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

REPLY BRIEF FOR THE UNITED STATES

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Since 1790, the Trade and Intercourse Act (also known as the Nonintercourse Act and currently codified as amended at 25 U.S.C. 177) has precluded the alienation of Indian land without the approval of the United States. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 231-233, 245-246 (1985) (*Oneida II*). Between 1795 and 1846, respondent State of New York repeatedly purchased lands from the Oneida Indian Nation without federal approval and resold those lands to non-Indian settlers at prices several multiples higher. See Pet. 4-5 & n.1.

In this case, the United States seeks to exercise its sovereign right to enforce the Nonintercourse Act by recovering monetary damages, such as disgorgement of profits, from the State. A divided panel of the court of appeals, however, held that the United States cannot recover damages because, in the court's view, *any* claim predicated on violations of the Act is necessarily too

"disruptive of justified societal interests that have developed over a long period of time * * * *regardless of the particular remedy sought*." Pet. App. 44a (emphasis added). Respondents acknowledge (Br. in Opp. 22-23) that the United States does not seek ejectment of current landowners or possession of the lands at issue.[1] They nevertheless contend (*id.* at 23) that the court of appeals correctly found that monetary remedies against the State would be similarly "disruptive" and therefore also barred, simply because those remedies would ultimately be "predicated" on the proposition that the original transactions "were invalid in the first instance."

The court of appeals' decision is inconsistent with the long-standing principle that laches does not apply to the United States when it acts in its sovereign capacity to enforce a federal statute. The court of appeals' decision also vitiates decades of litigation—including two decisions of this Court in a case that was very closely related to this one, see *Oneida II*, *supra*; *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974) (*Oneida I*)—as well as Congress's repeated actions to except cases like this from any statute of limitations. Moreover, the court of appeals' decision conflicts with *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. 197 (2005), by categorically foreclosing all forms of relief, even non-disruptive

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[1] The State is the only defendant named in the United States' current complaint-in-intervention. See Pet. ii. The County of Oneida and the County of Madison are defendants in the complaint filed by the Oneida Indian Nation of New York, the Oneida Tribe of Indians of Wisconsin, and the Oneida of the Thames (collectively, the Tribes or the Oneidas). See *ibid.* Because the State and the Counties have jointly filed a single brief in opposition to both the United States' petition (No. 10-1404) and the Tribes' petition (No. 10-1420), this reply generally refers to them all as "respondents."

forms like monetary damages. It thus precludes *any* redress for what this Court has acknowledged to be the State's "grave * * * wrongs." *Id.* at 216 n.11. This Court's review is accordingly warranted.

A. The United States Is Not Subject To Laches When It Sues To Protect Its Sovereign Interests

1. In its certiorari petition, the United States explains that violations of the Nonintercourse Act "invade the sovereign rights of the United States," Pet. 18-19, and, as a result, that laches does not apply to the United States' suit to enforce that Act. Pet. 19-21. Respondents do not seriously dispute the sovereign nature of the United States' interests in enforcing the Nonintercourse Act. See Pet. 18-19. Nor could they plausibly do so. After the petition was filed, this Court decided *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313 (2011), which re-affirmed that, when the United States acts as trustee for Indian Tribes, it does so "as a sovereign," and it "pursue[s] its own policy goals" as "the governing authority enforcing statutory law." *Id.* at 2324 (quotation marks and citation omitted). See also *id.* at 2326 ("[T]he Government exercises its carefully delimited trust responsibilities in a sovereign capacity to implement national policy respecting the Indian tribes.").

2. Respondents attempt to minimize the effect of the court of appeals' ruling on laches by asserting that the decision does not "purport[] to articulate generally applicable principles of laches," but instead only to "craft[] and appl[y] an equitable bar peculiar to the particular historical context here." Br. in Opp. 30. That assertion cannot disguise the true significance of the court of appeals' decision as an unprecedented departure from the

deep-rooted principle that "laches is not imputable to the Government." *United States* v. *Kirkpatrick*, 22 U.S. (9 Wheat.) 720, 735 (1824) (Story, J.); see also *Utah Power & Light Co.* v. *United States*, 243 U.S. 389, 409 (1917) ("[L]aches * * * 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.").

