CASE NO. 08-3621

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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OTTAWA TRIBE OF OKLAHOMA,

Plaintiff – Appellant,

v.

OHIO DEPARTMENT OF
NATURAL RESOURCES, *et al.*

Defendants – Appellees.

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APPEAL FROM THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO

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# BRIEF OF *AMICI CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS, GRAND TRAVERSE BAND OF OTTAWA AND CHIPPEWA INDIANS, HANNAHVILLE INDIAN COMMUNITY, KEWEENAW BAY INDIAN COMMUNITY, LITTLE RIVER BAND OF OTTAWA INDIANS, LITTLE TRAVERSE BAY BANDS OF ODAWA INDIANS, MATCH-E-BE-NASH-SHE-WISH BAND OF POTTAWATOMI INDIANS OF MICHIGAN, AND SAGINAW CHIPPEWA INDIAN TRIBE IN SUPPORT OF NEITHER PARTY AND OF NEITHER AFFIRMANCE NOR REVERSAL

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**DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, the National Congress of American Indians, Grand Traverse Band of Ottawa and Chippewa Indians, Hannahville Indian Community, Keweenaw Bay Indian Community, Little River Band of Ottawa Indians, Little Traverse Bay Bands of Odawa Indians, Match-e-be-nash-she-wish Band of Pottawatomi Indians of Michigan, and Saginaw Chippewa Indian Tribe make the following disclosures:

1. Is any of said parties a subsidiary or affiliate of a publicly owned corporation? NO

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? NO

September 8, 2008

s/ Riyaz A. Kanji
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## STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian Tribes and Alaskan Native villages. NCAI is dedicated to protecting the rights fundamental to the continued functioning of Tribes as vital, sovereign governments, including the rights secured to them through treaties entered into with the United States.

Each of the amici Tribes is found within the State of Michigan, and each is party to one or more treaties with the United States. *See, e.g,* 1836 Treaty of Washington, 7 Stat. 491; 1842 Treaty of La Point, 7 Stat. 591; 1855 Treaties of Detroit, 11 Stat. 621 and 663; and 1864 Treaty with the Chippewa, 14 Stat. 657. The rights secured to the Tribes through those treaties remain critical to their enduring existence as tribes, and have served as the basis for the forging of cooperative relationships with the State and with local units of government that have enhanced the interests of all involved.

This case was brought by the Ottawa Tribe of Oklahoma, which resides outside of this Circuit, against the Department of Natural Resources for the State of Ohio, a state which has no federally recognized tribes found within its borders. As the case was litigated and resolved below, the doctrine of laches took on a central,

[1] No persons or entities other than Amici have made a monetary contribution to the preparation or submission of this brief.

but entirely unnecessary, role. The parties casually assumed that the doctrine can be applied to assertions of tribal treaty rights, and the district court casually premised portions of its opinion on the same assumption. NCAI and the amici Tribes have a strong interest in ensuring that this Court does not make the same mistake.

The Amici take no position on the proper interpretation of the treaty language at stake in this case. They do urge, however, that if this Court agrees with the district court's treaty interpretation as not supporting the Ottawa Tribe's claims, principles of judicial restraint and of fairness to the tribes within this Circuit counsel against this Court going further and examining the issue of laches. Any such examination could directly implicate the amici Tribes' fundamental interests. On the other hand, if this Court disagrees with the district court's treaty interpretation, and hence finds it necessary to address any laches argument made by the Department, it should reaffirm the time-honored principle that laches cannot operate to defeat tribal treaty rights. The Amici, in sum, have a strong interest in ensuring that this Court's resolution of this case does not turn on a discussion or application of the laches doctrine in a manner that upends well-established law and, in doing so, directly threatens the treaty rights that are fundamental to the continued existence of the amici Tribes.

## INTRODUCTION

In the decision below, the district court examined the claims raised by the Ottawa Tribe of Oklahoma (the "Tribe") under two separate rubrics: (1) it interpreted the treaty language on which those claims are based; and (2) it analyzed whether the criteria for applying the doctrine of laches to equitable claims are satisfied in this case. The Amici respectfully submit that if this Court agrees with the district court's interpretation of the treaties (as not supporting the Tribe's claims) it need not, and under fundamental principles of judicial restraint should not, reach the broader and more complex issue of laches. If this Court, on the other hand, disagrees with the district court's treaty interpretation, it should hold that the doctrine of laches is inapplicable to assertions of Indian treaty rights. Accordingly, under either scenario this Court should, unlike the district court, decline to assess the Tribe's claims under the laches doctrine.

The Tribe sought a declaratory judgment below that it was entitled, under treaties entered into between the United States and the Tribe, to exercise two general categories of rights: fishing rights in Lake Erie ("Lake Erie rights"), and inland hunting and fishing rights in portions of northern Ohio ("inland rights"). (First Amended Complaint, R. 12, ¶¶ 8-19, 41(2); ROA pp. 83-86, 90).

