No. 15-1215

IN THE

Supreme Court of the United States

SHINNECOCK INDIAN NATION,

Petitioner,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

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

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Shinnecock Indian Nation's claim to a large tract of land in Southampton, New York, is barred by the equitable principles of laches, acquiescence and impossibility under the rule of *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), because, like the claim in *Sherrill*, the claim addresses a large tract of land that the Nation ceded to the Town many years ago and recognition of the claim would disrupt the justifiable and settled expectations of private and public landowners and governments.

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A. Introduction

In this action, petitioner Shinnecock Indian Nation (the "Nation") claims title to thousands of acres in the Town of Southampton, New York, that it alleges were wrongfully taken from it over 150 years ago. The Nation alleges that in 1703, its predecessors entered into a lease that gave it the right to possess these lands for a term of 1000 years. The Nation claims that in 1859, the State of New York passed legislation that authorized the conveyance of a portion of these lands to the Town of Southampton. According to the Nation, under this authority, representatives of the Nation conveyed these lands without the approval of the federal government, thereby violating the Indian Trade and Intercourse Act (the "Nonintercourse Act"), 25 U.S.C. § 177, which requires such approval. Thus, the tribe asserts, the conveyance of these lands was void *ab initio*. In exchange for this conveyance, the Nation acquired its state-created reservation at Shinnecock Neck (which the Nation occupies today).

As relief, the Nation seeks a declaration of its unextinguished title and possessory rights to the entire subject tract and the ejectment of all respondents, who are State and local governments, private businesses, a railroad, and a university. The Nation also seeks money damages for the alleged unlawful possession from 1859 to the present, with interest.

The Nation's ancient land claim is barred. In *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), this Court addressed the Oneida Indian

Nation of New York's attempt to revive its sovereignty over alleged ancestral lands by repurchasing them on the open market. Though the lands were long owned by others, the Oneidas asserted that their title had never been validly extinguished because the original land transfers violated the Nonintercourse Act. This Court held that "standards of federal Indian law and federal equity practice" precluded the tribe's claims. Invoking the doctrines of laches, acquiescence and impossibility, the Court explained that the relief sought by the Oneidas—immunity to real property taxes—was a "disruptive remedy" that was barred by the "long lapse of time" since the tribe's cession of the land in question, the continuous exercise of governmental power over the territory by "New York and its county and municipal units" during that time, the attendant changes in the character of the land, and the impossibility of returning the land to Indian control without "seriously burdening" State and local administration. *Id.* at 216-17, 220.

After *Sherrill* was decided, the United States Court of Appeals for the Second Circuit held that the rule announced in that case barred similarly-disruptive land claims, including those for damages, brought by the Cayuga Indian Nation and the Oneidas, in each case joined by the United States (which by contrast did not act on the Nation's request to intervene here). The Second Circuit found that the tribal claims for restoration of possession and damages for dispossession in those cases were at least as disruptive to settled expectations as the recognition of tax immunity in *Sherrill.* These ancient tribal claims directly challenged all current non-Indian title in the lands, undermining core principles of private land ownership undisturbed since the early days of the

Republic, and sought restoration of possession of the lands coupled with explicit demands or implicit threats to eject current landowners. By challenging title, possession and occupancy of lands held by non-Indians for generations, the Second Circuit held, these ancient land claims implicated all the concerns articulated in *Sherrill* and were properly barred by the same principles of laches, acquiescence and impossibility recognized there. And, the Second Circuit recognized, these principles applied equally to bar the tribes' claims for money damages premised on their allegedly unextinguished rights of possession. *See Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *Oneida Indian Nation of N.Y. v. County of Oneida*, 617 F.3d 114, 137 (2d Cir. 2010).

This Court denied the tribes' and the United States' petitions for certiorari in both cases. *United States v. Pataki*, 547 U.S. 1128 (2006) (denying certiorari in *Cayuga Indian Nation of N.Y. v. Pataki*); *Cayuga Indian Nation of N.Y. v. Pataki*, 547 U.S. 1128 (2006) (same); *United States v. N.Y.*, 132 S. Ct. 452 (2011) (denying certiorari in *Oneida Indian Nation of N.Y. v. County of Oneida*); *Oneida Indian Nation of N.Y. v. County of Oneida*, 132 S. Ct. 452 (2011) (same). The Second Circuit subsequently dismissed two additional ancient Indian land claims based on the principles of *Sherrill*, and in both cases this Court denied the tribes' petitions for certiorari. *Onondaga Nation v. N.Y.*, 500 Fed App'x 87 (2d Cir. 2012), *cert. denied*, 134 S. Ct. 419 (2013); *Stockbridge-Munsee Community v. State of New York*, 756 F.3d 163 (2d Cir. 2014), *cert. denied*, 135 S. Ct. 1492 (2015).

Moreover, the most recent of these cases, *Stockbridge-Munsee*, addressed and rejected the same argument raised

by the Nation here—that this Court's recent decision in *Petrella v. Metro-Goldwyn Mayer, Inc.*, 134 S. Ct. 1962 (2014), invalidated the Second Circuit's recent land claim precedents beginning with *Cayuga*. As the Second Circuit explained, *Petrella* holds only that the traditional equitable defense of laches does not bar legal relief on a federal statutory claim brought within a fixed statute of limitations (there, the Copyright Act's three-year period). For the same reason as in *Stockbridge-Munsee*, *Petrella* is inapposite here because (i) Congress has not fixed a statute of limitations for tribal land claims, and (ii) the "standards of federal Indian law and federal equity practice" invoked in *Sherrill* were based on a variety of equitable doctrines not limited to traditional laches. The holding below, therefore, does not conflict with *Petrella* or any other decision of this Court, and the Nation has not identified any other conflict with any other circuit court of appeals decision.

