Nos. 05-982 and 05-978

In The Supreme Court of the United States

CAYUGA INDIAN NATION OF NEW YORK, *et al.*,

Petitioners,

v.

GEORGE E. PATAKI, GOVERNOR OF THE STATE OF NEW YORK, *et al.*,

Respondents.

UNITED STATES,

Petitioner,

v.

GEORGE E. PATAKI, GOVERNOR OF THE STATE OF NEW YORK, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF *AMICUS CURIAE* ONONDAGA NATION, TONAWANDA BAND OF SENECA INDIANS, MOHAWK NATION COUNCIL OF CHIEFS AND THE HAUDENOSAUNEE IN SUPPORT OF THE PETITIONS FOR WRIT OF CERTIORARI

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INTEREST OF *AMICI*

Amici Onondaga Nation, Tonawanda Band of Seneca Indians, Mohawk Nation Council of Chiefs and the Haudenosaunee submit this brief in support of the petitions for certiorari filed by the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma in No. 05-982 and the United States in 05-978.[1] *Amici* are plaintiffs in land rights cases in New York that may be affected by the court of appeals' decision below.[2] The Onondaga Nation and Tonawanda Band of Seneca Indians are recognized by the United States. 70 Fed. Reg. 71194 (2005). The Mohawk Nation Council of Chiefs is a traditional Indian government with authority over its members at Akwesasne in northern New York (also known as the St. Regis Mohawk Reservation) and a co-plaintiff with two other Mohawk governments and the United States in the Mohawks' pending land claim. The Haudenosaunee, or Six Nations Confederacy, is a signatory to the Treaty of Fort Stanwix of 1784 and the Treaty of Canandaigua of 1794, which define the relationships between Indian nations in New York and the United States. The Onondaga Nation, Tonawanda Band of Seneca Indians and the Mohawk Nation are member nations of the Haudenosaunee. As claimants to lands obtained by the State of New York in

[1] Counsel for *amici* authored this brief in whole, and no person or entity other than *amici* made a monetary contribution to the preparation or submission of this brief.

[2] *Onondaga Nation v. State of New York, et al.*, Civ. No. 05-CV-314 (LEK/DRH) (N.D. N.Y., filed March 3, 2005); *Seneca Nation of Indians and Tonawanda Band of Seneca Indians v. State of New York, et al.*, 382 F.3d 245 (2d Cir. 2004), *petition for certiorari filed*, 6 U.S.L.W. 22 (U.S. Feb. 3, 2006) (No. 05-905); *Canadian St. Regis Band of Indians, et al. v. State of New York, et al.*, 278 F. Supp. 2d 313 (N.D. N.Y. 2003).

violation of the Trade and Intercourse Act, *amici* have a substantial interest in the issues raised by the court of appeals' decision and this Court's consideration of the petitions for certiorari. Respondents State of New York, et al. in both No. 05-982 and No. 05-978 have consented to the filing of this brief. Petitioner United States in No. 05-978 has consented to the filing of this brief. Petitioners Cayuga Indian Nation of New York and Seneca-Cayuga Tribe of Oklahoma in 05-982 have consented to the filing of this brief.

SUMMARY OF ARGUMENT

Review is warranted because the court of appeals' decision conflicts with this Court's rule that laches cannot be invoked by a party guilty of bad faith. New York State's bad faith with regard to the Cayugas consists of the State's knowing violation of the Trade and Intercourse Acts, its enormous financial profits from obtaining Cayuga land at a fraction of its value, and its steadfast resistence to justice for the Cayugas. Review is also warranted because the court of appeals' decision conflicts with this Court's rule that the passage of time should not be considered unreasonable for purposes of laches when the party against whom it is invoked did not have an adequate opportunity to assert its rights or was under a disability that effectively prevented such lawsuits. Here, Indian nations in New York, including the Cayugas, lacked legal capacity to file suit unless authorized by statute. This rule was not changed until relatively recently. Also, the federal and state courts were effectively closed to the Cayugas for more than 184 years, due to various jurisdictional and practical barriers. The court of appeals failed to take these

circumstances into account, as this Court's precedents require. The petitions should therefore be granted.