The Ohio Department of Natural Resources (the "Department") moved for summary judgment, arguing that the Tribe's claims were barred by laches. *See*

(Defendant's Motion for Summary Judgment, R. 69; ROA p. 369). In its response, the Tribe made no arguments in support of its claim to inland rights, and expressly abandoned that claim. *See* (Plaintiff's Opposition to Summary Judgment, R. 89, p. 12; ROA p. 541 ("The Court may . . . limit its analysis to commercial fishing on Lake Erie")).

The district court subsequently expanded the issues on summary judgment "to include the issue of whether the language in any of the treaties provides the Plaintiffs fishing rights on Lake Erie," and directed the parties "to file supplemental briefs on that issue by identifying in any one or more of the treaties the specific language granting or denying Plaintiff the right to fish on Lake Erie." (Order, R. 94; ROA p. 6).

The district court granted summary judgment in favor of the Department. (Memorandum Opinion and Order ("Opinion"), R. 103; ROA p. 294). With respect to all of the Tribe's asserted Lake Erie rights, the court based its grant of judgment on the specific language of the relevant treaties. *See* (Opinion, R. 103, pp. 14-23; ROA pp. 307-16). It also analyzed the Tribe's claims under the doctrine of laches, but found that laches could not defeat the Lake Erie claims because the Department had not demonstrated that any prejudice to it had been caused by the Tribe's alleged delay. (*Id.*, R. 103, pp. 11-14; ROA pp. 304-07). With respect to the Tribe's asserted inland rights, the district court deemed that claim abandoned.

(*Id.*, R. 103, pp. 9-10 and n.3; ROA pp. 302-03 and n.3) ("Plaintiff did not address its [inland] rights . . . in its opposition brief . . . . Failure to support a claim renders it abandoned."). It nevertheless addressed the inland claims and found them to be barred by laches. (*Id.*, R. 103, pp. 9-11; ROA pp. 302-04).

On appeal, the Tribe challenges the district court's ruling solely with regard to its asserted Lake Erie rights. The Tribe has not sought to reassert its abandoned claim to inland rights. It does not challenge the district court's determination that the Tribe abandoned that claim, or the district court's application of laches to that claim. Hence, the sole issue presented for review by this Court is the district court's ruling that the Tribe had no viable Lake Erie fishing rights after 1831.

## ARGUMENT

### I. THIS COURT SHOULD NOT ASSESS THE LAKE ERIE CLAIMS UNDER THE LACHES DOCTRINE

With respect to the Tribe's asserted Lake Erie rights, the district court granted summary judgment to the Department based on the specific language of the treaties, but also examined whether the Tribe's Lake Erie claims were barred by laches. *See* (Opinion, R. 103, pp. 11-23; ROA pp. 304-16). Fundamental principles dictate that this Court should not assess the Lake Erie claims under the laches doctrine.

1. This Court Should Review The District Court's Interpretation Of The Treaty Language First And End Its Analysis There If It Agrees With That Interpretation

Where a case presents more than one discrete, potentially dispositive ground for decision, a federal appeals court appropriately limits its ruling to the narrowest ground available. *See, e.g., Air Courier Conference of Am. v. Am. Postal Workers Union*, 498 U.S. 517, 531 (1991) (Stevens, J., concurring) ("Faithful adherence to the doctrine of judicial restraint provides a fully adequate justification for deciding this case on the best and narrowest ground available.").

In determining the Tribe's asserted Lake Erie rights, the district court passed separately upon the potentially dispositive issues of the treaty language and of laches. (Opinion, R. 103, pp. 11-23; ROA pp. 304-16). The two issues are separate and involve distinct considerations. *Cf. Gen. Drivers, Salesmen and Warehousemen's Local Union No. 984 v. Malone & Hyde, Inc.*, 23 F.3d 1039, 1046 (6th Cir. 1994) (adjudicating terms of labor contract and stating that "consideration of the issue [of laches] in no way involves a consideration of the merits of the underlying substantive issue") (internal quotation marks omitted). And as between the treaty language and the issue of laches, the treaty language is clearly the narrower available ground to potentially resolve the appeal. It involves specific disputed language contained in a limited set of treaties; it implicates a finite set of asserted rights clearly circumscribed in both substance and geographic

scope; and its resolution is unlikely to affect the rights of others beyond the parties to this case. *See United States v. Robison*, 505 F.3d 1208, 1221 (11th Cir. 2007) ("The narrowest grounds is understood as the less far-reaching . . . ground.") (internal quotation marks omitted). Moreover, the parties here chose to litigate the treaty interpretation issues based on the express language of those treaties, and without resort to the extensive historical evidence that is often presented to the courts to inform their understanding of such language.

By contrast, the scope and substance of the issues potentially implicated by a laches analysis inherently are not susceptible of such sharp containment. *See, e.g., Guaranty Trust Co. of N.Y. v. York*, 326 U.S. 99, 119 (1945) (Rutledge, J., dissenting) (referring to laches as a "notoriously amorphous doctrine"). Laches is a general doctrine with broad policy underpinnings that turns on principles of equity and reasonableness. In the context of Indian treaty rights, this Court's adjudication of a laches defense would, unlike a ruling on the specific treaty language, risk creating law with implications going far beyond the facts of, and parties to, this case. That risk is particularly acute in this Circuit.

