No. 03-855

IN THE

Supreme Court of the United States

CITY OF SHERRILL, NEW YORK
Petitioner,

v.

ONEIDA INDIAN NATION OF NEW YORK, *et al.,*
Respondents.

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

PETITION FOR REHEARING

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PETITION FOR REHEARING

The Court's departure from its customary process of deciding important issues only after full briefing has resulted in a change in the "standards of federal Indian law and federal equity practice" (Opinion 2) without analysis of critical legal and factual considerations. The Court should vacate its decision, and grant reargument to allow briefing of the pertinent issues or dismiss the writ of certiorari as improvidently granted in order to defer consideration of the issues to another case.

A. The Court's Decision Rests On Laches-Related Grounds Not Litigated Below And Not The Subject Of Adversarial Briefing In This Court.

In the district court, Sherrill sought leave to amend its answer to plead laches. Sherrill did not plead prescription and acquiescence, impossibility, or a general equitable bar to relief. The district court denied the motion to amend (Pet. App. 116), so no record on laches was developed. The Second Circuit affirmed. *Id.* at 47-48.[1]

Sherrill abandoned the laches defense in this Court when it did not seek review of the lower courts' denial of leave to amend to plead laches. The United States noted in its amicus brief at the petition stage that Sherrill's petition did not press "the argument, which has been made in other cases, that the New York Indians' present-day right to assert their land claims has been extinguished by laches or other equitable principles." US Pet. Br. 19. Sherrill did not dispute that assertion in its supplemental brief responding to the

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[1] Sherrill did not argue that it was entitled to judgment on the basis of laches. Sherrill C.A. Br. 66. Nor did Sherrill assert that honoring the Nation's tax immunity was impossible. The Second Circuit's brief discussion of "impossibility" (Pet. App. 26-27) rejected Sherrill's different argument that a district court's order refusing to allow ejectment of private landowners made all reservation land (including land in Nation possession) "freely alienable," and therefore taxable. Sherrill C.A. Br. 35-37 (citing *Cass County v. Leech Lake Band*, 524 U.S. 103, 115 (1998)).

Government's brief or suggest that such grounds were fairly included in the questions it did present.

After the Court granted review, Sherrill, in its opening brief, addressed only the questions it had presented and made no argument based on laches or other equitable principles. Accordingly, and reasonably, the Oneidas, and the United States as amicus curiae supporting them, did not brief such issues either, instead using their limited pages to address Sherrill's arguments. Only in its reply brief did Sherrill contend that the Oneidas' tax immunity was defeated, *not* by a state or federal treaty or by the Tribe's organizational diminution (the questions presented), but simply by the passage of time and changes in the area, a ground invoking quite distinct legal authorities and analysis. The Oneidas had no opportunity to brief this new contention. At oral argument – which cannot reasonably be viewed as a substitute for briefing – the Oneidas objected to consideration of this new contention as not fairly included within the questions presented. Arg. Tr. 32, 41.

In these circumstances, respondent lacked the fair opportunity for – and in any event this Court did not receive – the full adversarial briefing required for sound decision-making, and for due process. As strongly as this Court insists on timely raising of issues at the *petition* stage,[2] it is all the more important not to decide cases on grounds not even raised in the petitioner's opening brief on the merits – even *after* the Government flagged the issue as *not* raised at the petition stage. The Court nevertheless did so here. One result is to

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[2] *See Yee v. City of Escondido*, 503 U.S. 519, 536-37 (1992); *Jama v. Immigration and Customs Enforcement,* 125 S. Ct. 694, 706 n.13 (2005); *Thornton v. United States*, 124 S.Ct. 2127, 2132 n.2 (2004).

The grounds adopted by this Court are not subsidiary to those presented in the Petition and in Sherrill's opening brief. Moreover, the fact that the Oneidas assert tax immunity in this case cannot mean that *petitioner*, in presenting only a limited set of grounds opposing that claim in its Petition, has fairly included all possible defenses – defenses that, like laches, can be (and was) waived.

distort future practice in this Court, as respondents will now have to lard their briefs with arguments about issues not raised in the petitioner's opening brief, on the now-realistic chance that petitioner may raise them on reply and this Court will resolve them on a one-sided presentation. The more immediate result is to have decided important issues without analysis of critical considerations.

B. The Court Established New Indian Law Without Analysis Of Critical Issues.

The Court left undisturbed the ruling in *Oneida II*, 470 U.S. 226 (1985), that the Oneidas retained a federally protected possessory right, for which they could obtain current trespass damages, in land alienated long ago in violation of the Nonintercourse Act. Nevertheless, the Court held, as a matter of judicially fashioned common law, that inaction on the Oneidas' part caused loss of the tax immunity inherent in that possessory right and protected by federal statute, by federal treaty, and by ancient Indian title, even though the United States has not acted in the constitutionally required ways to eliminate those tribal rights. The opinion announcing that unprecedented holding does not address factual and legal issues that preclude, and should be fully considered in deciding whether to reach, such a result. In this rehearing petition, respondent can only flag these issues, which require fuller briefing and, possibly, factual development below.

