No. 10-1404

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW YORK, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General
SAMUEL C. ALEXANDER
STEVEN E. MISKINIS
ELIZABETH ANN PETERSON
KATHRYN E. KOVACS
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

The Trade and Intercourse Act of 1793 (also known as the Nonintercourse Act) stated in relevant part that "no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution." Ch. 19, § 8, 1 Stat. 330. The question presented is as follows:

Whether the United States may be barred from enforcing the Nonintercourse Act against a State that repeatedly purchased and resold (at a substantial profit) Indian lands in violation of the Act between 1795 and 1846, based on the passage of time and the transfer of the unlawfully obtained Indian lands into the hands of third parties, when the United States seeks monetary relief only against the State.

PARTIES TO THE PROCEEDINGS

The United States of America was an intervenor-plaintiff in the district court, and the State of New York was the only defendant named in its current complaint-in-intervention. In the court of appeals, the State of New York was an appellant/cross-appellee, and the United States was an appellee/cross-appellant.

The other parties to the proceedings below were as follows:

The Oneida Indian Nation of New York, the Oneida Tribe of Indians of Wisconsin, and the Oneida of the Thames were plaintiffs in the district court and were appellees/cross-appellants in the court of appeals.

The County of Oneida and the County of Madison were defendants in the district court (though not with respect to the United States' current complaint-in-intervention) and were cross-appellees in the court of appeals.

The New York Brothertown Indian Nation was an intervenor-plaintiff in the district court but was not a party to the interlocutory appeal in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Treaty and statutes:

Statutes—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No. 10-1404

UNITED STATES OF AMERICA, PETITIONER

v.

STATE OF NEW YORK, ET AL.

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

PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-67a) is reported at 617 F.3d 114. Opinions of the district court (App. 68a-104a, 105a-182a, and 183a-258a) are reported, respectively, at 500 F. Supp. 2d 128, 194 F. Supp. 2d 104, and 199 F.R.D. 61.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 2010. Petitions for rehearing were denied on December 16, 2010 (App. 285a-286a). On March 7, 2011, Justice Ginsburg extended the time within which to file

a petition for a writ of certiorari to April 15, 2011. On April 6, 2011, Justice Ginsburg further extended that time to May 16, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The following statutory provisions are reproduced in the appendix to this petition: Section 8 of An Act to Regulate Trade and Intercourse with the Indian Tribes (also known as the Nonintercourse Act) of 1793 (App. 279a-280a); the Nonintercourse Act, as currently codified at 25 U.S.C. 177 (App. 280a); 28 U.S.C. 2415(a)-(c) and (g) (App. 280a-283a); and Section 5(c) of Public Law No. 97-394, 96 Stat. 1978 (App. 283a-284a).

STATEMENT

1. The tribal plaintiffs in this case are direct descendants of the Oneida Indian Nation, which occupied approximately six million acres of central New York before the American Revolution. See *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 663-664 (1974) (*Oneida I*); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 230 (1985) (*Oneida II*). In the 1788 Treaty of Ft. Schuyler, the Oneida ceded most of their land to the State of New York but retained a reservation of approximately 300,000 acres. *Id*. at 231. In the 1794 Treaty of Canandaigua (7 Stat. 44), the United States acknowledged the right of the Oneida to those "reservation" lands, in recognition of their aid to the colonists during the Revolutionary War. *Oneida II*, 470 U.S. at 231 & n.1. The Treaty guaranteed that the "lands reserved to the Oneida * * * shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." Art. II, 7 Stat. 45.

Such purchases were governed in part by the Trade and Intercourse Act (also known as the Nonintercourse Act), which was first enacted in 1790, and which precluded the alienation of Indian land without the federal government's approval. See ch. 33, § 4, 1 Stat. 138. "In 1793, Congress passed a stronger, more detailed version of the Act" (*Oneida II*, 470 U.S. at 232), which provided in relevant part

> [t]hat no purchase or grant of lands, or of any title or claim thereto, from any Indians or nation or tribe of Indians, within the bounds of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution * * * : *Provided nevertheless*, That it shall be lawful for the agent or agents of any state, who may be present at any treaty, held with Indians under the authority of the United States, in the presence, and with the approbation of the commissioner or commissioners of the United Sates, appointed to hold the same, to propose to, and adjust with the Indians, the compensation to be made for their claims to lands within such state, which shall be extinguished by the treaty.

Ch. 19, § 8, 1 Stat. 330-331. The substance of that prohibition was carried forward in the Trade and Intercourse Acts of 1796, 1799, 1802, and 1834, and it remains in effect today. See 25 U.S.C. 177; see also *Oneida II*, 470 U.S. at 246 (noting that "[a]ll of the subsequent versions of the Nonintercourse Act, including that now in force, contain substantially the same restraint on the alienation of Indian lands") (citation omitted). As this Court has explained, the Act's "obvious purpose" is "to prevent unfair, improvident or improper disposition by Indians

of lands owned or possessed by them * * * without the consent of Congress." *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960).

In April 1795, notwithstanding the Nonintercourse Act and the Treaty of Canandaigua, the New York legislature passed a statute providing for the purchase of lands belonging to the Oneida and other Tribes. See 1795 N.Y. Laws 614. Under that statute, tribal lands were to be resold by the State for at least four times the price paid to the Tribes.[1] Upon learning of the State's intended purchases, Secretary of War Timothy Pickering sought the opinion of Attorney General William Bradford, who concluded that the language of the Nonintercourse Act was "too express to admit of any doubt" that the Act forbade the sale of tribal lands except pursuant to federal treaty. App. 276a-278a. Although that opinion was transmitted to outgoing Governor Clinton and incoming Governor Jay, the State ignored the warnings and purchased about 100,000 acres of the Oneida Reservation in 1795. *Oneida II*, 470 U.S. at 229, 232.