REASONS FOR GRANTING THE PETITIONS

The court of appeals' decision dramatically diminishes the legal protections Congress and this Court have provided Indian land rights. As such, this case is one of the most important Indian land rights cases to come before this Court in a generation. The petition should be granted because the court of appeals' decision applying the doctrine of laches against the Cayuga Indian plaintiffs and the United States to bar their claims for money damages against the State of New York for its acquisition of Cayuga land in violation of the Trade and Intercourse Act conflicts with this Court's jurisprudence on laches.

This Court has uniformly held that laches requires more than the mere lapse of time; it requires both unreasonable delay, as evidenced by lack of diligence in asserting the claim, and prejudice to the defendant from such delay. *Costello v. United States*, 365 U.S. 265, 282 (1961); *Kansas v. Colorado*, 514 U.S. 673, 687 (1995). The court of appeals did not analyze the first element at all, and its analysis of the second element presumed such prejudice without considering the relevant circumstances. The court of appeals ruled that the Cayugas' claim was barred by laches as a matter of law simply because a long period of time had elapsed, which effectively converted laches into an ad hoc statute of limitations. The ruling below is contrary to this Court's long-established rule that laches requires a fact-specific determination.

The court of appeals committed two critical errors in focusing almost exclusively on the passage of time in its laches determination. In finding that it was inequitable to allow the Cayugas' claim to proceed, the court of appeals failed to take into account the State of New York's bad faith in its dealings with the Cayugas. Moreover, the court of appeals ignored the rule that delay cannot be unreasonable for purposes of laches when the party against whom it is invoked did not have adequate opportunity to bring suit earlier or was under a disability that prevented such suits. Because the court of appeals' errors are substantial, inconsistent with settled law as established by this Court, and implicate the United States' longstanding commitment to protect Indian land, this Court should review the decision below. If left undisturbed, the court of appeals' ruling would create a novel rule of laches applicable to claims brought by Indian tribes, in particular Indian land claims, and thereby inflict a grave injustice on the Cayugas and raise the specter of similar injustice for countless other litigants.

I. Review is Necessary Because the Court of Appeals Failed to Apply the Rule Established by This Court That Laches May Not Be Invoked By A Party That is Guilty of Bad Faith.

Recognizing that the doctrine of laches promotes basic fairness between the parties, this Court has uniformly held that the doctrine requires a searching factual inquiry into the circumstances of the parties' conduct, a task the court of appeals wholly failed to carry out. Without analysis of the Cayugas' particular circumstances or citation to the record, the court of appeals found that "the same considerations that doomed the Oneidas' claim in *City of*

Sherrill apply with equal force here." App. 21a.[3] This Court's decision in *Sherrill*,[4] however, does not support the application of laches to tribal claims under the Trade and Intercourse Act.

The defense of laches is an equitable doctrine and cannot be invoked by a party that comes to court with unclean hands. *See, e.g., ABF Freight System, Inc. v. Nat'l Labor Relations Bd.*, 510 U.S. 317, 329-330 (1994) (Justice Scalia concurring) ("The 'unclean hands' doctrine closes the door of a court of equity to one tainted with inequitableness or bad faith relative to the matter in which he seeks relief, however improper may have been the behavior of the defendant."); *Pennecom B.V. v. Merrill Lynch Co., Inc.*, 372 F.3d 488, 493 (2d Cir. 2004). As the district court expressly found, the State of New York is guilty of bad faith in its long history of dealings with the Cayugas. App. 298a-300a. This bad faith and other factors discussed below precluded a finding of unreasonable delay by the Cayugas in filing the suit. Wholly disregarding the district court's factual findings, the court of appeals mistakenly concluded that laches barred the Cayugas' claims.

a. The State's Bad Faith With Regard to the 1795 Treaty

After reviewing the extensive historical record, the district court concluded that the facts "demonstrate[ ] all too vividly that the State did not act in good faith toward the Cayuga at the time of the 1795 and 1807 Treaties, but

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[3] Citations to pages in the Appendix ("App.") refer to the Appendix filed by Petitioner United States in 05-978.

