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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,

— *vs.* —

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

Defendants/Appellants/Cross-Appellees.

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

DEFENDANTS'/APPELLANTS'/CROSS-APPELLEES' OPPOSITION TO PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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Appellants jointly submit this opposition to Plaintiffs' petitions for rehearing and rehearing *en banc* pursuant to this Court's order dated August 11, 2005. The panel majority correctly applied the Supreme Court's recent decision in *City of Sherrill* v. *Oneida Indian Nation*, 544 U.S. __, 125 S. Ct. 1478 (2005) ("*Sherrill*"), holding that laches bars disruptive and forward-looking remedies arising out of ancient possessory land claims. Accordingly, there is no basis for a rehearing or rehearing *en banc*.

I. THE PETITIONS SHOULD BE DENIED BECAUSE, AFTER *SHERRILL*, THERE IS NO CIRCUIT CONFLICT AND NO QUESTION OF EXCEPTIONAL IMPORTANCE.

Rehearing *en banc* is "not favored and ordinarily will not be ordered" unless "consideration by the full court is necessary to secure or maintain uniformity of its decisions" or the case "involves a question of exceptional importance." Fed. R. App. P. 35(a). In this Circuit, granting rehearing *en banc* is "rare." *See Baker* v. *Pataki*, 85 F.3d 919, 940-41 (2d Cir. 1996) (*en banc*) (Feinberg, J., dissenting).

A. After *Sherrill*, The Panel's Decision Does Not Conflict With Any Other Circuit Or Supreme Court Decision.

As the majority noted, *Sherrill* "has dramatically altered the legal landscape against which we consider [Plaintiffs'] claims." Panel Dec., 413 F.3d at 273. *Sherrill* strongly supports the majority's holding that laches bars this ancient possessory land claim. Accordingly, even assuming that this Court's decision in *Oneida Indian Nation* v. *New York*, 691 F.2d 1070, 1084 (2d Cir. 1982) ("*Oneida*

IV"), should be read to foreclose laches as a defense,[1] it has been effectively overruled by the Supreme Court, *see* Panel Dec., 413 F.3d at 277 n.6, and no longer controls. *See Union of Needletrades* v. *INS*, 336 F.3d 200, 210 (2d Cir. 2003).[2]

The panel decision is likewise consistent with *Sherrill* and *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226 (1985) ("*Oneida VI*"). Although Plaintiffs suggest that the application of laches to an ancient tribal land claim was resolved in *Oneida VI*, in that case the Court expressly declined to consider whether the claim was barred by laches (470 U.S. at 244-45 & n.16) and four dissenting Justices would have applied laches. *Id.* at 255-73. In *Sherrill*, the Court approved Judge McCurn's rejection of ejectment based on equitable considerations. 125 S. Ct. at 1493.

B. After *Sherrill*, This Case No Longer Presents A Question Of Exceptional Importance.

Plaintiffs' contentions notwithstanding, *Sherrill* has foreclosed their argument that the application of equitable defenses to an ancient possessory claim presents a question of "exceptional importance." The majority opinion properly applies *Sherrill* to the facts in this case. Plaintiffs' "substantive disagreement"

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[1] We argued that *Oneida IV* did not foreclose the laches defense in Appellants' Main Brief at 155-57.

[2] Likewise, for the reasons set forth in the majority decision (413 F.3d at 279 & n.8), this Court's statements that the defense of laches is not available against the federal government does not present a circuit conflict.

with the majority opinion is not a basis for *en banc* review. *Landell* v. *Sorrell*, 406 F.3d 159, 165-66 (2d Cir. 2005) (Sack, J. & Katzman, J. concurring in denial of rehearing *en banc*).[3]

II. THE PETITIONS SHOULD BE DENIED BECAUSE THE MAJORITY CORRECTLY APPLIED *SHERRILL* AND DID NOT OVERLOOK ANY RELEVANT FACTS OR LAW.