The State paid the Oneida approximately 50 cents per acre in the 1795 transaction and soon resold the land to non-Indian settlers for about $3.53 per acre. App. 98a-99a. In many additional transactions over the next few decades, the State continued to purchase additional tracts of Oneida land without federal approval and to resell them at a profit. *Ibid.* (briefly describing evidence about valuation and compensation for lands acquired before February 1829). Despite the terms of the Nonintercourse Act, none of those transactions was autho-

[1] See Ch. 70, §§ III and VII, 1795 N.Y. Laws 616 (providing for annuity to the Oneida calculated as if the land had been "sold at four shillings per acre" and for resale of the land at no "less than sixteen shillings per acre").

rized by the federal government. By 1843, the Oneida were left with less than 1,000 acres. *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197, 207 (2005).

2. a. In 1966, Congress enacted a statute authorizing federally recognized Indian Tribes to bring civil actions arising under federal law without the consent of the United States and without alleging any minimum amount in controversy. See 28 U.S.C. 1362.[2] That same year, Congress also enacted a statute of limitations, which provided a special limitations period of six years and 90 days for contract and tort suits for damages brought by the United States on behalf of Indians, and stipulated that any earlier claims would be deemed to have accrued on July 18, 1966. See *Oneida II*, 470 U.S. at 241-242; 28 U.S.C. 2415(a), (b) and (g) (1970). Congress further provided that nothing in the new limitations provisions "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." 28 U.S.C. 2415(c) (1970).

In later amendments, in 1972, 1977, 1980, and 1982, Congress repeatedly extended the limitations period for contract and tort claims, and made it applicable to claims brought by Tribes themselves. *Oneida II*, 470 U.S. at 242-243. In the Indian Claims Limitation Act of 1982 (ICLA), Pub. L. No. 97-394, § 5(c), 96 Stat. 1978, Congress provided that any claim that was included on one of two lists published by the Secretary of the Interior in 1983 "remains live" (*Oneida II*, 470 U.S. at 243) as long as it is not formally rejected by the Secretary; if

[2] Section 1362 was intended "to open the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." *Moe* v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 472 (1976).

such a claim is rejected by the Secretary, the Tribe then has one year within which to sue. See *id.* at 243-244 & n.15; 28 U.S.C. 2415(a) and (b).

b. In 1970, the tribal successors to the historic Oneida Indian Nation—the Oneida Indian Nation of New York, the Oneida Indian Nation of Wisconsin, and, later, the Oneida of the Thames (collectively, the Tribes or the Oneidas)—filed a "test case" against Oneida County and Madison County in New York, challenging the validity of the 1795 transaction with the State and seeking as relief only the fair rental value of 872 acres for the years 1968 and 1969. App. 107a. In its 1974 decision in *Oneida I*, this Court held that the claim in the test case fell within the district court's federal-question jurisdiction under 28 U.S.C. 1331 and 1362. See 414 U.S. at 667.

This Court addressed the Oneidas' test case again in 1985. In *Oneida II*, the Court held that the Oneidas could maintain a federal common-law cause of action to vindicate their rights to land that had been acquired by the State in 1795 without federal authorization; it thus affirmed the judgment for the Tribes on liability. See 470 U.S. at 233-236, 253. The Court held that the Tribes' suit was not barred by any applicable statute of limitations, including a statute of limitations borrowed from state law, noting that Congress had specifically provided in ICLA and 28 U.S.C. 2415 that their claim was timely. See 470 U.S. at 240-244 & n.15.[3] The Court explained that "[b]y providing a 1-year limitations period for claims that the Secretary decides not to pursue,

[3] The Secretary of the Interior's first list of claims under ICLA included the Oneidas' "Nonintercourse Act Land Claim," 48 Fed. Reg. 13,920 (1983) (capitalization modified), and that claim therefore "remains live" under Section 2415. *Oneida II*, 470 U.S. at 243.

Congress intended to give the Indians one last opportunity to file suits covered by § 2415(a) and (b) on their own behalf." *Id.* at 244. The Court thus concluded that "the statutory framework adopted in 1982 presumes the existence of an Indian right of action not otherwise subject to any statute of limitations," and that "[i]t would be a violation of Congress' will were we to hold that a state statute of limitations period should be borrowed in these circumstances." *Ibid.*

While declining to rule definitively on the availability of a laches defense that would bar the claim (because the Counties had abandoned that defense on appeal), the Court identified various statutory and doctrinal principles weighing against recognition of such a defense and stated that "the application of laches would appear to be inconsistent with established federal policy." *Oneida II*, 470 U.S. at 244-245 & n.16. While thus casting considerable doubt on the availability of laches as a complete defense, the Court left open the possibility that "equitable considerations" might "limit the relief available to" the Oneidas if the case proceeded to final judgment. *Id.* at 253 n.27. After remand, the Counties ultimately paid a judgment in the test case of approximately $57,000 (including prejudgment interest). App. 3a.

3. In 1974, the Oneidas filed the instant suit against Oneida and Madison Counties, challenging the validity of 30 transactions between 1795 and 1846 in which the State of New York had acquired approximately 250,000 acres of the Oneida Reservation. App. 3a-4a. The case was largely dormant for 25 years, while the test case discussed above proceeded. *Ibid.* The United States intervened in this case as a plaintiff in 1998; and the State was added as a defendant in 2000. App. 191a, 194a-195a.

In 2000, the district court held that private landowners would not be joined in the case as defendants. App. 197a-258a. Although the court explained that it was "acutely aware of the claims of serious and even tragic harms which the State of New York allegedly perpetrated upon the Oneidas," it applied "a pragmatic approach" to the question of remedy and concluded that it would be "unfathomable" that ejectment of private landowners would be viable. App. 251a. While the court construed Second Circuit precedent as holding that "an award of monetary relief would be a workable alternative remedy," it determined that private landowners would not be jointly and severally liable with the State for monetary damages. App. 253a, 255a-257a.