Respondents suggest that the cases cited in the United States' petition (at 19-20) are distinguishable because "none of th[ose] cases involved centuries-old transactions or the scope of disruption presented by this and other Indian land claims dating from the early years of this Nation." Br. in Opp. 31. But respondents cite no case in which laches *was* applied to bar a claim brought by the United States in its sovereign capacity.[2]

Respondents attempt to excuse the State's conduct by saying that, at times, "the United States encouraged and assisted in the State's acquisition of the Oneidas' former reservation lands." Br. in Opp. 30; see also *id.* at 6-7.[3] There have undoubtedly been lengthy periods of

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[2] Respondents note (Br. in Opp. 31) that laches was applied in *United States* v. *Beebe*, 127 U.S. 338 (1888), but the Court explained that it departed from the general rule (which it described as "past all controversy or doubt") only because the suit, although formally brought in the government's name, was "not for the purpose of asserting any public right or protecting any public interest." *Id.* at 344, 347. That condition plainly does not obtain here. Respondents also invoke *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977), and *Heckler* v. *Community Health Services*, 467 U.S. 51 (1984), see Br. in Opp. 30-31, but the United States explains in its petition (at 20 & n.6) why those cases lend no support to the court of appeals' decision.

[3] Respondents do not contend that the United States actually authorized the State's transactions as required by the Nonintercourse Acts, which would have required formal ratification of a treaty by the United

this Nation's history during which federal officials were less than vigilant in their enforcement of the Nonintercourse Act. But barring this suit for that reason would contravene the "great principle of public policy" that prevents laches from being applied against the government (*i.e.*, "that the public interest should not be prejudiced by the negligence of public officers"). *United States* v. *Knight*, 39 U.S. (14 Pet.) 301, 315 (1840). Moreover, as this Court observed in *Oneida II*, the legislative history of the statute of limitations that Congress enacted in 1966 (and extended in 1972, 1977, 1980, and 1982) "is replete with evidence of Congress'[s] concern that the United States had failed to live up to its responsibilities as trustee for the Indians." 470 U.S. at 244; see Pet. 2-3. Congress's response to those prior failures was not, as respondents would have it, to declare that all such land claims were extinguished, but rather to enact a statute that *preserved* such claims.

3. As the petition explains (at 21-22), using a delay-based defense to bar the United States' claim was especially inappropriate because Congress has expressly preserved claims such as the one at issue here by adopting and repeatedly extending a statute of limitations governing Indian land claims brought by the United States or by Tribes.

Respondents do not deny that the claims in this case are not barred by the statute-of-limitation provisions in 28 U.S.C. 2415. Instead, they suggest (Br. in Opp. 27) that those limitations periods are inapplicable because Section 2415(c) states that "[n]othing herein shall be deemed to limit the time for bringing an action to estab-

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States. See 25 U.S.C. 177; Trade and Intercourse Act of 1793, ch. 19, § 8, 1 Stat. 330.

lish the title to, or right of possession of, real or personal property." But that provision cannot be read to subvert Congress's intention that "action[s] to recover *damages*" for "trespass" or "conversion" brought by or on behalf of Indian Tribes would be subject to the defined statutory limitations periods, 28 U.S.C. 2415(b) (emphasis added), which have not expired. In any event, Section 2415(c) is notably unhelpful to respondents' position, because the United States' suit would not be time-barred if it were encompassed by that subsection, which provides that government suits "to establish the title to, or right of possession of, real or personal property" are not subject to the limitations periods in other parts of Section 2415, and which does not contemplate the application of *any* alternative timing requirement. See S. Rep. No. 1328, 89th Cong., 2d Sess. 3 (1966) (explaining that Section 2415(c) "makes it clear that no one can acquire title to Government property by adverse possession or other means," because it "provid[es] that there is no time limit within which the Government must bring" the actions listed in Section 2415(c)); H.R. Rep. No. 1534, 89th Cong., 2d Sess. 5 (1966) (same).[4]

