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IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,

v.

STATE OF NEW YORK
Respondent.

ONEIDA INDIAN NATION OF NEW YORK, ET AL.,
Petitioners,

v.

COUNTY OF ONEIDA, NEW YORK, ET AL.,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

DAVID M. SCHRAVER
DAVID H. TENNANT
NIXONPEABODY LLP
1300 Clinton Square
Rochester, New York 14604
(585) 263-1341

Counsel for Respondents Counties of Oneida and Madison, New York

(Additional Counsel Listed on Signature Page)

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ANDREW D. BING
Deputy Solicitor General
DENISE A. HARTMAN
Assistant Solicitor General
The Capitol
Albany, New York 12224
Barbara.Underwood@ag.ny.gov
(518) 474-6697

Counsel for Respondent State of New York

**Counsel of Record*

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QUESTION PRESENTED

Whether the Second Circuit properly dismissed these Indian land claims as barred by laches, acquiescence, and impossibility under this Court's decision in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197 (2005), where petitioners' complaints seek declaratory and injunctive relief and damages for the defendants' allegedly unlawful possession of more than 250,000 acres of land in central New York that the historic Oneida Indian Nation sold to the State of New York in a series of transactions between 1795 and 1846.

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STATEMENT

In a series of treaties between 1795 and 1846, the historic Oneida Indian Nation ceded to New York State its interest in over 250,000 acres of land in what is now Madison and Oneida Counties. For the better part of two centuries, non-Indians have occupied this land almost entirely and New York State and the Counties have exercised jurisdiction and sovereignty there. And for nearly all of that time, non-Indian occupancy and governance of these lands went unchallenged by the Oneidas themselves and by the United States. As this Court recently summarized in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 544 U.S. 197, 216 (2005), "[t]he Oneidas did not seek to regain possession of their aboriginal lands by court decree until the 1970's." And for its part, "[f]rom the early 1800's into the 1970's, 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*." *Id.* at 214 (emphasis added).

The long-settled status of the title to the land ceded by the Oneidas was abruptly thrown into question in the 1970's when the tribal plaintiffs, claiming to be successors to the historic Oneida Indian Nation, sued the Counties challenging the validity of the Oneidas' ancient land cessions. The first of these claims was called a "test case" and sought only two years' rent for fewer than 900 acres of the quarter-million acre tract. That case came twice to this Court. In the first decision, *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661 (1974) ("*Oneida I*"), the Court held that the claim presented a federal question over which the federal courts had jurisdiction. In

the second, *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985) ("*Oneida II*"), the Court held that the claim stated a cause of action under federal common law for violation of possessory rights, *id.* at 236, but the Court declined to decide whether the claim was barred by laches, finding that defendants had not preserved that defense. *Id.* at 244-45.

That issue reached this Court in 2005, in a suit brought by the New York Oneidas, petitioners here, against the City of Sherrill, to bar the collection of property taxes on land that was allegedly transferred improperly from the Oneidas. In *Sherrill*, the Court held that "standards of federal Indian law and federal equity practice" barred the claim of the New York Oneidas to sovereign immunity from local taxation of lands that it had recently acquired within the 250,000-acre tract. 544 U.S. at 214. The Court found that laches, acquiescence and impossibility precluded the New York Oneidas' long-delayed assertion of sovereignty over these lands because of the substantial disruption to state and local governance the claim would cause. *See id.* at 202-03, 221. The Court observed that Congress has provided a process for the federal government to acquire land in trust for tribal communities that takes into account the interests of all those with stakes in the area's governance and well-being. *See id.* at 220-221, citing 25 U.S.C. § 465. The New York Oneidas pursued the trust process and in a 2008 Record of Decision, the Department of the Interior agreed to take approximately 13,000 acres of land into trust for the tribe.

Shortly after *Sherrill* was decided, the United States Court of Appeals for the Second Circuit applied the principle of that case to bar a 64,000-acre land claim

brought by the Cayuga Indian Nation. Holding that the claim was barred by the same laches, acquiescence and impossibility recognized in *Sherrill*, the court dismissed the complaints of both the tribal plaintiffs and the United States. *Cayuga Indian Nation of N.Y. v. Pataki*, 413 F.3d 266 (2d Cir. 2005). The Second Circuit concluded that the import of *Sherrill* is that disruptive forward-looking land claims, "a category exemplified by possessory land claims, are subject to equitable defenses, including laches." *Id.* at 277. These equitable defenses negated any continuing tribal right to possess the disputed lands, and precluded any relief, including damages, based on that right. *Id.* at 277-78. Both the tribal plaintiffs and the United States petitioned this Court for a writ of certiorari, making arguments that are substantially similar to those petitioners make here. This Court denied the petitions. *See United States v. Pataki*, 547 U.S. 1128 (2006); *Cayuga Indian Nation of N.Y. v. Pataki*, 547 U.S. 1128 (2006).

This case presents a straightforward application of *Sherrill* and *Cayuga* to an Indian land claim based on the same or similar land transfers. The New York and Wisconsin Oneidas commenced this action in 1974 seeking damages for the Counties' allegedly illegal occupation of reservation land,[1] but the case lay dormant for nearly 25 years. In 1998, more than 200 years after the first of the challenged transfers, the United States intervened as a plaintiff. In 2000, plaintiffs dramatically enlarged the action, amending their complaints to add the State of New York as a defendant and to claim damages for the 200-year occupation of the entire 250,000-acre tract.

[1] The Oneida of the Thames joined the action as a plaintiff in 2000.

The Oneidas "demand[ed] recovery of land they had not occupied since the 1795-1846 conveyances." *Sherrill*, 544 U.S. at 210. In addition, both the United States and the tribal plaintiffs sought to eject the approximately 20,000 private landowners who now occupied the lands. The district court rejected the imposition of any liability against the private landowners. *See id.* at 211.