In March 2002, the district court issued a lengthy opinion addressing several motions, including motions by the Tribes and the United States to strike affirmative defenses and dismiss counterclaims. App. 105a-182a. Among other things, the court struck the laches defense raised by the State and the Counties, noting that "even though [*Oneida II*] did not definitively decide the issue, the strong language it used * * * has been recognized by lower courts as effectively barring the defense of laches in Indian land claims." App. 132a; see also App. 131a ("Courts analyzing Indian land claim actions have consistently rejected the use of delay-based defenses.") (citing, *inter alia*, *Oneida Indian Nation* v. *New York*, 691 F.2d 1070, 1084, 1097 (2d Cir. 1982); *Oneida Indian Nation* v. *County of Oneida*, 719 F.2d 525, 538 (2d Cir. 1983), aff'd in part, 470 U.S. 226 (1985); and *Oneida Indian Nation* v. *New York*, 860 F.2d 1145, 1149 (2d Cir. 1988), cert. denied, 493 U.S. 871 (1989)). The court also struck the defendants' statute-of-limitations defense, holding that this Court's ruling on the statute of limita-

tions in *Oneida II* was "clear and directly applicable here." App. 141a-142a.

Later in 2002, the district court granted the United States' motion to file a Second Amended Complaint-in-Intervention "in order to seek relief only against the State of New York." C.A. App. A429. The amended complaint stated that the United States intervened "to enforce federal law, namely, the restrictions on alienation set forth in the Trade and Intercourse Act, 25 U.S.C. § 177; to enforce the provisions of the Treaty of Canandaigua of 1794, 7 Stat. 44, to which the United States was a party; and to protect the treaty-recognized rights of the Oneida Nation." App. 262a-263a. The complaint pleaded two claims: (1) a "Federal Common Law Trespass Claim," alleging that the State "interfered with [the] Oneida Nation's enjoyment of its rights to the Subject Lands under federal law and caused trespasses to the Subject Lands that originated with the State's illegal transactions," App. 272a-273a; and (2) a "Trade and Intercourse Claim," alleging that the State "asserted control and assumed possession of the Subject Lands in violation of the Nonintercourse Act," App. 273a. In its prayer for relief, the United States sought a range of relief, including "a declaratory judgment * * * that the Oneida Nation has the right to occupy the [Subject Lands] that are currently occupied by the State"; an award of "monetary and possessory relief, including ejectment where appropriate"; "me[sn]e profits or fair rental value" from the time of the State's initial purchases until the present; "appropriate monetary relief for those lands * * * over which the State no longer retains title or control"; and "such other relief as th[e] Court may deem just and proper." App. 273a-274a.

4. a. While this case was pending in the district court, one of the Oneida Tribes filed a separate suit, which was considered by this Court in 2005 in *City of Sherrill*, *supra*. In that case, the Oneida Indian Nation of New York contended that local governments could not tax land that the State had purchased in 1805 in violation of the Nonintercourse Act and that the Oneida Indian Nation of New York had reacquired on the open market in 1997. See 544 U.S. at 211-212. This Court rejected that contention. The Court found that a "checkerboard of alternating state and tribal jurisdiction in New York State—created unilaterally at [the Oneida Indian Nation's] behest—would seriously burden the administration of state and local governments and would adversely affect landowners neighboring the tribal patches." *Id.* at 219-220 (quotation marks and brackets omitted). The Court concluded that "the distance from 1805 to the present day, the [Oneida Indian Nation's] long delay in seeking equitable relief against New York or its local units, and developments in the city of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility," and would thus "render inequitable the piecemeal shift in governance this suit seeks unilaterally to initiate." *Id.* at 221. The Court expressly stated that "the question of damages for the Tribes' ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*." *Ibid.* The Court also reiterated that "application of a nonstatutory time limitation"—such as laches—"in an action for damages would be

'novel.'" *Id.* at 221 n.14 (quoting *Oneida II*, 470 U.S. at 244 n.16).[4]

b. A few months after this Court's decision in *City of Sherrill*, the Second Circuit decided *Cayuga Indian Nation* v. *Pataki*, 413 F.3d 266 (2005) (*Cayuga*), cert. denied, 547 U.S. 1128 (2006). With one judge dissenting in part, the court reversed an award against the State of almost $248 million in damages to the Cayugas for land claims similar to those at issue in *Oneida I* and *II*. The majority read *City of Sherrill* as holding that "equitable doctrines, such as laches, acquiescence, and impossibility," can "apply to [a] 'disruptive' Indian land claim[]," "even when such a claim is legally viable and within the statute of limitations." *Id.* at 273-274. Although the district court in *Cayuga* had awarded only money damages against the State, the court of appeals found that ejectment had been the Cayugas' "preferred remedy," *id.* at 274, and that "this type of possessory land claim * * * is indisputably disruptive," *id.* at 275. The court held that the Cayugas' trespass claim and request for damages in the amount of fair rental value of the land was subject to laches, because it was "predicated entirely upon plaintiffs' possessory land claim." *Id.* at 278.

---

[4] After remand from this Court in *City of Sherrill*, the court of appeals affirmed the district court's subsequent holding that tribal sovereign immunity nevertheless prevented Oneida and Madison Counties from foreclosing on the Tribe's land for non-payment of taxes. *Oneida Indian Nation* v. *Madison County*, 605 F.3d 149 (2d Cir.), cert. granted, 131 S. Ct. 459 (2010), vacated and remanded, 131 S. Ct. 704 (2011). This Court granted the Counties' petition for a writ of certiorari, but, before briefing on the merits was completed, it vacated and remanded the case for further proceedings in light of the Tribe's waiver of its sovereign immunity from tax-foreclosure actions. See 131 S. Ct. 704 (2011) (per curiam). The court of appeals is currently considering supplemental letter briefs from the parties.