All twelve of the federally recognized tribes located within the jurisdiction of this Court, including the amici Tribes, reside within the State of Michigan. As explained above, each amici Tribe is party to solemn treaties entered into with the United States in the nineteenth century, and each continues to exercise vital rights

under those treaties. The amici Tribes enjoy enduring relationships with the United States, the State and local governments of Michigan, and the non-Indian citizens of Michigan. These relationships have not infrequently been described as exemplary, and have given rise to important agreements – predicated on the continued existence of the tribes' treaty rights – that have been designed to further the mutual interests of the Tribal and State governments and their citizens. *See, e.g.*, *State, Tribes Approve Historic Inland Hunting and Fishing Rights Agreement*, November 21, 2007, *at*: http://www.michigan.gov/dnr/0,1607,7-153--181563--,00.html (last visited September 1, 2008) (discussed in more detail below).

The treaty rights of the amici Tribes remain essential to the effectiveness and independence of their governments, and to the economic vitality of their own and many surrounding communities. It is no exaggeration to state that the treaty rights of Indian tribes are fundamental to their existence as sovereigns. Review by this Court of the district court's laches ruling would unnecessarily risk affecting those rights in a way that resolving this appeal on the narrower grounds of the treaty language specific to the Ottawa Tribe would not. The Amici respectfully urge this Court to exercise judicial restraint and to avoid that unwarranted risk. *See, e.g., In re Parker*, 49 F.3d 204, 207 n.2 (6th Cir. 1995) (declining to address "argument with broader implications" because "it is appropriate to rule on the narrower grounds available in this case"). If this Court agrees with the district court's

interpretation of the treaties pertaining to the Tribe's asserted rights in Lake Erie, there is no need to go further by addressing the question of laches.

In addition to the prudent avoidance of far-reaching implications, resolving this appeal on the basis of the treaty language would also spare this Court an altogether unnecessary confrontation with the complex and controversial questions of fact and law inherent in a laches analysis. "[I]n keeping with notions of judicial restraint, federal courts should not reach out to resolve complex and controversial questions unnecessarily." *Gen. Acquisition, Inc. v. GenCorp*, 23 F.3d 1022, 1031 (6th Cir. 1994) (internal quotation marks omitted); *see also Brown v. Plaut*, 131 F.3d 163, 170 (D.C. Cir. 1997) ("We do not think it necessary or even useful to resolve so many complex and fact-specific issues in the context of this case which it may be possible to decide on far narrower grounds."). The record on the district court's ruling on the treaty language is modest. On that issue, the parties did not develop expert testimony, and submitted briefs with no attachments other than the relevant treaty language. *See* (Plaintiff's Supplemental Brief, R. 95; ROA p. 8; Defendant's Supplemental Brief, R. 97; ROA p. 69).

By contrast, the district court's ruling on laches entailed a highly fact-intensive inquiry into the relative equities of the parties' conduct and interests spanning centuries, and evaluation of competing expert opinions regarding the potential impact on the Lake Erie fishery from the exercise of the Tribe's asserted

fishing rights. *See* (Opinion, R. 103, pp. 6-14; ROA pp. 299-307). *Cf. Int'l Union of Operating Eng'rs v. Fischbach & Moore, Inc.*, 350 F.2d 936, 937 (9th Cir. 1965) ("[R]esort to the doctrine of laches . . . adds complex factual considerations to each controversy"). Moreover, as discussed in greater detail below, the threshold question of whether laches is even applicable to modify or eliminate Indian treaty rights – a question that the district court did not address – raises serious and difficult separation of powers issues because "Congress possesses plenary power . . . to modify or eliminate tribal rights. Accordingly, only Congress can alter the terms of an Indian treaty[.]" *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998) (citations omitted). *See also Turner v. Safley*, 482 U.S. 78, 85 (1987) (where authority is committed to coordinate branch, "separation of powers concerns counsel a policy of judicial restraint").

Accordingly, if this Court's interpretation of the treaties suffices to resolve this case, it should end its analysis there. Doing so would be consistent with the practice of this and other circuit courts with respect to laches. *See, e.g., Murray Hill Publ'ns. v. ABC Communications, Inc.*, 264 F.3d 622, 639 (6th Cir. 2001) (resolving issue on merits and stating that "[a]ccordingly, we see no need to discuss laches"); *Aluminum, Brick & Glass Workers Int'l Union v. Gen. Refractories Co.*, No. 94-6139, 1995 WL 283771, 54 F.3d 776 (Table), at *4 (6th Cir. 1995) (affirming district court on principal grounds and stating that laches