A. Monetary Remedies Are Premised Upon, And Are In Lieu Of, The Inherently Disruptive And Forward-Looking Remedies Of Ejectment And Repossession.

Sherrill holds that the defense of laches bars remedies in ancient possessory claims that are disruptive in nature, *i.e.*, remedies that "project redress for the Tribe into the present and future." *Sherrill*, 125 S. Ct. at 1483. Plaintiffs refrain from arguing that ejectment is not such a disruptive forward-looking remedy. The United States, however, contends that "an award of damages does not 'project redress into the present and future,'" U.S. Reh. Br. at 7, and that as a consequence, *Sherrill* does not apply in this case. This argument fails.

As an initial matter, *Sherrill* was not limited to equitable claims. The Court's repeated citations to *Oneida VI*, especially to Justice Stevens' dissenting opinion arguing that the claim for money damages was barred by laches, *Sherrill*,

[3] Plaintiffs also complain that, as a result of the majority decision, decades of litigation will be wasted. *See, e.g.,* United States Pet. For Panel Reh. and Pet. For Reh. *En Banc* ("U.S. Reh. Br.") at 13-14; Brief for the Cayuga Indian Nation of N.Y. and the Seneca-Cayuga Tribe of Okl. Seeking Reh. and Reh. *En Banc* ("Tr. Pls. Reh. Br.") at 3. This contention is meritless. The fact that the Supreme Court did not settle the laches issue until this year—after expressly leaving it open in 1985—does not support rehearing or rehearing *en banc*, and is immaterial.

125 S. Ct. at 1489 n.6, 1490 n.9, 1492 n.12, reveal the Court's understanding that equitable considerations must apply to limit or prevent damages as well as other types of relief.

Nevertheless, Plaintiffs and putative amici contend that they sought money damages for Defendants' alleged trespass that were somehow independent of their possessory claim. *See* U.S. Reh. Br. at 6-7; Tr. Pls. Reh. Br. at 6-7. Contrary to Plaintiffs' assertions now, their prior characterizations make clear that their claim is possessory and their claimed monetary damages are solely derived from Tribal Plaintiffs' alleged possessory right. For example:

- The Tribal Plaintiffs have long characterized their claim as "essentially one in ejectment" seeking "title to the land in question." *See* [Nation] Mem. of Law in Opp. to . . . Defendants' Motion to Dismiss (June 22, 1982) (Dkt. No. 77) at 45 n.25 & 11.

- In *Cayuga Indian Nation* v. *Cuomo*, 565 F. Supp. 1297, 1317-18 (N.D.N.Y. 1983) ("*Cayuga I*"), the district court adopted the Tribal Plaintiffs' characterization of their claims, concluding that "the complaint before this Court presents a possessory claim, 'basically in ejectment.'"

- At the remedies stage, Tribal Plaintiffs again wrote that "the *only* remedy available in Indian Treaty cases for wrongful possession is the remedy of ejectment. Money damages alone are insufficient in this case for several reasons." *See* Joint Post-Hearing Brief . . . Following the Evidentiary Hearing on Ejectment (Nov. 25, 1998) (Dkt. No. 484) at 37 (emphasis in original).[4]

- Once ejectment was denied, Plaintiffs sought damages consisting of the current fair market value ("CFMV") of the claim area, but these damages were claimed

[4] They also made clear that their claim for ejectment or trespass may "include a claim for mesne profits for the lost profits and damages sustained as a result of defendants' wrongful possession of the property." Mem. of Law of the Cayuga Indian Nation in Opp. to In Limine Motions (July 7, 1998) (Dkt. No. 447) at 7.

in lieu of ejectment and possession—precisely the type of forward-looking relief prohibited by *Sherrill*. *See* A4232, 4217 ¶ 25 (10)[5]; *see also* United States' . . . Memorandum in Support of its Motions In Limine (Nov. 22, 1999) (Dkt. No. 614) at 14.