Cayuga also held that the claims brought in that case by the United States were barred by laches, because of the long time that had passed since the events at issue, because no statute of limitations applied "until one hundred and fifty years after the cause of action accrued," and because the United States had intervened "to vindicate the interest of the Tribe, with whom it has a trust relationship." 413 F.3d at 279.

This Court denied petitions for a writ of certiorari filed by the United States and the Cayugas. See *United States* v. *Pataki*, 547 U.S. 1128 (2006); *Cayuga Indian Nation* v. *Pataki*, 547 U.S. 1128 (2006).

5. After the completion of discovery on issues associated with liability in this case (and after *Cayuga*), the State and the Counties moved for summary judgment against the Oneidas and the United States. On May 21, 2007, the district court granted that motion with respect to "possessory" damages claims (claims premised on a present right of the Tribes to possess the land, such as damages for trespass or compensation for the current value of the land), but denied the motion with respect to "non-possessory" claims for "fair compensation" for the prior purchases. App. 68a-104a.

Applying *Cayuga*, the district court held that claims that are "predicated on [the Tribes'] continuing right to possess land in the claim area and seek relief returning that land and damages based on their dispossession" are subject to laches. App. 76a. The court found it unnecessary to permit additional discovery or hold an evidentiary hearing on that issue, because it concluded that the claims in this case arise from circumstances "nearly identical" to those in *Cayuga*. App. 81a. The court noted, however, that "the Oneidas have diligently pursued their claims in various fora," and it specified that

its ruling on laches did not, "in any substantial part, rest on any supposed deficiency in the Oneidas' efforts to vindicate their claims." App. 82a-83a.

The district court next held that the Tribes asserted a "non-possessory" claim against the State: They alleged that the State had provided "inadequate compensation" for land transfers and had made "substantial profits" by reselling the land, and they sought "relief based on the benefit the State received from the land sales in the form of 'disgorgement.'" App. 86a-88a. The court concluded that such claims for "retrospective relief" were not foreclosed by *Cayuga*, App. 88a-89a, and were consistent with federal common-law precedents, App. 89a-98a. The court held that, to prevail on the "fair compensation" claims, the Tribes would have to show either inadequacy of consideration "coupled with evidence of the inferiority of the Oneida Indian Nation's negotiating position," or "gross inadequacy of the consideration received by Plaintiffs in comparison to the fair market value of the land." App. 97a. The court further held that the Tribes had presented sufficient evidence in support of their "fair compensation" claim to survive summary judgment—including evidence that, in 1795, the State paid about 50 cents per acre for land it resold for $3.53 per acre and that, by 1829, the Oneidas had received about $113,000 for land that the State sold for more than $626,000. App. 98a-99a.

The district court *sua sponte* certified its order for interlocutory appeal under 28 U.S.C. 1292(b). App. 103a. The court of appeals granted the parties' cross-petitions for permission to appeal. App. 5a.

6. On August 9, 2010, the court of appeals held that all of the Tribes' and the United States' claims are

barred by the equitable defenses recognized in *Cayuga*. App. 1a-67a.

a. The court of appeals affirmed the district court's dismissal of the Tribes' and United States' "possessory" claims. App. 20a-29a. It held that claims rooted in a present right of the Tribes to possess the lands at issue were identical to the claims asserted in *Cayuga* and were thus properly dismissed as barred by equitable considerations. App. 20a-24a. Although the majority acknowledged that the district court had not found the traditional elements of laches—unreasonable delay and prejudice—it found the absence of those findings irrelevant, because it concluded that *City of Sherrill* and *Cayuga* had focused instead on the length of time since the historical injustice and on the extent to which the claims would be disruptive and upset the settled expectations of innocent property owners. App. 25a-28a. The court also refused to consider the argument that laches does not apply to the United States, declaring that it was bound to follow *Cayuga*'s finding of laches "on facts virtually indistinguishable from those here." App. 28a-29a.

The court of appeals then proceeded to reverse the district court's holding that the Tribes' and United States' "non-possessory" claims could proceed. App. 29a-52a. The majority found that the Tribes' contract-based claim is barred by the State's sovereign immunity, because it determined that, unlike the Tribes, the United States had not pleaded a "contract-based claim" for fair compensation. App. 36a-41a. It reasoned that the United States' prayer for relief "predominantly, if not exclusively," seeks "trespass and ejectment-based" remedies, and that any "nonpossessory claim * * * in the [United States'] complaint is based entirely on the Nonintercourse Act." App. 36a-38a.

The court of appeals further held that nonpossessory claims based on the Nonintercourse Act "fall[] within the equitable bar recognized in *Cayuga*," because, even if those claims did not assert "a current possessory right," they would still "disrupt[]" settled expectations by virtue of being, "at base, premised on the invalidity of the initial transfer of the subject lands." App. 41a-44a. Although the court recognized that "the United States also seeks 'restitution' in lieu of the return of the land," it concluded that the "equitable" nature of that relief simply "confirmed" its conclusion that "the equitable defense recognized in *[City of] Sherrill* is applicable here." App. 49a-50a. The majority thus explained that, under *Cayuga*, it was "bound" to conclude that "all claims that are 'disruptive'"—by which the court meant all claims premised on the asserted invalidity of the initial purchases from the Oneidas—are barred. App. 52a. Finally, the majority declared that its decision was "not in tension with" this Court's decision in *Oneida II* because *Oneida II* "only recognized that [a possessory claim against Madison and Oneida Counties] existed," and it did not address the "nonpossessory claims" at issue here. *Ibid.*

b. District Judge Gershon (sitting by designation) dissented from the court of appeals' judgment on the nonpossessory claims. App. 53a-67a. She reasoned that the United States may sue to enforce a federal statute (the Nonintercourse Act), and that it could properly seek restitution of the State's profits, as it commonly does when suing to vindicate violations of federal law. App. 54a-55a, 62a. She further concluded that a claim that seeks only restitution, "rather than the current fair market value" of the land, would "concede[] that title ha[d] validly passed," App. 64a, and such relief "would

not upset present-day expectations because it has nothing to do with the present at all," App. 67a. Judge Gershon disagreed with the majority's decision to "foreclose[] plaintiffs from bringing *any* claims seeking *any* remedy for their treatment at the hands of the State." *Ibid.* "This," she explained, "is not required by *[City of] Sherrill* or *Cayuga*, and is contrary to the spirit of the Supreme Court's decisions in this very case." *Ibid.*