"need not be addressed on appeal" where laches was considered by district court "only as an alternative ground for granting summary judgment"). *See also Delaware Nation v. Pennsylvania*, 446 F.3d 410, 415 n.8 (3d Cir. 2006) ("[D]efendants urge us to dismiss the complaint . . . [based on] laches[.] These defendants cite *City of Sherrill v. Oneida Nation of New York*, 544 U.S. 197 (2005), and claim that the same considerations that led the *Sherrill* court to rule against the Oneida Indian Nation are relevant here. *We need not address this argument* because we find that the Delaware Nation's claims fail on the merits") (emphasis added); *In re Inland Gas Corp.*, 208 F.2d 13, 16 (6th Cir. 1953) (because the case could be resolved on the merits, "we find it unnecessary to enter upon a discussion of controversial issues . . . [including] laches"); *Puerto Rico Maritime Shipping Auth. v. Leith*, 668 F.2d 46, 50 (1st Cir. 1981) ("Instead of resolving the difficult laches question, the district court appropriately chose to address the plaintiff's motion for voluntary dismissal").

2. If This Court Disagrees With The District Court's Treaty Interpretation, It Should Hold That The Laches Doctrine Is Not Applicable To Indian Treaty Rights

If this Court disagrees with the district court's interpretation of the relevant treaties, it should reverse the district court on that basis; or, if it deems additional factual development appropriate and necessary to the interpretation of the treaties, it should remand the case to the district court in order that such additional

development can take place. In either case, this Court should reverse the district court's decision to analyze the Tribe's assertion of treaty rights under the laches doctrine. *See Chirco v. Crosswinds Cmtys, Inc.*, 474 F.3d 227, 231 (6th Cir. 2007) (for the "threshold question of law as to whether laches is even applicable in a particular situation, . . . our review is *de novo*").

Laches is not applicable to a direct assertion of rights guaranteed by a treaty entered into between an Indian tribe and the United States. As the Ninth Circuit has held, in a case involving a tribe's direct assertion of treaty rights:

> [L]aches . . . is not available to defeat Indian treaty rights. Although . . . the Tribes waited 135 years to assert their shellfishing rights, . . . we reiterate that we are interpreting a treaty, and that treaties enjoy a unique position in our law.

*United States v. Washington*, 157 F.3d 630, 649 (9th Cir. 1998) (internal quotation marks omitted); *Swim v. Bergland*, 696 F.2d 712, 718 (9th Cir. 1983) ("Laches . . . is not available to defeat Indian treaty rights. . . . This is true even where the Indians have long acquiesced in use by others").

A principal aspect of the "unique position" of Indian treaties in the law is that the power of Congress with respect to the terms of Indian treaties is "plenary and exclusive." *United States v. Lara*, 541 U.S. 193, 200-01 (2004); *see also Yankton Sioux Tribe*, 522 U.S. at 343 ("Congress possesses plenary power over Indian affairs, including the power to modify or eliminate tribal rights. . . . Accordingly, only Congress can alter the terms of an Indian treaty") (citations

omitted). Thus, while generally a "court's power . . . includes the possibility that a case may be dismissed on the basis of laches," *Cleveland Newspaper Guild v. Plain Dealer Publ'g Co.*, 839 F.2d 1147, 1155 (6th Cir. 1988), that power does not include the judicial application of laches to modify or eliminate Indian treaty rights. To do so would intrude unduly onto the province of Congress.

Nothing in the Supreme Court's decision in *Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), undermines this conclusion. In *Sherrill*, the Court held that equitable considerations barred a tribe's attempt to unilaterally reassert tax immunity with respect to portions of its aboriginal territory reacquired in fee simple on the open market. In so holding, the Court did not alter the historic prohibition against the judicial application of laches to Indian treaty rights. *Sherrill*'s predecessor, *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985) ("*Oneida II*"), turned specifically on the existence and viability of the Oneida Nation's federal "common-law right of action for unlawful possession." *Id.* at 233. *Sherrill* addressed the limits of that same right – *i.e.*, "a federal common law right to Indian homelands, a right this Court recognized in *Oneida II*." *See Sherrill*, 544 U.S. at 210 (internal quotation marks omitted); *see also Skokomish Indian Tribe v. U.S.*, 410 F.3d 506, 514 (9th Cir. 2005) (*Oneida II* involved "a federal common law damages claim for unlawful possession of land. *The Court's decision was not based on any treaty*. Rather, it was based on well-

established federal common law principles regarding aboriginal possessory rights in land. *See* [*Oneida II*] at 235-36, 105 S.Ct. 1245. By contrast, the Tribe in our case is seeking to [assert] fishing rights reserved to it by treaty" (emphasis added)).[2]

To read *Sherrill* as opening up all assertions of treaty-based rights to the defenses recognized in that case, this Court would have to conclude that the Supreme Court sought there to upend the long-settled rule that only Congress can abrogate the terms of a treaty, and that it did so by abrogating those terms itself, and without comment. This Court should be extremely reluctant to impute a usurpation of that sort to the Supreme Court. The Supreme Court has repeatedly affirmed that the power to alter treaty rights belongs solely to Congress, and has underscored the sacrosanct nature of those rights by outlining the very limited circumstances under which it will conclude that Congress has indeed abrogated a particular treaty right:

> We have required that Congress' intention to abrogate Indian treaty rights be clear and plain. Cohen 223; see also *United States v. Santa Fe Pacific R. Co.*, 314 U.S. 339, 353 (1941). "Absent explicit statutory language, we have been *extremely reluctant* to find congressional abrogation of treaty rights. . . ." *Washington v. Washington Commercial Passenger Fishing Vessel Assn.,* 443 U.S. 658, 690 (1979). We do not construe statutes as abrogating treaty

[2] In *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005), the Second Circuit applied laches to the same right at issue in *Oneida II* and *Sherrill*. *See id.* at 276 ("[T]he Cayugas are seeking to enforce a 'federal common law' right of action for violation of their possessory property rights").

> rights in "a backhanded way," *Menominee Tribe v. United States*, 391 U.S. 404, 412 (1968); in the absence of explicit statement, "'the intention to abrogate or modify a treaty is *not to be lightly imputed* to the Congress.'" *Id.* at 413, quoting *Pigeon River Co. v. Cox Co.*, 291 U.S. 138, 160 (1934). *Indian treaty rights are too fundamental to be easily cast aside.*

*United States v. Dion*, 476 U.S. 734, 738-39 (1986) (emphasis added); *see also Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-03 (1999) (same). Indeed, the *Sherrill* Court expressly recognized that its ruling did not — because it could not — defeat the Oneida Nation's treaty-based rights in its reservation. *See* 544 U.S. at 215-16 and n.9 (acknowledging that "'[o]nly Congress can alter the terms of an Indian treaty by diminishing a reservation.'" (quoting *Yankton Sioux Tribe*, 522 U.S. at 343)).

In sum, the district court exceeded its power in analyzing the Tribe's asserted treaty rights under the doctrine of laches.[3] If this Court finds it necessary to go beyond treaty interpretation in this case, it should hold that laches is not applicable to Indian treaties.

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[3] One other district court has expressed, in dicta, the erroneous view that laches may be applied by courts to modify or eliminate Indian treaty rights. *See Paiute-Shoshone Indians v. City of Los Angeles*, 2007 WL 521403, at *25 (E.D. Cal. 2007). Other than the district courts in that case and here, the undersigned have found no instances, pre- *or* post-*Sherrill*, of a federal court accepting the applicability of laches to an assertion of Indian treaty rights.

## II. IF THE COURT REVIEWS THE MERITS OF THE DISTRICT COURT'S LACHES RULING AS TO THE TRIBE'S LAKE ERIE RIGHTS, IT SHOULD AFFIRM THAT RULING IN THE NARROWEST POSSIBLE TERMS

In considering the substance of the Department's laches defense to the Tribe's Lake Erie rights, the district court determined that the Tribe had unreasonably delayed in asserting those rights, (Opinion, R. 103, pp. 6-9; ROA pp. 299-302), but that the Department had failed to establish that it had been prejudiced by the Tribe's delay (*id.*, R. 103, pp. 11-14; ROA pp. 304-07). The district court was correct that the Department had failed to establish prejudice, and this was a sufficient basis to uphold its rejection of the Department's laches defense as to the Tribe's asserted Lake Erie rights. *See, e.g., Int'l Union v. Cummins, Inc.*, 434 F.3d 478, 487 (6th Cir. 2006) ("Because Cummins cannot satisfy the first element of the laches defense, we need not consider the prejudice element."). However, the terms of the district court's laches analysis were unnecessarily sweeping and did not reflect many factors that are critical to any fair adjudication of Indian treaty rights where the passage of time and implications for state sovereignty are at issue. The Amici wish to underscore some of those factors for this Court and urge it to avoid a laches analysis similar to that of the district court in the event that it does venture into a substantive consideration of the Department's laches defense.

1. Delay And The Significance Of Federal Recognition

In evaluating the Department's assertion that the Tribe had unreasonably delayed asserting its treaty rights, the district court sweepingly proclaimed that "fourteen decades . . . far exceeds *any* reasonable time frame to assert treaty rights[.]" (Opinion, R. 103, p. 7; ROA p. 300) (emphasis added). It stated also that "[f]ederal jurisdiction has been available for over 125 years." (*Id.*, R. 103, p. 8; ROA p. 301).[4] These generic proclamations reach imprudently beyond the facts available to the district court.

