No. 20-1675

IN THE

Supreme Court of the United States

MELVIN L. PHILLIPS, INDIVIDUALLY AND AS TRUSTEE FOR MELVIN L. PHILLIPS, SR., *et al.*,

Petitioners,

v.

ONEIDA INDIAN NATION,

Respondent.

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

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF CONGRESSPERSON CLAUDIA TENNEY AS *AMICUS CURIAE* IN SUPPORT OF PETITION

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Representative Claudia Tenney (R-NY 22) hereby moves pursuant to S. Ct. R. 37.2, for leave to file a brief *amicus curiae* in support of the petition for a writ of *certiorari* to the United States Court of Appeals for the Second Circuit. Rep. Tenney is filing this motion because we have been unable to secure consent from Respondent.* A copy of the proposed brief is attached.

As more fully explained on page 2 of the attached brief under "Interest of *Amicus Curiae*," Rep. Tenney has long been concerned about the welfare of Petitioner Melvin Phillips, now 83 years old and in poor health, who is one of her constituents. Rep. Tenney, in her prior capacity as a lawyer in private practice, represented Melvin Phillips in litigation on a pro bono basis. Rep. Tenney is familiar with Melvin Phillips' petition to this Court, and offers a supporting brief to simplify the issues and bring them into sharper focus. In this way, Rep. Tenney believes the brief will assist the Court in determining whether to grant *certiorari*.

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* Counsel for Rep. Tenney secured consent from Petitioner but not Respondent.

Respectfully submitted,

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QUESTION PRESENTED

City of Sherrill v. Oneida Indian Nation of NY, 544 U.S. 197 (2005), held under equitable principles that the Oneida Indian Nation waited too long to challenge New York's governance of fee lands that were once located within the Oneidas' reservation. Those lands had been out of the Tribe's possession for more than 200 years. Citing principles of laches, acquiescence and impossibility, this Court prohibited the Tribe from unilaterally asserting sovereignty over fee lands recently purchased by the Tribe in open market purchases from non-Indians. *Sherrill* also recounted the Tribe's history and loss of reservation lands, including finding that, except for a single 32 acre-remnant of the historic reservation not at issue here, the Tribe had lost possession of all historic reservation lands through a series of State and Federal treaties.

This case presents a novel question not previously raised or decided in the five-decades-long litigation concerning the Oneidas' reservation in New York, including four prior grants of certiorari[1]:

Does the *Sherrill* "laches" formulation apply to bar the Oneida Nation from asserting sovereignty over historic reservation land that had passed into *individual Indian ownership* 180 years ago under the Oneidas' 1842 treaty with New York, which was entered into under the authority of the federal 1838 Treaty of Buffalo Creek?

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1. This Court granted petitions for certiorari in *Oneida Indian Nation of N.Y. v. Oneida County*, 412 U.S. 927 (1973); *Oneida County v. Oneida Indian Nation of N.Y.*, 465 U.S. 1099 (1984); *Oneida Indian Nation of N.Y. v. City of Sherrill*, 542 U.S. 936 (2004); and *Oneida Indian Nation of N.Y. v. Madison County*, 131 S. Ct. 459 (2010).

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INTEREST OF *AMICUS CURIAE*[1]

Rep. Tenney, who represents the 22nd Congressional District In New York, counts Petitioner Melvin Phillips among her constituents. Rep. Tenney, in her capacity as a lawyer in private practice, previously represented Petitioner in various judicial proceedings relating to his status as leader of the Oneidas living on Marble Hill, in the Town of Vernon, Oneida County, New York. Rep. Tenney has supported Mr. Philips' efforts, as a full-blooded Oneida Indian, and life-long resident of New York State, to have the right to continued ownership, possession and use of his family's ancestral lands.

In addition, Rep. Tenney represents in Congress certain non-Indian landowners who hold title similar to Petitioner, and whose long-standing property interests are equally subject to elimination through quiet title actions instituted by the Oneida Indian Nation of New York under the reasoning and holding of the Circuit Court.

Accordingly, Rep. Tenney has a strong interest in the issues raised in this case.

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1. Pursuant to Rule 37, counsel notes this brief was not authored by counsel for either party, and neither the parties nor their counsel nor anyone aside from amicus and her counsel have made any monetary contributions to the preparation or submission of this brief. The Law Office of David Tennant PLLC undertook the filing of this brief on a pro bono basis. Petitioner has consented to the filing of this brief, but Respondent has not.

