# 02-6111(L),

**02-6130(CON), 02-6140(CON), 02-6200(CON), 02-6211(CON), 02-6219(CON), 02-6301(CON), 02-6131(XAP), 02-6151(XAP) and 02-6309(XAP)**

# United States Court of Appeals

## for the

# Second Circuit

CAYUGA INDIAN NATION OF NEW YORK,

*Plaintiff-Appellee-Cross-Appellant,*

SENECA-CAYUGA TRIBE OF OKLAHOMA,

*Plaintiff-Intervenor-Appellee-Cross-Appellant,*

UNITED STATES OF AMERICA,

*Plaintiff-Intervenor-Appellee,*

v.

GEORGE PATAKI, as Governor of the State of New York, *et al.*, CAYUGA COUNTY and SENECA COUNTY, MILLER BREWING COMPANY, *et al.*,

*Defendants-Appellants-Cross-Appellees.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

## BRIEF FOR THE SHINNECOCK INDIAN NATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR REHEARING BY THE PANEL OR REHEARING *EN BANC* OF THE CAYUGA INDIAN NATION OF NEW YORK AND THE SENECA-CAYUGA TRIBE OF OKLAHOMA

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## STATEMENT OF AMICUS

The Shinnecock Indian Nation (the "Nation") is an Indian tribe, with lands in and around the Town of Southampton, Suffolk County, New York. The Nation is a nation or tribe of Indians within the meaning of the Indian Nonintercourse Act (the "NIA").[1] The Nation has functioned continuously as an Indian tribe, and has interacted with the United States and state and local governments as an Indian tribe, for more than 300 years.[2] Congress never has terminated its status as an Indian tribe. It is one of very few tribes not forcibly displaced by the United States and still occupies lands within the aboriginal lands it possessed at the time of first European contact.

The Shinnecock Indian Nation is similarly situated to the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma, in that its ancestral land has been unlawfully encroached upon or taken from it by the State of New York, either directly or by individuals purportedly authorized to do so by the State of New York. The Congress of the United States never has authorized the taking of any Shinnecock land. Consequently, the taking of Shinnecock land

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[1] Enacted as Act of July 22, 1790, Ch. 33, 1 Stat. 137 and now codified as 25 U.S.C. § 177.

[2] The Nation has petitioned the Office of Federal Acknowledgment of the United States Department of the Interior for administrative acknowledgment as an Indian tribe. Also, the Nation currently is being sued as an Indian tribe by the State of New York and by the Town of Southampton, *New York v. Shinnecock Indian Nation*, No. 03 Civ. 3243 (E.D.N.Y. filed Jul. 1, 2003) and *Town of Southampton v. Shinnecock Tribe*, No. 03 Civ. 3466 (E.D.N.Y. filed Jul. 14, 2003), and in that action is seeking judicial acknowledgment as an Indian tribe as a matter of federal common law.

purportedly authorized by the State of New York was in clear violation of the NIA. At present, the Shinnecock Indian Nation is pursuing land claim litigation against the State of New York and other defendants, *Shinnecock Indian Nation v. New York*, No. 05 Civ. 2887 (E.D.N.Y. filed June 15, 2005), seeking both money damages at law for the illegal taking, and restored possession, of tribal lands.

The Nation urges review of the opinion of the three-judge panel in *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005) (the "Panel Opinion"), pursuant to 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35. The Panel Opinion is inconsistent with Supreme Court precedent and, if not vacated, would radically and without basis overturn hundreds of years of settled precedent with respect to the non-applicability of equitable defenses to actions at law.

## SUMMARY OF ARGUMENT

The Panel Opinion disregards the express preservation by the Supreme Court of the United States of a damages remedy at federal common law for violation of the NIA. It also radically, and contrary to long-settled precedent, expands the application of equitable defenses, for the first time making legal claims for money damages generally subject to the equitable defense of laches, undermining the express will of Congress. If not vacated, the Panel Opinion would limit radically the right of Indian tribes to seek relief for the illegal taking of their

land, guaranteed to them by the NIA, a result contrary to clearly expressed Congressional intent.

The Panel Opinion also seriously and fundamentally misconstrues the nature of ejectment. Ejectment is a term applied both to a certain form of action and to the remedies available if the elements of a claim of ejectment are established. The Panel Opinion conflates the two uses of the term, generating a holding that flies in the face of the history of the common law and the settled understanding of that law for hundreds of years. Finally, the Panel Opinion misunderstands the elements of trespass, an action at law, confusing a claim for damages at law for illegal occupancy of land with a claim in equity for repossession of land. For all of these reasons, the petition by the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma for rehearing by the panel or rehearing *en banc* should be granted.