REASONS FOR GRANTING THE PETITION

The court of appeals' treatment of the United States' claim to enforce the Nonintercourse Act conflicts with settled and fundamental principles that extend beyond the context of Indian land claims—specifically, that laches does not apply to suits brought by the United States, and especially not when the statute of limitations specified by Congress that preserves the claim has not run. Here, although it is appropriate to forswear remedies that would attempt to undo land purchases that occurred between 1795 and 1846, there is no basis for barring any recovery whatsoever from the State of New York, which clearly violated the Nonintercourse Act by purchasing land from the Oneidas without federal approval. Yet the court of appeals has barred the United States from seeking even disgorgement of the substantial profits that the State of New York made by purchasing the Oneidas' reservation lands in violation of the Act and reselling those lands to non-Indian settlers at prices several multiples higher.

Moreover, although the court of appeals in this case and in its prior decision in *Cayuga Indian Nation* v. *Pataki*, 413 F.3d 266 (2005), cert. denied, 547 U.S. 1128 (2006), relied on this Court's decision in *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197 (2005), the court

of appeals' conclusion that the United States' claims as sovereign are too "disruptive" in the court's view to be countenanced (App. 5a-6a, 44a) is inconsistent with the rationale of *City of Sherrill*. It is also inconsistent with this Court's previous recognition in *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985) (*Oneida II*), of the validity of the Oneidas' claims based on the indisputably "grave" wrongs committed against them. *City of Sherrill*, 544 U.S. at 216 n.11.

In the Nonintercourse Acts, Congress committed the Nation—including the State of New York—to respect and protect the rights that the Oneidas and other New York Indians had in their reservation lands. And here, those rights were also secured by the Treaty of Canandaigua. Despite decades of litigation, including multiple decisions from this Court, the court of appeals' divided decision, if allowed to stand, would prevent the United States from honoring that commitment. And the court of appeals' disregard of Congress's explicit judgment to preserve the claims of the United States and the Tribes that are listed pursuant to the Indian Claims Limitation Act of 1982 calls into question the ability of the United States to exercise its sovereign right to enforce federal statutes and treaties adopted for the benefit of Indians. Review by this Court is therefore warranted.

A. The Court Of Appeals' Decision Conflicts With This Court's Decisions Holding That The United States Has The Authority To File Suit To Protect Its Sovereign Interests And Is Not Subject To Laches When Doing So

The court of appeals held that the United States is barred from enforcing the Nonintercourse Act by equitable considerations arising from the fact that this suit was filed long after the initial statutory violations by

New York. Its analysis is inconsistent with fundamental principles undergirding the United States' power to enforce federal law—principles that transcend the context of Indian land claims.

1. The United States' complaint in this case rests on the claim that the State's purchases of Oneida land violated the Nonintercourse Act. App. 260a, 270a-273a (¶¶ 1, 16, 21, 23-24, 26). This Court recognized long ago that such statutory violations invade the sovereign rights of the United States. In *United States* v. *Minnesota*, 270 U.S. 181 (1926), the United States filed suit alleging that land patents issued to the State of Minnesota violated the United States' treaty with the Chippewa Tribe. This Court held that the United States' interests in the suit arose "out of its guardianship over the Indians and out of its right to invoke the aid of a court of equity in removing unlawful obstacles to the fulfillment of its obligations; and in both aspects the interest is one which is vested in it as a sovereign." *Id.* at 194 (citations omitted). Similarly, in *Heckman* v. *United States*, 224 U.S. 413 (1912), the Court explained that enforcing statutory prohibitions on the alienation of Indian land "is distinctly an interest of the United States." *Id.* at 437; see also *id.* at 438 (an illegal sale of Indian land "is not simply a violation of the proprietary rights of the Indian. It violates the governmental rights of the United States."); *Nevada* v. *United States*, 463 U.S. 110, 141-142 (1983); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 657 n.1 (1979) (recognizing that the illegal alienation of Indian land violates both "proprietary rights of

the Indian" and "governmental rights of the United States") (citation omitted).[5]

Of course, even outside the context of Indian land claims, it is well established that the United States "has a right to apply to its own courts for any proper assistance in the exercise of [its powers] and the discharge of [its duties]." *In re Debs*, 158 U.S. 564, 584 (1895); see also *United States* v. *American Bell Tel. Co.*, 128 U.S. 315, 357-358 (1888). Accordingly, this Court held in *Cramer* v. *United States*, 261 U.S. 219 (1923), another case in which the United States sued based on an unauthorized conveyance of Indian lands, that "[t]he United States may lawfully maintain suits in its own courts to prevent interference with the means it adopts to exercise its powers of government and to carry into effect its policies." *Id.* at 233 (citation omitted). The government need not have a pecuniary interest in such a dispute, but may bring an action simply to protect its sovereign, governmental interests. See *Heckman*, 224 U.S. at 437-439; *Debs*, 158 U.S. at 584, 586.