SUMMARY OF THE ARGUMENT

Petitioner Melvin L. Phillips, Sr. seeks to protect his interests in real property that comprise his family's ancestral lands dating back to the late 18th Century. The Circuit Court's decision dispossessed Petitioner of these family lands.

The parcels in question are contained within the Marble Hill Tract[2] and have been separately held by Petitioner and his family—and not considered tribal lands by the Oneidas—for the past 175 years. Time and again, federal courts in New York have acknowledged that all tribal lands passed from the Tribe's ownership, possession and governance during the Founding Era of the country, with only 32 acres remaining within the tribe's control in the 20th Century. This history of total tribal dispossession, save 32 acres in Madison County and commonly referred to as "the Oneida Territory," was detailed in *United States v. Boylan*, 256 F. 468 N.D. NY (1919), *affirmed* 265 F. 165 (2d Cir. 1920), commented on in *Shenandoah v. U.S. Dept. of Interior*, 1997 WL 214947 at *8 n.6 (N.D.N.Y. Apr. 14, 1997 (Pooler, J.)), *aff'd*, 159 F. 3d 708 (2d Cir. 1998). and recounted in *Sherrill*. 544 U.S. at 203-207. "[B]y 1920, only 32 acres continued to be held by the Oneidas." *Id*. at 207.

Petitioner is a full blooded Oneida Indian and the 83-year-old leader of the Orchard Party/Marble Hill

2. The Marble Hill Tract consists of 100+/- acres, with recorded deeds showing Petitioner owns the 19.6 acres at issue in this litigation. Some 80 acres in the Marble Hill Tract are owned by non-Indians, who are not parties to this case.

(aka Orchard Hill) Band of Oneidas located in Oneida County. He is a life-long resident of New York State. He traces his direct family lineage to Oneidas living before the passage of the federal Treaty of Buffalo Creek in 1838. He is directly related to two of the Home Party signatories on the at-issue 1842 Treaty with New York: William Johnson and Moses Day. Petitioner and his forbearers have held in common certain parcels within the Marble Hill Tract for generations after those lands passed out of tribal ownership under the 1842 Treaty. They effectively and practically treated the land tenure as a family homestead—not Oneida tribal lands— since 1842.

The 1838 Treaty of Buffalo Creek (232a) expressly called for the Oneidas, as a long-standing sovereign political body, to remove from New York State and resettle on a new reservation west of the Mississippi, where it would continue tribal relations and governance over new reservation lands. The scattered non-tribal Oneidas who remained in New York after 1838 were expected to and did assimilate into the dominant non-Indian culture. Those few remaining Oneidas lacked tribal organization and did not hold any land tribally in their splintered small groups, consistent with the fact that the Tribe had emigrated from New York to Indian Country in the west.[3]

3. Phillips' chain of title had its origin in the Buffalo Creek Treaty but he and his ancestors owned the land in the complete absence of *tribal* sovereignty over it from 1838 until the decisions below.

Petitioner and his ancestors have for 180 years held these non-tribal lands as a shared family homestead. Only when Petitioner made provisions in September 2015 to have the lands held in trust for the benefit of his descendants, did the Oneida Indian Nation of New York (OIN)—the tribe reconstituted in New York in the 1980s—bring suit seeking to quiet title in its favor, waiting two years to commence that action in 2017. Petitioner's decision to put the land in trust for his decedents was a direct response to OIN's unilateral action to list the Marble Hill Tract in a 2013 settlement agreement with New York State, signaling to Petitioner that his family's landholdings were coveted by the Nation.[4]

Despite the uncontroverted facts and inferences to be construed in favor of Petitioner's allegations contained in his answer and counterclaims, the District and Circuit Courts granted judgment on the pleadings in favor of the Tribe and thereby erased 175 years of separate, non-tribal landholding. In doing so, the lower courts adopted a very different narrative concerning the lands in question. Both courts focused on treaty language and gave a purely legal interpretation that is divorced from the historical and

4. OIN's action in claiming the Marble Hill Tract in the 2013 Settlement was the Tribe's first "public" claim of Petitioner's land, a delay of 175 years from when Petitioner's ancestors' title vested in them pursuant to the 1838 Treaty. Petitioner reacted to that attack on his title by filing his deed, historically a practice among non-emigrant Oneidas. Such familial land tenure was organic to the Indian community and culture. *See* Thomas Donaldson, *The Six Nations of New York, Extra Census Bulletin, Indians*, U.S. Government Printing Office, Washington, D.C. 1892, *infra*, at 9-10 and n. 6.

factual record. The Circuit Court effectively concluded that Petitioner and his family could not have done with the land what Petitioner alleged and—through documentary evidence—proved his ancestors had done for generations. The actual non-tribal status of the lands for 175 years proved an inconvenient truth and affront to the fiction, advanced by the Tribe, that all lands possessed by an Oneida Indian must be tribal lands. The Tribe has never undertaken any steps to acquire an interest in these legally separate lands.