This case presents a straightforward application of *Sherrill* to yet another—now the fifth—New York Indian land claim based on 19th-century land transfers. The relief that the Nation seeks is at least as disruptive to the long-settled expectations of state and local governments and private landowners as the relief sought in the other cases: the Nation here seeks the ejectment of respondent landowners from lands owned and occupied by non-Indians for over 150 years, and money damages covering the entire period of the alleged dispossession. Accordingly, the court of appeals properly affirmed the dismissal of the Nation's claims in accordance with its precedents. This Court has declined to review each of those precedents, even where the tribes' claims and petitions for certiorari were joined by the United States. In this case, where the

United States has not intervened, there is even less reason for this Court to grant review of this now well-settled law.

Finally, review by this Court is not warranted for the additional reason that any decision in the Nation's favor on the issues presented would not affect the ultimate outcome of the case: the Nation cannot obtain any relief against State respondents because of the State's Eleventh Amendment immunity, and dismissal would be mandated against the remaining respondents because the State is a necessary party.

B. The Nation's Amended Complaint

The Nation commenced this action in the United States District Court for the Eastern District of New York (Platt, J.) in 2005.[1] The amended complaint alleges that the Trustees of the Freeholders of the Town of Southampton executed a lease in 1703 reserving to the Nation's predecessors certain lands in the Town for a term of 1,000 years. Amended Complaint ("AC") ¶ 27. The amended complaint alleges that in 1859, pursuant to 1859 N.Y. Laws chapter 46, the State of New York authorized the conveyance of "thousands of acres" of the lands reserved in the 1703 lease. AC ¶¶ 7, 30. One month later, Trustees of the Nation conveyed these lands to the Trustees of the

[1] The petition for certiorari contains numerous factual allegations not contained in the amended complaint, while omitting other important facts that were alleged in the complaint. Because this petition challenges the district court's dismissal of the complaint for failure to state a claim under Federal Rule 12(b) (6), respondents' summary of the facts adheres to the Nation's allegations as set forth in its amended complaint, which may be found at civil docket number 2:05-cv-02887-DRH-ARL (Doc. # 5).

Proprietors of the Common and Undivided Lands and Marshes of the Town of Southampton, allegedly without federal approval, in violation of the Nonintercourse Act. AC ¶ 31. As a result, the Nation claims, the transaction was void *ab initio*. AC ¶2, 38-39.

As defendants, the Nation named the State of New York and former Governor Pataki ("State respondents"); the County of Suffolk; the Town of Southampton, the Trustees of the Proprietors of the Common and Undivided Lands and Marshes of the Town of Southampton; the Trustees of the Commonality of the Town of Southampton ("Town respondents"); and various non-residential private entities, including the Long Island Railroad Company, Long Island University, several golf courses and other business landowners ("private respondents"). AC ¶¶ 47-71. The complaint enumerates claims against respondents directly under the Nonintercourse Act and for trespass and waste based on their allegedly unlawful occupation of the subject lands, including their occupation of the rights-of-way now used by State Highway 27 and the Long Island Railroad. AC ¶¶ 25, 73-99. The Nation acknowledged the existence of residential property owners within the subject lands whom it did not join as parties, but maintained that it was not seeking to displace, eject or seek damages against these owners "in this action." AC ¶ 72.

Against all defendants,[2] the Nation seeks damages for respondents' wrongful possession of the subject lands for the period 1859 to the present time, including

[2] The amended complaint, while asserting clams against the Long Island Railroad and Long Island University, does not specifically reference them in its prayer for relief.

prejudgment interest, in an amount equal to the subject lands' fair market value, lost profits and consequential damages, and an amount equal to the diminished value of the lands due to extraction of or damage to resources. It also seeks ejectment and declaratory and injunctive relief "as necessary to restore the Nation to possession" of the subject lands. Against the Town defendants, the Nation also seeks an accounting and disgorgement of the value of the benefits received from the sale and resale of the lands. AC Prayer for Relief.

C. This Court Bars "Disruptive" Relief in *Sherrill*

In 2005, this Court decided *Sherrill*, the last in a series of cases where this Court had considered the Oneida Indian Nation of New York's invocation of its aboriginal title to lands in central New York. First, in *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 675 (1974) ("*Oneida I*"), this Court held that the Oneidas' ancient land claim arose under federal law so that the federal courts had jurisdiction over it. Then, in *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 236 (1985) ("*Oneida II*"), this Court held that the tribe's claim could be maintained as a matter of federal common law and was not otherwise barred by a statute of limitations. Although four dissenters would have rejected the Oneidas' claim based on laches, *id.* at 255-73, the majority "[did] not reach this issue," finding that it was not preserved. *Id.* at 244-45; *see also id.* at 253, n. 27 (expressing no opinion on whether other equitable considerations may limit available relief).

In *Sherrill*, the Court held that "standards of Indian law and federal equity practice" barred the Oneidas' assertion of sovereignty over lands that were allegedly

part of their ancient reservation and that the tribe had recently purchased on the open market. 544 U.S. at 202, 211. As in this case, the tribe claimed that the ancient transactions that purported to extinguish its title violated the Nonintercourse Act and were therefore void. It maintained that its recent purchases revived its sovereignty over these lands, immunizing the tribe from real property taxes.