After *Sherrill*, the district court dismissed what it termed plaintiffs' "possessory land claims," but refused to dismiss what it deemed plaintiffs' "non-possessory claims" for "fair compensation." U.S.Pet.App. 68a-104a. On appeal, the court of appeals reversed this part of the district court's judgment and found that all claims raised by the plaintiffs, "whether possessory or purportedly non-possessory, are subject to and barred by the defense recognized in *Sherrill* and *Cayuga*." U.S.Pet.App. 52a-53a.

The court of appeals correctly found that the defense that this Court applied in *Sherrill* bars all the claims of all of the plaintiffs here, including the United States. Because this Court in *Sherrill* recently reviewed this unique historical record and the decision of the court of appeals is consistent with and follows from *Sherrill*, there is no need for further review by this Court.

Historical Background of the Oneida Land Claim

A brief counterstatement of the history of the Oneida land claim is necessary to dispel two erroneous impressions that may be fostered by the petitions in this case. First, petitioners (U.S. Pet. 4, 25; Oneida Pet. 5) attribute great significance to a 1795 opinion of the United States Attorney General suggesting that a federal treaty

was required for the 1795 sale "unless there be something in the circumstances of this case." U.S.Pet.App. at 277a. But a full review of the history demonstrates that on numerous other occasions the United States actively encouraged, participated in, and defended those land transactions. And second, although petitioners assert that their claim for compensation here is separate from, and less disruptive than, the claims that *Sherrill* found barred by the two-century delay in asserting them (U.S. Pet. 27-28; Oneida Pet. 23-24), the history of these claims shows that they are inextricably linked to those same barred claims.

1. Before the Revolutionary War, the Oneida Indian Nation occupied some six million acres in what is now central New York. In 1788, New York and the Oneida Nation entered into the Treaty of Fort Schuyler, under which the Oneidas ceded "all their lands" to the State, and the State made payments in money and kind and set aside for the Oneidas' "use and cultivation" an area of approximately 250,000 to 300,000 acres. *See Sherrill*, 544 U.S. at 203.

In 1790, Congress enacted the Indian Trade and Intercourse Act, commonly known as the Nonintercourse Act. Act of July 22, 1790, ch. 33, 1 Stat. 137. As amended in 1793, the Act provided that "no purchase or grant of lands, of any title or claim thereto, from any Indians or any nation or tribe of Indians, within the boundaries of the United States, shall be of any validity in law or equity, unless the same be made by a treaty or convention entered into pursuant to the constitution" (U.S.Pet.App. 279a-280a). Act of March 1, 1793, ch. 19, § 8, 1 Stat. 330-331. The current version (U.S.Pet.App. 280a) is codified at

25 U.S.C. § 177. The Act "bars sales of tribal land without the acquiescence of the Federal Government." *Sherrill*, 544 U.S. at 204.

In 1794, the United States entered into the Treaty of Canandaigua. Treaty of November 11, 1794, 7 Stat. 44. The Treaty of Canandaigua acknowledged the area set aside by the Treaty of Fort Schuyler for the Oneidas and provided that the United States would not interfere with the Oneidas' "free use and enjoyment" of that land. *Id.* at 45, art. II. The Treaty also authorized the Oneidas to sell their lands to "the people of the United States, who have the right to purchase." *Id.* This provision authorized the Oneidas to sell their lands only to New York State, because it had the right of preemption. *See Sherrill*, 544 U.S. at 203 n. 1. The Oneidas agreed that they would "never claim any other lands within the boundaries of the United States." *Id.* at 45, art. IV; *see Sherrill*, 544 U.S. at 204-05.

In 1795, after the Treaty of Canandaigua, the Oneidas conveyed to the State their interest in approximately 100,000 acres of the lands set aside in the Fort Schuyler Treaty. *See* 544 U.S. at 205. In a score of subsequent transactions, the Oneidas ceded their interest in most of the remaining lands to the State in exchange for money and other lands. By 1846, the Oneidas retained an interest in only a few hundred acres. *See id.* at 206-07.

Although the United States Attorney General had opined in 1795 that the sale of lands to the State by the Six Nations required a federal treaty under the Nonintercourse Act unless there was something in the circumstances of this case to take it out of the Act's general prohibition (U.S.Pet.App. 276a-278a), the United States did not thereafter challenge the validity of the 1795 Oneida

sale or subsequent sales to New York until nearly two centuries later. Instead, the United States encouraged and participated in many of these transactions. Beginning in the first decade of the 1800s, the United States pursued a policy designed to open reservation lands to white settlers and to remove Indian tribes from the eastern States to frontier regions then not populated by settlers. *See Sherrill* at 205. To that end "early 19th-century federal Indian agents in New York . . . 'took an active role . . . in encouraging the removal of the Oneidas . . . to the west.'" *Sherrill* at 205-06, quoting *Oneida Nation of N.Y. v. United States*, 43 Ind. Cl. Comm'n 373, 390, 391 (1978) (noting that federal agents were "deeply involved" in "plans . . . to bring about removal of the [Oneidas]" and in the State's acquisition of Oneida land).[2]

In 1815, the Oneidas sought the assistance and consent of the United States to their removal to the west, 7 Stat. at 550, and the federal government "accelerated" its efforts to remove the Indian tribes from the east. *See Sherrill* at 206. With continued federal encouragement, the Oneidas sold more land to New York and used the proceeds to finance their emigration to Wisconsin.[3] During the 1830s, it appeared that further removal to Wisconsin

[2] In addition, in 1830, Congress adopted the Indian Removal Act authorizing the President to set aside federal lands west of the Mississippi "for the reception of such tribes or nations of Indians as may choose to exchange the lands where they now reside, and remove there." Act of May 28, 1830, 4 Stat. 411-412.

[3] *See Report of the Special Committee to Investigate the Indian Problem of the State of New York* (1889) at 287 (Treaty of August 26, 1824); at 291 (Treaty of February 13, 1829); at 293 (Treaty of October 8, 1829); at 296 (dated April 2, 1833); at 298 (Treaty of February 1, 1826); at 303 (Treaty of April 3, 1830); at 305 (Treaty of February 26, 1834).

was not feasible, and the United States and the New York Indians, pursuant to the federal removal policy and the Indian Removal Act, entered into the Treaty of Buffalo Creek in 1838. *See* F. Cohen, Handbook of Federal Indian Law 420 (1942 ed.). By then, the Oneidas had sold all but 5000 acres of their lands. *Sherrill* at 206. Six hundred of their members resided in Wisconsin, while 620 remained in New York. 7 Stat. 556 (Sched. A).

