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 *AMICUS CURIAE* SENECA NATION OF INDIANS SUPPORTING APPELLEES/CROSS-APPELLANTS' MOTION FOR REHEARING OR REHEARING *EN BANC*

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATUTES

REGULATIONS

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE[1]

The Seneca Nation of Indians is a signatory to the 1794 Treaty of Canandaigua, 7 Stat. 44, which confirmed the Nation's title to much of its aboriginal and historical territory encompassing western New York.[2] It is a plaintiff in a longstanding land claim case, *Seneca Nation of Indians v. New York*, 382 F.3d 245 (2nd Cir. 2005), pending on petition for rehearing and rehearing en banc (No. 02-6185(L), and in a recently settled case, *Seneca Nation v. State of New York*, No. 85-CV-411C (W.D.N.Y.), consent decree and judgment entered June 23, 2005, in which it asserts that its treaty protected lands were lost through illegal transactions conducted by the State of New York in violation of the treaties, federal common law, and the Nonintercourse Act (NIA), 25 U.S.C. § 177. In this regard, the Nation's claims are similar to those of the Cayuga parties in this matter, including the claim for money damages, and to those of other tribes to treaty protected land located in New York.[3]

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[1] This Amicus Brief is filed with the consent of all parties, except for Miller Brewing Co. who did not respond to our request for consent. Therefore a Motion for Leave to File Amicus Brief is being filed with this brief.

[2] The Seneca Nation is recognized by the Federal Government. *See* 68 Fed Reg. 68180,68182 (Dec. 5, 2003).

[3] These other cases include: *Oneida Indian Nation of New York et al. v. State of New York*, 74-CV-187 (N.D.N.Y.); *St. Regis Mohawk Tribe v. State of New York*, 82-CV-783, 82-CV-1114 & 89-CV-829 (N.D.N.Y.); *Stockbridge Munsee Community v. State of New York*, 86-CV-1140 (LEK\GJD) (N.D.N.Y.)

Altogether, there are more than a half dozen such cases, all filed in the northern and western district courts of New York, all governed by precedent of this Court.

The present case provides for the application of laches to bar money damages in these cases, a defense asserted by the State and other defendants in the Nation's cases and the other New York land claim cases. This unprecedented ruling sweeps aside longstanding Supreme Court precedent validating the Nation's, the Cayuga's, and other similar claims and, if left unchanged, leaves virtually no means to effectuate the important federal treaty rights and law on which the claims are based. As such, the panel's decision conflicts with Supreme Court authority on a question of fundamental importance affecting multiple cases in this circuit. En banc review by this Court of the majority decision in *Cayuga Indian Nation of New York v. Pataki,* 413 F.3rd 266 (2nd Cir. 2005) is warranted.

ARGUMENT

For more than three decades now the validity of the longstanding claims of amici and the Cayugas, particularly the availability of money damages remedies, have been upheld by the Federal courts, including the Supreme Court, and relied on by Congress in enacting numerous land claims settlements. See 25 U.S. C., chap. 17. Applying longstanding Supreme Court precedent, the fundamental principles

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and *Onondaga Nation v. State of New York*, 05-CV-00314 (N.D.N.Y).

underlying these important claims were first established in *Oneida Indian Nation v. County of Oneida (Oneida I)*, 414 U.S. 661 (1974) and *County of Oneida v. Oneida Indian Nation of New York (Oneida II)*, 470 U.S. 226 (1985). Although the validity of the New York land claims were expressly reaffirmed by the Court in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. ___, 125 S.Ct. 1478 (2005), the *Cayuga* panel ignored the *Sherrill* Court's direct reaffirmation of the validity of the rights asserted and the availability of money damages to vindicate such rights, and applied laches to bar the Cayuga's damages claims.

In *Oneida I*, the Supreme Court unanimously affirmed federal court jurisdiction over the Oneida's claim holding it asserted a present right based on the "not insubstantial claim that federal law now protects, and has continuously protected from the time of the formation of the United States, possessory rights to tribal lands, ..." 414 U.S., at 675. On remand and after further proceedings, the district court entered judgment for the Oneidas and awarded trespass damages. *Oneida II*, 470 U.S. at 230.

Ten years later in *Oneida II*, the Court found that "from the first Indian claims presented," the "'unquestioned right'" of Indians to their lands "has been reaffirmed consistently," *id.* at 234-35 (quoting *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831)), and that the Court's decisions spanning two centuries had recognized that

"Indians have a federal common-law right to sue to enforce their aboriginal land rights," *id.* at 235. Based on these "well-established principles," the Court concluded that "the Oneidas can maintain this action for violation of their possessory rights based on federal common law." *Id.* at 236.

In so holding, the Court expressly acknowledged that it had considered whether the passage of 175 years defeated the Oneidas' right, stating that:

> [O]ne would have thought that claims dating back for more than a century and a half would have been barred long ago. As our opinion indicates, however, neither petitioners nor we have found any applicable statute of limitations or other relevant legal basis for holding that the Oneidas' claims are barred or otherwise have been satisfied.