- The district court understood that the monetary damages were intended as compensation for the impossible remedy of ejectment and were necessarily forward-looking. *See Cayuga Indian Nation of N.Y.* v. *Pataki*, 165 F. Supp. 2d 266, 366 (N.D.N.Y. 2001) ("*Cayuga XVI*") ("compensation for the loss of use of that land, past *and future*") (emphasis added).

- In their cross-appeal, the Tribal Plaintiffs pressed their claim for ejectment, arguing, *inter alia*, that the federal courts lacked the power to deny them the possession of their former lands. Indeed, the United States still maintains that "only full compensation through [CFMV] damages could prevent further suits 'for a continuing violation of [the Cayugas'] federal right to possession.'" U.S. Reh. Br. at 9 (citations omitted).[6]

Thus, the majority correctly recognized that Plaintiffs' request for damages was intended to be a forward-looking remedy that flowed from their possessory claim.[7]

[5] Citations to the Joint and Deferred Appendix are denoted as "A.__( )." The number in parentheses refers to the Appendix Volume.

[6] Plaintiffs' possessory claim is even more disruptive when viewed in the context of Plaintiffs' contention that the district court's award of monetary damages does not eliminate their continuing claim for possession. U.S. Reh. Br. at 9; id. at 9, n. 2 ("only Congress can extinguish a tribe's treaty-confirmed interest in land") (citations omitted); Joint Post-Hearing Brief . . ., (Dkt. No. 484) at 16 ("Anything short of an order restoring the plaintiffs' possession of their lands would be an extinguishment of Indian title without congressional consent.").

[7] Putative amici's assertion (*see* Brief of Amicus Six Nations Haudenosaunee Confederacy at 3-4) that the State's alleged bad faith, among other factors, would prevent application of laches, is mistaken. The defense of laches was a basis to dismiss the complaint with respect to all of the Defendants, not just the State, since the complaint asserted a possessory claim against all current landowners. Thus, the majority correctly held that "if the Cayugas filed this complaint today, exactly as worded, a District Court would be required to find the claim subject to the defense of laches under *Sherrill* and could dismiss on that basis." Panel Dec., 413 F.3d at 278. *See also Oneida VI*, 470 U.S. at 266 ("in cases of gross laches the passage of a great length of time creates a nearly insurmountable burden on the plaintiffs to disprove the obvious defense of laches.") (Stevens, J., dissenting). The district court's finding, in the context of prejudgment interest, that the State did not act in good faith, is therefore not pertinent to the availability of laches in defense of Plaintiffs' possessory claim. In addition, the State challenged the district court's

B. The Majority Properly Applied *Sherrill* To Conclude That Plaintiffs' Delay In Bringing Suit Was Not Excusable.

Plaintiffs contend that the majority either overlooked or misapprehended the district court's finding that the Cayugas' delay was excusable. Tr. Pl. Reh. Br. at 8-9; U.S. Reh. Br. at 8, n.1. However, Plaintiffs ignore the district court's finding that, in the context of ejectment, the Cayugas' delay was not excusable. *Cayuga Indian Nation* v. *Cuomo*, 1999 WL 509442, at *26 (N.D.N.Y. July 1, 1999) ("*Cayuga X*"). The panel majority expressly relied on that finding. Panel Dec., 413 F.3d at 277; *cf.* Tr. Pls. Reh. Br. at 8. Further, the only delay that the *Sherrill* Court found to be relevant was the Cayugas' long delay in seeking to regain possession of their aboriginal lands "by court decree." *Sherrill*, 125 S. Ct. at 1491. It is undisputed that the Cayugas (as well as the United States) did not seek to regain possession of the former reservation lands until they commenced the land claim lawsuit in 1980.[8] Both *Sherrill* and *Oneida VI* establish that the tribes' alleged inability to bring a successful claim in federal or state court prior to 1974 is not an impediment to the assertion of a laches defense. *See Oneida VI*, 470 U.S. at

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findings of lack of good faith on appeal. *See* Appellants' Main Brief, pp. 192-203. In light of the Court's dismissal on other grounds, the finding is no longer entitled to any preclusive or other effect. *See Stone* v. *Williams*, 970 F.2d 1043, 1054 (2d Cir. 1992). If there is any party to this case that is guilty of bad faith, it is the United States, which affirmatively supported the State for two centuries before intervening in this lawsuit.

