No. 15-1215

IN THE

Supreme Court of the United States

SHINNECOCK INDIAN NATION,

Petitioner,

v.

STATE OF NEW YORK, ET AL.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF FOR *AMICI CURIAE* FEDERAL INDIAN LAW PROFESSORS, NATIONAL CONGRESS OF AMERICAN INDIANS, AND UNITED SOUTH & EASTERN TRIBES, INC., IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

As set out more fully in the appendix annexed hereto, *amici* are law professors whose scholarship and clinical practice focus on the subject matter areas—federal jurisdiction, federal Indian law, and property—addressed by the Second Circuit's decision in this case, and intertribal organizations constituted to advance the interests of tribal nations. We submit this brief to highlight the extent to which the remarkably troubling ruling below—conferring a large and amorphous "equitable" immunity, based on the "disruption" associated with the passage of time, for violations of federal statutes, treaties, and common law—(1) undermines responsible reservation governance initiative and interrupts a long history of good faith resolution of Indian claims in accordance with the United States' duty of protection to Indian nations and Indian people, and (2) contravenes the considered judgments of the executive and legislative branches and of this Court.

Amici include professors of federal Indian law and property with interests in ensuring the uniform and just application of settled legal principles. Law professor *amici* are co-authors and co-editors of

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than *amici*, their members, and their counsel provided any monetary contribution to fund the preparation or submission of this brief. The Shinnecock Indian Nation is one of several member-tribal nations of *amicus* United South and Eastern Tribes, Inc., but neither the Nation nor its counsel has provided any financial support or contribution for the preparation or submission of this brief. Counsel of record provided each party's attorney at least ten days' notice of the intent to file this brief. The parties' consents to the filing of this brief are on file with the clerk.

COHEN'S HANDBOOK OF FEDERAL INDIAN LAW (2005 ed. & 2012 ed.); GOLDBERG, TSOSIE, CLINTON & RILEY, AMERICAN INDIAN LAW: NATIVE NATIONS AND THE FEDERAL SYSTEM (7th ed. 2015); ANDERSON, BERGER, KRAKOFF & FRICKEY, AMERICAN INDIAN LAW: CASES AND COMMENTARY (3d ed. 2015); GETCHES, WILKINSON, WILLIAMS, FLETCHER & CARPENTER, CASES AND MATERIALS ON FEDERAL INDIAN LAW (7th ed. forthcoming 2017); and MATTHEW L.M. FLETCHER, FEDERAL INDIAN LAW (2016), as well as dozens of scholarly articles on federal Indian law.

Amicus National Congress of American Indians ("NCAI") is the oldest, largest, and most representative national organization addressing American Indian interests, representing more than 250 American Indian tribes and Alaska Native villages. NCAI is dedicated to protecting the rights and improving the welfare of American Indians and Alaska Natives. NCAI tribes have a strong interest in this case because the resolution of Indian land claims is extremely important to tribal governments; there is a long history of settlement that should inform the legal standards, and the creation of new legal standards will undermine opportunities for just and honorable settlement of the remaining claims.

Amicus United South and Eastern Tribes, Inc. ("USET") is an intertribal organization comprised of 26 federally recognized Indian tribes in the southern and eastern United States. USET and its member-tribal nations share a strong interest in this case because of the importance of assuring a legal framework for the settlement of long-standing and on-going Indian land claims that accords full consideration to the Indian interests at stake and to

the right of tribes to bring these land claims where federal law so allows.

INTRODUCTION AND SUMMARY OF ARGUMENT

In the decision below, a panel of the Second Circuit Court of Appeals held that federal courts are empowered to dismiss claims arising out of state and local authorities' violation of federal law, based on the passage of time and the disruption that enforcing the right would ostensibly entail, irrespective of the character of the relief sought, and without regard to the federal law that claims of this type are to be heard in federal court.

That decision warrants this Court's review. The Second Circuit's rule fundamentally misapplies the rule of decision in *City of Sherrill v. Oneida Indian Nation*, 544 U.S. 197 (2005): although this Court highlighted the unfavorable disruption that could ensue from granting relief in a tax immunity case, the Court never held that suits for monetary relief were similarly disruptive. In fact, the Second Circuit's decision ignores the critical role in reservation governance that Indian land claims have played over the last several decades in *settling* long-running interjurisdictional disputes, creating resolution rather than disruption. Following negotiation, tribal, state, and federal parties have routinely settled underlying Indian land claims by also settling ongoing reservation governance matters. Typical examples include public safety cooperative agreements and tax collection agreements. Numerous Acts of Congress ratifying settlements reflect that reality and support Congress' considered judgment that such claims be allowed to proceed in federal court.

Second, the court ignored the cardinal principle that equity must follow the law. Constitutional separation-of-powers principles prohibit federal courts from fashioning "equitable" rules when, as here, Congress has already taken into account the considerations the Court finds weighty. In this case, these include the passage of time and—implicitly—the magnitude of the award to which plaintiffs would be entitled. The Second Circuit further ignored that federal courts generally do not have power to impose "equitable" bars, even the most recognized ones like laches and estoppel, in suits brought against those who violate federal law.

