Nos. 10-1404, 10-1420

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

STATE OF NEW YORK, et al.

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

Petitioners,

v.

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

Respondent.

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

BRIEF *AMICI CURIAE* OF LAW PROFESSORS IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE*

As set out more fully in the appendix annexed hereto, amici are law professors whose scholarship and clinical practice focus on the subject matter areas – federal jurisdiction, federal Indian law, and remedies – addressed by the Second Circuit's decision in this case. We submit this brief to highlight the extent to which the remarkably troubling ruling below – conferring a large and amorphous "equitable" immunity, based on the "disruption" associated with the passage of time, for violations of federal statutes, treaties, and common law – departs from basic principles of equity, both historic and modern; contravenes the considered judgments of the executive and legislative branches and of this Court; and threatens far-ranging, unwarranted adverse consequences for the ability of Indian Tribes to vindicate their legal rights, and (potentially) for the federal government's enforcement of other important statutes.

REASONS FOR GRANTING THE PETITION

In the decision below, a divided panel of the Second Circuit interpreted this Court's decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005), and prior circuit precedent, *Cayuga Indian Nation of New York v.*

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* No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici or their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received timely notice of intent to file this brief and gave consent to its filing, and letters reflecting that consent have been lodged with the Clerk of the Court.

Pataki, 413 F.3d 266 (2d Cir. 2005), as empowering federal courts to dismiss claims arising out of State and local authorities' violations of federal law, based on the passage of time and the "disruption" that enforcing federal rights would entail, irrespective of the character of the relief sought, and without regard to federal statutes providing that claims of this type be heard in federal courts.

That decision warrants this Court's review. First, the Second Circuit's holding fundamentally mistakes the rule of decision in *Sherrill*: although the Court highlighted the "disruption" that would ensue from granting relief, it fashioned an unusual equitable defense in response to a claim – and remedial demand – that was itself unusual. In rejecting plaintiffs' plea for restoration of sovereignty over (and attendant tax immunity for) parcels of land purchased piecemeal on the open market – relief that would have "project[ed] redress . . . into the present and future," 544 U.S. at 202 – the Court took care to relate the defense to traditional equitable doctrine, and to make plain that it was not overturning or questioning *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida II*"), *see Sherrill*, 544 U.S. at 221, which had affirmed a money damages award for a "violation of possessory rights that occurred over 175 years ago," 470 U.S. at 230.

Although ostensibly based on equity and *Sherrill*, the decision before the Court is, in the many different senses of that term, inequitable. First, the appeals court ignored the cardinal principle that equity must follow the law – and the related constitutional separation-of-powers principles that federal courts are debarred from fashioning "equitable" rules when Congress has already taken account of the considerations the court finds weighty

(here, the passage of time and the potential effect on "societal expectations") – and also that federal courts generally lack power to impose equitable bars, even firmly-established ones like laches and estoppel, in suits brought by the United States to enforce federal law.

The Second Circuit's decision is more remarkable because the justiciability of essentially this very claim was contemplated both by Congress – which was well aware of the "ancient" character of the violation and the potential shortcomings ("disruption") of remedies centuries removed from the violations which give rise to them – and by this Court, which rejected arguments by these very defendants that the gap in time in itself rendered such litigation "equitably" nonjusticiable. *See id.* at 240-50; *see also id.* at 244 n.16 (describing availability of laches as "questionable" and "novel"). But the decision fails at an even more basic level. Instead of undertaking to adjust the parties' legal relationship with an eye toward doing substantial justice, the court announced a complete maximal "equitable" bar, one that leaves victims of "grave" legal wrongs without any redress, *Sherrill*, 544 U.S. at 217 n.11, took a startlingly one-sided view of the relevant factors and a punctilious and hypertechnical view of the Nation's and the United States's legal positions, but a sympathetic, flexible approach to respondents' defenses. The Second Circuit embraced a harsh and ill-considered rule that could be relied in federal Indian law and potentially beyond. However understood, it should not be permitted to stand.

I. The Second Circuit's Judicially-Created Bar Impermissibly Defies the Considered Legislative Judgment Codified in the Indian Claims Limitation Act

The Second Circuit's "equitable" bar to all means of redress for violations of the Non-Intercourse Act has effectively "frustrat[ed] the will of the Legislature," *Oneida II*, 470 U.S. at 262 (Stevens, J., dissenting), which through sustained democratic contemplation established a structure by which the government (and Indian tribes) may seek money damages for this and similar claims.