[8] Even in the context of the prejudgment interest hearing, the district court considered the Cayugas' delay in suing, and the conduct of the United States, to reduce the claimed interest award. *See Cayuga XVI*, 165 F. Supp. 2d 266, 365-66 (N.D.N.Y. 2001).

266 ("As the Court holds, . . . there was no legal impediment to the maintenance of this cause of action at any time after 1795.") (Stevens, J., dissenting); *see also* Appellants' Main Br. at 163-66.

C. The Panel Correctly Interpreted *Sherrill* to Allow it to Dismiss a Claim Under the Nonintercourse Act.

Plaintiffs argue that dismissal of their lawsuit is inconsistent with the federal policy underlying the Nonintercourse Act ("NIA"). *See* U.S. Reh. Br. at 9-10; Tr. Pls. Reh. Br. at 10-11. In *Sherrill*, the Oneida Indian Nation of New York ("OIN") argued that it was not only immune from taxation but that the NIA's restriction against alienation precluded a tax foreclosure sale of its property. *See* Brief for Respondents, filed in the Supreme Court in *Sherrill*, 2004 WL 2246333 at *3, *9, *15, *16. Nevertheless, the Supreme Court held that the OIN could not block the application or enforcement of state real estate tax laws either affirmatively or defensively. 125 S. Ct. at 1490 n.7. The majority therefore properly understood *Sherrill* as authorizing it to bar an inherently disruptive remedy, even if that remedy is based upon an alleged violation of the NIA.

D. The *Oneida VI* Court's Remark That The Application Of Laches To An Ancient Land Claim Would Be "Novel" Is Not A Bar To Its Application.

Plaintiffs argue that the panel's application of laches to a claim for monetary damages based on a possessory claim conflicts with Supreme Court precedent, because the Court, in *Oneida VI*, 470 U.S. at 244, n.16, stated that application of

laches to a legal claim would be "novel." However, the *Oneida VI* Court left the issue open, and Plaintiffs' argument fails for two additional reasons. First, as shown above, the Cayugas' claim for monetary relief springs directly from their possessory claim, and the determination of ownership and possession is within the Court's equitable power. Second, laches applies to legal as well as equitable claims. *See, e.g., Teamsters & Empl. Welfare Trust of Ill.* v. *Gorman Bros. Ready Mix*, 283 F.3d 877, 881 (7th Cir. 2002) ("Teamsters") ("laches is equally available in suits at law"); *see also* Appellants' Main Br. at 150-51 (discussing *Robins Island Pres. Fund, Inc. v. Southold Dev. Corp.*, 949 F.2d 409 (2d Cir. 1992).[9]

Plaintiffs also argue that the panel's decision conflicts with holdings "that laches is inapplicable in actions at law filed within the statutes of limitations." U.S. Reh. Br. at 12; Pls. Reh. Br. at 12-13. But, as the *Sherrill* opinion itself demonstrated, timeliness under an analogous statute of limitations does not foreclose the application of laches: the underlying OIN land claim was subject to the identical analogous statute of limitations.

