's actions), and the Second Circuit did not disturb that holding.

Second, the State contends that the price paid the Cayugas was fair. The district court found, however, that the terms of the State's 1795 Act were "patently disadvantageous to the Indian's best interests," and that "the State cannot be said to have acted in good faith with respect to the Cayuga when it forged ahead with the 1795 Act, putting its own financial gain above all else." Pet. App. 168a-69a.

Third, although the State seeks to convey the impression that the Tribes somehow sat on their rights, the district court expressly found otherwise, noting that "the record contains considerable proof as to the Cayuga's efforts, beginning in 1853 and continuing right up until filing this lawsuit." Pet. App. 212a; *see also id.* 219a ("The court cannot find that the Cayuga are responsible for any delay in bringing this action."). And the State does not contest that no judicial forum was open to the tribes throughout the relevant period. *See* Amicus Br. of Onondaga Nation *et al.* at 12-17.

Finally, although the State neglects to mention it, in its damages award the district court accounted for both the minimal annuities and payments that the State has provided over the years, and for the alleged failure of the United States to protect the Tribes, in the latter case reducing the amount of prejudgment interest damages by 60%. Pet. App. 236a-237a.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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