In the Buffalo Creek Treaty, the Oneidas and the other New York Indians accepted nearly two million acres in what is now Kansas "as a permanent home for all the New York Indians, now residing in the State of New York, or in Wisconsin, or elsewhere in the United States, who have no permanent homes . . . ." Arts. 1, 2, 7 Stat. at 551-552. The Treaty provided that the Oneidas "hereby agree to remove to their new homes in Indian territory, as soon as they can make satisfactory arrangements with the Governor of the State of New York for the purchase of their lands at Oneida." Art. 13, 7 Stat. at 554; *see Sherrill* at 206. During the 1840's, the Oneidas sold most of their remaining lands to the State. *Sherrill* at 206-07, citing *New York Indians v. United States*, 40 Ct. Cl. 448, 458, 469-71 (1905).

2. In 1893, with the United States' consent, the New York Indians, including the Oneidas, sued the United States for monetary relief for failing to reserve certain Kansas lands for them as promised by the Treaty of Buffalo Creek. *New York Indians v. United States*, 170 U.S. 1 (1898); *see* Act of January 28, 1893, 27 Stat. 426. In explaining the 1893 legislation, Senator Platt, who reported the bill out of committee, explained that the Indians' claim was grounded in the surrender of their New York lands at the time of Buffalo Creek and before. *See*

24 Cong. Rec. 588-589 (1893). The United States argued that the Oneidas had forfeited the Kansas lands because they did not timely "accept and agree to remove to" those lands, as required by the Treaty. 170 U.S. at 26. This Court disagreed, holding that, notwithstanding the Oneidas' failure to occupy the new reservation, their agreement to remove "as soon as" they sold their remaining lands to the State was sufficient to avoid forfeiture of the Kansas lands. Both the argument of the United States and the ruling of this Court acknowledged the efforts of the United States to induce the New York Indians to sell their New York land and remove to the west: that agreement to remove was "[p]robably . . . the main inducement" for the United States to set aside new lands for them in the Indian territory. *New York Indians*, 170 U.S. at 15. The Oneidas shared in the resulting award of damages. *See New York Indians*, 40 Ct. Cl. 448, 467, 471-472 (1905) (on remand, identifying the tribes qualified to share in the award); *see also Sherrill* at 207.

In 1951, in the Indian Claims Commission, the United States defended the New York land transactions at issue here.[4] The New York and Wisconsin Oneidas alleged that the United States had breached its fiduciary duty under the Nonintercourse Act to protect the Oneidas from unfair dealings by third parties. *See Oneida Indian Nation of N.Y. v. United States*, 26 Ind. Cl. Comm'n 138 (1971), *aff'd*, 201 Ct. Cl. 546, 477 F2d 939 (1973). They claimed they had received unconscionable compensation in 25 treaties of cession concluded between 1795 and 1846, including

[4] Under the Indian Claims Commission Act, ch. 959, 60 Stat. 1049, 1050 (1946), Congress provided a specific monetary remedy for Indian tribes that received unconscionable consideration for the sale of their lands.

transactions at issue here. The United States strongly defended New York's right to purchase the Oneidas' lands, arguing "that Section 4 of the [Nonintercourse Act] is not applicable [when] New York is purchasing or condemning land from its own resident Indians." 26 Ind. Cl. Comm'n at 146. The United States maintained that the 1794 Treaty of Canandaigua authorized the Oneidas to sell their lands to New York, which held the right of preemption.[5] The United States further acknowledged that the Treaty of Buffalo Creek authorized New York to purchase the Oneidas' lands. *Oneida Nation of N.Y. v. United States*, 43 Ind. Cl. Comm. 373, 406 (1978).

The Indian Claims Commission found that the federal government had constructive knowledge of the treaties and probably actual knowledge of most of them, and was therefore "liable under the Indian Claims Commission Act if the Oneida Indians received less than conscionable consideration" under any of the treaties involved in the case. *Id.* at 407.[6] Although further proceedings were anticipated in the Court of Claims to determine the extent of the United States' liability, the Oneidas abandoned pursuit of their established right to damages for unconscionable consideration and elected instead to

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[5] *See* U.S. Brief in *Stockbridge Munsee Community, et al., v. United States*, Docket No. 300A et al., Motion to Consolidate for Summary Judgment or, in the Alternative, for Preliminary Hearing as to Liability of Defendant, at 47, reprinted in Amicus Br. of Counties of Madison and Oneida in support of petition for certiorari in *Sherrill*, Case No. 03-855, at A43.

[6] The findings of the ICC refute the United States' present assertion (Pet. 4-5) that "none of those transactions was authorized by the federal government." *See also Oneida II*, 470 U.S. at 246-247 (recognizing "federally approved treaties in 1798 and 1802").

seek "a determination that they have present title to the land in New York State which is involved in these cases." *See Oneida Nation of N.Y. v. United States*, 231 Ct. Cl. 990, 991, 1982 WL 25826 (1982) (per curiam).

Oneida I* and *Oneida II

In 1970, the Oneidas commenced what came to be known as the "test case" against the Counties of Oneida and Madison, claiming that the Counties were in unlawful possession of fewer than 900 acres of their lands, a small fraction of the acreage at issue here. The Oneidas alleged that their 1795 cession of 100,000 acres of land to New York did not terminate the Oneida's right to possession of those lands because the treaty was not approved by the United States pursuant to the Nonintercourse Act. The Oneidas sought damages measured by the fair rental value of the 900 acres limited to just two years, 1968 and 1969. In 1974, this Court held that the claim arose under federal law so that the federal courts had jurisdiction over it. *Oneida Indian Nation of N.Y. v. County of Oneida*, 414 U.S. 661, 675 (1974) ("*Oneida I*"). The Court emphasized the possessory nature of the claim: the Oneidas asserted "a present right to possession based in part on their aboriginal right of occupancy which was not terminable except by act of the United States. Their claim is also asserted to arise from treaties guaranteeing their possessory right . . . . Finally, the complaint asserts a claim under the Nonintercourse Acts." *Id.* at 678.

