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), 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.

BRIEF OF AMICUS CURIAE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF UNITED STATES' AND CAYUGA INDIAN NATION OF NEW YORK'S AND SENECA-CAYUGA TRIBE OF OKLAHOMA'S PETITION FOR REHEARING *EN BANC*

John H. Dossett, Esquire
National Congress of American Indians
1301 Connecticut Avenue, N.W.
Suite 200
Washington, D.C. 20036

Of Counsel

Douglas B. L. Endreson, Esquire*
Reid Peyton Chambers, Esquire
James T. Meggesto, Esquire
Arthur Lazarus, Jr., P.C.
SONOSKY, CHAMBERS, SACHSE, ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(P) (202) 682-0240

* Counsel of Record

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STATEMENT OF INTEREST OF *AMICUS CURIAE*

Established in 1944, *amicus curiae*, the National Congress of American Indians ("NCAI"), is the oldest and largest American Indian organization, representing more than 250 Indian tribes and Alaskan Native villages.[1] NCAI is dedicated to protecting the rights and improving the welfare of American Indians. As shown below, this case calls for the straightforward application of settled principles of federal law – established by the Supreme Court, this Court and the district court in this and similar cases over the past 35 years – namely, that tribes and the United States as their trustee may sue and obtain money damages for the violation of tribe's longstanding rights to land protected by federal law. The panel's contrary decision would deny tribes any relief at all for such violations on the premise that vindication of their rights would significantly disrupt settled expectations. This unprecedented ruling both threatens to extinguish all tribal land claims in this Circuit, a result directly contrary to all prior decisions, and will be argued to mean that the substantive rights of Indian tribes to their lands and resources are unenforceable whenever their recognition would seriously disrupt the *status quo*. This would be a disastrous and legally unsupportable result, which *amicus* supports rehearing to forestall.

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[1] NCAI is joined in this brief by Oneida Tribe of Indians of Wisconsin, the Stockbridge-Munsee Indian Community, and the Confederated Tribes of Siletz Indians of Oregon.

ARGUMENT

The Court should grant rehearing *en banc* in this appeal pursuant to Fed. R. App. P. 35 because the panel decision conflicts with the decisions of the United States Supreme Court in *City of Sherrill v. Oneida Indian Nation of N.Y.*, 125 S. Ct. 1478 (2005), and *County of Oneida v. Oneida Indian Nation of N.Y.*, 470 U.S. 226 (1985) ("*Oneida II*"). Furthermore, the question presented by the petition – whether equitable considerations can entirely bar the right of both an Indian tribe and the United States as the tribe's trustee to sue for damages for violation of the tribe's federally-protected rights to land – is of exceptional importance because of its impact on other tribal land claims and its threat to other Indian rights protected by federal law.

In *Oneida II*, the Supreme Court expressly held that a tribe may bring suit to recover damages for violation of its possessory rights protected by federal law. 470 U.S. at 236. In *Sherrill*, the Court restated its holding in *Oneida II* that "the Oneidas could maintain their claim to be *compensated* 'for violation of their possessory rights based on federal common law.'" 125 Sup. Ct. at 1487 (emphasis added); *see also id.* at 1494 ("[T]he 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*.") Contrary to the panel's decision, the underlying principle that the Cayugas may seek money damages thus would seem well-settled.

The Court in *Oneida II* left open a separate question: "whether equitable considerations should limit *the relief* available to the present day Oneida Indians" for violation of their rights under federal law. 470 U.S. at 253 n.27 (emphasis added). After reaffirming the holding in *Oneida II*, the Court in *Sherrill* then considered the question *Oneida II* had reserved. 125 S. Ct. at 1490 n.8. The *Sherrill* Court determined that the relief there sought by the Tribe – to reestablish its sovereign control over lands the Tribe had repurchased within its original reservation as well as to oust longstanding jurisdiction of state and local governments over those lands – was precluded by equitable considerations. *Id.* at 1494. The Court in *Sherrill* was persuaded by a number of factors not present here. Relying on two centuries of state sovereign control of the lands at issue, during which time the lands had changed from wilderness to city and greatly increased in value, the Court found that justifiable expectations as to both possession and governmental control arose on the part of non-Indians located on the lands. *Id.* at 1490-91. The Court also observed that the Oneida did not seek to regain possession of their aboriginal lands until the 1970s, and did not acquire the lands at issue in *Sherrill* until the 1990s. *Id.* at 1491.