The Court rejected these claims, holding that an adjudication of "present and future" sovereignty would be a "disruptive remedy" that is precluded by the equitable principles underlying the doctrines of laches, acquiescence and impossibility. *Id.* at 216-17, 221. More particularly, the Court observed that the wrongs of which the Oneidas complained "occurred during the early years of the Republic" and for "the past two centuries, New York and its county and municipal units have continuously governed the territory." *Id.* at 216. Accordingly, "this long lapse of time" and "the attendant dramatic changes in the character of the properties" precluded the tribe from obtaining the remedy it sought. *Id.* at 217.

Among other considerations, the Court noted that the tribe and the United States had long acquiesced to New York's dominion and sovereignty over the lands, giving rise to the "justifiable expectations" of the residents of the area, "grounded in two centuries of New York's exercise of regulatory jurisdiction." *Id.* at 215-16, 218. The Court explained that "given the extraordinary passage of time," granting the relief the Oneidas sought "would dishonor the historic wisdom in the value of repose." *Id.* at 218-19 (internal quotation marks omitted). And the Court observed that from the early 1800s into the 1970s, "the

United States largely accepted, or was indifferent to, New York's governance of the land in question and the validity *vel non* of the Oneidas' sales to the State," and, indeed, that national policy in the early 1800s "was designed to dislodge east coast lands from Indian possession." *Id.* at 214. Finally, the Court invoked the equitable doctrine of impossibility, noting that "returning to Indian control land that generations earlier passed into numerous private hands" is fundamentally impracticable and would "seriously burden the administration of state and local governments" and "adversely affect" neighboring landowners. *Id.* at 219-20. For these reasons, the Court held that the Oneidas were barred from "rekindling embers of sovereignty that long ago grew cold." *Id.* at 214.

D. Based on *Sherrill*, the Second Circuit Dismisses Indian Land Claims in *Cayuga*, *Oneida*, *Onondaga* and *Stockbridge-Munsee*

Shortly after *Sherrill* was decided, the Second Circuit applied these equitable principles to bar a 64,000-acre land claim brought by the Cayuga Indian Nation. *Cayuga*, 413 F.3d at 266. There, the tribe asserted claims to its alleged historic lands and sought ejectment of their current occupants. *Id.* at 274-75. The district court ruled that the tribe's desired remedy of ejectment was inappropriate given the impact it would have on many innocent landowners far removed from the alleged acts of dispossession, but nonetheless awarded the tribe money damages. *Id.* at 275. The Second Circuit reversed, holding that the equitable principles recognized in *Sherrill* barred all remedies, including damages, flowing from ancestral land claims because such claims themselves, when raised long after the events which gave rise to them, are

inherently disruptive.[3] *Id.* at 275, 277. In so holding, the court cited the same factors that this Court relied on in *Sherrill*, such as the time during which non-Indians have owned and developed the land, the residence of the tribe elsewhere, and the tribe's long delay in seeking relief. *Id.* at 277. This Court denied the petitions for a writ of certiorari filed by both the tribal plaintiffs and the United States. *See United States v. Pataki*, 547 U.S. 1128 (2006); *Cayuga Indian Nation of N.Y. v. Pataki*, 547 U.S. 1128 (2006).

Four years after *Cayuga*, in 2010, the Second Circuit again applied *Sherrill* to dismiss a subsequent land claim by the Oneidas involving 250,000 acres. *See Oneida,* 617 F.3d at 137. The court reiterated its holding in *Cayuga* that any claims "premised on the assertion of a current, continuing right to possession as a result of a flaw in the original termination of Indian title—are by their nature disruptive." 617 F.3d at 125. The court explained that while in *Cayuga* it had used the term "laches" as a "convenient shorthand for the equitable principles" at issue in these cases, the equitable doctrines underlying *Sherrill* and *Cayuga* did not require a defendant to establish the elements of traditional laches. *Id.* at 127. "Rather," the court recognized, the proper equitable analysis focuses "more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations

[3] The Court rejected the Cayugas' claim for trespass damages because possession is an element of trespass, and therefore, the trespass claim "is predicated entirely upon plaintiffs' possessory land claim." 413 F.3d at 278. As that claim was barred, the plaintiffs' trespass claim failed as well. *Id.*

of individuals and entities far removed from the events giving rise to plaintiff's injury." *Id.* at 127. Because all of the Oneidas' claims, whether for possession or money damages, depended on a declaration that the original land transfers were void *ab initio*, they were inherently disruptive and barred by *Sherrill*'s equitable principles. *Id.* at 129-31. Again this Court denied both the tribe's and the United States' petitions for certiorari. *See United States v. New York*, 132 S. Ct. 452 (2011); *Oneida Indian Nation of N.Y. v. County of Oneida*, 132 S. Ct. 452 (2011).

More recently, in 2012, the Second Circuit rejected a third ancient land claim based on an alleged flaw in the original termination of the tribe's title. Based on the *Sherrill-Cayuga-Oneida* trilogy, the court affirmed in a summary order the dismissal of the Onondagas' claim to 2.5 million acres in central New York, this time on the pleadings. *See Onondaga*, 500 Fed App'x at 87. Among other things, the Second Circuit rejected the tribe's argument that it was entitled to discovery to establish that it had "strongly and persistently protested" the population and development of its ancestral lands because "the standards of federal Indian law and federal equity practice" would nonetheless bar the claim. *Id.* at 90. This Court denied the tribe's petition for certiorari. 134 S. Ct. 419 (2013).