[4] *City of Sherrill v. Oneida Indian Nation of New York*, 125 S.Ct. 1478 (2005).

also on subsequent occasions throughout the 200 years under consideration herein." App. 303a.[5] Following the American Revolution, the State of New York embarked on an aggressive policy to acquire the lands of the Six Nations Confederacy, of which the Cayuga Nation was a member, in knowing defiance of federal policy and law that centralized control over Indian land transactions in the federal government. *See generally*, Barbara Graymont, *New York State Indian Policy After the Revolution*, 57 NEW YORK HISTORY 438 (1976). Shortly after Congress enacted the second Trade and Intercourse Act in 1793, the State enacted a statute appointing agents for the purpose of inducing the Cayugas (and Oneidas and Onondagas) to quitclaim to the State for five dollars per square mile the lands the Indian nations had previously reserved. As Professor Graymont has noted, by this act "New York State intended to maintain complete control over Indian affairs and transfers of Indian real property within its borders, without recourse to the federal government." *Id*. at 461.

Shortly after the 1794 Treaty of Canandaigua was ratified guaranteeing the lands of the Six Nations, the State enacted a similar statute appointing agents for the purpose of acquiring Cayuga land, in open defiance of the requirements of the Trade and Intercourse Act and the Treaty. The 1795 act provided that the Cayugas would be paid fifty cents per acre and the land would subsequently be sold at public auction for not less than two dollars per acre, a disparity which the district court found to make the State's bad faith "virtually self-evident." App. 279a-280a. The State relied on this authority in negotiating the 1795

[5] Although the district court's bad faith inquiry was conducted as part of the court's determination of prejudgment interest, the facts found are equally relevant to the bad faith analysis under the doctrine of laches.

Treaty with the Cayugas, even though the State's Council of Revision had vetoed the act. The State Legislature overrode the Council's veto, ignoring the Council's findings that the 1795 act was completely unfair to the Cayugas and inconsistent with the State's obligations to them because three-quarters of the proceeds of any sale of Cayuga land would go to the State. App. 246a-247a. As the district court concluded, "the State cannot be said to have acted in good faith with respect to the Cayuga when it forged ahead with the 1795 act, putting its own financial gain above all else." App. 248a. The district court's conclusion that the 1795 act "was nothing more than a transparent attempt on the State's part to generate revenue at the expense, both economically and otherwise, of the Cayuga" is fully supported by the historical record. App. 286a-287a.

The circumstances surrounding the State's acquisition and subsequent sale of Cayuga land show a pattern of bad faith and duplicitous conduct. The State does not contest the fact that it obtained neither authorization nor approval from Congress for its acquisition of 64,000 acres of Cayuga land in the 1795 Treaty of Cayuga Ferry. New York Governor John Jay was aware of the Trade and Intercourse Act's requirements, having received a copy of a legal opinion from U.S. Attorney General William Bradford that unequivocally stated the necessity of the State's compliance with the terms of the Act. App. 259a. The State's lead negotiator, Phillip Schuyler, also knew of the Act's requirements before the 1795 Cayuga Treaty. In July, 1795, Israel Chapin, the federal Indian agent, questioned Schuyler about "how he construed the law of Congress in regard to holding treaties with the Indian tribes." In a letter to Secretary of War Timothy Pickering, Chapin reported that Schuyler "made very little reply by saying it

was well where it could correspond with that of an Individual state." *Quoted in* Barbara Graymont, *New York State Indian Policy After the Revolution*, 57 NEW YORK HISTORY 438, 469 (1976). Accordingly, the district court properly characterized the State's conduct as "calculated disregard" of the Trade and Intercourse Act. App. 289a.