Moreover, laches may deny relief even if an express limitations period has not run. *See Alsop* v. *Riker*, 155 U.S. 448, 460-61 (1894) ("equity, in the exercise

[9] *See also Hot Wax, Inc.* v. *Turtle Wax, Inc.*, 191 F.3d 813, 822 (7th Cir. 1999); *A.C. Aukerman Co.* v. *R.L. Chaides Constr. Co.*, 960 F.2d 1020, 1031 (Fed. Cir. 1992) (*en banc*); *Alexian Bros. Health Providers Assoc.* v. *Humana Health Plan, Inc.*, 330 F. Supp. 2d 970, 977 (N.D. Ill. 2004); *In re T & M Enter., Inc.*, 284 B.R. 256, 262 (Bankr. N.D. Ill. 2002); *Harris* v. *Beynon*, 570 F. Supp. 690, 692 n.3 (N.D. Ill. 1983); *Central States, Southeast and Southwest Areas Pension Fund* v. *Lloyd L. Sztanyo Trust*, 693 F. Supp. 531, 541 (E.D. Mich. 1988).

of its inherent power to do justice between the parties, will, when justice demands it, refuse relief, even if the time elapsed without suit is less than prescribed by the statute of limitations.").[10]

E. The Equities In This Case Mirror Those In *Sherrill* And Overwhelmingly Favor A Finding Of Laches.

The *Sherrill* Court relied on a host of equitable considerations to reject the OIN's attempt to assert sovereignty over newly acquired land in its historic land claim area. The majority here carefully delineated how "the same considerations that doomed the Oneidas' claim in *Sherrill* apply with equal force here." Panel Dec., 413 F.3d at 277. These considerations, including the longstanding non-Indian character of the area and its inhabitants, the impossibility of returning to Indian control land that passed into numerous private hands generations earlier, and the tribes' inordinate delay in seeking relief against New York, establish that a damages judgment, premised as it must be on a continuing right of possession, would, as in *Sherrill*, "seriously disrupt the justifiable expectations of the people living in the area." *See Sherrill*, 125 S. Ct. at 1490-91 (quoting *Hagen* v. *Utah*, 510 U.S. 399, 421 (1994)).[11] The district court relied on many of these same

[10] *See also Teamsters*, 283 F.3d at 881; *Telink, Inc.* v. *United States*, 24 F.3d 42, 46 n.5 (9th Cir. 1994); *Hubbard* v. *Manhattan Trust Co.*, 87 F. 51, 59 (2d Cir. 1890).

[11] The fact that the *Sherrill* Court effectively denied the OIN's underlying possessory claim, while recognizing that their reservation had never been disestablished or diminished, was not lost on Justice Stevens, who observed in dissent, that "[t]he Court has done what only Congress may do – it has effectively proclaimed a diminishment of the Tribe's reservation. . . ." 125 S. Ct. at 1496 (Stevens, J., dissenting).

considerations in denying ejectment. *Cayuga Indian Nation* v. *Cuomo*, 1999 WL 509442; *see also* Panel Dec., 413 F.3d at 277.

Finally, the money damages claimed by the Tribal Plaintiffs would, if awarded, substantially disrupt the State and its taxpayers. In their cross-appeal, the Tribal Plaintiffs seek more than $1.5 billion in additional damages from New York State.[12] Such an enormous damages award would substantially disrupt the State's budgetary and fiscal planning and would place an extraordinary burden on the State's taxpayers. The Cayugas also maintained the right to seek damages from individual landowners and the local municipal defendants if they did not obtain full relief from the State. *See* Cayugas' Mem. of Law In Opp. To Defendants' Post-Judgment Motions (Nov. 20, 2001) (Dkt. No. 907) at 11.[13] Undoubtedly, a large award against individual landowners and local municipalities could have devastating consequences. The inequity of such a judgment is unparalleled: the individual landowners are indisputably innocent of any wrongdoing – none of them even existed at the time of the transaction at issue. Accordingly, in this case

[12] The State asserted in the district court, and on appeal, that any remedial request by the tribes that exceeds the request of the United States violates the Eleventh Amendment. *See* Appellants' Reply Br., pp. 107-110; *Cayuga Indian Nation* v. *Pataki*, 79 F. Supp. 2d 78, 93-94 (N.D.N.Y. 1999) ("*Cayuga XII*").