In 1985, the case again reached this Court. The Court held the Oneidas' claim could be maintained as a matter of federal common law; the Court characterized it as a claim to be compensated "for violation of their

possessory rights based on federal common law." *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226, 236 (1985) ("*Oneida II*"). Although the four dissenters would have rejected the Oneidas' claim based on laches, *id.* at 255-273, the majority "[did] not reach this issue," finding that it was not preserved. *Id.* at 244-45, *see also* 253, n.27 (expressing no opinion whether other equitable considerations may limit available relief). On remand, the district court awarded damages in the amount of $15,994 from Oneida County and $18,970 from Madison County, plus prejudgment interest. *Oneida Indian Nation of N.Y. v. County of Oneida*, 217 F. Supp. 2d 292, 310 (N.D.N.Y. 2002).

This Action

In 1974, while the first ("test") case was pending, the New York and Wisconsin Oneidas commenced this action against the Counties of Oneida and Madison, seeking more extensive relief for the Counties' allegedly illegal occupation of all of their reservation lands. C.A.J.A. 80-86. The Oneidas alleged a violation of possessory rights resulting from New York's allegedly unlawful acquisition of their former lands. They sought damages equal to the fair rental value of such occupied lands since 1951 and into the future, with interest. The claim was expressly based on the invalidity of the land sales; the Oneidas did not assert a claim for unconscionable or inadequate compensation for the lands they ceded in treaties with the State of New York. For nearly 25 years, this action was largely held in abeyance.

In 1998, this action was revitalized. The United States intervened, alleging that between 1795 and 1846, the Oneidas conveyed most of their lands to New York without federal consent or ratification as required by the Nonintercourse Act. C.A.J.A. 122-136. The United States alleged that as a result of these transfers, the Counties were in wrongful possession of parts of the Oneidas' ancient reservation. For the benefit of the Oneidas, the United States sought damages for the Counties' allegedly wrongful possession of lands. C.A.J.A. 135.

In 2000, petitioners dramatically expanded this action. They added the State of New York as a defendant and sought relief for the unlawful possession of all 250,000 acres of the Oneidas' former lands. The Oneidas and the United States also sought to join as defendants approximately 20,000 private landowners who now lived on the former reservation lands. *See* U.S.Pet.App. 188a-194a. They demanded possession of land the Oneidas had not occupied since the 1795-1846 conveyances and ejectment (or declaratory relief leading to ejectment) of the current landowners. The district court refused on equitable grounds, including bad faith of the Oneidas and the United States, to sanction any relief against the 20,000 private landowners. U.S.Pet.App. 219a-239a, 252a-257a.

Thereafter, the Oneidas and the United States continued to emphasize that their claims here were possessory and that all requested relief is based on the Oneidas' allegedly unlawful cessions to the State. The Oneidas alleged that they "have a continuing right to title and possession of the subject lands," and that as a result of the State's willful violation of the federal laws, the Oneidas have been "unlawfully dispossessed of the

subject lands," and that the "unlawful dispossession of the subject lands continues to the present day." C.A.J.A. 221-225. Their complaint seeks a declaration that there has been no termination of their possessory rights, that the transactions transferring the lands to the State were unlawful and void *ab initio*, that the subject lands have been in the unlawful possession of trespassers, and that all interests of any defendant in the subject lands are null and void. Their complaint also seeks injunctive relief "as necessary to restore plaintiffs to possession of those lands to which defendants claim title" and damages. C.A.J.A. 228-229. The United States pleaded claims against the State of New York for common law trespass and under the Nonintercourse Act. U.S.Pet.App. 259a-275a. The United States complaint seeks "a declaratory judgment . . . that the Oneida Nation has the right to occupy the lands," "ejectment where appropriate" against the State and the "fair rental value for the entire Claim Area from the time when the State attempted to acquire each separate parcel of the Subject lands . . . until the present." U.S.Pet.App. 273a-274a.

Sherrill* and *Cayuga

In *Sherrill*, this Court reviewed the history of the Oneida land cessions and litigation and held that the Oneidas' claim to sovereignty over its ancient reservation lands was barred by considerations of laches, acquiescence and impossibility. The Court observed that the wrongs of which the Oneidas complained "occurred during the early years of the Republic," and that the Oneidas "did not seek to regain possession of their aboriginal lands by court decree until the 1970's." 544 U.S. at 216. The

Court concluded, "This long lapse of time, during which the Oneidas did not seek to revive their sovereign control through equitable relief in court, and the attendant dramatic changes in the character of the properties, preclude [the New York Oneidas] from gaining the disruptive remedy it now seeks." *Id.* at 216-217.

The Court rested its decision in *Sherrill* not only on the delay-based doctrine of laches, but also on petitioners' long acquiescence in the State's dominion and sovereignty over the lands. 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,'" noting that "[i]t bears repetition that for generations, the Oneidas dominantly complained, not against the State of New York or its local units, but about '[mis]treatment at the hands of the United States Government." *Id.* at 218-19 and n. 12, quoting *Oneida II*, 470 U.S. at 262, 269 (Stevens, J., dissenting in part). And it observed, "[f]rom the early 1800's into the 1970's, 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 1800's "was designed to dislodge east coast lands from Indian possession." *Id.* at 214. The Court also relied on the equitable doctrine of impossibility. The Court rejected the argument that impossibility had no application because the Oneidas were not seeking to uproot current property owners, concluding that the unilateral reestablishment of Indian sovereign control, even over land that they had purchased at market prices, would have "disruptive practical consequences" and would "seriously burden the administration of state

and local governments" and "adversely affect landowners neighboring the tribal patches." *Id.* at 219-220 (internal quotations omitted).[7]

Finally, this Court noted that Congress created "a mechanism for the acquisition of lands for tribal communities that takes into account of the interests of others with stakes in the area's governance and well-being." *Id.* at 220-221, citing 25 U.S.C. § 465. Following this Court's decision, the Oneida Indian Nation of New York applied under § 465 to have the lands at issue in *Sherrill* placed in trust, and in May 2008, the Secretary of the Interior issued a Record of Decision agreeing to take approximately 13,000 acres into trust.[8]

Applying the principle of *Sherrill*, the Second Circuit Court of Appeals dismissed the Cayugas' claims for possession of land and damages in lieu of possession.