This decision is particularly troubling because the justiciability of essentially this very claim was contemplated by Congress, which was well aware of the "ancient" character of the violation and the potential shortcomings ("disruption") of remedies centuries removed from the violations which give rise to them. It has also been considered by this Court, which expressly *rejected* arguments by these very defendants, that the gap in time in itself rendered this litigation "equitably" nonjusticiable.

ARGUMENT

I. The Second Circuit's Rule is Antithetical to the Good Governance of Indian Country and Cooperative Resolution of Inter-Governmental Conflict.

The modern thinking on Indian country governance involves good-faith cooperation and negotiation between federal, state, and tribal governments over virtually all areas of government. The Second Circuit's equity precedents improperly reward state governments refusing to cooperate or negotiate by vesting

them with presumed immunity from substantive governance claims by tribes and the United States over disputed areas of territorial authority.

The lower court has created and administered this *ad hoc* equitable doctrine to circumvent the technical requirements of laches to the detriment of the Shinnecock Indian Nation ("Shinnecock" or "the Nation"). *Shinnecock Indian Nation v. State of New York*, 628 Fed. Appx. 54, 55 (2d Cir. 2015) ("The District Court held that the Nation's claims are foreclosed by the equitable considerations, including laches, crystallized in [*Sherrill*], and *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005)[.]") (parentheticals omitted). The Second Circuit's defense applies to "claims that are 'disruptive,' a *category* which includes those premised on the assertion of a continuing possessory interest in the subject lands[.]" *Oneida Indian Nation of N.Y. v. County of Oneida,* 617 F.3d 114, 139 (2d Cir. 2010) (emphasis added).

In modern Indian country governance, the fear of "disruption" that drives the Second Circuit's precedents in this area is unfounded as a practical matter. *See generally* Matthew L.M. Fletcher, Kathryn E. Fort, & Dr. Nicholas Reo, *Tribal Disruption and Indian Claims*, 112 MICH. L. REV. FIRST IMPRESSIONS 65 (2014); Matthew L.M. Fletcher, *Tribal Disruption and Federalism*, 76 MONT. L. REV. 97 (2015). Time and time again, tribal land claims have been the precursor for state and local governments to sit down at the negotiating table to hammer out taxation, public safety, gaming regulation, environmental negotiation agreements, and other agreements.

For example, after sustained reservation boundaries litigation with the State of Michigan and several local

municipalities, the Saginaw Chippewa Indian Tribe was able to negotiate and execute numerous cooperative agreements over a broad swath of reservation governance issues. Fletcher*, Tribal Disruption and Federalism, supra,* at 103-08. Similarly, prior to the Second Circuit's application of *Sherrill*, the Seneca Nation of Indians and the State of New York reached a settlement over lands on a portion of Cuba Lake, but only after the parties engaged in extensive discovery. *Seneca Nation of Indians v. New York*, 213 F.R.D. 131, 133 (W.D.N.Y. 2003) ("When initial settlement negotiations proved unsuccessful, the parties engaged in extensive discovery prior to the filing of cross-motions for partial summary judgment on liability."); Dale T. White, *Indian Country in the Northeast*, 44 TULSA L. REV. 365, 377 (2008) (describing the settlement). Conversely, the Second Circuit's recent precedents foreclosed the ability of the Onondaga Nation to persuade the State of New York and local governments to cooperate and negotiate—or even to engage in discovery—over the clean-up of Onondaga Lake, the core water source of the tribe's homelands, recently described as the "most polluted lake" in the United States. Fletcher, *Tribal Disruption and Federalism*, *supra*, at 109-10. *See Onondaga Nation v. New York*, 500 Fed. Appx. 87, 89 (2d Cir. 2012).

The Second Circuit's rule is also antithetical to modern federalism, and federalism's cooperative aspects. Modern federalism privileges democratic participation, local autonomy, and problem solving capacity. Wenona T. Singel, *The First Federalists*, 62 DRAKE L. REV. 775, 821-26 (2014). Reservation governance in the modern era is "post-territorial," involves three sovereigns, tribal members and nonmembers, all of whom are American citizens.

Angela R. Riley, *Good (Native) Governance*, 107 COLUM. L. REV. 1049, 1057-59 (2007). *See, e.g.*, Kristen A. Carpenter, *Interpreting Indian Country in* State of Alaska v. Native Village of Venetie, 35 TULSA L.J. 73, 156-61 (1999) (cataloguing reservation governance issues in Alaska). Indian country long ago moved away from the rhetoric of the 19th century when Indians and their neighbors behaved as "deadliest enemies." *United States v. Kagama*, 118 U.S. 375, 384 (1886). Now, states and tribes routinely cooperate and negotiate on Indian country governance. *See, e.g.*, CONFERENCE OF WESTERN ATTORNEYS GEN., AMERICAN INDIAN LAW DESKBOOK §§ 14:1 to 14:60, at 1009-71 (2014 ed.) (cataloguing dozens of inter-governmental, cooperative agreements between tribes and states). The Second Circuit's rule immunizing state and local governments from Indian land claims discourages cooperation and negotiation, thereby creating inequitable and even absurd outcomes in Indian country governance.