[13] Prior to the Phase I jury trial on damages, the United States also reserved its right to seek relief against the private landowners. *See* United States' Mem. of Law in Support of Its Motions in Limine (June 8, 1999) (Dkt. No. 521) at 12-13 n.8. It eventually retreated from that position after deciding to seek relief only against New York.

Plaintiffs' request for money damages is an inherently disruptive and inequitable remedy. *Compare* U.S. Reh. Br. at 7, 9, 10; Tr. Pls. Reh. Br. at 9-10.

III. THE UNITED STATES IS SUBJECT TO LACHES.

The majority cites strong support for its holding that the United States is subject to laches: three Supreme Court decisions, all of which were subsequently relied upon by Judge Posner of the Seventh Circuit. Panel Dec., 413 F.3d at 278-79. Importantly, Plaintiffs do not even challenge two of the three circumstances in which the majority found that laches was properly applied to the United States. *See* Panel Dec., 413 F.3d at 279.[14] Rather, they claim that the United States intervened to protect a public interest and, therefore, laches does not apply. U.S. Reh. Br. at 10-11; Tr. Pls. Reh. Br. at 13-15.

Plaintiffs' position begs the question of whether the United States' intervention on behalf of the OIN in *Sherrill* would have changed the outcome in that case. If one believes that the result in *Sherrill* would be the same had the United States intervened, Plaintiffs' argument is meritless.[15]

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[14] The first circumstance—egregious delay—clearly applies here. Indeed, neither the Tribal Plaintiffs nor the United States attempt to refute the majority's conclusion that this "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." Panel Dec. at 279. *Sherrill* recounted the United States' active support and encouragement of New York's acquisition of Indian lands from the early nineteenth century. 125 S. Ct. at 1484-85, 1490. The United States repeatedly affirmed the validity of the transactions here well into the twentieth century, including before the Indian Claims Commission. *See* Appellants' Main Br. at 35-37, 42-44, 116-17; Appellants' Reply Br. at 15-17.

[15] Notably, the United States submitted briefs supporting the OIN to the Supreme Court in *Sherrill* at the certiorari and merits stages and participated in the oral

In any event, it is apparent that the United States' intervention is best understood as protecting a private and not a public right. The reason that the United States intervened is well-known: to prevent dismissal pursuant to *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775 (1991), which upheld a state's Eleventh Amendment immunity defense in a suit commenced by a tribe. A2583-84 (7). *See also* Tr. Pls. Reh. Br. at 13 ("in this case the United States intervened in its trustee capacity on behalf of the Cayugas."). In circumstances such as these—where the United States acts based on its fiduciary relationship with a tribe—to the extent laches is a bar to the tribes' possessory claim, it also bars the United States' identical claim. *Cf. Thompson* v. *County of Franklin*, 15 F.3d 245, 252 (2d Cir. 1994) ("the invalidation of land treaties under the [NIA] involves the vindication of rights that are exclusively tribal in nature").

The cases relied upon by Plaintiffs do not suggest otherwise. The controlling public interest at stake in *Nevada* v. *United States*, 463 U.S. 110, 141 (1983), was not the United States' relationship with the tribe but its duty to obtain water rights for all landowners in the reclamation projects.[16] In the context of that case, the Court remarked that "the Government was not in the position of a private

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argument. Thus, for all practical purposes, the United States had intervened, and the Court nevertheless found that laches applied.

[16] Nor are public rights or interests implicated merely because the United States' claim may appear to further federal statutory policy. *See Occidental Life Ins. Co.* v. *EEOC*, 432 U.S. 355, 373 (1977) (federal courts have the authority to deny back

litigant or private party under traditional rules of common law or statute." 463 U.S. at 141. From this statement the United States incorrectly asserts that where it represents the property interests of an Indian tribe its representation necessarily involves a public interest. The Court, however, later clarified:

> It may be that where only a relationship between the Government and tribe is involved, the law respecting obligations between a trustee and beneficiary in private litigation will in many, if not all, respects adequately describe the duty of the United States. But where Congress has imposed upon the United States, in addition to its duty to represent Indian tribes, a duty to obtain water rights for reclamation projects ... the analogy of a faithless private fiduciary cannot be controlling for purposes of evaluating the authority of the United States to represent different interests.