Id. at 253. The Court left open the question of "whether equitable considerations should limit the relief available to the present day Oneidas." *Id.* at 253 n. 27.

In *Sherrill*, the Court specifically reaffirmed that under *Oneida II* Indian tribes have a substantive right to bring an action "to be compensated 'for violation of their possessory rights based on federal common law,'" *id.* at 1487 (quoting *Oneida II*, 470 U.S. at 236).[4] The Court in *Sherrill* then considered the issue reserved in *Oneida II*,

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[4] Even if *Sherrill* had not reaffirmed *Oneida II* on this question, *Oneida II* still controls this case, for the Supreme Court has specifically held that "[i]f a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions." *Agostini v. Felton*, 521 U.S. 203, 237 (1997) (alteration in original) (quoting *Rodriguez de Quijas v. Shearson/American*

namely "the question of equitable considerations limiting the relief available to OIN." *Sherrill*, 125 S. Ct. at 1490 n.8.

The *Sherrill* Court observed that "when the Oneidas came before this Court . . . in *Oneida II*, they sought money damages only," *id.* at 1489. The Court distinguished the question reserved in *Oneida II* from the Tribe's substantive right to bring such an action. The Court explained that the "substantive question whether the plaintiff has any right" is very different from "the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is," *id.* (quoting D. Dobbs, Law of Remedies § 1.2, at 3 (1973)). Declaring this distinction to be "fundamental," *id.*, the *Sherrill* Court adopted the district court's holding following remand of *Oneida II* that "[t]here is a sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right." *Sherrill*, 125 S. Ct. at 1489 (quoting *Oneida Indian Nation of N.Y. v. County of Oneida*, 199 F.R.D. 61, 90 (N.D.N.Y. 2000).[5]

Express, Inc., 490 U.S. 477, 484 (1989)); *see also United States v. Martinez*, 413 F.3d 239, 243-244 (2d Cir. 2005). *Bach v. Pataki*, 408 F.3d 75, 84-86 (2d Cir. 2005); *Perez v. Greiner*, 296 F.3d 123, 125 n. 4 (2d Cir. 2002).

[5] In that phase of the case, the district court considered whether the Oneidas should be permitted to amend their complaint to add individual landowners as defendants and seek ejectment as a remedy. *County of Oneida*, 199 F.R.D. at 67-68. The district court clearly recognized the existence of the Oneidas' federal common law right, but held that it could be vindicated only by pursuing a damages

As to the specific relief sought by the Oneida Indian Nation -- "recognition of its present and future sovereign immunity from local taxation" on land it had purchased within its claim area – the *Sherrill* Court held the Oneidas were precluded by the passage of time when the relief was considered against "the long history of state sovereign control over the territory," and the "disruptive practical consequences" of the relief. In so holding, the Court expressly made clear that in contrast to the "shift in governance" sought by the OIN, *Sherrill*, 123 S.Ct. at 1494, neither of these considerations are relevant to or present in the context of a money damages award: "In sum, the question of money damages for the Tribe's ancient dispossession is not at issue in this case, and we do not disturb our holding in *Oneida II*." *Id.*

The Cayuga panel's attempt to characterize the damages awarded to the Cayugas as a monetized version of ejectment to which *Sherrill's* laches analysis applies, while a convenient means of bringing the cases to a final end, simply does not stand up in light of *Sherrill's* specific reaffirmation of the validity of and

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remedy against the State, not by ejectment. *Id.* at 94-95. In so ruling, the district court relied on its earlier ruling in this litigation. *Cayuga Indian Nation of N.Y. v. Pataki*, 79 F. Supp. 2d 66 (N.D.N.Y. 1999). *See County of Oneida*, 199 F.R.D. at 93. The *Sherrill* Court's express reliance on the *Oneida* district court decision on remand - - which upheld a money damages remedy against the State - - confirms the inconsistency of the panel decision in this case with *Sherrill*.

availability of money damages for such claims under *Oneida II*. Rather than altering the legal landscape against which money damages in Indian land claims must be considered, *Sherrill* directly affirms the legal landscape.

CONCLUSION

For the reasons set forth in this *Amicus* Brief, the petitions for rehearing and rehearing en banc should be granted.

Respectfully submitted,

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DATED: August 22, 2005

CERTIFICATE OF COMPLIANCE

I certify under Federal Rule of Appellate Procedure 32 and Local Rule 29 of the United States Court of Appeals for the Second Circuit that the attached Amicus Brief is proportionately spaced, has a typeface of 14 points or more, and contains 1,661 words.

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CERTIFICATE OF SERVICE

I hereby certify that on August 22, 2005, copies of the foregoing Brief for *Amicus* Curiae Seneca Nation of Indians of New York Supporting Appellees/Cross-Appellants Motion for Rehearing or Rehearing En Banc, was sent via U.S. mail and electronic mail to counsel of record at these addresses:

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