2. Because the United States' claim in this case to enforce the Nonintercourse Act is indisputably a sovereign one, the court of appeals' decision to foreclose that claim on the basis of a judicially fashioned "delay-based equitable defense[]" (App. 28a) squarely conflicts with decisions of this Court establishing "past all controversy or doubt" that "the United States are not * * * barred by any laches of their officers, however gross, in a suit brought by them as a sovereign Government to enforce

---

[5] The court of appeals acknowledged only glancingly that the United States has "its own interest," separate from the interests of the Oneidas, "in the vindication of a federal statute." App. 29a n.7. But it failed to give effect to that distinct sovereign interest of the United States, which precludes application of laches and similar doctrines.

a public right, or to assert a public interest." *United States* v. *Beebe*, 127 U.S. 338, 344 (1888); see also, *e.g.*, *United States* v. *California*, 332 U.S. 19, 39-40 (1947); *United States* v. *Summerlin*, 310 U.S. 414, 416 (1940).

The court of appeals refused to consider the United States' argument that it is not subject to laches or other delay-based defenses. By way of explanation, the court said only that it was "adhering faithfully to *Cayuga*," which it read as "expressly conclud[ing] that the United States *is* subject to [delay-based] defenses under circumstances like those presented here." App. 29a. But the cases on which *Cayuga* relied (see 413 F.3d at 278) do not support the application of laches against the United States. See *id.* at 287-288 & n.9 (Hall, J., dissenting in part and concurring in part). In *Clearfield Trust* v. *United States*, 318 U.S. 363 (1943), the United States appeared as a mere commercial actor. *Id.* at 369 ("The United States as drawee of commercial paper stands in no different light than any other drawee."). In *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977), the Court indicated that the EEOC's undue delay in seeking back pay may be relevant to the amount of any monetary remedy it might ultimately obtain, but the Court did not suggest that such delay could provide a basis for dismissal of the suit *ab initio*. *Id.* at 372-373.[6]

Nor is there any merit to *Cayuga*'s suggestion that *City of Sherrill* "substantially altered the legal land-

---

[6] In *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984), the relevant question was estoppel against the government, not laches. And the Court made clear in *Heckler* that if estoppel against the government is available at all, the party asserting it must demonstrate, at a minimum, that it reasonably relied to its detriment on misrepresentations of fact by the government. *Id.* at 59, 61. The State did not attempt to meet that standard here.

scape" (413 F.3d at 279) in a way that could warrant the invocation of laches to bar a suit by the United States to enforce the Nonintercourse Act. The United States was not a party in *City of Sherrill*, which involved the unilateral attempt by the Oneida Indian Nation of New York to re-establish sovereignty over lands it purchased on the open market, and the Court made clear in rejecting that very different claim that it was not disturbing the holding in *Oneida II* that a suit for monetary relief based on the violation of the Nonintercourse Act was available even when brought by the Tribe alone. See 544 U.S. at 221. Indeed, *City of Sherrill* repeated *Oneida II*'s observation that "application of a nonstatutory time limitation in an action for damages would be 'novel.'" *Id.* at 221 n.14 (quoting 470 U.S. at 244 n.16). Thus, the Court did not even address, much less purport to limit, the long-standing principle that laches does not apply to the United States when it acts—as it does here—in its sovereign capacity to enforce a federal statute.

3. The invocation of a delay-based defense to the United States' claim in this case was especially inappropriate because Congress has expressly adopted and repeatedly extended a statute of limitations governing Indian land claims brought by the United States or by Tribes. See 28 U.S.C. 2415; *Oneida II*, 470 U.S. at 241-244 & n.15; see also pp. 5-6 & n.3, *supra*. The court of appeals did not suggest that the statute of limitations has run here. To the contrary, it repeatedly asserted that the judicially fashioned delay-based defenses it found controlling are applicable "even when such a claim is * * * within the statute of limitations." App. 19a, 23a (quoting *Cayuga*, 413 F.3d at 273). But this Court has established that "[l]aches within the term of the statute of limitations is no defense at law. Least of all is

it a defense to an action by the sovereign." *United States* v. *Mack*, 295 U.S. 480, 489 (1935) (citations omitted); see also *United States* v. *Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497 (2001) ("Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute."); *Cross* v. *Allen*, 141 U.S. 528, 537 (1891) (stating, in foreclosure suit brought in equity, that "[t]he question of laches and staleness of claim virtually falls with that of the defense of the statute of limitations").

Thus, the Ninth Circuit concluded in *Brooks* v. *Nez Perce County*, 670 F.2d 835 (1982), that "the government's claim for damages" for the allegedly wrongful sale of Indian trust land was not barred by laches or by the statute of limitations in 28 U.S.C. 2415, even though the government did not appear as a plaintiff until 54 years after the county's wrongful taxation of the property in question. *Id.* at 837. The court explained that Congress "was aware that claims as old as 180 years might be protected and that [its] extension of the [limitations period] would impose burdens on state and local governments," but had concluded "that failure to extend the [limitations period] would result in inequities to Indians who would otherwise be deprived of rights due to delinquent and dilatory action by the government in processing claims." *Ibid.* (internal quotation marks and citations omitted). The court of appeals' decision in this case is inconsistent with that result and with the long-established principles, discussed above, which the Ninth Circuit correctly applied.[7]

[7] Even though laches does not bar its suit, the United States' delay in pursuing the State's violations of the Nonintercourse Act could still affect the amount of any recovery. See *Oneida II*, 470 U.S. at 253 n.27 (declining to consider "whether equitable considerations should limit

B. The Court Of Appeals' Decision Conflicts With *City Of Sherrill* By Foreclosing Appropriate, Non-Disruptive Relief

The court of appeals held that the United States' Nonintercourse Act claim "is barred by the equitable considerations described in *[City of] Sherrill*." App. 41a. But even assuming *arguendo* that the equitable considerations the Court identified could ever be applied to bar completely a claim by the United States brought within the applicable statute of limitations, the court of appeals' conclusion that *any* land claim such as this is necessarily "disruptive of justified societal interests that have developed over a long period of time * * * *regardless of the particular remedy sought*," App. 44a (emphasis added), conflicts with *City of Sherrill* itself. The Court's decision in *City of Sherrill* was directly predicated on the difference between monetary remedies and the more extraordinary and far-reaching relief that the Tribe sought there.