Following the 1795 Treaty, the State sold the acquired Cayuga lands at an average price of $4.50 per acre, more than twice the statutory minimum, and thereby realized a profit of $247,609.33. App. 280a. By contrast, the Cayugas received fifty cents an acre, a grossly inadequate sum by any standard. As the district court noted, the fact that private buyers were willing to bid nine times the price the State paid the Cayugas is conclusive evidence of inadequate consideration, and further evidence of the State's pattern of bad faith. App. 282a.

b. The State's Bad Faith With Regard to the 1807 Treaty

The State's conduct with regard to the 1807 Treaty was scarcely any better. The district court found that the State knowingly violated the requirement of the Trade and Intercourse Act for congressional approval. App. 293a. In 1807, the State appraised the Cayuga lands at approximately $4.50 per acre and then purchased them for $1.50 per acre, garnering a handsome profit at the Cayugas' expense. The State's bad faith concerning the 1807 Treaty thus consists of its knowing and willful violation of the Act on unconscionable terms to the permanent disadvantage of the Cayugas. App. 294a.

c. The State's Campaign to Avoid Fair Compensation

The State's bad faith in taking advantage of the Cayugas in the 1795 and 1807 treaties is compounded by its largely successful effort to defeat the Cayugas' attempts throughout the 19th and 20th centuries to obtain additional compensation from the state legislature for the taking of their lands. As chronicled by the district court, these efforts included the legislature's refusal to appropriate funds in response to a 1861 formal request presented by a chief of the Six Nations; the refusal to finalize and implement a 1906 settlement agreement to pay the Cayugas $297,131.20; the discontinuance of additional annuities in 1918; and the closure of state courts to claims by the Cayugas until relatively recently. App. 294a-298a. Viewing this record as a whole, the district court concluded that the State's "treatment of the Cayuga since 1807 is simply a continuation of its poor treatment of the Cayuga in the preceding years," (App. 300a) noting that State officials "often times refused to acknowledge [the State's] obligations to the Cayuga." App. 298a.

In its dealings with the Cayugas, New York State consistently defied the principle, as articulated by this Court, that "[o]nce the United States was organized and the Constitution adopted, these tribal rights to land became the exclusive province of the federal law." *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 667 (1974). Under no reasonable view of the facts could the State justifiably believe that its unlawfully obtained title to Cayuga lands would not be challenged if and when the courts opened to the Cayugas. The State knowingly violated the Trade and Intercourse Act, reaped enormous profits from its illegal acts and resisted efforts by the

Cayugas to obtain fair compensation. Surely under these circumstances the State is not prejudiced by the passage of time between the date of its wrongful acts and the Cayugas' day in court.

New York State's ill-treatment of the Cayugas was consistent with its conduct toward the other nations of the Six Nations Confederacy. Despite federal treaties and statutes protecting Six Nations land, the State pursued an aggressive policy of land acquisition, employing often unconscionable methods to extract land cessions from the Six Nations. The historical record shows, for example, that the State used deception and coercion in securing Indian land cessions;[6] reaped enormous profits by purchasing Indian land at a fraction of its value,[7] and routinely purchased Indian lands in knowing violation of the Trade and Intercourse Act.[8]

The court of appeals understood this Court's ruling in *Sherrill* to have altered the law applicable to time-bars for Indian land claims. On the contrary, *Sherrill* was not an Indian land claim and did not modify the bedrock principle established by this Court that laches cannot be invoked by

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[6] *Oneida Indian Nation of New York v. State of New York*, 691 F.2d 1070, 1078 (2d Cir. 1982) (In securing the purchase of five million acres of Oneida land, Governor Clinton "gave repeated assurances that New York's aim was only to protect the Indian land and not to purchase it, and the Oneidas believed that the treaty restored their lands to them and only leased or entrusted certain portions to the State for their own protection.")

[7] Alan Taylor, *The Divided Ground: Indians, Settlers, and the Northern Borderland of the American Revolution* 165 (2006). Professor Taylor concluded that between 1790 and 1795, "nearly half of the state's revenue came from selling land recently obtained from the Indians." *Id.* at 201.