For example, the district court noted briefly that the Ottawa Tribe lacked federal recognition for significant portions of its history, (*id.*, R. 103, pp. 8-9; ROA pp. 301-02), but did so without the benefit of substantial argument as to the implications of that fact, *see, e.g.*, (Plaintiff's Opposition to Summary Judgment, R. 89, p. 18; ROA p. 547), and clearly did not apprehend those implications itself. The importance of federal recognition for a tribe's historic ability to assert its treaty rights was often profound and could vary widely among tribes. Formal federal recognition of a tribe by the United States is a prerequisite to an Indian

[4] The district court further stated that the Tribe's "excessive delay is *presumed* unreasonable, as Plaintiff knew of its rights under the various signed treaties." (Opinion, R. 103, p. 7; ROA p. 300 (emphasis added)). This Court has flatly rejected such a presumption. To the contrary, "[i]n this Circuit, there is a strong presumption that a plaintiff's delay in asserting its rights *is* reasonable as long as an analogous state statute of limitations has not elapsed." *Nartron Corp. v. STMicroelectronics, Inc.*, 305 F.3d 397, 408 (6th Cir. 2002) (emphasis added). No analogous state limitations period had elapsed in this case.

tribe's government-to-government relationship with the United States and to the government's fiduciary trust relationship to the tribe. Tribes lacking federal recognition "have no legal relationship with the federal government. As a result, they have very little, if any, federally sanctioned authority to function legally[.]" COHEN'S HANDBOOK OF FEDERAL INDIAN LAW § 3.02[3], at 139 (2005 Ed.).

Federal recognition can be unilaterally terminated by the United States. *See Lara*, 541 U.S. at 203 (and cases cited therein). The recognition of many Indian tribes, including many of the amici Tribes, was terminated by the United States for long periods, sometimes exceeding a century, and with immense consequences. For example, as this Court has observed, the United States illegally terminated federal recognition in 1872 of the Grand Traverse Band of Ottawa and Chippewa Indians, which is one of the amici Tribes here, based on a misreading of the 1855 Treaty of Detroit. Thereafter, the United States "refus[ed] to carry out any trust obligations for over one hundred years. [As a result], the [Grand Traverse] Band experienced increasing poverty, loss of land base and depletion of the resources of its community[.]" *Grand Traverse Band of Ottawa and Chippewa Indians v. Office of the U.S. Attorney*, 369 F.3d 960, 968-69 (6th Cir. 2004) (internal quotation marks omitted).

The potential consequences of termination were not limited to the United States' passive refusal to carry out its trust obligations and the resulting social and

economic near-annihilation of a tribe. In Michigan, those consequences included the United States' proactive debilitation of tribes' capacities to function as legal entities. In *United States v. Michigan*, 471 F. Supp. 192 (W.D. Mich. 1979), the United States had sued on behalf of a federally recognized tribe in Michigan to enforce its rights to fish in the Great Lakes based on an 1836 treaty. Other Michigan tribes sought party status. The district court limited participation to recognized tribes because, in its view, federal recognition was a prerequisite to establishing "plaintiff-intervenor tribes as the modern tribal successors to the Indians who were signatory to the Treaty of 1836." *Id.* at 249.[5]

When the Grand Traverse Band attempted to intervene later in that case, the United States strenuously opposed its participation based on its lack of federal recognition. As this Court has explained:

> In a 1979 brief filed in a case concerning the Band's fishing rights under a 1836 treaty, the United States argued, ["]The problem with fishing rights for [the Grand Traverse Band of] Ottawas is that there is no federally recognized tribal entity. Without such an entity, the federal government must oppose the assertion of treaty fishing rights[."]

[5] The district court in *United States v. Michigan* relied extensively on the Supreme Court's decision in *Menominee Tribe of Indians v. United States*, 391 U.S. 404 (1968), for general principles governing the abrogation of treaty rights. The district court failed to note that its limitation of tribal parties to recognized tribes was inconsistent with *Menominee*, where the Supreme Court deemed the tribe's treaty rights viable despite the tribe's lack of federal recognition. *See id.* at 412-13.

*Grand Traverse Band*, 369 F.3d at 969 n.4 (quoting Mem. of the United States Relating to Treaty Fishing Rights of Ottawa Indians, *United States v. Michigan*, No. M 26-73 (W.D. Mich), at 2) (emphasis omitted).

> In that 1979 brief, the United States further argued that:
>
> [A]n individual or group does not make a sufficient showing of entitlement to the exercise of the [treaty] right merely by a showing that the individual or group members descend from the tribes and bands signatory to the treaty securing the fishing right. It must, in addition, be shown that the individuals involved are members of a tribe which is a successor in interest to the tribes and bands who secured the treaty right. . . .
>
> Because treaty fishing rights are tribal rights, and there currently are no federally recognized Ottawa tribal entities, there are no Ottawa fishing rights currently exercisable under the Treaty of 1836. The United States must oppose all attempts by individuals of Ottawa ancestry to establish such rights, since their rights depend upon membership in a tribe possessing the rights, and there is no such tribe of Ottawas.

Ex. A. (Memorandum of the United States Relating to Treaty Fishing Rights of Ottawa Indians, at 2-3 and 11, *United States v. Michigan*, No. M 26-73 (W.D. Mich. 1979)) (internal quotation marks and citations omitted). The United States stated that if the Grand Traverse Band obtained recognition, "it would then be a tribe eligible to exercise the treaty fishing right." *Id.* at 5. Only when the Grand Traverse Band persuaded the court of its imminent recognition in 1980, did the court rule that "[t]here is substantial acknowledgment and recognition of this band of Indians, and sufficient to give them *standing as a party of this Court*, and I so

order." *See* Ex. B. (Partial Hearing Transcript of November 13-14, 1979 in *United States v. Michigan*, No. M 26-73 (W.D. Mich. 1979)).