## ARGUMENT

### The Panel Opinion Is Inconsistent With Supreme Court Precedent In *City Of Sherrill* And *Oneida II*

Contrary to the Panel Opinion, *City of Sherrill v. Oneida Indian Nation of New York*, 125 S. Ct. 1478 (2005), does not hold, or support a holding, that equitable defenses apply to bar actions at law. Instead, the Supreme Court in *Sherrill* held that an equitable defense (laches) could be applied to a claim for equitable relief (an injunction prohibiting future real estate taxation of real property

purchased by an Indian tribe within the boundaries of its established reservation). Indeed, the opinion in *Sherrill* expressly stated that "the question of damages for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*."[3]

The *Sherrill* opinion plainly does not hold, or support a holding, that an Indian tribe may be barred by the passage of time from seeking money damages for a taking of its land in violation of the NIA. The plaintiff in *Sherrill* did not request money damages, and in that case the Supreme Court went to great lengths to avoid even appearing to countenance new defenses to a claim for money damages. Indeed, the holding of *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) ("*Oneida II*"), as characterized in *Sherrill*, "recognized that the Oneidas could maintain a federal common-law claim for damages for ancient wrongdoing."[4] In *Oneida II*, the Supreme Court was not called upon to decide whether or not equitable time bars are available in the defense of an action for damages at law; however, it did note that "application of the equitable defense of laches in an action at law would be novel indeed."[5] The holding in *Oneida II*, addressing an ancient dispossession of Indian land virtually identical to the one at issue here, also emphasized that "application of laches would

[3] *Sherrill*, 125 S. Ct. at 1494.
[4] *Sherrill*, 125 S. Ct. at 1483.
[5] 470 U.S. at 244 n.16.

appear to be inconsistent with established federal policy" since "the extinguishment of Indian title requires a sovereign act."[6] In short, *Sherrill* holds that certain equitable defenses may apply to certain Indian land claims seeking prospective equitable remedies, but no Supreme Court precedent supports the application of the equitable defense of laches to damages actions at law. As discussed below, this would not only be "novel," it would be grievous, plain error, overturning centuries of settled precedent.[7]

**Application Of The Equitable Defense Of Laches To Actions At Law Seeking Money Damages Is Unprecedented And Unwarranted And Would Have A Pernicious Effect On All Actions For Damages**

Despite the procedural merger of law and equity in federal practice, each of the two systems maintains a separate substantive content and function, with important – sometimes crucial – differences. For example, a litigant has a right to trial by jury with respect to questions of fact in actions that can be characterized as actions at law, but not in actions seeking only equitable relief. The creation of a single form of civil action in the Federal Rules of Civil Procedure was not intended to destroy the coherency of either system or to obliterate the different remedies and defenses in each.

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[6] *Id.*

[7] *See generally* E. W. Hinton, Equitable Defenses Under Modern Codes, 18 Mich. L. Rev. 717, 719 (1920), stating: "Of course, there were equitable defenses to equitable claims, where there were no similar defenses to corresponding legal claims. For example, the doctrine of laches might defeat a suit for an injunction in a case where the plaintiff would have no difficulty in recovering damages at law."

As the Supreme Court of the United States has noted, "Notwithstanding the fusion of law and equity by the Rules of Civil Procedure, the substantive principles of the Courts of Chancery remain unaffected."[8] Elsewhere, the Supreme Court has held that federal courts have the "authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."[9]

Likewise, the substantive contours of actions at law generally have been preserved after the merger of law and equity. *See, e.g.*, *Bereslavsky v. Caffey*, 161 F.2d 499, 499-500 (2d Cir. 1947) (holding that a plaintiff had a right to demand a jury trial within ten days after amending his complaint from one seeking equitable relief to one seeking solely legal - *i.e.* monetary - relief); *see also Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 473 (1962) (requiring that any legal issues for which a trial by jury is demanded must be submitted to a jury, stating that the "sole" determination "is whether the action . . . contains any legal issues").