Congress enacted the Indian Claims Limitation Act of 1982 ("ICLA"), now codified at 28 U.S.C. §§ 2415(a) and (b), to provide a workable structure for resolving land claims like this one. Those who drafted and passed that law were keenly aware of the "ancient" nature of the claims and their potential effect on prevailing societal expectations. *See* H.R. Rep. 95-375 at 5-6 (1977) (Letter from Leo Krulitz, Solicitor, Department of Justice to Hon. Peter W. Rodino, Chairman, Committee on the Judiciary, House of Representatives (May 18, 1977)) (explaining that "many of these claims go back to the 18th and 19th Centuries"). The ICLA allows these claims to be brought in federal courts under a structure that requires specified policy determinations by the Secretary of Interior and the Attorney General as to which (if any) mode of resolution, legislative or judicial, is appropriate for particular claims.

ICLA is the end result of a decade-long accumulation of laws and represents the final congressional judgment on the procedure for the United States to bring claims for money damages on behalf of Indians and Indian tribes.

The ICLA's history is directly relevant to the proper understanding of the operation of the statute, and the constraints it imposes on judicial lawmaking in this case.

In July 1966, Congress enacted a general statute of limitations on the United States as a plaintiff seeking money damages for tort and contract claims. Pub. L. 89-505, § 1, 80 Stat. 304. That 1966 statute was silent as to claims brought by the United States on behalf of Indians and Indian tribes. As a result of concerns expressed by the Department of Interior in late 1971, "Congress extended the statute of limitations for pre-1966 claims brought by the United States on behalf of Indians to July 7, 1977." *Covelo Indian Cmty. v. Watt*, Nos. 82-2377 & 82-2417, 1982 U.S. App. LEXIS 23138, at *6 (D.C. Cir. Dec. 21, 1982) (citing Act of October 13, 1972, Pub. L. 92-485, 86 Stat. 803); *see also* H.R. Rep. 95-375 (1977). Because "hundreds of newly identified claims could not be researched, identified, and filed by the deadline and would, as a result, be lost," Congress again extended the deadline in 1977 to April 1, 1980. *Covelo Indian Cmty.*, 1982 U.S. App. LEXIS 23138, at *6 (citing Act of Aug. 15, 1977, Pub. L. 95-103, 91 Stat. 842); *see also* H.R. Rep. 96-807 (1980).

In 1980, for reasons similar to those underlying earlier extensions, Congress once more extended the deadline; that time, to December 31, 1982. *Covelo Indian Cmty.*, 1982 U.S. App. LEXIS 23138, at *7 (citing Act of March 27, 1980, Pub. L. 96-217, 94 Stat. 126); *see also* S. Rep. 96-569 (1980). Congress added a requirement in the 1980 extension that the Secretary of Interior and the Attorney General submit legislative proposals to Congress by June 30, 1981 "to resolve those Indian claims . . . that the

Secretary of Interior or the Attorney General believes are not appropriate to resolve by litigation." Pub. L. 96-217, § 2. The government's failure to produce these proposals by the deadline prompted litigation by tribal interests that resulted in a court order mandating the government submit the legislative proposals by December 31, 1982. *See Covelo Indian Cmty. v. Watt*, 551 F. Supp. 366, 384 (D.D.C. 1982), *aff'd*, 1982 U.S. App. LEXIS 23138, at *36-37 (D.C. Cir. 1982).

On December 30, 1982, Congress enacted ICLA, enabling the Department of Interior to avoid violating the *Covelo* court order. Pub. L. 97-394, 96 Stat. 1966. That statute established a one-year limitations period for tribal claimants to bring suit once the Secretary of Interior published in the Federal Register a notice rejecting a claim, and a three-year limitation period for tribal claims once the Secretary submitted legislation or a legislative report to Congress to resolve those claims. 28 U.S.C. § 2415(a). Congress incorporated a modified form of Section 2 of the 1980 enactment, granting extensive agency discretion to bring suit, decline to bring suit, or submit proposed legislation to Congress. The government's 1998 intervention in this case represents an example of a Department of Justice determination that the claims are appropriate for judicial resolution.

The government long has exercised its discretion in determining whether to prosecute claims under ICLA, including early claims raised by the Oneida Indian Nation ("OIN"). For example, on June 30, 1978, prior to the 1980 extension, Attorney General Griffin B. Bell formally notified Interior Secretary Cecil D. Andrus that the Justice Department would not bring suit under Section

2415 on behalf of OIN and other tribes against private landowners, expressly reserving judgment whether to file suit against the State of New York. Letter from Griffin B. Bell, Attorney General, to Cecil D. Andrus, Secretary of Interior (June 30, 1978), *reprinted in* Statute of Limitations Extension, Hearing before the Select Committee on Indian Affairs, United States Senate, 96th Con., 1st Sess. 34-36 (Dec. 17, 1979). But the claim at issue here, listed as the "Oneidas' Nonintercourse Act Land Claim," is on the list published by the Secretary of the Interior in 1983. Petition for Writ of Certiorari, No. 10-10404 at 6 n.3. As such, it was intended to remain live, and not be barred by an equitable or legal limitations period.

