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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-Appellee-Cross-Appellee

v.

GEORGE PATAKI, GOVERNOR, ET. AL.
Defendants-Appellants-Cross-Appellees.

BRIEF OF AMICUS UNITED SOUTH AND EASTERN TRIBES IN SUPPORT OF CAYUGA INDIAN NATION'S PETITION FOR REHEARING EN BANC

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INTEREST OF AMICUS CURIAE

The United South and Eastern Tribes, Inc. (USET) is a non-profit organization founded in 1968 to represent federally-recognized tribes throughout the eastern United States, from Maine to Texas. Its members include tribes with pending land claims and tribes that have settled land claims.

USET's brief addresses the conflict between (a) the panel decision, which holds that laches bars claims by tribes and the United States for damages arising from illegal late eighteenth century land transactions even though the applicable statute of limitations, 28 U.S.C. § 2415, has not expired, and (b) Circuit precedent, which holds that the timeliness of such claims is governed by 28 U.S.C. § 2415, which Congress enacted in 1966 and amended thereafter to assure that current tribal land claims arising from old, illegal tribal land conveyances would not be barred.

LEGAL ARGUMENT

The panel decision is contrary to binding Circuit precedent. *Oneida Indian Nation v. State of New York*, 691 F.2d 1070, 1084 (2d Cir. 1982), and *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 537-38 (2d Cir. 1983), correctly applied the principle that federal courts may not fashion common law rules that conflict with statutes addressing the same subject, and thus rejected a laches bar to tribal land claims governed by a specific statute of limitations, 28 U.S.C. § 2415. *See Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259-60 (2d Cir. 1997) ("laches within the term of the statute of limitations is no defense at law" because "fixing the periods for bringing damages actions is a legislative function" reflecting a legislative "value judgment").

By enacting section 2415 in 1966 and by later amending it, Congress preserved old tribal land claims and gave the United States and Indian tribes time to sue on them; indeed, Congress provided that such claims did not even accrue until the enactment of the statute. The panel majority's judgment that it is too "disruptive" to award a tribe damages for land transferred in violation of federal law a long time ago is a policy judgment that cannot be reconciled with the decision of Congress to allow such claims to proceed, and thus is foreclosed by the Circuit precedent cited above.[1]

1. The panel decision is based on the passage of time and imposes an ad hoc limitations bar on tribal land claims. The panel decision (p. 18) lists four parallels to *City of Sherrill,* amounting collectively to nothing more than the passage of a long period of time, during which the area became predominantly occupied by non-Indians. Non-Indian occupation, of course, was part and parcel of the illegal land transfers for which the Cayugas seek redress. Neither time

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[1] Contrary to the panel majority's view that the Supreme Court's recent *Sherrill* decision, 125 S.Ct. 1478 (1995), "hold[s]" that laches can be applied "to Indian land claims, even when such a claim is legally viable and within the statute of limitations," *Sherrill* was not a land claim case and did not even refer to section 2415 or a statute of limitations. *Sherrill* did, however, note that it does not disturb *County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 244 (1985) (*"Oneida II"*), in which the Court specifically discussed section 2415, observed that any land claim listed by the Secretary of the Interior pursuant to section 2415 "remains live," and held that it "would be a violation of Congress' will" for the federal courts to borrow state law that would bar such a claim. 470 U.S. at 243-44. Thus, *Sherrill* did not overrule this Court's precedent regarding laches and section 2415 and did not question *Oneida II's* interpretation of section 2415's intent to preserve tribal land claims.

itself, nor the encroachment of non-Indians, establishes laches, which requires proof of unreasonable delay and prejudice.[2] Therefore, the panel majority "treats the special defense of laches as if it were in the nature of a statute of repose," (dissent, p. 31), establishing an ad hoc period of limitations for damages claims.