1. What The Oneidas Failed To Do. The Court critically relied on "the Oneidas' long delay in seeking equitable relief against New York or its local units" (Opinion 21), yet does not address what actions the Oneidas could realistically have pursued before filing their land claim in 1970.[3] More concrete analysis, or district court development, would make a difference. In the related *Cayuga* case, the district court, after an evidentiary hearing, found that the Cayugas, who first filed a possessory action in 1980, were not

[3] Lack of diligence is a requirement of any applicable laches doctrine. *Kansas v. Colorado*, 514 U.S. 673, 687 (1995).

"responsible for any delay in bringing this action," but "took advantage of the legal and political mechanisms available to them through the years." *Cayuga Indian Nation v. Pataki*, 165 F. Supp. 2d 266, 357 (N.D.N.Y. 2001), *appeal pending*, No. 02-6111 (2d Cir., argued March 11, 2004).

This Court did not suggest that the Oneidas delayed *after* they obtained possession of the land in question, when the question of tax immunity presented itself for the first time. Nor did the Court, which spoke only of suits against New York and its municipalities, fault the Oneidas for not buying the land earlier: any possible conclusion on that issue would require a factual record about the impoverished financial situation of the Oneidas until the 1990s. Accordingly, the Court's opinion must be read to fault the Oneidas for failing to sue the State or local governments before repurchasing land. But the Court did not consider whether such suits were possible.[4]

The Eleventh Amendment shielded the State from suit in federal court. *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). Moreover, New York and its local governments did not *have* more than a tiny fraction of the Oneidas' land, certainly not the land in question here, so they could hardly have been sued to obtain possession. Nor can the Oneidas be faulted for not suing to assert sovereign rights over land without seeking, and before obtaining, possession. The tribe's substantive claim is that it can exercise unextinguished sovereign rights *once* possession is reestablished, not before; and in any event, obvious Article III objections – that the suit is unripe, speculative, hypothetical – would have met any federal suit for adjudication of sovereign rights before particular land could even be identified as destined to be re-acquired by the Oneidas. (Before the enactment of 28 U.S.C. § 1362 in 1966, the "amount in controversy" requirement of

[4] In referring only to suits against the *State* and *local governments*, the Court presumably recognized that, in an opinion resting on the protection of non-Indian reliance interests, it could hardly fault the Oneidas for failing to sue *private* landowners to eject them.

general federal question jurisdiction would have been a problem as well. *See Yoder v. Assiniboine & Sioux Tribes*, 339 F.2d 360 (9th Cir. 1964); H.R. Rep. 89-2040, *reprinted in* 1966 U.S.C.C.A.N. 3145, 3149 (referring to *Yoder*)).

State court suits also faced roadblocks this Court did not address. As a matter of federal law, unless authorized by Congress, "state courts may not exercise jurisdiction over Indian tribal affairs or claims arising out of or relating to their restricted tribal lands." *Oneida Indian Nation v. County of Oneida*, 464 F.2d 916, 923 n.9 (2d Cir. 1972) (Friendly, J.). New York law separately closed state courts to tribe-brought land claims without a special jurisdictional act. *Seneca Nation v. Appleby*, 196 N.Y. 318 (1909); *Johnson v. LIRR*, 162 N.Y. 462 (1900). By 1958, when New York extended jurisdiction over tribal claims, N.Y. Indian L. § 11-a, Congress had carefully excluded "civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952" from its grant of civil jurisdiction to New York. 25 U.S.C. § 233; *Oneida Indian Nation*, 464 F.2d at 923 n.9. Not surprisingly, the *Cayuga* court concluded that "basically the Cayuga were foreclosed from pursuing relief in state court." 165 F. Supp. 2d at 355. In short, this Court's crucial premise of available but foregone remedies does not stand up when examined concretely.

2. Inconsistency With Congressional Directives. The Court's opinion fails to square its new, judicially fashioned equity ground for eliminating certain tribal rights, even when protected by federal statute and treaty, with congressional directives and established law upon just this matter. *First*: 25 U.S.C. § 177 is emphatic and precise: an unauthorized purchase is without "validity in law or equity." Those words, carefully chosen by Congress in 1793 and maintained for two centuries, are inconsistent with giving effect (by stripping tax immunity) to purchases on the basis of laches or related equity defenses – which is what this Court has now done. The Court wrote in *Ewert v. Bluejacket*, 259 U.S. 129, 138

(1922), addressing the weaker statutory protection against alienation of allotted land: "the equitable doctrine of laches, developed and designed to protect good faith transactions against those who have slept on their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed and to bar the rights of Indian wards in lands subject to statutory restrictions." This Court's current opinion does not mention *Ewert*.