It is beyond dispute that the equitable defense of laches would not have applied to an action for money damages at law at the time of the separation of

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[8] *Stainback v. Mo Hock Ke Lok Po*, 336 U.S. 368, 382 n.26 (1949).
[9] *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318 (1999) (citations omitted).

the United States from England. Beginning with the Limitation Act of 1623,[10] explicit statutory time bars were set out in England for various actions at law. The Court of Chancery in England sometimes applied these statutory time bars to defeat actions in equity.[11] However, English courts of law (which of course were separate) did not apply the equitable defense of laches to bar claims at law. Indeed, under settled English law, an action at law could be brought until the day the statute of limitations expired, even if a court in equity might apply laches to bar a similar claim for equitable relief.[12]

English courts (and courts of the United States, having in this regard adopted the common law of England as the law of this country) uniformly recognized that statutes of limitations reflect legislative judgments about the appropriate time period within which a claim may be litigated. Application of the discretionary equitable defense of laches to claims already subject to a legislative time bar, or where the legislature has specifically provided that no time bar should apply, oversteps the boundaries of the judicial power and intrudes upon the prerogative of the legislative branch.

In 1966, Congress arguably imposed a statute of limitations on tort and contract claims, including those for trespass, brought on behalf of Indian tribes

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[10] 21 Jas. 1 c. 16 (1623).
[11] William Blanshard, A Treatise on the Statutes of Limitation 62 (London 1826).
[12] *See, e.g.*, *Collins v. Rhodes*, 20 Ch. D. 230 (1881).

by the federal government acting in its capacity as trustee.[13] With the enactment of the Indian Claims Limitation Act of 1982, Pub.L. 97-394, 96 Stat. 1966, "Congress for the first time imposed a statute of limitations on certain tort and contract claims for damages brought by individual Indians and Indian tribes." *Oneida II*, 470 U.S. at 242 (discussing application of 28 U.S.C. Section 2415). The claims for damages in this action plainly were brought within any applicable time limit set by Congress, and the Panel Opinion does not suggest otherwise.

As Congress recognized in setting these time limitations, "it is important that [the government] formulate a policy which somehow reconciles the interest of preserving the economic and social fabric . . . and at the same time giving the due consideration to our fundamental notions of fairness under the law."[14] Courts are bound to respect this legislative balancing of competing interests. By applying the equitable defense of laches to all Indian land claims, the Panel Opinion flies in the face of Congressional intent and has upset the careful and explicit balance struck by Congress between the expectations of non-Indian landowners on the one hand and the meritorious claims of wronged Indian plaintiffs on the other. This was plain error.

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[13] 28 U.S.C. § 2415, Pub. L. 89-505, 80 Stat. 304 (1966). The statute of limitations period was extended three times prior to 1982, when the Indian Claims Limitation Act of 1982 was enacted into law. Pub. L. 92-353, 86 Stat. 499 (1972); Pub. L. 95-103, 91 Stat. 842 (1977); Pub. L. 96-217, 94 Stat. 126 (1980).

[14] 123 Cong. Rec. 22166 (daily ed. July 11, 1977) (statement of Rep. Cohen).

Finally, there is nothing in the logic of the Panel Opinion to limit its scope to Indian tribes, since the availability of defenses at common law does not turn on the political identity of the plaintiff but rather on the nature of the claims advanced. If not vacated, the Panel Opinion will engender all sorts of mischief in the defense of actions for damages at law, encouraging defendants to attempt the scattershot application of equitable defenses to meritorious actions at law that are within the limitations period, or which the legislature has declined to limit, in the hope of finding a sympathetic judge. In addition, if the Panel Opinion is not vacated, and time-related discretionary defenses to actions in equity (such as laches) are held to defeat actions at law, the internal coherency of the system of common law, developed over hundreds of years, will be undermined.

**The Panel Opinion Fundamentally Misconstrues The Nature Of Ejectment And Trespass, Each Of Which Is Both A Claim For Relief And A Remedy**

The Panel Opinion relies heavily on the faulty proposition that ejectment is a "possessory land claim"[15] to argue for the application of laches. However, as the dissent to the Panel Opinion correctly notes, "plaintiffs here have sought money damages from the filing of this case." 413 F.3d at 281.[16] The federal common law claims for ejectment and trespass in this action are

[15] *See, e.g.*, Panel Opinion at 268, 275, 276, 277.

[16] For example, the fifth prayer for relief in the complaint in this action, as originally filed, sought "trespass damages" for the entire period of plaintiff's dispossession of "not less than $350,000,000." Record on Appeal A228.

"possessory" only in that they apply to things capable of being physically reclaimed.[17] For such claims, money damages are a long-recognized remedy.