[8] Lawrence M. Hauptman, *Conspiracy of Interests: Iroquois Dispossession and the Rise of New York State* 74-78 (1999) (summarizing dispossession of Onondaga Nation and Oneida Nation).

a party guilty of bad faith in its dealings with the claimant. *Holmberg v. Armbrecht,* 327 U.S. 392, 396 (1946). The State of New York's bad faith in its treatment of the Cayugas precludes application of the equitable considerations identified in *Sherrill.* Review is warranted to correct the grave error committed by the court of appeals in failing to take into account the State's bad faith, as found by the district court, and applying laches to bar completely the Cayugas' claims.

II. Review is Necessary Because the Court of Appeals Failed to Apply the Rule Established by This Court That Laches Cannot Be Applied Where Legal or Practical Obstacles Prevented the Plaintiff From Bringing Suit Earlier.

Fundamental to any laches determination – long established in this Court's decisions – is the principle that a delay in filing suit cannot be deemed unreasonable if the party did not have an adequate and effective opportunity to assert its rights in a court with jurisdiction to hear the claim. *Galliher v. Cadwell,* 145 U.S. 368 (1892) (laches can be imputed only when the party against whom it is asserted has knowledge of his rights and "an ample opportunity to establish them in a proper forum"); *Ewert v. Bluejacket,* 259 U.S. 129, 138 (1922) ("[T]he equitable doctrine of laches, developed and designed to protect goodfaith [sic] transactions against those who have slept upon their rights, with knowledge and ample opportunity to assert them, cannot properly have application to give vitality to a void deed. . . .").[9]

[9] *Felix v. Patrick*, 145 U.S. 317 (1892) is not to the contrary, because, unlike Indians in New York State, in that case the Indian party had ample opportunity to assert its rights in the courts of Nebraska.

The courts of the United States were closed to the Cayugas for more than 184 years. The Cayugas filed suit in 1980, within a few years of this Court's decision in *Oneida I*, which upheld for the first time the jurisdiction of the federal courts to hear claims based on the Trade and Intercourse Act. *Oneida Indian Nation v. County of Oneida,* 414 U.S. 661 (1974). The settled law of laches precludes its application when federal and state courts were closed to Indian tribes for virtually the entire period from the State's acquisition of Cayuga land to the filing of this suit. Because the court of appeals overlooked this fact and declined to follow binding Supreme Court precedent, this Court should review the decision.

From the founding of the United States until well into the 20th century, Indian nations lacked capacity to sue in their own names except where that right was specifically provided by statute. In *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1 (1831), this Court decisively rejected efforts by Indian nations to surmount this barrier by invoking the original jurisdiction of the Supreme Court as foreign nations. Particularly during the latter decades of the 1800s, the so-called "wardship" status of Indian nations disabled them from suing in the courts of the United States in their own name. For example, in *Felix v. Patrick*, 145 U.S. 317, 330-331 (1892), this Court tied the incapacity of Indians to sue to their lack of American citizenship and status as "wards of the nation." This Court recognized this lack of capacity to sue in *Seneca Nation v. Christy*, 162 U.S. 283, 289 (1896), noting that prior to the enactment of a state authorizing statute, the Seneca Nation lacked such capacity, citing *Strong v. Waterman*, 11 Paige Ch. 607 (1845). This Court described the Seneca Nation's lack of capacity in these terms: "no provision was made by law for

bringing an ejectment action to recover the possession of such lands for their benefit, nor could they maintain an action at law, in the name of their tribe, to recover damages sustained by them by reason of trespasses committed on their reservations. . . ."; *see also Heckman v. United States*, 224 U.S. 413, 446 (1912) (suggesting that Indian "wards" do not have capacity to sue when the United States as trustee has sued on their behalf).