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[4] Respondents insinuate (Br. in Opp. 27) that the United States described the statute of limitations as inapplicable in its amicus brief in *Oneida II*. The passage they cite, however, was to the same effect as the discussion above: that Congress's "extensions of the statute of limitations were intended to *preserve damage actions* based on eastern Indian land claims, including those of the Oneidas." U.S. Amicus Br. at 25, *Oneida II*, *supra* (Nos. 83-1065 and 83-1240) (emphasis added); see also *id.* at 24 (the statute "clearly reflects a congressional intent that a tribal possessory action such as that involved here is *not* barred by a statute of limitations"). Far from suggesting that Section 2415(a) and (b) were irrelevant, the United States disclaimed (*id.* at 24-25) as "no longer accurate" some pre-1982 statements in the legislative history suggesting that Indian Tribes "might not be barred from suing for

By recognizing a novel, laches-based defense against a suit brought by the United States in its sovereign capacity, the court of appeals' decision transcends the context of Indian land claims. But allowing that decision to stand would be particularly unfortunate precisely because it arises in a context in which the United States "has charged itself with moral obligations of the highest responsibility and trust, obligations to the fulfillment of which the national honor has been committed." *Jicarilla Apache Nation*, 131 S. Ct. at 2324 (quotation marks and citations omitted).

As the Ninth Circuit observed in *Brooks* v. *Nez Perce County*, 670 F.2d 835 (1982)—a case which respondents do not acknowledge but which is irreconcilable with the decision below—when Congress extended the statute of limitations in 28 U.S.C. 2415, "it was aware that claims as old as 180 years might be protected and that extension of the statute would impose burdens on state and local governments." 670 F.2d at 837. Nevertheless, the Ninth Circuit explained, Congress concluded that "failure to extend the statute would result in inequities to Indians who would otherwise be deprived of rights due to delinquent and dilatory action by the government[.]" *Ibid.* (quotation marks and citation omitted).[5]

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damages even *after* the United States is time-barred under 28 U.S.C. 2415(a) and (b)."

[5] *Brooks* also noted that, although "laches [did] not bar the government's claim for damages," its delay in bringing suit could "be weighed by the district court in calculating damages." 670 F.2d at 837. The United States acknowledges that its delay may have an effect on the amount of any recovery here. See Pet. 22 n.7; see also Pet. App. 67a n.8 (Gershon, J., concurring in part and dissenting in part) (suggesting that equitable considerations could warrant a reduction in prejudgment interest); *Oneida II*, 470 U.S. at 253 n.27.

This Court should not permit the court of appeals to reverse Congress's considered judgment in that regard.

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

Respondents contend (Br. in Opp. 21) that dismissal of the United States' claim "follows from this Court's treatment of the claim in *[City of] Sherrill*." In fact, the court of appeals' decision is flatly inconsistent with the Court's decision in that case.

1. Respondents first err in collapsing the distinction between the viability of a claim and the viability of a particular remedy. Respondents contend that, if "ejectment and possession" are unavailable, so are "petitioners' requests for declaratory and monetary relief," because the latter remedies, like the former, would necessarily be based on the premise that the transactions that the United States and the Tribes "challenge were invalid in the first instance." Br. in Opp. 23. See Pet. App. 38a, 46a (court of appeals' conclusion that "any nonpossessory claim" in the United States' complaint "is based entirely on the Nonintercourse Act," and "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"); *id.* at 47a ("adroit manipulation of the remedy sought will not rescue a claim").