The Second Circuit's decision ignores the direction of Congress by applying equitable factors to dismiss congressionally-preserved claims maintained by the Executive Branch in accordance with a federal statute. In barring the claim entirely, the Second Circuit's rule conflicts with cardinal principles governing the relationship between the respective branches: "Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute." *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001); *see also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought.").

ICLA represents Congress's considered response to the complexity and consequences of claims like this one, and its codified judgment concerning the proper procedure for identifying, investigating, adjudicating, and

otherwise resolving Indian land claims. As the political branches carefully considered both the age and effect of allowing such claims to proceed, the Second Circuit lacked authority to fashion a judicial rule that gave those very factors an essentially opposite, decisive significance.

II. Creation of An "Equitable" Doctrine Untethered From Longstanding Principles of Law and Equity is Contrary to This Court's Equity Jurisprudence

The Second Circuit below relied on "equity" powers far beyond what established doctrine allows, fundamentally altering the defense of laches – and then using it to bar claims expressly allowed by congressional statute brought by both the federal government and OIN. While this Court in *Sherrill* relied on an amalgam of equitable defenses to preclude the prospective tax-immunity *remedy* sought by OIN in that case, here, the Second Circuit went far beyond this Court's decision, reading *Sherrill* as supporting a power to dismiss entire *claims*, including ones plainly preserved by Congress. Moreover, the Second Circuit's newly created defense represents a strange and inequitable reformulation of the settled doctrine of laches. Like laches, the new doctrine focuses on the length of time since the original harm and the effects of granting relief. But, unlike laches, it gives no significance to whether plaintiffs' delay was excusable or whether defendants were prejudiced – and leaves no room for considering the justice, or effect on plaintiffs, of denying relief.

In describing laches in *Sherrill*, this Court explained: "It is well established that laches, a doctrine focused on one side's inaction and the other's legitimate reliance, may bar long-dormant claims for equitable relief." 544 U.S.

at 217. The Court continued, "[L]aches is not . . . a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced – an inequity founded upon some change in the condition or relations of the property or the parties." *Id.* at 217-18 (quoting *Galliher v. Cadwell*, 145 U.S. 368, 373 (1892)). While *Sherrill* did not rest squarely on this formulation, it still used the equitable defenses it discussed to bar a single, unusual, and prospective remedy, a distant cry from using them, as here, to preclude an entire array of claims, including ones grounded in law, seeking retrospective and monetary relief, ones brought by the United States, and ones requiring recognition of a nonpossessory interest.

The Court's case law provides ample evidence that laches' doctrinal contours are long- and well-settled. *See Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121-22 (2002) ("This defense requires proof of (1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense.") (quoting *Kansas v. Colorado*, 514 U.S. 673, 687 (1985)); *New Jersey v. New York*, 523 U.S. 767 (1998); *Costello v. United States*, 365 U.S. 265 (1961); *Bowman v. Wathen*, 42 U.S. (1 How.) 189, 195 (1843) ("[T]he complainants have slept, long slept upon their rights; by their want of reasonable diligence, others have been induced to embark in an undertaking against which these complainants had power to warn them . . . ."). In its familiar form, laches is simple to define and its potential application is usually apparent to parties involved in a case. Fed. R. Civ. P. 8(c); *Lonchar v. Thomas*, 517 U.S. 314, 324 (1996) ("After all, equitable rules that guide lower courts reduce uncertainty, avoid unfair surprise, minimize disparate treatment of similar cases, and thereby help all litigants . . . ."); *Moragne v.*

States Marine Lines, Inc., 398 U.S. 375, 403-04 (1970); *cf. Oneida Indian Nation of N.Y. v. New York*, 500 F. Supp. 2d 128, 133 (N.D.N.Y. 2007).