The courts of New York State also denied Indian tribes capacity to sue in the absence of authorizing legislation. *Johnson v. Long Island R.R. Co.,* 56 N.E. 992 (N.Y. 1900) (Indian tribes lack capacity to sue in the absence of a statute); *King v. Warner*, 137 N.Y.S.2d 568, 569 (Sup. Ct. Suffolk County 1953) (characterizing precedents denying Indian tribes the right to sue in absence of a statute as "many and impressive.")[10] In 1953, New York enacted a statute that arguably recognized the capacity of Indian nations to sue, but ambiguities about the effect of the statute were not resolved until 1987. *Oneida Indian Nation of New York v. Burr*, 132 A.D.2d 402 (3d Dept. 1987).

Even if Indian nations had been able to overcome these obstacles, they nonetheless faced insurmountable jurisdictional barriers. For example, federal courts were not granted general federal question jurisdiction until 1875. *County of Oneida v. Oneida Indian Nation*, 470 U.S.

[10] In those rare cases where statutes were enacted authorizing such suits, the state legislature often required the Governor to appoint an attorney with exclusive authority to bring suit in his own name on behalf of the Indians "whose interests are committed to him." *Jackson ex dem. Van Dyke v. Reynolds*, 14 Johns. 335, 336 (N.Y. Sup. Ct. 1817). The requirement of the Governor's approval no doubt had a chilling effect on statutory suits by such attorneys against the State of New York for land rights violations.

226, 255, n.1 (1985) (Stevens, J. dissenting).[11] Even after federal question jurisdiction was established, the federal courts remained closed to tribal claims based on the Trade and Intercourse Act until 1974, when this Court decided *County of Oneida v. Oneida Indian Nation*, 414 U.S. 661 (1974) (upholding federal question jurisdiction for Trade and Intercourse Act claims). Before then, the prevailing law on federal court jurisdiction was *Deere v. St. Lawrence River Power Co.*, 32 F.2d 550 (2d Cir. 1929), which held that such courts had no jurisdiction over a Mohawk claim to recover possession of lands obtained by the State of New York in violation of the Trade and Intercourse Act.

State courts likewise remained closed to tribal land claims based on violations of the Trade and Intercourse Act. During most of the relevant period, state courts generally lacked jurisdiction over Indian land claims in the absence of authorizing legislation by Congress. *Oneida Indian Nation of New York v. County of Oneida*, 464 F.2d 916, 923, n.9 (2d Cir. 1972), *rev'd on other grounds*, 414 U.S. 661 (1974). With respect to New York State, Congress has specifically declined to extend jurisdiction over Indian land claims to state courts. 25 U.S.C. § 233 (authorizing New York State courts to hear civil actions involving Indians, but expressly withholding jurisdiction "involving Indian lands or claims with respect thereto which relate to transactions or events transpiring prior to September 13, 1952."); *see also Seneca Nation of New York v. Christy,* 126 N.Y. 122, 140 (1891), *aff'd on other grounds*, 162 U.S. 283

[11] Diversity of citizenship has never been a basis for federal court jurisdiction over tribal claims because Indian tribes have never been considered citizens for purposes of diversity jurisdiction. *See, e.g., Romanella v. Howard*, 114 F.3d 15, 16 (2d Cir. 1997).

(1896) (New York State could acquire Indian lands to which it held "right of preemption" without violating federal law).[12]

Suits by the United States on behalf of Indian nations were likewise rarely available. The shifting federal policies with regard to the protection of Indian rights made it nearly impossible to persuade the United States to undertake such action. *See generally Cohen's Handbook of Federal Indian Law* 45-97 (Nell Jessup Newton, et al. eds, 2005) 45-97 (discussing evolution of federal policy beginning with removal, continuing through allotment, assimilation, and termination, and culminating with self-determination in the 1970s). Because of inconsistent federal polices, for many decades, Indian nations could not reliably look to federal officials to file suit to protect their rights when the Indian nations themselves could not do so.[13] In the rare case when the United States did file suit, the courts invariably held that tribal rights under the Trade and Intercourse Act could not be enforced against the State of New York. *United States v. Franklin County,* 50 F. Supp. 152 (N.D. N.Y. 1943) (Trade and Intercourse Act does not apply to land transactions between the State of New York and Indian tribes).