Thus, even if the Circuit Court's interpretation of the treaties were correct (it is not) the fact remains that the 175-year long delay by the Tribe in asserting tribal ownership over the Phillips' family lands should result in a finding of laches, just as in *Sherrill.* This case presents an important and novel question. Under principles of equal protection under the law, the rights of private-landowners must be treated equally, without regard to whether the landowner is non-Indian or Indian. The same result should obtain in either case. That is, when this Court in *Sherrill* held that the passage of centuries made it inequitable to disrupt the settled expectations of non-Indian landowners, that same equitable principle should inure to the benefit of Petitioner and his family, making it similarly inequitable to disturb their settled expectations after 175 of undisturbed possession and use. Both Indians and non-Indians took title to former tribal lands through conveyances after 1842. Both classes of landowners toiled to make their properties their own, to benefit their own families. Justifiable expectations of continued ownership, possession and use arise from 175 years without challenge. Petitioner's status as a life-long resident of New York State, with intergenerational private

ownership of the Phillips' family homestead land, deserves nothing less than the protection afforded to non-Indian landowners in *Sherrill*.

The writ should be issued to allow this Court to determine if the *Sherrill* laches formulation (or a variant of it) provides equal protection to Indian and non-Indian landowners alike. Indeed, leaving the Circuit Court decision in place not only dispossesses Petitioner of his family's interest in the Marble Hill Tract but jeopardizes the landholdings within the Tract owned by non-Indians. By a parity of reasoning, those real property interests are equally subject to acquisition by the Tribe through quiet title actions, or if not, an equal protection problem arises. The undisturbed ownership, possession and use of the parcels within the Marble Hill Tract should be protected under *Sherrill*'s equitable principles without regard to the racial/ethnic identity of the landowner.

ARGUMENT

I. Petitioner Phillips and his ancestors held title to the parcels in question as tenants in common; those lands were not tribal lands governed by the Oneida Nation until the Circuit Court dispossessed Petitioner of his interest in the land.

A. The Marble Hill Tract

The Marble Hill Tract at issue encompasses not only the 19.6 acres possessed and used by Petitioner and his lineal ancestors, but also the remainder of the land under Phillips' deed, as well as approximately 80 acres of land under recorded deeds held by non-Indians. The Circuit Court's decision did not just dispossess Petitioner of his

family's intergenerational land tenure, but also casts a cloud over the non-Indian land tenures that extend back a generation or more. The collateral consequences to these non-Indian landowners provide additional urgency to Petitioner's writ petition.

The Circuit Court has provided a recipe for dispossession of non-Indian landowners as well as Petitioner, and in doing so ignored the well documented landholding practice followed by Petitioner's ancestors and other fragments of the Oneida tribe that remained in New York after the tribe removed to Wisconsin and other parts.

B. The *Boylan* decisions demonstrate non-tribal ownership of land by another small group of non-emigrating Oneida.

The Second Circuit's century-old decision in *United States v. Boylan*, 265 F. 165 (2d Cir. 1920) provides useful guidance (overlooked by the Circuit Court below) in its examination of title and possession of individual family estates owned by non-emigrant Oneidas.

As in Petitioner's case, at issue in *Boylan* was a portion of the historic Oneida reservation. It was occupied by four Oneida families of the First and Second Christian Parties. They decided, as Phillips' ancestors had, not to emigrate to the west but to remain on their estate pursuant to Article 13 of the Buffalo Creek Treaty (236a) and in reliance on federal treaty commissioner Ransom Gillet's contemporaneous commitment on behalf of the United States that the treaty would not require forcible removal of Oneidas from New York. Commissioner Gillet considered the remaining Oneidas would in effect have

a life estate after which the lands would be divided in severalty and owned in the same fashion as non-Indians.