Second: To the extent that the Court relied on the Executive Branch's inattentiveness in protecting the Oneidas' statutory and treaty rights, settled law precludes such inaction from destroying the underlying rights. "As a general rule, laches or neglect of duty on the part of officers of the government is no defense to a suit by it to enforce a public right or protect a public interest." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) (acquiescence by federal officials did not give private parties right in federal lands); *see Heckler v. Community Health Servs. of Crawford*, 467 U.S. 51, 68 (1984) (Rehnquist, J., concurring in the judgment); *OPM v. Richmond*, 496 U.S. 414, 426-28 (1990) (promise by federal officials does not alter statutory eligibility for benefits). That principle preserves the constitutional means for altering federal statutes and treaties, yet is absent from the current opinion. Allowing neglect by federal officials to eliminate tax immunity would be contrary to the specific rule, which remains unquestioned, that only Congress can disestablish a reservation. (Opinion 15 n.9).

Third, and most pointedly: Congress has specifically spoken to the question whether the Oneidas' rights are simply too old now to be recognized (if otherwise valid) – and answered it "no." *See* 28 U.S.C. § 2415. *Oneida II* itself rejected application of state statutes of limitations to the Oneidas' possessory claim as "inconsistent with federal policy." 470 U.S. at 241. When Congress, in the 1960s through 1980, statutorily authorized tribal possessory actions, it pointedly refused to enact time bars, and it did so fully aware that the lands subject to tribal possessory and treaty

claims had been in non-Indian hands and under non-Indian jurisdiction for many years. Arg. Tr. 41-42.[5] This Court, in its current opinion, did not consider how its policy judgment that it is too late for the Oneidas to assert tax immunity (on land purchased from willing sellers) can be squared with Congress' evident judgment *not* to bar "ancient" claims to possessory and treaty rights.

The "common law" and "equity" contexts do not license disregard of such congressional judgments. The Court has repeatedly stressed that equity principles must follow congressionally expressed policy (*United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497-98 (2001); *Lonchar v. Thomas*, 517 U.S. 314, 323 (1996)) and that there is little if any room for gap-filling federal judicial "common law" where Congress has acted (*Black & Decker Disability Plan v. Nord*, 538 U.S. 822, 831-32 (2003); *Milwaukee v. Illinois*, 451 U.S. 304, 314-15 (1981)). Those basic principles apply here to curtail the fashioning of common-law equity doctrines to cut off tribal rights Congress chose to preserve.

3. The Announced Doctrine's Novelty. The Court did not discuss the novel implications of its decision and its incompatibility with much relevant precedent.

First: The Court has never before applied laches to an Indian tribe. *Felix v. Patrick*, 145 U.S. 317 (1892), highlighted by the Court (Opinion 17), involved a claim by an

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[5] "The statute of limitations does not bar an Indian tribe, band, group or individual Indian, or the United States acting on their behalf from bringing a claim for title to lands." S. Rep. 96-569, at 4 (1980); *see Oneida II*, 470 U.S. at 243 n.15 (construing statute of limitations to exempt tribal suits to establish title or right of possession to land and noting agreement of the United States); Memorandum, Congressional Research Service, to Rep. Don Young, Nov. 20, 1979, *reprinted in* Hearing before the Senate Select Comm. on Indian Affairs, 96th Cong., 1st Sess. 324 (1979) ("[T]here are no limitations on actions brought by the United States or Indian tribes to, for instance, quiet title to trust lands, seek ejectment of trespassers, enjoin violations of treaty rights, or declare water rights."). Congress could not have intended to allow tribes to sue for possession despite the passage of time, but to strip tribes of tribal rights in land subject to that right of possession.

individual Indian, not a tribe with sovereignty. The common law has long exempted sovereign governments from laches and statutes of limitations. *Weber v. Bd. of State Harbor Comm'rs*, 85 U.S. 57 (1873); *Guaranty Trust Co. v. United States*, 304 U.S. 126, 133 (1938); *United States v. Summerlin*, 310 U.S. 414, 416 (1940); *Block v. North Dakota ex rel. Bd. of Univ. and Sch. Lands*, 461 U.S. 273, 294 (1983) (O'Connor, J., dissenting). The Court has expressly reserved the question whether laches could ever apply to States. *Kansas v. Colorado*, 514 U.S. at 687-88 (1995); *New Jersey v. New York*, 523 U.S. 767, 806 (1998). Laches, of course, does not apply to the United States, which has an established right to sue to enforce tribal tax immunity, *United States v. Rickert*, 188 U.S. 432, 444 (1903), a right implying that the tribe's own suit is not barred, *see Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 474-75 (1976) (bar inapplicable to US suit inapplicable to tribal suit). Applying laches to a sovereign Indian tribe is a drastic step, with consequences for other tribal claims (and those of other sovereigns), that requires full briefing.