To further support its reliance on the passage of time as precluding the relief sought in *Sherrill*, the Court also relied on the doctrine of laches, which is based on "one side's inaction and the other's legitimate reliance," and *Felix v. Patrick*, 145 U.S. 317 (1892), a case applying laches to bar Indian heirs' attempt to establish a

constructive trust over lands earlier conveyed in violation of federal law. *Sherrill*, 125 S. Ct. at 1491-92. At the same time, however, the Court in *Sherrill* expressly recognized "that application of a nonstatutory time limitation in an action for damages would be 'novel,'" *id.* at 1494 n.14 (quoting *Oneida II*, 470 U.S. at 244 n.16), and then distinguished such a case from the one before it, stating "[n]o similar novelty exists when the specific relief OIN now seeks would project redress for the Tribe into the present and future." *Sherrill*, 125 S. Ct. at 1494 n.14.[2]

Contrary to *Oneida II* and *Sherrill*, the panel incorrectly interpreted *Sherrill* to establish a broad rule that whether equitable defenses bar the assertion of an Indian tribe's possessory right to land turns on the disruptive effect recognition of that possessory right would have upon the land's current occupants. More specifically, the panel decision held that the very existence of an Indian tribe's substantive right to sue for violation of possessory rights is subject to equitable defenses, including laches, acquiescence and impossibility, *Cayuga Indian Nation of N.Y. v. Pataki*, No.

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[2] The *Sherrill* Court pointed to the impracticability of restoring Indian control over lands that had been privately held for generations, 125 S. Ct. at 1492-93, relying on its observation in *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 357 (1926), that it was impossible to undo a cession to restore Indians to their former lands when those lands had been long settled by non-Indian purchasers. The *Sherrill* Court further found that the relief sought by the Oneida would have a disruptive practical effect because it would establish a jurisdictional checkerboard in a city that is overwhelmingly non-Indian. *Sherrill*, 125 S. Ct. at 1493. But no such impacts – no "disruptive practical consequences" – result from a money damages remedy, since that remedy does not seek to restore either Indian possession or governmental control over formerly private lands.

02-6111(L), slip op. at 4, 18-19 (2d Cir. June 28, 2005) ("slip op."), that these defenses apply to bar "disruptive" Indian claims, *id.* at 14, 18, and that the Cayuga possessory land claim, measured by ejectment (even though the district court denied the remedy of ejectment), would have a disruptive effect, *id.* at 15, 18-19. The panel decision thus would deny the Tribe and the United States any remedy for violation of the Tribe's federally protected possessory rights to land that have been repeatedly sustained by the Supreme Court and the district court in a case pending over three decades and now nearing completion.

The panel compounded its error by ruling that, under *Sherrill*, where recognition of a tribal possessory right is found to be "disruptive," again as measured by ejectment, that determination also bars the award of monetary damages because trespass damages "depend[ ] on the possessory land claim." *Id.* at 19. The panel so ruled without any analysis of whether a remedy in damages actually would have any disruptive effect, including the fact that the occupants of the land will not be liable for such money damages. By contrast, as *Sherrill* made clear, the impact of equitable considerations is a factual assessment that is based on the specific remedy sought for the possessory claim. Contrary to the panel decision, the application of laches to the remedy sought in *Sherrill* does not support its applicability to a money damages remedy in this case, which would not cause any "disruptive" change in jurisdiction or otherwise affect the "legitimate reliance" of the people residing in the area one

iota.[3]

More fundamentally, settled law recognizes that the "disruptiveness" of a claim is not itself a bar to that claim, nor does it preclude any and all forms of relief. As this Court stated in rejecting a like contention in *Oneida Indian Nation of N.Y. v. New York*, 691 F.2d 1070, 1083 (2d. Cir. 1982), "the courts have in numerous contexts treated as justiciable claims that resulted in wide-ranging and 'disruptive' remedies."[4]

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[3] Laches is inapplicable to this case because the United States is here seeking to protect Indian rights to land in its capacity as trustee, which is an interest held by the United States in its sovereign capacity, rather than as a private right. *See United States v. Minnesota*, 270 U.S. 181, 196 (1926); *Heckman v. United States*, 224 U.S. 413, 438 (1912). While the panel decision correctly recognized that laches has no application to a suit brought by the government to enforce its sovereign rights, slip op. at 20, it avoided that principle by construing this action to be one to enforce private rights, *id.* at 21 & n.8. That determination conflicts directly with *Minnesota* and *Heckman*, which are controlling of the question and compel rejection of the laches defense in this case. That laches would not provide a basis for extinguishing the Cayuga claim for money damages is also supported by the Court's statement in *Oneida II* that application of the doctrine for that purpose would be contrary to the settled rule "that extinguishment of Indian title requires a sovereign act" and the application of laches to bar a claim for damages "would appear to be inconsistent with established federal policy." 470 U.S. at 244 n.16.