Finally, dismissing a fourth tribal land claim, the Second Circuit rejected the principal argument on which the Nation bases its petition—that this Court's 2014 decision in *Petrella* implicitly overturned the Second Circuit's line of cases applying *Sherrill* to bar claims of ancient dispossession. *See Stockbridge-Munsee*, 756 F.3d at 165. The court noted that *Petrella* holds only that

laches cannot defeat a claim brought within a statute of limitations enacted by Congress, and thus, that case had no bearing on tribal claims to enforce rights to title and possession of alleged ancestral lands, because Congress had not fixed a statute of limitations applicable to such claims. *Id.* Moreover, the court further distinguished *Petrella* from its land claim precedents on the ground that *Sherrill's* equitable defense does not focus on traditional laches. Thus, the court affirmed dismissal of the Stockbridge-Munsee's claim. This Court denied the tribe's petition for certiorari. 135 S. Ct. 1492 (2015).

E. Proceedings Below

After the decision in *Cayuga*, respondents moved to dismiss the Nation's amended complaint pursuant to Federal Rule 12(b)(6) for failure to state a claim, asserting, among other things, that the Nation's claims were barred by the equitable principles discussed in *Sherrill* and *Cayuga*. Respondents also argued that the claims against the State respondents must be dismissed on the ground of Eleventh Amendment immunity and the claims against the other respondents must be dismissed because the State is an indispensable party.

In November 2006, the district court dismissed the Nation's claims, concluding that *Cayuga* was controlling. The court found that the Nation's claims are inherently disruptive given the generations that have passed during which non-Indians have owned and developed the subject lands, the changes in the demographics and character of the area, and the passage of 140 years between the alleged wrongful dispossession and the attempt to regain possession (Petitioner's Appendix ["A"] 17.) The court also

found that the relief the Nation seeks is indistinguishable from the relief sought in *Cayuga*: "a declaration of their possessory interest in the subject land and immediate ejection of defendants from the subject land, damages equal to the fair market value of the land for the entire period of plaintiff's dispossession, as well as an accounting and disgorgement of all benefits received by the defendant municipalities, such as tax revenue." (A. 18.) The district court therefore dismissed all of the Nation's claims based on the equitable principles articulated in *Sherrill* and *Cayuga*, and did not reach respondents' alternative arguments.

The Nation moved for reconsideration, claiming for the first time that dismissal of its land claim would violate the tribe's Due Process and Takings Clause rights under the Fifth Amendment. (ECF No.3.) The Nation also filed a notice of appeal. Over the ensuing eight years, the district court granted the Nation's multiple applications to adjourn its motion and continue the stay of all district court proceedings, among other reasons, to allow the Nation to pursue the intervention of the United States in this action on the Nation's behalf. The United States did not intervene. Eventually, in October 2011, the Nation withdrew its motion for reconsideration (ECF No. 70.), and in October 2014, withdrew its motion for leave to amend (ECF No. 104). Thereafter, it filed a second notice of appeal, after which it perfected its appeal to the Second Circuit from the district court's order dismissing its claims.

The Second Circuit summarily affirmed, holding that the Nation's claims were barred by *Sherrill* and the Circuit's land claim precedents. (A. 4.) The court also

noted that the Nation's argument concerning *Petrella* was foreclosed by *Stockbridge-Munsee*, which had addressed and rejected the same argument. (A. 5.) The Nation subsequently filed this petition for certiorari.

REASONS FOR DENYING THE PETITION

I. The Decision Below Follows A Well-Settled Line Of Cases In Which The Second Circuit Has Applied *Sherrill* To Bar Ancient Indian Land Claims, And Which This Court Has Repeatedly Declined To Review.

In dismissing the Nation's challenge to its ancient land transfers, the court below followed a now well-settled line of Second Circuit cases which have applied *Sherrill* to bar such claims as inherently disruptive, regardless of the type of relief requested. These cases are consistent with and follow from *Sherrill*, and this Court has declined to review each and every one of them, despite petitions from both the tribes and the United States seeking their review. This case was brought by a tribe that seeks relief that is similarly, if not more, disruptive, including the ejection of respondents from land now occupied by a major state highway, a university, and the Long Island Railroad, as well money damages covering a 150-year period, and the United States has refused to join the tribe in seeking this relief. Accordingly, this case presents an even less compelling vehicle to review this well-settled precedent governing New York land claims than the prior petitions for certiorari denied by this Court.

The Nation here appears to have abandoned its claims for equitable relief, arguing only that the Second Circuit

erred by dismissing its legal claims for money damages. To support this argument, the Nation contends, first, that *Sherrill* did not extend to claims at law for money damages (Pet. 24-26) and, second, that *Petrella* confirms that claims for money damages arising from ancient dispossession are not subject to delay-based equitable defenses when brought within the applicable statute of limitations (Pet. 26-31). We address the first argument in this section, and the second in the next.

The argument concerning *Sherrill's* applicability to money damages, which both the tribes and the United States also made in *Cayuga* and *Oneida*, lacks merit and does not warrant this Court's review. While *Sherrill* did not expressly address money damages, its rationale is fully applicable to that form of relief. Because the Oneidas did not seek damages in *Sherrill*, but only declaratory and injunctive relief, 125 S. Ct. at 1489, the Court was not required to revisit its holding in *Oneida II* that the Oneidas could maintain a federal common law cause of action for damages for a violation of their possessory right. The Court in *Sherrill* stated that it did "not disturb our holding in *Oneida II*" because *Sherrill* did not present "the question of damages for [the Oneidas]' ancient dispossession." 544 U.S. at 221; *see also Oneida II*, 470 U.S. at 230.