1. In *City of Sherrill*, the Court rejected the possibility that the Tribe could unilaterally effect a "piecemeal shift in governance" that would seriously burden state and local government and "adversely affect" neighboring owners." 544 U.S. at 220-221. But the Court ex-

---

the relief available to the present day Oneida Indians"); *Occidental Life*, 432 U.S. at 372-373; *Brooks*, 670 F.2d at 837 (finding "laches does not bar the government's claim for damages" for wrongful sale of Indian trust land, but noting that the government's 54-year delay "may be weighed by the district court in calculating damages"). For instance, as Judge Gershon suggested, equitable considerations could warrant a reduction in prejudgment interest. App. 67a n.8. But this case is currently on appeal from a decision about liability, not the amount of an award. At this stage, the cases discussed above make clear that the United States' delay cannot bar its claim entirely.

pressly distinguished the availability of monetary remedies for the unlawful dispossession of Indian land in violation of the Nonintercourse Act. See *id.* at 221 ("[T]he question of damages for the Tribes' ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*."). And the Court repeatedly contrasted what it termed the "disruptive remedy" that the Tribe was seeking there (*id.* at 217) with the "demands for monetary compensation" that had been made in earlier cases, *id.* at 212. See also *id.* at 211-212 (describing the relief at issue as "[i]n contrast to *Oneida I* and *II*"); *id.* at 213 ("When the Oneidas came before this Court 20 years ago in *Oneida II*, they sought money damages only."). Indeed, the payment of monetary relief by the State for its past wrongs would not be at all disruptive of present-day patterns of land ownership or governance in the area that the State illegally acquired from the Oneidas.

Significantly, *City of Sherrill* invoked the district court's 2000 opinion in this very case (App. 183a-258a), which held that neither ejectment nor monetary relief would be available against private landowners, but also recognized that monetary relief could be available from the State. *Id.* at 253a-257a. Acknowledging that the district court had "found it high time 'to transcend the theoretical'" and adopt "'a pragmatic approach,'" *City of Sherrill*, 544 U.S. at 211 (quoting App. 251a), this Court endorsed the district court's decision as having "rightly found" that "pragmatic concerns" prevented restoration of "Indian sovereign control over" the disputed lands at this late date, *id.* at 219.

This Court's discussion of "impossibility" in *City of Sherrill* also rested in part on earlier decisions holding that monetary compensation *was* available to tribal

plaintiffs when—indeed, *because*—the passage of time had made it "impracticab[le]" to "return[] to Indian control land that generations earlier had passed into numerous private hands." 544 U.S. at 219 (citing *Yankton Sioux Tribe of Indians* v. *United States*, 272 U.S. 351, 357 (1926) (Tribe could recover value of land), and *Felix* v. *Patrick*, 145 U.S. 317, 334 (1892) (Indian's representatives could recover value of scrip used to purchase land, plus interest)). This Court also drew the same distinction between monetary relief and return of the property in *United States* v. *Minnesota*, *supra*. There, Indian lands had been mistakenly conveyed to the State of Minnesota, which had in turn conveyed some of them to third-party purchasers. With respect to lands for which the Court held that "the patenting was contrary to law and in derogation of the rights of the Indians under [a statute]," it concluded that "the United States is entitled to a cancellation of the patents as to these lands, unless the State has sold the lands, *and in that event is entitled to recover their value*," which was to be determined as if the lands had "been dealt with[] as they should have been[] under the [statute]." 270 U.S. at 206, 215 (emphasis added).

In this case, the State dispossessed the Oneidas of massive amounts of land, despite having been explicitly warned by federal officials that its purchases would violate the Nonintercourse Act. See *Oneida II*, 470 U.S. at 232. The evidence indicates that, as the state legislature had contemplated, the State realized substantial profits when it turned around and resold the Oneidas' land for a price many times higher than it had paid the Oneidas. App. 98a-100a. In these circumstances, some monetary recovery (at least, *e.g.*, restitution in the form of disgorged profits or some other measure of relief) is essen-

tial to remedy the wrong and do justice, and would at the same time be "pragmatic" and no more "disruptive" than the monetary relief that this Court found proper in *Minnesota*, *Yankton Sioux*, *Felix*, and *Oneida II*—and affirmatively distinguished in *City of Sherrill*. Such relief would also further the Nonintercourse Act's purpose of preventing the "unfair, improvident or improper disposition by Indians of [their] lands." *Federal Power Comm'n* v. *Tuscarora Indian Nation*, 362 U.S. 99, 119 (1960).

The court of appeals' holding that equitable considerations drawn from *City of Sherrill* completely bar a claim by the United States based on the Nonintercourse Act, "regardless of the particular remedy sought," App. 44a, thus conflicts with *City of Sherrill* itself, as well as numerous other decisions of this Court.

2. The court of appeals' approach also disregarded another aspect of *City of Sherrill*: It erroneously conflated questions about the viability of a claim with those about the viability of a particular *remedy*. Although the court of appeals expressly acknowledged that "the United States * * * seeks 'restitution' in lieu of the return of the land," App. 49a, it rejected that remedy on the misguided notion that its availability would convert an "otherwise unsuccessful claim" for possession "into a successful claim simply by re-framing it as 'nonpossessory.'" App. 50a.