To be sure, equity jurisprudence, of which laches is an essential part, is distinguished by "[f]lexibility rather than rigidity," *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944), but that flexibility serves "[t]he essence of equity jurisdiction"; "the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." *Id.* "[T]he traditional function of equity has been to arrive at a 'nice adjustment and reconciliation,' between competing claims," one that "'balances the conveniences of the parties and possible injuries to them according as they may be affected by the granting or withholding'" of particular relief. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982) (quoting *Hecht*, 321 U.S. at 329, and *Yakus v. United States*, 321 U.S. 414, 440 (1944)); *see also Freeman v. Pitts*, 503 U.S. 467, 487 (1992). Equitable discretion must follow "a principle of balancing various ethical and hardship considerations." DAN B. DOBBS, 1 LAW OF REMEDIES 91 (2d ed. 1993). The creation of an "equitable" rule that eliminates an entire claim (one specifically authorized by Congress) without considering the inequity of denying relief, turns equity into a "'nuclear weapon' of the law," and is plainly impermissible. *See Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999).

The lower court created this ad hoc equitable doctrine to circumvent the technical requirements of laches to the detriment of OIN. *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 127 (2d Cir. 2010) ("[W]e have used the term 'laches' here . . . as a convenient shorthand . . .

."). The Second Circuit's elevation of the disruption prong, an undefined factor without any discernable limiting principles, and its practical disregard for unjust delay, *see id.* ("the district court in this case did not make findings that the Oneidas unreasonably delayed the initiation of this action or that the defendants were prejudiced by this delay – both required elements of a traditional laches defense"), has undermined the clarity and fairness existing laches law provides. For example, the newly created defense applies to mere money damages if the court believes those damages are disruptive to "societal expectations," *id.* at 135-36, an impossible standard to apply objectively. And it treats "disruption" as controlling, even if the delay on the part of the plaintiff, including the federal government, was blameless and did not prejudice the defendant. *See id.* at 127.

Moreover, the new defense constructed by the Second Circuit takes no account of the established wrongdoing on the part of defendants, *see Oneida Indian Nation of N.Y.*, 500 F. Supp. 2d at 147 (noting that "the Oneidas and their ancestors have been subjected to historic levels of disruption – disruption that forms the heart of this action and merits this Court's consideration."). Instead, as the Second Circuit held, the defense defeats any and "all claims [a court views as] 'disruptive,' a category which includes those premised on the assertion of a continuing possessory interest in the subject lands . . . ." *Oneida Indian Nation*, 617 F.3d at 140.

The Second Circuit's decision failed to recognize the flexibility inherent in equity and ignored the "statutes, rules, and precedents" governing this claim. 517 U.S. at 323. The new equitable defense could have far-reaching

consequences, especially for the ability of the United States to enforce its own laws. As the decision states, the claims at issue here are subject to the newly created equitable bar, "even when such claims are legally viable and within the statute of limitations, when the relief sought is limited to monetary damages, and when the disruptive claims sound at law rather than in equity." *Oneida Indian Nation*, 617 F.3d at 126 (internal citations and quotations omitted). This defense is far beyond the denial of remedies; it is a denial of the right to bring a claim foreseen and allowed by federal statute. *See* DOBBS, 1 LAW OF REMEDIES at 151 ("When chancellors invoked discretion, it was to deny remedies, not to foreclose rights. If a judge in the merged court system were to deny all remedies in her discretion, she would in effect deny all rights.").

III. The Second Circuit's Dismissal of the Federal Government's Claims Based on These Equitable Defenses Has Broad Significance for Other Areas of Law

The Second Circuit's holding allows the use of ad hoc "equitable" rules to dismiss claims brought by the United States, where the government is innocent of prejudicial delay and "regardless of the particular remedy sought." *Oneida Indian Nation*, 617 F.3d at 136. In creating an equitable bar to valid federal claims based on "disrupti[on]" of expectations, *id.* at 127, the Second Circuit decision opens the door to defendants in diverse areas of law asserting equitable defenses, both traditional and novel, that this Court and others have long held unavailable against the United States.

The remedy shaped by the district court in this case included non-disruptive monetary relief grounded

on unconscionable contract terms. *See Oneida Indian Nation*, 500 F. Supp. 2d at 144. That remedy was no more disruptive than would be simple money judgments of the sort for which States are routinely held liable in many areas of law. In allowing relief based on unconscionable consideration, the district court did not invalidate the original land purchases and thereby upset settled expectations of present landowners. *Id.* at 140. These monetary claims were *not* based on the court's recognizing a continuing possessory interest in the lands, but rather entailed restitution for previously realized undeserved profits. *See id.*; *cf. Nelson v. Serwold*, 576 F.2d 1332, 1340 (9th Cir.) (restitution is appropriate when the buyer is unable to return the property), *cert. denied*, 439 U.S. 970 (1978).