Id. at 142. In the instant case, the only alleged property interests the United States seeks to protect are those of the Tribal Plaintiffs, to the detriment of current landowners. Thus, it cannot be maintained plausibly that the United States is undertaking to enforce a public right or protect the public interest.

Similarly, *United States* v. *Minnesota*, 270 U.S. 181, 196 (1926), holds only that *state law* notions of laches and statutes of limitations have no applicability to suits brought by the United States on behalf of Indian tribes. *See also Board of Comm'rs of Jackson Co.* v. *United States*, 308 U.S. 343, 351 (1939). Here, the majority, relying on *Sherrill*, concluded that "the *federal law* of laches can apply

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pay relief in Title VII actions based on EEOC delay); *see also Martin* v. *Consultants & Adms., Inc.*, 966 F.2d 1078, 1090 (7th Cir. 1992).

against the United States in these particular circumstances." Panel Dec. at 279 (emphasis added).[17]

Finally, Plaintiffs and putative amici argue that the application of laches in this case is inconsistent with the language and congressional policy underlying 28 U.S.C. § 2415, enacted in 1966 and subsequently amended. *See* U.S. Reh. Br. at 11; Tr. Pls. Reh. Br. at 11-13; Amicus Brief of St. Regis Mohawk Tribe, et al. at 1-7. But § 2415 was enacted nearly 160 years after the 1807 treaty, at a time when laches already barred this action. *Accord* Panel Dec., 413 F.3d at 279; *Oneida VI*, 470 U.S. at 271-72 & nn.28-29 (Stevens, J., dissenting).[18] By that late date, the character of the claim area had already changed dramatically. When Congress meant to bar the assertion of laches as a defense to a tribal claim for damages, it expressly so stated. *See, e.g.,* Indian Claims Commission Act, 60 Stat. 1050, SPA 72912 ("All claims hereunder may be heard and determined by the Commission notwithstanding any statute of limitations or laches.").

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[17] The Tribal Plaintiffs' reliance on *Heckman* v. *United States*, 224 U.S. 413, 437 (1912) is equally misplaced. There, the Supreme Court did not hold, as Plaintiffs suggest, that all suits brought by the United States on behalf of a tribe or tribal members involve a public interest. Rather, the Court simply recognized that, consistent with its guardianship responsibilities, the United States has an interest in protecting Indian property rights. *See id.*

[18] Indeed, Justice Stevens questioned whether 28 U.S.C. § 2415 is constitutional if it purports to "*revive* already barred claims." *See* 470 U.S. at 271-72 (Stevens, J., dissenting) (emphasis in original). In making this point, Justice Stevens inherently acknowledged that the defense of laches and a statute of limitations are independent.

CONCLUSION

For the foregoing reasons, the petitions for rehearing and rehearing *en banc* should be denied.

Respectfully submitted,

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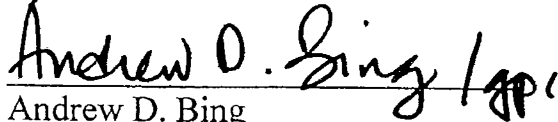

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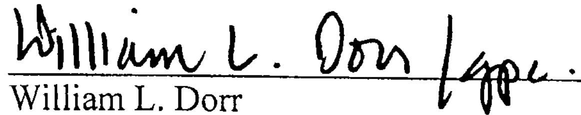

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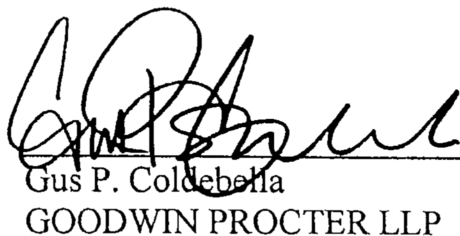

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