That reasoning conflicts with this Court's admonition in *City of Sherrill* that there is a "fundamental" "distinction between a claim or substantive right and a remedy." 544 U.S. at 213 (quoting *Navajo Tribe of Indians* v. *New Mexico*, 809 F.2d 1455, 1467 (10th Cir. 1987)). *City of Sherrill* did not hold that courts may invoke equitable doctrines to dismiss Indian land *claims* seeking

monetary relief merely because they were predicated on an allegation that the defendant's wrongful conduct began long ago. The Court focused not on the claim at issue, but on the "appropriateness of the relief" requested in that case, and held that equitable considerations barred the extraordinary *relief* that the Tribe was seeking: unilateral restoration of its sovereignty over the land and a resulting sovereignty-based immunity from property taxes. *Id.* at 214; see also *Cayuga*, 413 F.3d at 288-290 (Hall, J., dissenting in part and concurring in part in the judgment).

3. As Judge Gershon explained in her dissent (App. 66a-67a), awarding restitution or other monetary relief in this case would not implicate the concerns that *City of Sherrill* had about disrupting the *status quo*. An award of restitution, for instance, would accept as *faits accomplis* the transactions in which the State acquired the land, but require the State to disgorge its profits, effectively providing the fair compensation that the Nonintercourse Act was intended to secure. See 1 Dan B. Dobbs, *Dobbs Law of Remedies* § 4.1(1), at 552 (2d ed. 1993) (restitution's "major unifying thread" is "to prevent the defendant's unjust enrichment by recapturing the gains the defendant secured in a transaction").

Contrary to the court of appeals' concerns (App. 22a, 46a), restitution or other monetary relief would not unsettle current land titles. It could instead protect settled expectations by confirming that this long-lasting dispute could be concluded with relief that did not alter current ownership rights. See App. 64a (Gershon, J., concurring in part and dissenting in part) (concluding that the requested remedy here would "necessarily concede[] that title has validly passed"). As this Court explained in *United States* v. *Mottaz*, 476 U.S. 834 (1986),

an Indian plaintiff's claim for "monetary damages" in the amount of "the proceeds realized" from the allegedly unlawful sale of her land "would involve a concession that title had passed * * * and that the sole issue was whether [she] was fairly compensated for the taking of her interests." *Id.* at 842.[8] Following that reasoning, the Tenth Circuit observed—in a decision cited in *City of Sherrill*, 544 U.S. at 213—that non-Indians who held title to land "claimed by Indians could not be secure in their ownership until the Indians' claims were litigated." *Navajo Tribe*, 809 F.2d at 1467. By allowing such claims to go forward, but limiting the plaintiffs to monetary remedies, the Tenth Circuit recognized that "non-Indians were assured of continued possession regardless of the outcome of the litigation." *Ibid.* (citation omitted).

In this case, an award of monetary relief would similarly vindicate the federal policy embodied in the Nonintercourse Act and—far from disrupting current landowners' expectations or projecting remedies into the future—bring this long-running dispute to an end. That

---

[8] Because the plaintiff in *Mottaz* sought not restitution of profits, but rather "*current* fair market value," this Court held that her claim challenged the current title to the land and was barred by the statute of limitations in the Quiet Title Act. *Mottaz*, 476 U.S. at 841, 842. The court of appeals attempted to distinguish *Mottaz* on the ground that the Nonintercourse Act "claim here necessarily requires a conclusion that title did *not* pass validly in the challenged land transactions, because the claim's premise is that the transactions violated the Nonintercourse Act." App. 46a. As explained above, however, a Nonintercourse Act violation could be remedied not only by voiding the challenged transactions, but also by awarding appropriate compensation. The court of appeals should have presumed the availability of an appropriate remedy that would vindicate the purposes of the Nonintercourse Act rather than holding that the United States is precluded from enforcing it altogether.

result would also vindicate the Court's decision in *City of Sherrill* not to "disturb" its holding in *Oneida II* about "the question of damages for the Tribes' ancient dispossession." 544 U.S. at 221.[9]

---

[9] Because the court of appeals in this case relied so extensively on its earlier decision in *Cayuga*, some aspects of this petition are inevitably parallel to arguments that were made in the United States' petition for a writ of certiorari in that case, which this Court denied. See *United States* v. *Pataki*, 547 U.S. 1128 (2006). The Court's denial of certiorari in *Pataki* may have reflected an understandable wariness about revisiting the import of *City of Sherrill* so soon after it was issued, especially when *City of Sherrill* had been "resolve[d] * * * on considerations not discretely identified in the parties' briefs," 544 U.S. at 214 n.8. Cf. *Arizona* v. *Evans*, 514 U.S. 1, 23 n.1 (1995) (Ginsburg, J., dissenting) (noting that the Court often postpones its review to permit "periods of 'percolation' in, and diverse opinions from, state and federal courts").

In its earlier petition, the United States concluded that the Second Circuit's "apparent intent is to terminate all" pending suits involving substantial tribal land claims in the State of New York—including this case—"on the ground that the Tribes' complaints were 'subject to dismissal *ab initio*.'" Pet. at 29 & n.8, *Pataki*, *supra* (No. 05-978) (quoting *Cayuga*, 413 F.3d at 278). The United States' and the Oneidas' subsequent efforts to distinguish this case from *Cayuga* insofar as they seek "nonpossessory" relief persuaded the district court, but only one member of the court of appeals panel. The Second Circuit's decision in this case thus bears out the prediction in the earlier petition and demonstrates that review by this Court will not benefit from any further time for "percolation."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
IGNACIA S. MORENO
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
CURTIS E. GANNON
Assistant to the Solicitor General
SAMUEL C. ALEXANDER
STEVEN E. MISKINIS
ELIZABETH ANN PETERSON
KATHRYN E. KOVACS
Attorneys

MAY 2011