But the Second Circuit appropriately concluded, in the series of cases discussed above, that the broad equitable principles supporting that decision, drawing on notions of laches, acquiescence and impossibility, precluded such relief where the claims were similarly disruptive. *Sherrill's* principles are designed to protect settled expectations that are centuries in the making and they therefore logically

apply equally to bar all disruptive ancient land claims that seek redress for distant historic wrongs without regard to whether the claims seek damages or equitable relief. Indeed, because such claims are not subject to a fixed statute of limitations—there is no end date by which they must be brought—the *Sherrill* equitable principles are needed to protect the long-settled property interests and other reliance-based interests that have developed over the past 150 years of non-Indian ownership and occupation, whether the relief sought is legal or equitable. For these reasons, in the context of ancient land claims the distinction between legal and equitable claims – which the Nation emphasizes – is artificial and unpersuasive. The impact upon settled expectations is equally disruptive.[4]

The Second Circuit's decisions barring monetary relief follow directly and logically from this Court's reasoning in *Sherrill*, which focused on the disruptive nature of the *claim* of ancient dispossession rather than the specific form of relief requested. In holding that equitable principles underlying laches, acquiescence and impossibility barred the Oneidas' claim of renewed sovereignty over its former lands, this Court invoked the tribe's inordinate delay in

[4] Even outside the context of federal Indian law and *Sherrill*'s unique formulation of "laches, acquiescence and impossibility," courts have recognized the need for the defense of laches to be applied to limit legal claims for damages when Congress fails to set a fixed statute of limitations. *See Short v. Belleville Shoe Mfg. Co.*, 908 F.2d 1385, 1395 (7th Cir. 1990) (Posner, J., concurring) (in the absence of a statutory limitations period "court will apply the equitable doctrine of laches even if the cause of action is legal rather than equitable .... There is precedent for applying laches in cases at law") (citation omitted). Applying the *Sherrill* equitable doctrines to bar actions at law is not novel.

asserting its claim, the disruptive practical consequences any relief would entail, and the justifiable expectations of current landowners. Because the Oneidas' belated claim was inherently disruptive, this Court held, it was "best left in repose." *Sherrill*, 544 U.S. at 221 n.14.

Following this reasoning, the Second Circuit has repeatedly held that the *Sherrill* equitable considerations bar ancient Indian land claims regardless of the relief requested. Thus, in *Cayuga*, the Second Circuit held that the rule of *Sherrill* barred not only injunctive relief but also damages, because the Cayugas' claim, whether for immediate possession or damages in lieu of possession, was just as disruptive as the Oneidas' request for reinstatement of sovereignty in *Sherrill*, 413 F.3d at 274-75, and therefore equally subject to the *Sherrill* bar. In their petitions to this Court, the Cayuga Nation and the Solicitor General on behalf of the United States contended, among other things, that the court erred in finding a claim for monetary damages disruptive. Cayuga Pet. (No. 05-982); U.S. Pet. (No. 05-978). This Court denied review.

Then, in *Oneida*, where the Oneidas sought compensation based on allegations that the State had illegally acquired 250,000 acres between 1795 and 1846, the Second Circuit again held that any claims premised on the assertion of a current, continuing right to possession as result of a flaw in the original termination of Indian title, whether seeking ejectment or money damages, are by their very nature disruptive. The equitable defenses recognized in *Sherrill* therefore bar such claims, the court held, over the objection of the United States as a party supporting the tribe. The tribe and the Solicitor General again filed petitions for certiorari, which again emphasized

the purportedly retrospective nature of the relief sought. U.S. Pet. (No-10-1404). This Court again denied review.

The Nation's request here for money damages against respondents covering over 150 years of alleged unlawful possession would be just as disruptive to settled expectations of current landowners as the requests for money damages in the earlier cases, and would have equally disruptive effects on state and local sovereignty.

Here the Second Circuit merely applied its prior precedent, applying *Sherrill* to bar claims for money damages as well as for equitable relief, and broke no new legal ground. Moreover in this case, unlike *Cayuga* and *Oneida*, the United States has declined to intervene in support of the Nation's claim. Thus, this case is even less deserving of review than the earlier cases in which review was denied.

II. *Petrella* Does Not Alter The Analysis Of Ancient Land Claims Or Otherwise Warrant Review of This Settled Law.

Unable to distinguish this case from the prior Indian land claim cases where this Court has denied review, the Nation argues that this case warrants review because the Court's recent decision in *Petrella* invalidated the entire line of Second Circuit Indian land claim cases by its holding that "delay-based defenses. . . must yield to an applicable federal statute of limitations." Pet. 26-27. As noted above, the Second Circuit rightly rejected this argument in *Stockbridge-Munsee*, and this Court denied review. It should do so again here.

Petrella concerned whether a traditional laches defense could bar a copyright infringement claim for money damages brought within the Copyright Act's three-year statute of limitations. *Petrella* is inapposite for two independent reasons. First, it held that laches was inapplicable where Congress had enacted an express statute of limitations, but Congress did not enact any statute of limitations for Indian land claims. Second, *Petrella* concerned traditional laches, but *Sherrill* invoked a distinctive constellation of equitable principles tailored to the unique circumstances of Indian land claims. Thus, *Petrella* has no bearing on the settled principles that govern this case.