By the same token, in 1988, the Little Traverse Bay Bands of Odawa Indians (the "Little Traverse Band") attempted to assert its fishing rights under the Treaty of 1836 in federal court. *Little Traverse Bay Bands of Odawa Indians v. Michigan*, File No/ G87-118 CA7. The Little Traverse Band had yet to achieve federal recognition. The district court, citing *United States v. Michigan*, dismissed the complaint because "tribal status is a prerequisite to the enforcement of treaty rights." *See* Ex. C. (Opinion of August 3, 1988 at 2). According to the court, the Little Traverse Band was required to seek "recognition as an Indian tribe . . . *before attempting to secure treaty fishing rights in this Court*." *Id.* at 4 (emphasis added).[6]

For the Michigan tribes, then, federal recognition was more than a prerequisite to the exercise of treaty rights; it was a prerequisite to a tribe's standing to litigate, and to a federal court's very power to adjudicate, such rights. Any prudent judicial assessment of the availability of federal jurisdiction or the reasonableness of a tribe's timing in seeking to vindicate its treaty or other solemn

[6] Nor had the Michigan tribes slept on their rights. For example, as this Court observed, by the time the Grand Traverse Band achieved federal recognition in 1980, it had spent 108 years trying to undo the debilitating effects of termination. *See Grand Traverse Band*, 369 F.3d at 962 ("Between 1872 and 1980, the Band continually sought to regain its status as a federally recognized tribe.").

rights should take such factors meaningfully into account. And any such assessment, in the interests of judicial restraint and of simple justice, should avoid broad-brush proclamations that obliterate differences in the diverse historical experiences of Indian tribes.

2. Exercise Of Indian Treaty Rights Does Not *Per Se* Impair State Sovereignty

In the district court, the Department argued that,

> The disruption occasioned by the exercise of treaty-based rights is real and significant. [The] ODNR has been regulating the Lake Erie fishery for over 150 years, and the exercise of treaty based rights is an affront to Ohio's previously-unchallenged sovereign right to manage her natural resources. This affront is not different in kind from that resulting from the declaration that property is no longer subject to the taxing authority, as sought by the Oneida in *Sherrill*.

(Defendant's Reply, R. 91, pp. 16-17: ROA pp. 622-23).

The argument is seriously misplaced. No sensible reading of *Sherrill* supports the radical proposition that the exercise of Indian treaty rights is *per se* disruptive and an unacceptable "affront" to state sovereignty. As the Supreme Court has instead made clear:

> [A]n Indian tribe's treaty rights to hunt, fish, and gather on state land are not irreconcilable with a State's sovereignty over the natural resources in the State. Rather, Indian treaty rights can coexist with state management of natural resources. Although States have important interests in regulating wildlife and natural resources within their borders, this authority is shared with the Federal Government when [it] exercises one of its enumerated constitutional powers, such as treaty making.

*Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 204 (1999) (citations omitted). Nowhere in *Sherrill* did the Supreme Court disavow these principles.

The district court appropriately rejected the Department's attempt to equate the Lake Erie rights asserted by the Ottawa Tribe in this case with the relief sought in *Sherrill*. *See* (Opinion, R. 103, pp. 11-14; ROA pp. 304-07). But the district court stated, without explanation, that "[l]imiting ODNR's ability to enforce regulations against Plaintiff is definitely prejudicial to the state's interest in managing its own natural resources[.]" (*Id.*, R. 103, p. 12; ROA p. 305). The district court's naked assumption of prejudice to the state's sovereign interests is unwarranted and again illustrates why judicial restraint is critical when a court is opining on doctrines such as laches with potentially far-reaching implications beyond a particular case.

Numerous tribes throughout the United States presently exercise treaty-based hunting and fishing rights. The fact that they do so does not *per se* constitute an infringement on the sovereignty or regulatory capacity of the states in which they are found. *See Mille Lacs Band*, 526 U.S. at 204. To the contrary, the norm today is that states and tribes work closely together to enhance their regulatory regimes and their abilities to manage and conserve shared natural resources. As an example, the State of Michigan and five Michigan tribes recently entered a historic

agreement ("Agreement") coordinating the Tribes' regulation of their members' inland hunting and fishing activities under their rights reserved in the Treaty of 1836 with the State's regulation of hunting and fishing in the same areas. *See* 2007 Consent Decree, *at*: http://www.michigan.gov/dnr/0,1607,7-153-10364_47864-176765--,00.html (last visited September 1, 2008).[7] The Agreement, which the State and Tribes have praised as respectful of their sovereign rights, provides for cooperative regulatory and resource conservation efforts by the State and Tribes. *See Agreement Reached in Inland Treaty Rights Case*, September 26, 2007, *at*: http://www.michigan.gov/som/0,1607,7-192-34773-176736--,00.html (last visited September 1, 2008). The State of Michigan describes the Agreement as a "best-case scenario for the parties involved and for Michigan's natural resources." *See State, Tribes Approve Historic Inland Hunting and Fishing Rights Agreement*, November 21, 2007, *at*: http://www.michigan.gov/dnr/0,1607,7-153--181563--,00.html (last visited September 1, 2008). This best-case outcome would not have been possible had the exercise of solemn Indian treaty rights been deemed *per se* "definitely prejudicial to the state's interest in managing its own natural resources," (Opinion, R. 103, p. 12; ROA p. 305), and as such defeated at the