Indeed, in its original form in England, ejectment was a claim at law for damages, not for physical possession.[18] As the law evolved, ejectment became an action with several possible remedies—possession, damages, or some mixture of the two. At no point did ejectment become strictly an action for physical possession of land. To the contrary, the courts of England held that the right to immediate possession upon judgment was not a necessary condition of an action in ejectment; and money damages commonly were awarded to plaintiffs pleading ejectment who had lost a legal or actual right to physical possession of the land in question (as, for example, when the term of a lease expired during the pendency of an ejectment lawsuit by a lessee).[19]

The English common law of ejectment, described above, was adopted by the American colonies, and later by the States.[20] That settled law should be

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[17] For example, a waterway was not considered an appropriate object of a claim for ejectment, since the water is always running, but a claim for the ground under the waterway would be suitable (and could include the water above). John Adams, A Treatise on the Principles and Practice of Ejectment 21 (2d ed., London 1818).

[18] *See, e.g.*, Sir Geoffrey Gilbert, The Law and Practice of Ejectments 53 (London 1741).

[19] *See, e.g.*, Sir Geoffrey Gilbert, The Law and Practice of Ejectments 94 (London 1741) ("And hence it is, that if the Term expires pending the [ejectment] Suit, that the Plaintiff can't recover the Possession . . . yet he shall have his Judgment for Damages, because the Trespass still remain'd.").

[20] *See, e.g.*, John Adams, A Treatise on the Principles and Practice of Ejectment [preface] (Philo Ruggles ed., New York 1821) ("This remedy is found in the modern action of Ejectment, the essential features of which, as established by the British tribunals, have been adopted by the

followed in this case, which presents only claims arising under the federal common law.[21] Under that settled law, the discretionary equitable defense of laches may not be applied to bar or limit an action in ejectment seeking money damages. The Panel Opinion, holding to the contrary, plainly is incorrect.

Similarly, the Panel Opinion creatively reinterprets the black letter law of trespass to conflate a necessary element of the claim for relief – possession or a right to possession in the plaintiff superior to any right of possession in the defendant – with the remedy of physical repossession, a remedy generally not available in trespass. Ejectment and trespass are independent claims for relief, which evolved along different tracks.[22] Even where ejectment is not available, trespass may be a viable claim for relief.[23] In addition, damages historically were the remedy for trespass, and trespass remains a claim for which damages are a recognized remedy.[24] The failure of the Panel Opinion to distinguish between a

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Courts of New York . . . . There being no work upon the subject exclusively American, a well-written English treatise has, therefore, become indispensable.").

[21] *See, e.g., Oneida II*, 470 U.S. at 236 ("we hold that the Oneidas can maintain this action for violation of the possessory rights based on federal common law").

[22] *See generally* George E. Woodbine, The Origins of the Action of Trespass, 33 Yale L.J. 799 (1924); 34 Yale L.J. 343 (1925).

[23] In part this is because the two actions can require different sorts of title. A trespass action may be maintained by one with mere possession of the land, for example, while ejectment generally requires a claim of legal title. *See, e.g.*, Prosser and Keeton on the Law of Torts 77 (W. Page Keeton ed., 5th ed. 1984).

[24] *See, e.g.*, 3 William Blackstone, Commentaries on the Laws of England *214 (1765-1769) ("[E]jectment . . . being now a mixed action, not only gives damages for the ejection, but also possession of the land: whereas in trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered; nothing being recovered but damages for the wrong committed."); Charles T. McCormick, Handbook on the Law of Damages 480-82 (1935).

right to possession as an element of a claim of trespass and the remedy for trespass, which is damages and not repossession, also was plain error.

## CONCLUSION

For all the foregoing reasons, this Court should grant rehearing by the panel or rehearing *en banc*.

Dated: New York, New York
August 23, 2005

Respectfully submitted,

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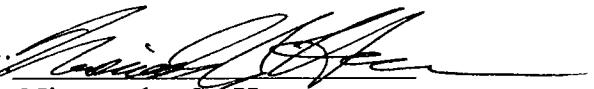
By: 
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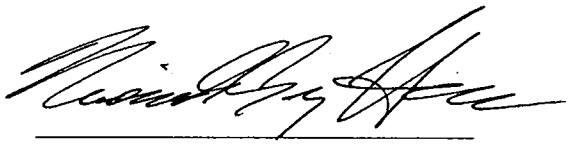

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