A. Congress Has Not Fixed A Statute of Limitations for Indian Land Claims.

In *Petrella*, this Court held that "in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." 134 S. Ct. at 1974. The rationale for this rule is that a fixed statute of limitations "itself already takes account of delay," *id.* At 2983; laches "originally served as a guide when no statute of limitations controlled the claim," *id.* at 2975. The Nation contends that in 28 U.S.C. § 2415, Congress enacted a statute of limitations controlling Indian land claims, Pet. 28-29, but that is simply not so. Rather than imposing a statute of limitations, this statute *exempts* claims to enforce property rights from the limitations periods that it otherwise imposes on suits concerning Indian rights. Specifically, 28 U.S.C. § 2415(c) provides that "[n]othing herein 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." Reviewing the federal limitations

scheme set forth in 28 U.S.C. § 2415, this Court stated in *Oneida II* that "[t]here is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights." 470 U.S. at 240; *see also United States v. Mottaz*, 476 U.S. 834, 848 n. 10 (1986) (same). The Nation characterizes this as a "sentence fragment" that does not warrant reliance because "it derives from a more expansive statement that no limitations period barred the Oneidas' land claim." Pet. 27. But this context in no way undermines the plain meaning of this Court's statement, which simply reflects the substance of 28 U.S.C. § 2415(c).

An overview of the statutory scheme confirms that the statement was correct. As originally enacted in 1966, section 2415 only addressed claims brought by the United States on behalf of Indians; it subjected contract and tort claims for money damages to an express statute of limitations of six years and 90 days, *see* 28 U.S.C. §§ 2415(a), (b), and section 2415(c) excluded from the limitations period actions to establish title to real property. *Oneida II*, 470 U.S. at 242. The contract and tort suits subject to the limitations period were deemed to have accrued as of 1966. *Id.*

In 1982, Congress amended section 2415 to impose a limitations period on certain claims brought directly by tribes as well as on claims brought by the United States on their behalf. *See* Indian Claims Limitation Act of 1982 ("ICLA"), Pub. L. 97-394, 96 Stat. 1976, note following 28 U.S.C. § 2415; *see also Oneida II*, 470 U.S. at 243. The ICLA directed the Secretary of the Interior to compile and publish in the Federal Register a list of claims accruing to any tribe that would otherwise be time-barred by section 2415. Such claims would be barred sixty days after

the date of publication of the list unless the Secretary included the claim on the list. If the Secretary included the claim on the list, the claim is not subject to any statute of limitations, unless and until the Secretary either (a) rejects the claim for litigation, in which case the tribe has one year from the date of publication of the rejection in which to file the claim; or (b) proposes a resolution of the claim by legislative action, in which case the tribe has three years from the Secretary's submission of a report to Congress in which to file the claim. *See* ICLA §§ 5(a)-(c), 6(a) (reprinted at A. 30-32); *see also Oneida II*, 470 U.S. at 243. But as for land claims, the 1982 amendments carried forward the exclusion from the limitations period set forth in section 2415(c). *Id.* at 242. The 1982 amendments thus retained the status quo ante, whereby Indian claims relating to aboriginal title and possession fell outside any state or federal statute of limitations. *Id.* at 242-43.

The Nation's claims here are claims to adjudicate title to real property and thus fall under section 2415(c), which exempts them from any statute of limitations. The Nation's addition of trespass and waste claims for damages does not take them outside this provision because those claims are predicated on the Nation's real property rights – the claim of an unbroken right of possession superior to respondents from 1859 to the present. For this reason, the Nation's request for a declaration of its right to title and possession of the subject lands is the true foundation for all of its claims, regardless of the relief requested, and the claims are therefore all excluded as land claims from any statute of limitations by 28 U.S.C. 2415(c). Moreover, even if the Nation's claims could somehow be deemed to fall under 28 U.S.C. § 2415(b)—and they cannot—the result, because the Secretary of the Interior has listed the claims, would

be to keep them viable in perpetuity unless and until the Secretary takes further action. As the Secretary has not taken any such action in the thirty years that the Nation's claims have been listed, they are not subject to a statute of limitations, and not governed by *Petrella*, 134 S. Ct. at 1975 (explaining that laches "originally served as a guide when no statute of limitations controlled the claims").

Independent of its *Petrella* argument, the Nation mistakenly infers a Congressional intent to preclude a laches defense to all claims listed in the Federal Register under the ICLA based on the fact that such claims are exempt from any statute of limitations unless and until the Secretary takes further action. (Pet. 31.) This argument is not supported by *Petrella*, which addressed only a fixed limitations period. Indeed, long before *Petrella* was decided, the Cayugas and the United States made the same argument in their petitions for certiorari. Cayugas Pet. Reply 7-8 (No. 05-982); U.S. Pet. 24-25 (No. 05-982). It remains erroneous. Section 2415 does not expressly bar laches as a defense to any of the listed claims. And where Congress has intended to bar laches as a defense to Indian claims, it has said so. *See* Indian Claims Commission Act, ch. 959 § 2, 60 Stat. 1049, 1050 (1946) (the ICC may hear and determine specified claims against the United States "notwithstanding any statute of limitations or laches"); 25 U.S.C. § 640d-17(b) (act settling certain Indian land claims provides that "[n]either laches nor the statute of limitations shall constitute a defense to any action authorized by this subchapter for existing claims if commenced within" specified periods). Nor is there any indication that in enacting or amending section 2415, Congress intended to revive ancient Indian claims seeking possession of or title to land that were already barred by

laches over a century before. *See Oneida* II, 470 U.S. at 271-72 (Stevens, J., dissenting) (§ 2415[c] merely reflects an intent to preserve the law as it existed on the date of enactment). Thus, the absence of a statute of limitations in section 2415 governing ancient land claims does not support the Nation's claim that Congress intended to preclude delay-based equitable defenses to such claims.