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[7] This Court did not decide in *Sherrill* whether the Treaty of Buffalo Creek disestablished the Oneidas' reservation, but cited Justice Stevens' dissenting opinion in *Oneida II*, 470 U.S. at 269, n. 24 ("There is . . . a serious question whether the Oneida did not abandon their claim to the aboriginal lands in New York when they accepted the Treaty of Buffalo Creek in 1838"). Subsequently, this Court granted certiorari in *Madison County v. Oneida Indian Nation of N.Y.*, 562 U.S. ___, 131 S.Ct. 459 (2010) on two questions, including "whether the ancient Oneida reservation in New York was disestablished or diminished." After the New York Oneidas waived sovereign immunity from foreclosure to enforce real property taxes, this Court vacated the judgment below and remanded for further proceedings. 562 U.S. at ___, 131 S.Ct. 704 (2011).

[8] The State and the Counties have challenged the Record of Decision. *See New York v. Salazar*, No. 6:08-cv-644 (N.D.N.Y.).

Cayuga Indian Nation v. Pataki, 413 F.3d 266 (2d Cir. 2005). Like the Oneidas, the Cayugas alleged that the State of New York acquired 64,000 acres of their land two centuries ago in violation of the Treaty of Canandaigua and the Nonintercourse Act. The Cayugas had sought a declaration that they hold legal and equitable title to those lands, restoration to immediate possession, and immediate ejection of the current landowners. The district court rejected the claims for declaratory and injunctive relief but awarded damages equal to the fair market and rental value of the lands, amounting to $36.9 million plus prejudgment interest for 204 years of about $211 million. *Id.* at 272-273.

On appeal, the Second Circuit reversed the award of damages and dismissed the complaints based on *Sherrill*, which was decided while the appeal was pending. The court found that "*Sherrill's* holding is not narrowly limited to claims identical to that brought by the Oneidas" but instead applied "to disruptive Indian land claims more generally." 413 F.3d at 274 (internal quotations omitted). The court determined that the Cayugas' claim "sounding in ejectment" was just as disruptive as *Sherrill's* request for reinstatement of sovereignty because it seeks immediate possession of the subject land (413 F.3d at 274-275); that "the same considerations that doomed the Oneidas' claims in *Sherrill* apply with equal force here" (*id.* at 277); that damages in lieu of ejectment are barred because ejectment is barred (*id.* at 277-278); and that the Cayugas' request for trespass damages is barred because it "is predicated entirely on [their] possessory land claim" (*id.* at 278). The court of appeals also dismissed the United States' complaint in intervention, noting that "given the relative youth of this country, a suit based on events that

occurred two hundred years ago is about as egregious an instance of laches on the part of the United States as can be imagined" (*id.* at 279); that the statute of limitations in 28 U.S.C. § 2415(a) was not established until 1966, 150 years after the cause of action accrued (*id.*); and the United States had intervened "to vindicate the interest of the Tribe, with whom it has a trust relationship" (*id.* at 279). Accordingly, the court held that "whatever the precise contours of the exception to the rule against subjecting the United States to a laches defense, this case falls within the heartland of the exception." *Id.*

Both the Cayuga plaintiffs and the United States filed petitions for certiorari, claiming, as petitioners do here, that the court of appeals' decision conflicted with *Oneida II* and *Sherrill*, with cases holding that laches does not apply to the federal government, and with the statute of limitations set forth in 28 U.S.C. § 2415. *See* Pet. of the Cayuga Indian Nation, *Cayuga Indian Nation of N.Y. v. Pataki*, (No. 05-982), at 16-28; Pet. of the United States, *United States v. Pataki*, (No. 05-978), at 14-28. This Court denied the petitions. 547 U.S. 1128 (2006).

The Decisions Below

Relying on *Sherrill* and *Cayuga*, the State and Counties moved for summary judgment dismissing the complaints in this case. Petitioners opposed the motion, arguing for the first time that their pleadings assert a non-possessory claim to compel the State to pay fair compensation for the Oneida's land based on its value when the State acquired it. The district court granted the defendants' motion for summary judgment dismissing petitioners' possessory land claims, but denied the motion

with respect to what the court called a "fair compensation claim." U.S.Pet.App. 68a-104a. While holding that all possessory claims, whether for ejectment or damages, are subject to the equitable defenses of *Sherrill*, the district court, fashioning a claim similar to the one the Oneidas abandoned in the ICC 25 years earlier, concluded that petitioners had adequately pled a contract claim seeking to "reform or revise a contract that is void for unconscionability." U.S.Pet.App. 85a-100a.

The parties cross-appealed. The court of appeals dismissed the Oneidas' and United States' claims in their entirety. U.S.Pet.App. 1a-53a. The court adhered to its holding in *Cayuga* that "'possessory land claims' — 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, and that accordingly, the equitable defenses recognized in *Sherrill*" bar such claims. U.S.Pet.App. 22a. This follows, the court held, whether plaintiff seeks a remedy of ejectment or monetary damages because, in either case, such a claim "seeks to overturn years of settled land ownership." *Id.* Thus, the court held that petitioners' claims for trespass damages against the State and the Counties in this case are precluded by the equitable defense recognized in *Sherrill* and *Cayuga*. U.S. Pet.App.52a-53a.

The court of appeals rejected petitioners' arguments that the defendants did not establish the traditional elements of laches, explaining that *Sherrill* and *Cayuga* "applied not a traditional laches defense, but rather distinct, albeit related, equitable considerations . . . ." U.S.Pet.App. 27a-29a. These equitable considerations

apply, the court held, notwithstanding that the United States is not subject to traditional delay-based equitable defenses under most circumstances. U.S.Pet.App. 28a-29a.