[7] Not all of the amici Tribes are party to the Agreement. For example, the Keweenaw Bay Indian Community is not signatory to the Treaty of 1836 and took no part in the negotiations with the State of Michigan that resulted in the Agreement. The Keewenaw Bay Indian Community retains rights to hunt and fish on Michigan lands under the 1842 Treaty of La Point.

outset by an unwarranted application of the laches doctrine. Indeed, according to the State of Michigan:

> All previous Supreme Court decisions have ruled that the passage of time cannot erode treaty rights. . . . That is why the state of Michigan chose, in part, not to try the 1836 Treaty rights case in court. . . . A fair and much more acceptable outcome for everyone was the result.

*State, Tribes Approve Historic Inland Hunting and Fishing Rights Agreement, at*: http://www.michigan.gov/dnr/0,1607,7-153--181563--,00.html (internal quotation marks omitted).

In sum, the district court's laches analysis was gratuitously sweeping in its terms and marred by unwarranted assumptions. Should this Court decide to review the merits of the district court's laches ruling as to the Tribe's Lake Erie rights, principles of judicial restraint counsel that it should affirm that ruling in the narrowest of terms.

## III. THE DISTRICT COURT'S RULING THAT LACHES BARRED THE TRIBE'S CLAIM OF INLAND RIGHTS IS NOT AT ISSUE ON THIS APPEAL

The district court's determination that laches barred the Tribe's claim to inland rights is not properly subject to review by this Court. The Tribe abandoned its inland claim below and has not attempted to revive it on appeal. *See* (Plaintiff's Opposition to Summary Judgment, R. 89, p. 12; ROA p. 541 ("The Court may . . . limit its analysis to commercial fishing on Lake Erie"); Opinion, R. 103, pp. 9-10; ROA pp. 302-03 ("Plaintiff did not address its [inland] rights . . . in its opposition

brief . . . . Failure to support a claim renders it abandoned.")). *See also United States v. Layne*, 192 F.3d 556, 566 (6th Cir. 1999) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived") (quotation marks omitted).

Because the Tribe disclaimed its assertion of inland rights prior to the district court's rendering of its decision, no controversy existed as to that claim. *See* 10B Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, Federal Practice and Procedure § 2757 (3d ed. 1998) (stating that no controversy exists "if the opposing party disclaims the assertion of countervailing rights[,]" and that "[i]t is not enough that there may have been a controversy when the action was commenced"); *Parma, Ohio v. Cingular Wireless, LLC*, No. 07-3321, 2008 WL 2178108, at *6 (6th Cir. May 28, 2008) (unpublished) (favorably quoting same). In its opening brief in this Court, the Tribe made no attempt to revive a controversy with respect to its abandoned inland rights. *See generally* August 27, 2008 Appellant Brief. Thus, with respect to those rights, no controversy exists for this Court to resolve. *See United States v. McGee*, 494 F.3d 551, 558 (6th Cir. 2007) (stating that Article III prevents this Court from issuing advisory opinions); *see also United States v. McPhearson*, 469 F.3d 518, 523 (6th Cir. 2006) (arguments not raised on appeal are "abandoned and are not reviewable on appeal"); *Boyd v. Ford Motor Co.*, 948 F.2d 283, 284 (6th Cir. 1991) (district court ruling that certain

claims were time-barred was "not reviewable" because not pressed on appeal). Accordingly, this Court should not review the district court's resolution of the Tribe's abandoned claim to inland rights.

## CONCLUSION

Indian tribes in this Circuit and elsewhere have vital rights and interests potentially implicated by this Court's review of the district court's decision. This Court should exercise judicial restraint and refrain from reaching the laches issue if it agrees with the district court's interpretation of the treaty language, because in that event the treaty language would represent the best and narrowest available grounds to resolve all of the issues in controversy. If this Court reaches the laches issue at all, it should strike down the district court's decision to conduct a laches analysis because that decision was inconsistent with the bedrock principle that only Congress – and not a court applying equitable doctrines – is empowered to modify or eliminate rights guaranteed in Indian treaties. Should this Court nevertheless proceed to address the substance of the district court's laches ruling with respect to the Tribe's Lake Erie rights, it should couch its review in the narrowest possible terms.

Dated this 8th day of September, 2008.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because it contains 6832 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32 (a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared with a proportionally spaced typeface using Microsoft Word 2003, font size 14, and Times New Roman type style.

September 8, 2008

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