B. The Holding and Reasoning in *Petrella* Is Limited to Traditional Laches And Does Not Apply To *Sherrill's* Broader Equitable Defense.

Petrella is further inapposite because it concerned only the traditional laches defense, whereas the *Sherrill* defense reflects "standards of federal Indian law and federal equity practice," and draws from several equitable doctrines—laches, acquiescence and impossibility. As the Second Circuit correctly explained:

> The equitable defense recognized in *Sherrill* and applied in *Cayuga* does not focus on the elements of traditional laches but rather more generally on the length of time at issue between an historical injustice and the present day, on the disruptive nature of claims long delayed, and on the degree to which these claims upset the justifiable expectations of individuals and entities far removed from the events giving rise to the plaintiff's injury... The Supreme Court [in *Sherrill*] discussed laches not in its traditional application but as one of several preexisting equitable defenses, along with acquiescence and impossibility, illustrating fundamental principles of equity that precluded the plaintiffs

> from 'rekindling embers of sovereignty that long ago grew cold.'

Oneida, 617 F.3d at 127-28 (citations omitted).

The distinction between traditional laches and the broader equitable defense recognized in *Sherrill* is based on this Court's decisions dating back to the late nineteenth century and cited by this Court in *Sherrill*. For example, in *Felix v. Patrick*, 145 U.S. 317 (1892), the "[Supreme] Court applied the doctrine of laches . . . to bar the heirs of an Indian from establishing a constructive trust over land their Indian ancestor had conveyed in violation of a statutory restriction." *Sherrill*, 544 U.S. at 217; *see also Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926) ("It is impossible . . . to rescind the cession and restore the Indians to their former rights because the lands have been opened to settlement and large portions of them are now in the possession of innumerable innocent purchasers ... .") (cited in *Sherrill*, 544 U.S. at 217). As *Petrella* did not discuss *Sherrill* or the equitable principles that pertain to these special types of Indian land cases, the Second Circuit rightly found it inapplicable. Under these circumstances, there is no basis for this Court to review that determination.

III. The Nation's Belated Fifth Amendment Claim Does Not Merit Review.

The Nation's final argument for certiorari is that the Second Circuit's application of the *Cayuga* line of cases to dismiss its tribal land claim violates the Fifth Amendment's Due Process and Takings Clauses. The Nation waived this claim and, in any event, it does not merit this Court's review.

The Nation did not raise its Fifth Amendment claim in any of its complaints, in its opposition to defendants' motion to dismiss, or in its oral argument on the motion. And although the Nation mentioned a Fifth Amendment challenge to the district court's decision in its motion for reconsideration of the district court's dismissal, *see* Motion for Reconsideration (ECF No. 36), it withdrew the reconsideration motion in its entirety "[i]n light of the Second Circuit Court of Appeals' decision in *Oneida* . . . and the Supreme Court's denial of certiorari." (ECF No. 70 at 1).

As a result, neither the district court nor the Second Circuit considered it, and this Court should not review it. *See, e.g., City of Springfield v. Kibbe*, 480 U.S. 257, 259 (1987) ("We ordinarily will not decide questions not raised or litigated in the lower courts."); *Singleton v. Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below."). Also, the Nation's strategic decision to unconditionally withdraw its motion for reconsideration—its only mention of the Fifth Amendment argument in the district court—is a true waiver that forecloses review of this argument on appeal. *United States v. Olano*, 507 U.S. 725, 733 (1993) (explaining the difference between forfeiture of a right by failing to timely assert it and waiver, which is the "intentional relinquishment or abandonment of a known right") (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)); *United States v. Yu-Leung*, 51 F.3d 1116, 1122 (2d Cir. 1995) (explaining that when a "party consciously refrains from objecting as a tactical matter . . . that action constitutes a true waiver, which will negate even plain error review") (internal quotation marks omitted).

Even had the Nation properly raised its Fifth Amendment argument below, this Court's review would not be warranted. The Nation identifies neither a circuit split regarding the issue nor a true conflict with this Court's decisions. The purported conflict (Pet. 31-33) with the Court's plurality opinions in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), and *Stop the Beach Renourishment, Inc. v. Florida Dep't of Env'tal Resources*, 560 U.S. 702 (2010), is illusory, because, unlike in those cases, in ruling for respondents in this hotly contested land claim, the courts did not extinguish the Nation's established rights or settled expectations.

Neither the Nation nor other tribal plaintiffs had an established right or settled expectation to the disputed land, and the fact that they ultimately lost does not amount to a retroactive extinguishment or taking by "judicial fiat." (Pet. 36.) The courts simply decided the parties' disputed and competing claims. In *Oneida II*, this Court left open the question whether laches might bar the Oneidas' land claim, 470 U.S. at 244-45, and in *Sherrill*, relying on laches, acquiescence and impossibility, the Court denied the relief sought there. The equitable defense recognized in *Sherrill* is the embodiment of "several *preexisting* equitable defenses" and longstanding principles of "'federal Indian law and federal equity practice.'" *Oneida*, 617 F.3d at 128 (quoting *Sherrill*, 544 U.S. at 214) (emphasis added). Based on *Sherrill*, the *Cayuga* line of Second Circuit decisions rejected tribal challenges to ancient land transactions primarily because granting any form of relief would have been inherently disruptive. The Second Circuit did not violate due process or commit a judicial taking when it applied *Sherrill* to bar these claims. *See generally Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 97 (1993) (when this Court applies a rule of federal law to the parties

before it, that rule controls all cases still open on direct review and to all events whether they predate or postdate the decision).