This same defense could also be interposed in cases where the federal government seeks restitutionary relief in enforcing its own statutes. *See United States v. Lane Labs-USA Inc.*, 427 F.3d 219 (3d Cir. 2005) (holding the government could seek, and district court could grant, restitution for violation of federal law); *United States v. Universal Mgmt. Servs., Inc.*, 191 F.3d 750, 763 (6th Cir. 1999) ("Because restitution seeks to remedy the type of economic harm to consumers contemplated by the FDCA, it serves goals of the FDCA that are encompassed within the section the FDA charges Appellants violated."); *FTC v. Gem Merch. Corp.*, 87 F.3d 466, 467 (11th Cir. 1996) (holding defendant obliged to pay restitution to consumers or the United States Treasury for violations of Federal Trade Commission Act); *United States v. Exxon Corp.*, 773 F.2d 1240 (Temp. Emer. Ct. App. 1985), *cert. denied*, 474 U.S. 1105 (1986). If the restitution is considered disruptive or delayed, the courts could prevent the government from using that remedy to enforce its own statutes.

Finally, in applying the defense to the federal government, the Second Circuit has deepened a split among the lower federal courts concerning the application of laches and similar defenses to the federal government. This Court has held repeatedly that laches and other equitable time bars do not apply to the federal government, especially when it is enforcing public rights as a sovereign. *See United States v. Summerlin*, 310 U.S. 414, 416 (1940) ("It is well settled that the United States is not bound by state statutes of limitation or subject to the defense of laches in enforcing its rights.") (gathering cases); *United States v. City & County of San Francisco*, 310 U.S. 16, 32 (1940); *Utah Power & Light Co. v. United States*, 243 U.S. 389, 409 (1917) ("A suit by the United States to enforce and maintain its policy . . . stands upon a different plane in this and some other respects from the ordinary private suit . . . ."); *United States v. Beebe*, 127 U.S. 338 (1888). Many lower courts have also taken that view. *See Hatchett v. United States*, 330 F.3d 875 (6th Cir. 2003), *cert. denied*, 541 U.S. 1029 (2004); *Herman v. South Carolina Nat'l Bank*, 140 F.3d 1413, 1427 (11th Cir. 1998), *cert. denied*, 525 U.S. 1140 (1999); *United States v. Thornburg*, 82 F.3d 886 (9th Cir. 1996); *Board of County Comm'rs for Garfield County, Colo. v. W.H.I., Inc.*, 992 F.2d 1061, 1065 (10th Cir. 1993); *United States v. St. John's Gen. Hosp.*, 875 F.2d 1064 (3d Cir. 1989).

However, in this case and in a series of decisions cited by the Second Circuit in *Cayuga Nation*, the Seventh Circuit has discussed allowing the application of laches to the United States. *See United States v. Admin. Enters., Inc.*, 46 F.3d 670 (7th Cir. 1995); *Martin v. Consultants & Admin'rs, Inc.*, 966 F.2d 1078, 1100 (7th Cir. 1992); *NLRB v. P*I*E Nationwide*, 894 F.2d 887, 893-4 (7th Cir. 1990).

The Second Circuit has pushed the ruminations of the Seventh Circuit to their extreme, applying equitable time bars to a claim brought by the federal government in its sovereign capacity.

While the Second Circuit held in this case that the government was pursuing private rights on behalf of OIN, *see* 617 F.3d at 129 (citing *Cayuga*, 413 F.3d at 279), this Court, in *United States v. Jicarilla Apache Nation*, No. 10-382, slip op. (U.S. June 13, 2011), recently reaffirmed that the relationship between Indian tribes and the federal government is properly characterized as implicating the government's sovereign capacity and therefore its public rights. *Id.*

The Seventh Circuit's expansion of the holding of *Occidental Life Insurance Company of California v. EEOC*, 432 U.S. 355 (1977), and the Second Circuit's expansion of *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51 (1984), and *Irwin v. Department of Veterans Affairs*, 498 U.S. 89 (1990), are unwarranted and inconsistent with settled law – and are sowing confusion in the lower courts. *Compare United States v. Robert Wood Johnson Univ. Hosp.*, 2009 WL 4576097, at *6 (D.N.J. Dec. 1, 2009), *with Hernandez, Kroone & Assocs., Inc. v. United States*, 95 Fed. Cl. 395, 399 (Fed. Cl. 2010); *see also United States v. Estate of Oxarango*, 2008 WL 5411719, *9-11 (D. Idaho Dec. 24, 2008); *Chamlikyan v. Bardini*, 2010 WL 5141841, *6 (N.D. Cal. Dec. 13, 2010) (using *Cayuga* in its contemplation of applying laches to the United States in an asylum case).

This Court's review of the appellate court's decision here is required to address the broad national, and

especially federal, interests at stake in the application of equitable defenses to federal claims enforcing federal statutes.

Respectfully submitted,

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