The estate in *Boylan* was held by tenancy in common among those specific Oneida families, not as common land of the historic Oneida tribe. *See Boylan*, 265 F. at 174 ("The record here shows clearly that the Oneida Indians hold as tenants in common.").[5] The United States did not claim, and *Boylan* did not require as a basis for the government's claim, that the lands were titled in the historic Oneida Tribe. The Circuit Court affirmed that the United States had the authority as guardian of those specific "*remaining Indians of the tribe of the Oneidas*" to bring the action against those seeking to eject the Oneida families. 265 F. at 174 (emphasis added).

The dissent in *Boylan* succinctly described the land tenure at issue.

> By the treaty of May 23, 1842, the Oneida reservation was divided into 19 lots; the Indians known as the Emigrating Party ceding their title to the state in lots 1, 3, 4, 5, 7, 10, and 15, and their title in lots 2, 6, 8, 9, 11, 12, 13, 14, 16, 17, 18, and 19 to the Home Party. Schedule B attached to the treaty enumerates the individuals comprising the Home Party by name and states that they hold their lands in severalty as tenants in common and owners. The lands now in question were part of lot

5. Pursuant to Article 2 (234a) of the Buffalo Creek Treaty, the historic Oneida tribe had agreed to accept ownership of land in the west, and, in Article 4 (234a), exercise its sovereignty and self-governance there.

> 17, and 23 individuals, comprising 4 families, are named as tenants in common and owners of that lot; in other words, *their Indian title of occupancy was changed into a title in fee simple.*

265 F. at 175 (emphasis added). The *Boylan* court further observed that "[i]t is only where Congress has enacted legislation controlling the disposition of property of Indian reservations that valid conveyances may be made." *Id.* at 171. The authorization for title validly to devolve to Petitioner through his ancestral chain of title is the Buffalo Creek Treaty to which his ancestors were signatory.

Boylan concluded that the Buffalo Creek Treaty changed the nature and extent of the federal relationship with Oneida Indians who elected to stay in New York from that which existed under the 1794 Treaty of Canandaigua. In the Buffalo Creek Treaty, the United States authorized them to make satisfactory arrangement for their lands. But it did not abandon those Indians. In *Boylan*, the United States, as guardian, chose to step in to protect specific Oneida Indians and their interests in their family estate on which they had remained after deciding not to emigrate—not to vindicate the historic Oneida tribe's possessory interest in these former reservation lands. The United States acted pursuant to the guardian-ward relationship to protect the individual Oneidas' title, as possessors of the land vested in them pursuant to Article 13 of the Buffalo Creek Treaty (236a) and pursuant to Oneida land tenure customs and traditions.

> [L]and tenure . . . is, as a rule, secure in the families enjoying it . . . the evidence of title for many years largely depended upon visible

possession and improvement, rather than upon the record evidence common to white people. Verbal wills recited at the dead feasts, in the presence of witnesses to the devise, were usually regarded as sacred, and a sale, with delivery of possession, was respected when no written conveyance was executed. The Indians preferring to hold the papers and the records themselves instead of having them moved from place to place, with a change of [tribal] clerk, there being no regular place or rules for deposit or protection . . . . Indian common law, that of immemorial custom, as with the early English holdings, has generally carried its authority or sanction with effective prohibitive force against imposition of fraud, even when occupation and improvement of public domain have been actual but without formal sanction. No well-ordered system of record for wills, grants, or transfers is in habitual use among the Six Nations. The infrequency of transfer out of a family and the publicity of the act when such a transfer is made have been esteemed sufficiently protective. There is no penalty for failure to make record, and the chain of title is not broken into so many links as to confuse the transmission. During late years farmers having made substantial improvements have secured legal advice and perfected their papers in the usual business form common to white people, for deposit or record at county seats in which the lands and reservations are located. [6]

6. Donaldson, *The Six Nations of New York, Extra Census Bulletin, Indians*, at 12.

This record demonstrates that New York Indians traditionally embraced individual family possessory interests in real property. They did so as the non-Indians did, but not because the non-Indians did it; familial land tenure was organic to the Indian community and culture.

C. The federal decision in *Shenandoah* supports the non-tribal status of the lands at issue.

The analysis of tribal banishment in *Shenandoah v. U.S. Dept. of the Interior*, 1997 WL 214947 (N.D.N.Y. 1997), *aff'd* 159 F.3d 708 (2d Cir. 1998), sheds light on the non-tribal status of the parcels contained in the Marble Hill Tract. The case involved a habeas corpus proceeding against OIN by certain OIN members who claimed, among other things, that OIN tribal government had "banished them from the Oneida Nation." *Id*. 1997 WL 214947 *8. But then-District Judge Rosemary Pooler found that one of the plaintiff OIN members, who lived on Lot 2 of the Marble Hill Tract, "does not reside on Oneida Nation Territory." *Id*. *8 n. 6. Judge Pooler's finding was left intact in the Circuit Court's subsequent affirmance.