2. Congress rejected the policy implemented by the panel majority and chose instead to enact a statute of limitations preserving tribal land claims arising from old land transactions. In 1966, Congress imposed a statute of limitations on certain damage claims by the United States as trustee for tribes, including with respect to land. Pub. L. 89-505, 80 Stat. 304, § 1, *codified at* 28 U.SC. § 2415. A few months later, Congress enacted 28 U.S.C. § 1362 for the purpose of giving tribes the right to bring the same claims in federal court that the United States could have filed on behalf of tribes. *See Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 464-75 (1976). Reviewing the history of post-1966 amendments of 28 U.S.C. § 2415, which extended the limitations deadline for claims not brought already, the Supreme Court found it "replete with evidence of Congress' concern that the United States had failed to live up to its responsibilities as trustee for the Indians, and that the Department of the Interior had not acted with appropriate dispatch in meeting the deadlines provided by § 2415." *Oneida II,* 470 U.S. at 244; *see* Hearings before the

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[2] Laches means "[u]nreasonable delay in pursuing a right or claim – almost always an equitable one – in a way that prejudices the party against whom relief is sought." BLACK'S LAW DICTIONARY 891 (8th ed. 1999). *See also* 27A AM. JUR. 2D *Equity* § 140, at 618 (1996) (laches requires showing of prejudice). Unreasonable delay and prejudice are essential elements of laches. Dissent, at 28 (quoting *Kansas v. Colorado*, 513 U.S. 673, 687 (1995)); *Thom v. Ashcroft*, 369 F.3d 158, 166 (2d Cir. 2004).

Subcomm. on Indian Affairs, Senate Comm. on Interior & Insular Affairs, 92d Cong., 23 (Sept. 12, 1972) (United States has to litigate "questions of title, going back 100 years, 150 years, 200 years in some cases"). Thus, the long delay invoked by the panel majority to impose a laches bar actually led Congress to enact and amend section 2415 to *preserve* judicial redress for claims with respect to old land transactions.[3]

In 1982, Congress more specifically addressed the timeliness of tribal land claims brought by tribes themselves.[4]

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[3]H.R. Rep. 95-375, *reprinted in* 1977 U.S.C.C.A.N. 1616, 1621 (time needed to develop claims that "go back to the 18th and 19th centuries"); Hearings before the Senate Select Comm. on Indian Affairs, 95th Cong., 24 (May 3 & 16, 1977) (Department of Interior submitted list of tribal land claims, including the Cayuga Act claim, that would be barred unless Congress extended the deadline for suit); *id.* at 33 (testimony of Assistant Attorney General for Lands and Natural Resources referring to suits in Maine and in New York on behalf of the Oneidas and Mohawks); *id.* at 6, 31, 37, 77 (also referring to tribal claims in Maine); 101-04 (statement of Massachusetts Attorney General regarding Mashpee claim); 123 Cong. Rec. 22500-02 (July 12, 1977) (Rep. Foley) (objecting to allowing claims as old as 180 years); *id.* at 22504 (Rep. Risenhoover) (advocating preserving claims until the government "has faithfully performed its stewardship").

[4]In 1982, Congress knew that the Supreme Court had opened the door to old tribal land claims in *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661 (1974), that the district court had awarded damages to the Oneidas, 434 F. Supp. 527 (N.D.N.Y. 1977), and that Congress had enacted two settlements of very old land claims, providing monetary compensation and land to the tribes, 25 U.S.C. §§ 1701-1715 (Rhode Island); 25 U.S.C. §§ 1721-35 (Maine).

Oneida II, 470 U.S. at 243 & n. 15. The Indian Claims Limitations Act required the Secretary of the Interior to list Indian claims, which remain live unless and until rejected by the Secretary, at which time the tribe has one year to bring the claim. 470 U.S. at 243. The lists published in 1983 included the Cayuga land claim and the claims of other tribes in New York and the eastern United States, many which were based on late eighteenth century transactions. 48 Fed. Reg. 13698, 13920 (March 31, 1983). The Secretary has never rejected the Cayuga land claim.

3. ***The federal courts cannot adopt federal common law rules in derogation of the will of Congress.*** Congress is primarily responsible for substantive federal law, even in fields pervaded by federal common law. *See Senator Linie Gmbh & Co. Kg v. Sunway Line, Inc.* 291 F.3d 145, 166 (2d Cir. 2002). Federal courts are not free to adopt common law rules that conflict with statutory schemes. *Milwaukee v. Illinois*, 451 U.S. 304, 314-15 (1981); *Ivani Contracting Corp. v. City of New York*, 103 F.3d 257, 259-60 (2d Cir. 1997) (legislative value judgments embodied in statute of limitations governing damages action cannot be varied by judicial application of laches principles); *see generally Chevron Oil Co. v. Huson*, 404 U.S. 97, 104-05 (1971) (laches held not to apply where Congress provided for statute of limitations: "Congress made clear provision for filling in the 'gaps' in federal law; it did not intend that federal courts fill in those 'gaps' themselves by creating new federal common law.").