Next, the court of appeals dismissed the Oneidas' claim for "fair compensation" to the extent it was premised on federal common law "sounding in contract" on the ground that, since the United States did not plead such a claim, the Oneidas' claim was barred by New York's sovereign immunity. U.S.Pet.App. 33a-35a, citing *Arizona v. California*, 460 U.S. 605 (1983), and *Alabama v. North Carolina*, 130 S.Ct. 2295 (2010).

Finally, the court of appeals held that any claim for fair compensation as an alternative remedy for alleged violations of the Nonintercourse Act would also be a disruptive claim barred by the equitable considerations applied in *Sherrill* and *Cayuga*. U.S.Pet.App. 41a-51a. Noting that the Nonintercourse Act provides that "no sale of lands made by . . . any nation or tribe of Indians" undertaken without the consent of the United States "shall be valid," the court reasoned that the underlying premise of a claim based on the Nonintercourse Act is that the transaction is "void ab initio." U.S.Pet.App. 44a, quoting *Oneida II*, 470 U.S. at 245. The court concluded that "[c]laims having this characteristic . . . necessarily threaten to undermine broadly held and justified expectations as to the ownership of a vast swath of lands — expectations that have arisen not only through the passage of time but also the attendant development of the properties." U.S.Pet. App. 45a. Thus the court of appeals dismissed all of petitioners' claims, including those seeking compensation, as barred by *Sherrill*.

REASONS FOR DENYING THE PETITIONS

In *Oneida II*, this Court left open the question whether laches might bar an ancient tribal possessory land claim. Twenty years later, in *Sherrill*, the Court squarely addressed the applicability of delay-based equitable defenses, holding that laches, acquiescence and impossibility barred the New York Oneidas' claim to renewed sovereignty over its former lands because of the inordinate delay in asserting the claim and its disruptive practical consequences. Because the claim was inherently disruptive, this Court held, it was "best left in repose." *Sherrill*, 544 U.S. at 221 n. 14 (quoting *Oneida II*, 470 U.S. at 273 [Stevens, J., dissenting]).

The court of appeals' holding in this case — that the delay-based doctrines that foreclosed relief in *Sherrill* apply equally to preclude petitioners' possessory land claims — is consistent with and follows from this Court's treatment of the claim in *Sherrill*. Whether the Oneidas seek sovereignty, ejectment of some or all of the current landowners, or compensation in lieu of possession of the land, the same equitable considerations of laches, acquiescence and impossibility require dismissal of petitioners' claims. The court of appeals correctly held that invalidating these ancient cessions at this late date would disrupt and undermine broadly held and justifiable expectations as to ownership of 250,000 acres of lands across upstate New York. In addition, the New York Oneidas have invoked the administrative process that this Court mentioned in *Sherrill*, and the United States has already agreed to take 13,000 acres into trust. There is no reason for this Court to revisit the issues it decided so recently.

I. The Court of Appeals' Decision Is Consistent With and Follows From This Court's Decision in *Sherrill* and Does Not Conflict with *Oneida II*.

A. The court of appeals' decision is fully consistent with, and follows from, this Court's decision in *Sherrill*. This Court analyzed this historical record, and concluded that equitable considerations applicable under federal law barred the New York Oneidas' claim. The equitable considerations that foreclosed relief in *Sherrill* apply equally to possessory claims, and thus bar any claims that rest on an alleged right to current possession and title. This Court rejected the Oneidas' claim of sovereignty over these lands in *Sherrill* because it undermined rights established by ancient treaties, which have been long thought settled by generations of "innumerable innocent purchasers." 544 U.S. at 219. This Court relied on its own precedent of *Yankton Sioux Tribe v. United States*, 272 U.S. 351 (1926), and *Felix v Patrick*, 145 U.S. 317 (1892), where this Court refused to award possession of former Indian lands because of "the impracticability of returning to Indian control land that generations earlier had passed into" many private hands. 544 U.S. at 219. *Sherrill* also noted approvingly the refusal of the district judge in this case to eject or grant other relief against 20,000 private landowners. *Id.* Here, petitioners challenge the same ancient land cessions they challenged in *Sherrill*, and the present challenge similarly threatens to disrupt long held and justifiable expectations of thousands of innocent landowners.

Petitioners do not now seriously dispute that the equitable considerations in *Sherrill* preclude them from ejecting the current owners and obtaining possession of

a quarter-million acres of central New York. They argue, however, that while these considerations may foreclose ejectment and possession, they do not bar damages. Their argument ultimately fails, as the court of appeals concluded, because petitioners' requests for declaratory and monetary relief are inextricably intertwined with the underlying possessory claim. Any relief here would flow directly from the finding that the Oneidas are entitled to possession. Under *Sherrill* that disruptive claim must be rejected due to equitable considerations of laches, acquiescence and impossibility. That same reasoning precludes any relief, including money damages, that is predicated on the equitably barred finding that they are entitled to possession.

In *United States v. Mottaz*, 476 U.S. 834, 842 (1986), this Court recognized that, although plaintiff dropped her claim for rescission of improper sales by the United States of her interest in Indian allotments, her demand for damages equal to their fair market value amounted to "a declaration that she alone possesses valid title to interests in the allotments and that the title asserted by the United States is defective." Likewise here, petitioners' claims necessarily require them to prove that the 26 transactions they challenge were invalid in the first instance. The Nonintercourse Act provides that "no sale of lands made by . . . any nation or tribe of Indians" undertaken without the consent of the United States "shall be valid." As a result, petitioners' extreme delay in pursuing this land claim, and the concomitant disruption of long settled expectations that it would engender, "cannot . . . be ignored here as affecting only a remedy to be considered later; it is, rather, central to [their] very claims of right." *See Sherrill*, 544 U.S. at 222 (Souter, J. concurring).