Second: In eliminating the Oneidas' tax immunity without a factual record on the "prejudice" component of traditional laches doctrine, the Court necessarily announced a doctrine of prejudice as a matter of law.[6] It cited no precedent, however, for allowing a municipality to assert a vested reliance interest in taxes from a State-effected acquisition of land without "any validity in law or equity." Nor did it consider how such a *per se* reliance interest comports with the fact that parcels are routinely removed from the tax base when purchased by a church, university, or other tax-exempt entity. The Court also made no mention of *Bd. of County Comm'rs v. Seber*, 318 U.S. 705, 718 (1943), which ruled that federal protection trumps local interests in tax revenue.

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[6] The Oneidas, of course, paid full market value for the land, so that its appreciation over time is not a source of prejudice. *Compare* Opinion 17.

Third: The doctrines of prescription and acquiescence, cited though not directly relied on by the Court (Opinion 18), cannot support stripping the Oneidas of their tax immunity. Reflecting the fact that the result is to terminate a federally protected sovereignty without the constitutionally prescribed means of Federal Government action, there is no precedent for invoking such doctrines. Even with *States* (with access to this Court's original jurisdiction and to Congress), the Court's precedents require more than (even long) delay to defeat rights. *E.g.*, *Rhode Island v. Massachusetts*, 40 U.S. 233, 272-73 (1841) (allowing Rhode Island boundary challenge despite delay of more than a century); *Virginia v. Maryland*, 540 U.S. 56 (2003) (upholding Virginia's rights despite roughly 200-year delay); *New Jersey v. New York*, 523 U.S. at 771 (upholding New Jersey's rights in Ellis Island despite delay of more than century).

Fourth: There is no "impracticability" doctrine precluding recognition of tribal tax immunity for land that always has been federally protected and is re-acquired by the Tribe. *Yankton Sioux Tribe v. United States*, 272 U.S. 351 (1926), cited by this Court (Opinion 19), involved no such issue. *Yankton* was a pure takings-damages case in which one sentence noted the impossibility of rescinding old transactions simply to confirm that the land had irretrievably been taken by the United States, triggering compensation.

4. Misapplication To Damages Suits. The Court's decision will make the land claim actions pending in New York for more than three decades harder to resolve through a political solution. The decision severs the persistent possessory right upheld in *Oneida II*, and which the Court did not disturb, from its black letter corollary -- immunity from property taxes. *New York Indians I*, 72 U.S. 761, 770-71 (1867); *Yakima v. Confederated Tribes*, 502 U.S. 251, 263-64 (1992); 25 C.F.R. § 1.4.[7] Despite the Court's clear statement

[7] The substantive right recognized as within federal-question jurisdiction in *Oneida I*, was "a *current right to possession* conferred by federal law." 414 U.S. 661, 666 (1974) (emphasis added); *see id.* at 675 ("a present

that the holding in *Oneida II* was not disturbed (Opinion 21), the State has now invoked this Court's decision as the basis for interposing defenses to liability for damages in the *Oneida* and *Cayuga* land claim cases and for withdrawing settlement legislation involving other tribes.[8]

* * *

In short, there are critical legal and factual issues that, lacking adversarial briefing, the Court did not address. The issue decided is too important to be resolved in that way. It affects the interests of the Oneidas, of many other New York tribes, and of the Federal Government – whose protection of tribal sovereignty has been stripped without authorized Federal Government action.

CONCLUSION

The petition for rehearing should be granted.

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right to possession under federal law."); *id.* at 677; *id.* at 683 (Rehnquist, J., concurring). In *Oneida II*, this Court specifically held that the Oneidas were entitled to damages for violation of their *possessory rights in 1968 and 1969*. 470 U.S. at 230, 235-36; *see Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 541 (2d Cir. 1983) ("the Counties are responsible for the continuing violation of the 1793 [Nonintercourse] Act and are liable in damages for that violation"). The Court thus recognized a live possessory right – which Congress, despite this Court's invitation (470 U.S. at 253), has refused to disturb.

[8] P. Healy, *Bill Supporting Indian Casinos Is Held Back*, N. Y. Times, April 16, 2005 at B1; J. Odato, *Pataki Pulls Gaming Effort*, Albany Times-Union, April 16, 2005 at A1; Defendants' Letter Brief, *Cayuga Indian Nation v. Pataki*, No. 02-6111 (filed April 18, 2005); Defendants' Letter Requesting Stay, *Oneida Indian Nation v. State*, No. 74-CV-187 (filed April 12, 2005).

Respectfully submitted,

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CERTIFICATE OF COUNSEL

As counsel for the respondent, I hereby certify that this petition for rehearing is presented in good faith and not for delay.

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