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[12] State laws generally disadvantaged Indians seeking justice in state courts by excluding them from juries or declaring them incompetent as witnesses. *See* Nell Jessup Newton, *Federal Power Over Indians: Its Sources, Scope and Limitations*, 132 U. Pa. L. Rev. 195, 217 (1984).

[13] President George Washington's promise to Cornplanter, Chief of the Seneca Nation, on December 29, 1790, shortly after the Trade and Intercourse Act was passed, that the United States "will be your security that you shall not be defrauded in the bargain you make" with regard to the lands of the Six Nations has not been fulfilled. 4 *American State Papers* 142 (1832).

Moreover, even if the courts had been open, Indian nations faced enormous practical obstacles to filing suit, such as lack of financial resources, unfamiliarity with the English language, inability to retain attorneys, and unfamiliarity with the American legal system. *See* Katherine F. Nelson, *Resolving Native American Land Claims and the Eleventh Amendment: Changing the Balance of Power*, 39 Vill. L. Rev. 525, 537 (1994). These nearly insurmountable obstacles to relief are critical to a fair determination of whether any opportunities the Cayugas may have had to assert claims in court were adequate, much less "ample," as required by this Court's precedents. *Ewert v. Bluejacket*, 259 U.S. at 138.

Not until 1966 were these jurisdictional and juridical barriers even partially overcome. In that year, Congress enacted 28 U.S.C. § 1362, which "opened federal courts to the kinds of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought." *Moe v. Confederated Salish & Kootenai Tribes,* 425 U.S. 463, 472 (1976). By authorizing federal courts to hear claims brought by Indian tribes themselves, Congress implicitly recognized the pervasive problem that tribes lacked capacity to sue before 1966. Even after the enactment of the jurisdictional statute, however, the ability of Indian nations to enforce the requirements of the Trade and Intercourse Act against the State and private parties was still not possible because of cases like *Deere v. St. Lawrence River Power Company*. The first Indian tribal claim brought under the Trade and Intercourse Act was dismissed for lack of a federal question. *Oneida Indian Nation v. County of Oneida,* 464 F.2d 916 (2d Cir. 1972). That decision was overturned by this Court in 1974 in *Oneida I. County of Oneida v. Oneida Indian Nation*, 414

U.S. 661 (1974). Moreover, the right of Indian nations to seek judicial remedies for violations of the Trade and Intercourse Act was not firmly established until this Court's decision in *Oneida II* in 1985. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985).

Under these circumstances, it is not surprising that the district court could "not find that the Cayuga are responsible for any delay in bringing this action."[14] App. 302a. Rather, the delay in filing this suit "was not unreasonable insofar as the actions of the Cayuga are concerned." App. 302a. The law is clear that for the purposes of the laches determination, a party is fully justified in awaiting more favorable legal developments before filing suit. *Travelers Ins. Co. v. Cuomo,* 14 F.3d 708 (2d Cir. 1993), *rev'd on other grounds*, 514 U.S. 645 (1995) (party has legitimate reason to delay filing suit until prospects for success improved with new Supreme Court precedent, especially when prior law "created little hope of success"). The court of appeals' decision thus creates a new rule of laches, applicable only to Indian claims, particularly Indian land claims, that a party is chargeable with laches even if filing suit would have been futile. Such a dramatic departure from this Court's settled precedents warrants review.

CONCLUSION

The district court's exhaustive review of the historical records shows that New York State was guilty of bad faith

[14] The district court nonetheless took the passage of time into account in reducing the prejudgment interest award by 60% because "[a]llowing recovery for 200 years of compounded prejudgment interest would offend this court's sense of fundamental fairness." App. 320a.

in its dealings with the Cayugas and their lands. Federal and state courts were not available to the Cayugas to seek redress for Trade and Intercourse Act violations until shortly before this lawsuit was filed. Review is warranted because the court of appeals dramatically departed from the established doctrine of laches in barring the Cayugas' claims. For these reasons, the petitions of the Cayuga Indian plaintiffs and the United States for a writ of certiorari should be granted.

Date: April 7, 2006

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