Thus the United States mistakenly relies (U.S. Pet. 27-28) on *Mottaz* in support of its argument that fair compensation would not be disruptive because the award would clear the cloud on title resulting from the alleged violation of the Nonintercourse Act. As the court of appeals correctly recognized, petitioners do not seek a share of the profits from a concededly valid sale; rather they seek fair compensation as a substitute for return of the property that they must establish was unlawfully taken in order to prove their claims in the first instance. U.S.Pet.App. 44a-45a.

Any award of damages would be extremely disruptive, despite petitioners' contentions to the contrary. *See* U.S. Pet. 23-28; Oneidas' Pet. 23-24. Any determination that these ancient transactions were unlawful in their inception could jeopardize local mortgages and inhibit investment in local real estate and businesses. *See Cayuga*, 413 F.3d at 275 ("any remedy . . . which would call into question title to over 60,000 acres of land in upstate New York can only be understood as" a disruptive remedy). Moreover, the potential award of billions of dollars in money damages and two centuries of pre-judgment interest, would have a dramatic impact on the State's budgetary and fiscal planning and place an extraordinary burden on the State's taxpayers.[9]

The equitable considerations that doomed the Oneidas' claim in *Sherrill* are even more compelling

[9] The award ultimately reversed in *Cayuga* was $36.9 million for the fair market and rental value of lands plus $211 million of prejudgment interest for 204 years. The present claim involves four times the amount of land involved in *Cayuga*.

here. Petitioners' claims in this case are not limited to the 17,000 acres they recently purchased in Oneida and Madison Counties that were at issue in *Sherrill*. *See id.* at 211. Nor are they limited to the fair rental value of fewer than 900 acres for two years as in *Oneida II*. The claims here involve more than 250,000 acres in central New York and imperil the settled expectations of thousands of private landowners. "Claims having this characteristic . . . necessarily threaten to undermine broadly held and justified expectations as to the ownership of a vast swath of lands — expectations that have arisen not only through the passage of time but also the attendant development of the properties." U.S.Pet.App. 45a.

Because this Court squarely addressed the effect of similarly disruptive ancient tribal claims in *Sherrill*, and there is no circuit split on this issue, there is no basis for granting the petitions for certiorari. The Court stated that 25 U.S.C. § 465 provides "a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being." 544 U.S. at 220. In accordance with that suggestion, the New York Oneidas pursued the trust process and the United States issued a Record of Decision agreeing to take approximately 13,000 acres into trust. Although respondents have challenged the Record of Decision, the invocation of the administrative land trust process further demonstrates that the issues here do not merit this Court's review.

B. The decision below does not conflict with *Oneida II*. While this Court held that the Oneidas could maintain a federal common law cause of action for damages for a violation of their possessory rights, it expressly declined

to consider whether the Oneidas' claim is barred by laches because, in that case, the defendants had not preserved the defense. *See Oneida II*, 470 U.S. at 244-45; *but see id* at 261-270 (Stevens, J., dissenting) (four Justices concluded that laches would bar the claim). Although the majority in *Oneida II* offered "observations" about whether laches could be applied in that case, which was limited to seeking two-years' rent on fewer than 900 acres owned by the Counties of Madison and Oneida, it expressly declined to rule on the issue, *id.* at 244-245 n. 16, notwithstanding the fact that the dissenters stated unambiguously that they would find the claims barred by laches, *id.* at 255-273 (Stevens, J.), presaging this Court's decision in *Sherrill* and the court of appeals decisions in *Cayuga* and this case.

Nor does this Court's statement in *Sherrill* that it did "not disturb [its] holding in *Oneida II*," 544 U.S. at 221, suggest a conflict with this Court's decisions. *Oneida II* and *Sherrill* together establish that while a federal common law cause of action exists for the wrongful dispossession of Indian lands, such a claim may nevertheless be barred by laches and related equitable considerations. The court of appeals' decision in this case reflects that the holdings of *Oneida II* and *Sherrill* stand side-by-side. Thus, the decision below does not conflict with *Oneida II*.

The court of appeals correctly applied both *Sherrill* and *Oneida II* to hold that this claim which challenges dozens of transactions that occurred nearly two centuries ago during the very infancy of our nation, and which will affect 250,000 acres of land and 20,000 private landowners, is barred by these equitable considerations. The holding is consistent with this Court's precedent and does not merit review by this Court.

II. The Other Questions Presented By Petitioners Do Not Warrant This Court's Review.

A. Applying *Sherrill's* equitable doctrines to bar these claims does not conflict with the congressional policy expressed in 28 U.S.C. § 2415. The statutes of limitations established in 28 U.S.C. § 2415 do not apply to claims that seek "to establish the title to, or right of possession of, real or personal property." 28 U.S.C. § 2415(c). Congress has adopted no statute of limitations for tribal possessory and title claims such as the present one. *See Oneida II*, 470 U.S. at 240 ("[t]here is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights"); *see also Mottaz*, 476 U.S. at 848 n. 10 (same). Indeed, the United States agreed in *Oneida II* that these claims involving litigation over the continued vitality of aboriginal title, even those for damages, may be construed as suits "to establish the title to, or right of possession of, real or personal property" that would be exempt from the statute of limitations in 28 U.S.C. § 2415. *See Oneida II*, 470 U.S. at 243 n. 15, citing Brief of the United States as Amicus Curiae at 24-25.

This case is and always has been about the validity of the title and the Oneidas' current right to possession of lands sold to New York in the late eighteenth and early nineteenth centuries. In their 1974 complaint, the Oneidas alleged violations of their right to possession, and in its 1998 complaint, the United States alleged that the ancient cessions were invalid and that the counties were in wrongful possession of the land. In 2000, both petitioners sought to eject 20,000 private landowners, and in their current complaints, they still assert claims of title and possession of the lands occupied by the respondents

and a declaration that the cessions were void *ab initio*. In addition, the United States seeks from the State over 200 years' fair rental value of the quarter-million acres. Even now, in their petition to this Court, the Oneidas characterize their claim as premised on their right to possession of these lands. Their first question presented is whether the court of appeals contravened *Oneida II* and *Sherrill* by ruling that equitable considerations barred their "claims for money damages for the dispossession of their tribal lands in violation of federal law." Oneida Pet. at (i). Accordingly, even if petitioners now purport to seek only damages for trespass or fair compensation in lieu of a return of title or possession, the court of appeals' holding does not violate the congressional policy of § 2415 because petitioners' claims remain possessory land claims to which the statute does not apply.