The Marble Hill Tract includes all of the land under Phillips' deed, including the specific parcels at issue in this case. None of the Marble Hill Tract is Oneida Nation territory, notwithstanding the 2013 Settlement.

D. *Sherrill* concluded that the 32 acre tract ("Oneida Territory") was the only remaining Oneida tribal lands in New York.

This Court cited numerous primary and secondary historical sources in recounting the loss of Oneida reservation lands in New York as the result of federal

removal policy and related acquisitions of former tribal lands by individual Indians and non-Indians. *See* 544 U.S. at 207. This Court identified the loss of tribal landholdings as follows:

> By 1838, the Oneidas had sold all but 5,000 acres of their original reservation. . . . By 1843, the New York Oneidas retained less than 1,000 acres in the State. That acreage dwindled to 350 in 1890; ultimately, by 1920, only 32 acres continued to be held by the Oneidas.

Id. at 205-207 (citations omitted). The 32 acres that were held by the Oneidas in 1920 and deemed its "Territory" can be traced back to an 1842 Treaty with the Christian Party—not to the 1842 Treaty with the Home Party that pertains to Petitioner's forbearers and the lands at issue. The undisputed history shows that the Oneidas lost all ownership, possession and use of historic reservation lands save these 32 acres. This fact necessarily means that the Marble Hill Tract was not considered tribal lands after 1842.

E. Preparation of deed for Phillips' family tract

As steward of the legacy of his family estate, which generations of family members had faithfully conserved, Petitioner prepared a deed documenting the chain of title that had been respected by the Oneida community and the State of New York for 180 years and recorded it with Oneida County. The Circuit Court (14a) misapprehended the dispute here as one between the OIN and the Orchard Party. Rather, the dispute is between the OIN and an individual Oneida owner of a specific family estate at

Marble Hill, the area occupied by the historic Orchard Party of Oneida. The OIN knows this; it *sued Phillips "individually." Phillips' trust holds only the family estate.* Neither the name of the trust nor the trust itself is a claim of tribal status. Petitioner's deed does not base title on him being a leader of a separate tribe, though it does describe his heritage and stature to describe his donative intent.

II. Even if the Marble Hill Tract was never legally divorced from tribal status (which is not the case) the Petition raises the separate question of whether *Sherrill*'s equitable defenses apply to Petitioner, and if so, how.

This Court's decision in *Sherrill* protects justifiable expectations of landowners rooted in their undisturbed ownership, possession and use of real property when measured in generations and centuries. *See* 544 U.S. at 218 ("When a party belatedly asserts a right to present and future sovereign control over territory, longstanding observances and settled expectations are prime considerations. It has been two centuries since the Oneidas last exercised regulatory control over the properties . . . .") The Circuit Court nonetheless concluded that the *Sherrill* equitable defenses were not available to Petitioner because (a) the parcels at issue are not "distinctly non-Indian in character" and (b) New York State and local governments do not tax the property. (21a-22a.) The Circuit Court's brief discussion of *Sherrill*'s equitable principles, and the cited grounds for withholding these defenses from Petitioner, beg the question presented here: Does *Sherrill*'s formulation of laches (or a variant of it) protect the reasonable reliance interests of Petitioner

based on his family's undisturbed possession and use of their homestead for 175 years?

III. Review should be granted to prevent the dispossession of non-Indian landowners whose title to parcels within the Marble Hill Tract is clouded by the Circuit Court's decision.

The Circuit Court's decision provides a roadmap for the OIN to bring quiet title actions to eliminate the land tenure of non-Indians who own parcels within the Marble Hill Tract. Review is warranted to avoid this additional conflict with the holding in *Sherrill*. Petitioner along with these non-Indian landowners justifiably expect their land tenures to continue undisturbed based on intergenerational ownership, possession and use over the past 175 years. This Court can and should resolve how the *Sherrill* laches formulation applies to the Marble Hill Tract as a whole, considering both Indian and non-Indian landowners within it.

CONCLUSION

For the foregoing reasons, Amicus Curiae urges the Court to grant the Petition for a Writ of Certiorari in this case and to clarify and uphold the application of *Sherrill*'s equitable defenses.

Respectfully submitted,

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