But this Court squarely rejected such reasoning in *City of Sherrill* itself. The Court observed 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)). Indeed, it quoted the district

court's opinion in this very case as authority for the "sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right." *Ibid.* (quoting Pet. App. 245a). And the Court endorsed the district court's "pragmatic approach," *id.* at 211 (quoting Pet. App. 251a), under which it refused to allow ejectment or monetary relief against private landowners while still recognizing that monetary relief could be available from the State, Pet. App. 253a-257a.

The Court's refusal in *City of Sherrill* to "disturb [the] holding in *Oneida II*" (544 U.S. at 221) further demonstrates the critical distinction between a claim that a statute has been violated and the form of relief that a plaintiff seeks. The claim that this Court countenanced in *Oneida II*, which sought damages, depended entirely on establishing "unlawful possession." *Oneida II*, 470 U.S. at 233; see also *City of Sherrill*, 544 U.S. at 208 (explaining that the Oneidas' earlier suit "alleged that the cession of 100,000 acres to New York State in 1795 * * * violated the Nonintercourse Act and thus did not terminate the Oneidas' right to possession"). The decision below, however, concluded that, under *City of Sherrill*, a claim of unlawful possession would be too "disruptive of justified societal interests" to survive, "*regardless of the particular remedy sought*." Pet. App. 44a (emphasis added); see also Br. in Opp. 17 ("damages in lieu of ejectment are barred because ejectment is barred"). If that were true, then *City of Sherrill* could not have left *Oneida II*'s holding "[un]disturb[ed]" simply because "damages" were at issue in one case but not

the other. 544 U.S. at 221. This Court clearly believed that the nature of the remedy was important.[6]

2. Another fundamental mistake in respondents' view of *City of Sherrill* is their conclusion (Br. in Opp. 24) that "[a]ny award of damages [here] would be extremely disruptive." In fact, as the United States explains in its petition (at 23-25), *City of Sherrill* described the disruptive nature of the remedy sought there—a disruption in "the governance of central New York's counties and towns," 544 U.S. at 202—by contrasting it with other cases (including this one) in which the United States, the Oneidas, or other Tribes sought "money damages only," *id.* at 213, or were allowed to recover only money damages when the passage of time or other events had made it "impracticab[le]" to return land to Indian control. *Id.* at 219; see also *Yankton Sioux Tribe of Indians* v. *United States*, 272 U.S. 351, 357 (1926); *United States* v. *Minnesota*, 270 U.S. 181, 215 (1926); *Felix* v. *Patrick*, 145 U.S. 317, 334 (1892).

Respondents speculate (Br. in Opp. 24) that even monetary relief would be disruptive because any ruling "that these ancient transactions were unlawful * * * could jeopardize local mortgages and inhibit investment in local real estate and businesses." Were that true, that effect should have followed from the test case, in which, more than 25 years ago, this Court allowed the Oneidas to pursue "their claim to be compensated 'for violation

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[6] Respondents contend (Br. in Opp. 25-26) that "the holdings of *Oneida II* and *[City of] Sherrill* stand side-by-side," because *Oneida II* had not expressly "consider[ed] whether the Oneidas' claim is barred by laches." But respondents disregard the *reason* the Court gave for not disturbing *Oneida II*: it was because *City of Sherrill* raised no "question of damages," 544 U.S. at 221, which *Oneida II* had allowed, not because *Oneida II* had failed to definitively rule on laches.

of their possessory rights,'" and in which Oneida and Madison Counties were ordered to pay a $57,000 judgment. *City of Sherrill*, 544 U.S. at 209 (citation omitted); Pet. App. 3a. Moreover, as the United States explains in its petition (at 27-29), a decision requiring the State to disgorge its profits but forswearing ejectment and other similar remedies—in other words, the kind of decision the district court in this case envisioned and the Court in *City of Sherrill* approved—would bring this long-lasting dispute to a conclusion without threatening or altering current ownership rights.

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For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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