The Nation further mistakenly argues that by rejecting the Nation's land claim the Second Circuit's ruling denied the Nation due process because it "presumes that all Indian land claims are 'inherently disruptive,' without probing the facts and circumstances of the specific case" (Pet. 34) and "departs from settled legal principles by imposing a new rule of dismissal based on irrebuttable factual conclusions" (Pet. 33). The court below did no such thing. Rather, the court relied on *Sherrill*, which relied on "specific factors," the existence of which "determine when ancestral land claims are foreclosed on equitable grounds" because they are inherently disruptive to justifiable societal interests. *Onondaga*, 500 F. App'x at 89. In so holding, this Court in *Sherrill* and the Second Circuit in the cases that followed properly relied on the facts pleaded in the tribes' complaints as well as on judicially-noticed facts. *See, e.g.*, 544 U.S. at 211 (census data). The Second Circuit's determination, based on *Sherrill* and its progeny, that an equitable defense required dismissal of the Nation's complaint does not violate the Nation's Fifth Amendment rights.

IV. Denial of Review is also Warranted Because Independent Grounds Preclude The Nation from Obtaining Relief.

In addition to the other reasons for denying certiorari, this case presents a poor vehicle to consider the issues presented by the petition. A decision in the Nation's favor would not affect the ultimate outcome here, because

the complaint would in any event have to be dismissed on alternative grounds. As to the State respondents, sovereign immunity mandates dismissal; as to the other respondents, dismissal is required by the consequent absence of the State respondents, who are necessary parties. Because the complaint must in any event be dismissed, the question whether the complaint is barred by the equitable doctrines addressed in *Sherrill* is ultimately an abstract question and for that reason alone does not warrant this Court's review. As Justice Kennedy has observed, a "procedural obstacle unrelated to the question presented" is a reason to deny certiorari. *DTD Enters., Inc. v. Wells*, 130 S. Ct. 7, 8 (2009).

The Eleventh Amendment bars suit in federal court by an Indian tribe against a State. *Blatchford v. Native Village of Noatak*, 501 U.S. 775 (1991). There is no basis for finding the Eleventh Amendment inapplicable here. The United States has not intervened in this case despite the Nation's request. Nor was New York's sovereign immunity abrogated by Congress in the Nonintercourse Act. *See Seminole Tribe v. Florida*, 517 U.S. 44, 72-73 (1996) (holding that Congress lacked the power to abrogate the States' Eleventh Amendment immunity under its Indian Commerce Clause or its other Article I powers). And the doctrine of *Ex parte Young*, 209 U.S. 123 (1908), does not defeat New York's sovereign immunity here because Indian land claims are essentially actions to "quiet title," which are not subject to that doctrine. *Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 296-97 (1997); *accord Western Mohegan Tribe & Nation v. Orange County*, 395 F.3d 18, 20-23 (2d Cir. 2004). Thus, the courts would have to dismiss the claims against the State respondents on the ground of Eleventh Amendment immunity.

Moreover, the State respondents are required parties in whose absence the action cannot proceed, and thus, the complaint must be dismissed against all remaining respondents. *See* Fed. R. Civ. P. 12(b)(7) and 19. Indeed, this Court has held that "where sovereign immunity is asserted, and the claims of the sovereign are not frivolous, dismissal of the action must be ordered where there is a potential for injury to the interests of the absent sovereign." *Republic of Philippines v. Pimentel*, 553 U.S. 851, 867 (2008); *see also Seneca Nation of Indians v. New York*, 383 F.3d 45 (2d Cir. 2004) (claims against non-State defendants dismissed under Rule 19 where Indian land claims against the State were barred by sovereign immunity), *cert. denied*, 547 U.S. 1178 (2006).

Specifically, the Nation would be unable to obtain complete relief without the State and its officials as parties. The Nation's claims are premised on allegations that the State was the original wrongdoer by authorizing the 1859 conveyance, but the State would not be bound by any ruling that it acted unlawfully or that its current regulation of the subject lands as well as its possession of the lands, including the right-of-way used by State Highway 27, are invalid. And a judgment rendered in the State's absence declaring that the Nation has possessory rights in these lands would necessarily implicate the State's sovereignty interests. *Coeur d'Alene*, 521 U.S. at 281. Having allegedly authorized the 1859 transfer, the State has a sovereign interest in protecting the rights of all landowners whose title ultimately derives from this act. *See, e.g.*, N. Y. State Law § 10 (McKinney 2003) (governor is obligated to provide for the legal defense of any action to recover lands instituted against any person deriving title from the State).

In light of the State's sovereign immunity, this case cannot proceed against either the State respondents or any of the remaining respondents. Accordingly, this case would be unsuitable for plenary review even if the Nation had presented a question that otherwise merited review (and it has not).

In sum, this Court should reject the Nation's attempt to reopen issues related to an equitable defense that, after decades of litigation, has finally resolved major Indian land claims against the State of New York, its local governments, its citizens and its businesses. This case presents no occasion to unsettle this well-considered repose.

CONCLUSION

The petition for a writ of certiorari should be denied.

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