[4] "[A]s a general rule, one panel of this Court cannot overrule a prior decision of another panel," *Union of Needletrades, Indus. and Textile Employees v. I.N.S.*, 336 F.3d 200, 210 (2d Cir. 2003), and is "bound by the decisions of prior panels until such time as they are overruled either by an en banc panel of our Court or by the Supreme Court." *United States v. Wilkerson*, 361 F.3d 717, 732 (2d Cir. 2004). Although this Court has recognized that "an exception to this general rule arises where there has been an intervening Supreme Court decision that casts doubt on our controlling precedent," *Union of Needletrades*, 336 F.3d at 210, the Supreme Court in *Sherrill*, far from casting doubt on the issue, specifically left undisturbed *Oneida II's* holding that Indian tribes have a

See also, Oneida Indian Nation of N.Y. v. County of Oneida, 719 F.2d 525, 539 (2d. Cir. 1983) (endorsing this determination). The prospect of disrupting the *status quo* because of a state's longstanding denial of a tribe's rights based on federal law has never been a basis for leaving the tribe with no remedy for protection of those rights. *E.g., Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 668-69 & n.14, 676 n.22, 685-87 (1979) (upholding tribes' treaty rights to take up to half of salmon and steelhead fish runs despite a decline in the tribal fish take to approximately two percent of those runs that was caused in part by state regulations discriminating against Indian treaty rights); *United States v. John*, 437 U.S. 634, 652-54 (1978) ("the long lapse in the federal recognition of a tribal organization," and significant periods of unchallenged assertions of state jurisdiction over Indians and their lands, does not authorize a state to lawfully exercise criminal jurisdiction over Indians contrary to a federal statute). *See also Idaho v. United States*, 533 U.S. 262, 281 (2001) (affirming tribal and U.S. title to submerged lands under lakebed); *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 208 (1999) (affirming tribal treaty hunting and fishing rights); *Arizona v. California*, 373 U.S. 546, 595-601 (1963) (affirming tribal water rights). Vindication of tribal

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substantive right to sue for damages for violation of their possessory rights to land. 125 S. Ct. at 1494. Accordingly, the panel was without authority to find that *Sherrill* "effectively overruled" this Circuit's prior decision in *Oneida Indian Nation of N.Y. v. New York*, 691 F.2d at 1097, rejecting laches and other delay-based defenses. Slip. op. at 18 n.6.

rights protected under federal law in these and other subject areas often entails some "disruption" of settled expectations even after passage of significant amounts of time. If that disruption can become the basis for destroying substantive rights themselves, as distinct from limiting the available remedy to minimize the disruption, countless rights of tribes would be jeopardized. This too makes *en banc* consideration of the panel decision in this case exceptionally important.

CONCLUSION

For the reasons stated above, *amicus curiae* respectfully submits that the petition for rehearing *en banc* should be granted.

Respectfully submitted,

Douglas B. L. Endreson, Esquire*
Reid Peyton Chambers, Esquire
James T. Meggesto, Esquire
Arthur Lazarus, Jr., P.C.
SONOSKY, CHAMBERS, SACHSE ENDRESON & PERRY, LLP
1425 K Street, N.W., Suite 600
Washington, D.C. 20005
(202) 682-0240
(202) 682-0249

Counsel for Amicus National Congress of American Indians

John H. Dossett, Esquire
National Congress of American Indians
1301 Connecticut Avenue, N.W.,
Suite 200
Washington, D.C. 20036

Of Counsel

* Counsel of Record

CERTIFICATE OF SERVICE

I hereby certify that on this 19th day of August, 2005, I served by Federal Express for delivery on Monday, August 22, 2005 the Amicus Brief of the National Congress of American Indians upon the following:

Howard L. Zwickel, Esq.
Asst. Attorney General
State of New York Law Dept.
Litigation Bureau, The Capitol
2nd Floor
Albany, NY 12224

Martin R. Gold, Esq.
Sonnenschein, Nath & Rosenthal, LLP
1221 Avenue of the Americas
New York, NY 10020

Gus P. Coldebella, Esq.
Goodwin Procter, LLP
Exchange Place
53 State Street
Boston, MA 02109

Glenn M. Feldman, Esq.
Marsical, Weeks, McIntyre &
Friedlander, P.A.
2901 North Central Avenue
Suite 200
Phoenix, AZ 85012

William L. Dorr, Esq.
Harris Beach, LLP
99 Garnsey Road
Pittsford, NY 14534

Todd Kim, Esq.
United States Department of Justice
ENRD
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

James T. Meggesto