In *Oneida II*, the Supreme Court declined to apply the rule that the federal common law borrows analogous state statutes of limitations to a tribe's damage claim, because "the borrowing of a state limitations period in these cases would be inconsistent with federal policy." 470 U.S. at 240-41. The Court concluded that "the statutory framework adopted in 1982 presumes the existence of an Indian right of action not

otherwise subject to any statute of limitations. It would be a violation of Congress' will were we to hold that a state statute of limitations period should be borrowed in these circumstances." *Id.* at 244.

The panel's judgment that, after many years, tribes may not pursue damage claims imposes an ad hoc limitations period indistinguishable in principle from the state limitations periods held in *Oneida II* to conflict with the congressional policy expressed in section 2415. Congress concluded it would be unfair, in light of the obstacles that Indian tribes faced and the limitations of the federal agencies long responsible for enforcing federal protections, to cut off tribal claims even for centuries-old injuries. Congress rejected clear arguments, the same ones advanced by the panel majority, that it is too late for such claims, and established in 28 U.S.C. § 2415(g) that such claims accrued on the date of enactment of the statute. There is no room in that scheme for a federal common law rule that would cut off damage claims even before the statutory accrual date, let alone before a statutory bar date that has not yet arrived.

4. The record provides no basis for finding laches. The panel decision cannot be sustained as an application of laches. The record does not establish inexcusable delay by the Cayugas or prejudice to the State, concededly two essential preconditions for laches. State Br. 150.

There was no inexcusable delay by the tribe.[5] Because of the State's Eleventh Amendment immunity, the Cayugas could not have sued the State of New York in federal court until the United States intervened. Nor could they have sued in state court because tribes had no standing under state law to bring land claims. *Seneca Nation v. Appleby*, 196 N.Y. 318 (1909); *Johnson v. LIRR*, 162 N.Y. 462 (1900).[6] By the time New York changed the law to confer jurisdiction over such tribal claims in 1958, Congress had already excluded "civil actions involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952," from its grant of civil jurisdiction to New York in 25 U.S.C. § 233. *Oneida Indian Nation v. County of Oneida*, 464 F.2d 916, 923 n.9 (2d Cir. 1972).

The passage of time did not prejudice the State. The defendants' brief complains of clouds on individual landowners' titles, State Br. 166, but that has nothing to do with an award of damages against the State, and flows from the long period of time the action was pending in court, not from delay in filing. Nor is there prejudice to the State in

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[5]Delay by the United States cannot permit dismissal. Congress extended the deadline for filing these suits to accommodate agency resource constraints and the fact that the United States had not fulfilled its duties, so Congress could not have intended to have those extensions undone by application of laches principles.

[6]After *Oneida I*, federal courts had jurisdiction over such claims, but this Court's prior precedent was to the contrary. *Oneida Indian Nation v. County of Oneida*, 464 F.2d 916, 920 (2d Cir. 1972). In 1966, 28 U.S.C. § 1362 opened federal courts to tribal land claims. Tribes previously depended on the United States to sue for them. *See* 25 U.S.C. § 175; *United States v. Boylan*, 265 F. 165 (2d Cir. 1920).

defending the litigation. The validity of the State transactions depends on whether there is a federal treaty or statute approving them, a matter of public record, not on private documents or the memories of individuals. Regardless of its magnitude, an award of compensatory damages is not "prejudice."

CONCLUSION

Rehearing en banc should be granted.[7]

Respectfully submitted,

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[7] This brief is lodged with a motion for leave to file pursuant to FRAP 29(b). The United States, the State of New York and the Counties consent. The non-governmental defendants Miller Brewing Co., et al. have withheld consent.

Certificate of Compliance
Pursuant to Fed. R. App. P. 32(a)(7)(C)

I certify, relying on the word count of the word processing system used to prepare this brief, that this amicus brief contains 2,239 words, including headings, footnotes, and quotations, but excluding the cover, the table of contents, table of authorities, signature lines and certificates of counsel. This complies with the applicable limitation within the Federal Rules of Appellate Procedure.[8]

Michael R. Smith

[8]Rule 32(a)(7) provides that 30 pages equals 14,000 words. Rule 35(b)(2) limits petitions for en banc rehearing to 15 pages, and Rule 29(d) limits amicus briefs to one-half of a party's brief, or 7.5 pages here, which equates to 3,500 words.