Moreover, petitioners' § 2415 argument would not warrant a grant of certiorari, even if that section were applicable to the claims here, because the existence of a federal statute of limitations would not preclude the application of laches and related equitable doctrines. Where Congress intends 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). Congress did not expressly preclude the laches defense in § 2415, and the

application of laches by the court of appeals is therefore not "a violation of Congress' will." *Cf. Oneida II*, 470 U.S. at 244 (concluding that it would violate Congress' will "to hold that a state statute of limitations period should be borrowed in these circumstances"). And there is no indication that in enacting or amending § 2415 Congress intended to revive ancient Indian claims seeking possession of or title to land that were barred by laches over a century before. *See Oneida II*, 470 U.S. at 271-272 (Stevens, J., dissenting) (§ 2415[c] merely reflects an intent to preserve the law as it existed on the date of enactment).

In any event, this Court has held that laches may bar actions that are otherwise within the statute of limitations. *See Holmberg v. Armbrecht*, 327 U.S. 392, 396 (1946) ("[a] suit in equity may fail though 'not barred by the act of limitations'") (quoting *McKnight v. Taylor*, 42 U.S. 161, 168 (1843)); *Alsop v. Riker*, 155 U.S. 448, 460-461 (1894) (equity may refuse relief "even if the time elapsed without suit is less than prescribed by the statute of limitations); *see also Gardner v. Panama R. Co.*, 342 U.S. 29, 31 (1951) (use of laches "should not be determined merely by a reference to and a mechanical application of the statute of limitations," but rather depends on the court's discretion). Accordingly, even if § 2415 applied and this action were brought under that section, the court of appeals' holding that laches and related equitable doctrines bar this claim fits squarely within this Court's holdings.

B. The court of appeals' application of the equitable considerations of laches, acquiescence and impossibility to the United States' claim does not raise an important federal question warranting this Court's review. First, neither *Sherrill* nor the Second Circuit's decision applying

Sherrill purported to articulate generally applicable principles of laches, but rather crafted and applied an equitable bar peculiar to the particular historical context here. In addition to laches the Court considered the United States' acquiescence in the land transfers for nearly two centuries. As this Court noted after reviewing this ancient history, "[f]rom the early 1800's into the 1970's, 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.*" *Id.* at 214 (emphasis added). And the Court also relied on the disruption that would result from such a claim in undermining governmental administration and the long settled and reasonable expectations of thousands of landowners. The application of these doctrines to the United States in the historical circumstances presented here does not raise a question that merits this Court's review.

Second, the decision below is consistent with this Court's recognition that an action by the United States may be precluded by "inordinate delay" even when the United States is acting in its sovereign capacity. *See Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 373 (1977) (EEOC's inordinate delay in bringing Title VII enforcement action may preclude relief). Particularly here where (1) the United States encouraged and assisted in the State's acquisition of the Oneidas' former reservation lands and relocation to Wisconsin and Kansas, (2) the United States delayed for nearly two centuries in bringing suit and even defended the transactions before the ICC, and (3) any relief would disrupt long-settled land titles, the decision below to apply *Sherrill* breaks no new ground. *See, e.g., Heckler v. Community Health Serv. of Crawford County, Inc.*, 467 U.S. 51, 61 (1984) (equitable estoppel

may apply against the United States where necessary to vindicate the "interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government.")

Contrary to the assertion of the United States (U.S. Pet. 19-20) this case does not "squarely conflict" with this Court's decisions in *United States v. Beebe*, 127 U.S. 338, 344 (1888); *United States v. California*, 332 U.S. 19, 39-40 (1947); and *United States v. Summerlin*, 310 U.S. 414, 416 (1940). While the Court declined in those cases to bar particular claims of the United States for reasons of delay, none of the cases involved centuries-old transactions or the scope of disruption presented by this and other Indian land claims dating from the early years of this Nation. *California* involved the United States in its capacity as off-shore landowner and found laches inapplicable where the conflicting claims were made only in the preceding decade. 332 U.S. at 39. *Summerlin*, although referring in the opinion to "laches," held only that the United States was not bound by state statutes of limitations. And *Beebe* held that the United States' suit to cancel land patents was in fact barred by laches because the United States was "a mere formal complainant" in the suit on behalf of private persons. 127 U.S. 338, 346-348 (1888) None of these cases stands for the proposition that the extreme delay of two centuries involved in this case cannot constitute a bar to recovery by the United States. Here, the United States did not bring this suit in the first instance, and did not intervene in the Oneidas' suit for decades, nearly 200 years after the challenged transactions occurred. The court of appeals correctly concluded that whatever the interest of the United States in trying at this late date to revive ancient tribal rights of possession by overturning land

titles secure for centuries, its egregious delay and the resulting disruption of long-held justifiable expectations about land ownership across a quarter-million acres of central New York bar these claims. That decision does not conflict with any decision of this Court or of the courts of appeals.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted,

DAVID M. SCHRAVER
DAVID H. TENNANT
NIXONPEABODY LLP
1300 Clinton Square
Rochester, New York 14604
(585) 263-1341

Counsel for Respondents Counties of Oneida and Madison, New York

S. JOHN CAMPANIE
Madison County Attorney
P.O. Box 635
Wampsville, New York 13163
(315) 363-0585

LINDA M. H. DILLON
Oneida County Attorney
HARRIS J. SAMUELS, *of Counsel*
County Office Building
800 Park Avenue

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
BARBARA D. UNDERWOOD*
Solicitor General
ANDREW D. BING
Deputy Solicitor General
DENISE A. HARTMAN
Assistant Solicitor General
The Capitol
Albany, New York 12224
Barbara.Underwood@ag.ny.gov
(518) 474-6697

Counsel for Respondent State of New York

**Counsel of Record*

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