These factors are especially relevant here, as the State of New York has been dealing with the reality of Shinnecock sovereignty even before the Nation's formal federal recognition in 2010. Shinnecock's land holdings had not been subject to state or local property taxes since the 1850s. *See New York v. Shinnecock Indian Nation*, 400 F. Supp. 2d 486, 494 (E.D.N.Y. 2005) ("[I]t appears to be undisputed that neither the Town nor the State has imposed any taxes on the real property contained in the Indian's reservation or the Westwoods property occupied by members of the Indian Tribe since circa 1850."). In contrast, one of the municipal defendants had asserted the power to enforce zoning regulations on Shinnecock's lands since at least the 1950s. *Id*. at 495 (describing local zoning

laws and their application to Shinnecock lands in the 1950s, 1970s, and 1980s).

Disruption and potential intergovernmental conflict, then, had already been present for centuries when the United States acknowledged Shinnecock's sovereignty in 2010. To shut the door to land claims now allows that potential conflict to fester by discouraging cooperation and negotiation. Indian nations are timeless entities, and merely barring Indian land claims from the federal courthouse without resolution does not make the claims and the underlying conflicts disappear. Fletcher, Fort, and Reo, *supra*, at 67-68 (arguing that eastern Indians like the Shinnecock Nation have been through enormous disruption throughout history but have survived by using modern tools and strategies such as litigation and negotiation to survive).

As Felix S. Cohen demonstrated long ago, "[P]ractically all of the public domain of the continental United States (excluding Alaska) has been purchased from the Indians." Felix S. Cohen, *Original Indian Title*, 32 MINN. L. REV. 28, 34 (1947). *See also id*. at 35 (". . . practically all of the real estate acquired by the United States since 1776 was purchased not from Napoleon or any other emperor or czar but from its original Indian owners."). Cohen acknowledged even in the 1940s that state policymakers had expressed "fears" that Indian claims would cloud the titles of innocents, or that paying Indian claims would impose "vast liabilities" on the United States. *Id.* at 33. But the experience of decades of litigation and negotiation, not to mention numerous federal statutes, has trumped fears in the arena of the Nonintercourse Act claims.

Congress has ratified several settlements of the eastern land claims arising under the Nonintercourse Act, 25 U.S.C. § 177, since the 1970s. In 1978, Congress ratified a negotiated settlement between the Narragansett Tribe and the State of Rhode Island. 25 U.S.C. §§ 1701-12. Congress later ratified agreements involving Maine tribes, 25 U.S.C. §§ 1721-35; Connecticut tribes, 25 U.S.C. §§ 1751-60 (Mashantucket Pequot) & §§ 1775-1775*h* (Mohegan); Massachusetts tribes, 25 U.S.C. §§ 1771-1771*i*; and one New York tribe, 25 U.S.C. §§ 1774-1774*h*. In each of these agreements, the parties addressed reservation governance issues. 25 U.S.C. §§ 1707-1708 (Rhode Island); §§ 1725, 1727, 1730 (Maine); § 1755 (Mashantucket Pequot in Connecticut); §§ 1771*c-e* (Massachusetts); § 1774*c* (Seneca Nation in New York); and § 1775*d* (Mohegan Nation in Connecticut).[2] Of the states affected by the eastern land claims, only the State of New York has failed to reach settlement agreements with all of its tribal claimants.

The Second Circuit's rule barring Indian land claims at the pleadings stage based on the assumed "disruption" caused by the claims is belied by the numerous land claims settlements throughout American history, and most especially in the northeast. Moreover, *City of Sherrill* is inapposite to these claims. There, the Oneida Indian Nation unilaterally sought to remove its properties from the county tax rolls rather than invoke the fee to trust process, the

[2] Like all agreements, these settlements are subject to varying interpretations which have led to further negotiations and even litigation. However, any current dispute over the scope, intent or meaning of these settlement acts is a matter of implementation and does not threaten the type of "disruption" with which the Second Circuit was concerned.

mechanism provided by Congress and the Interior Department. *Sherrill,* 544 U.S. at 220 (2005) ("Congress has provided . . . a mechanism for the acquisition of lands for tribal communities that takes account of the interests of others with stakes in the area's governance and well-being.") (referencing 25 U.S.C. § 465). In the context of Indian land claims, however, Congress has created a federal right in the Nonintercourse Act that may be enforced in federal court. *Id.* at 221 ("In sum, the 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*.") (referencing *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226 (1985)).

The United States recognizes a duty of protection deriving from treaty relationships and the structure and text of the Constitution that undergirds and extends to the federal government's efforts to equitably resolve Indian land claims. *Worcester v. Georgia*, 31 U.S. 515, 556 (1832) (noting that treaties recognize the United States is "assuming the duty of protection, and of course pledging the faith of the United States for that protection[.]"); *United States v. Mitchell*, 463 U.S. 206, 225 (1983) (noting that the United States acknowledges "the undisputed existence of a general trust relationship between the United States and Indian people."). Until the Second Circuit began misapplying *Sherrill*, the United States consistently addressed Indian land claims faithfully. The Second Circuit's ruling barring these claims is an unfortunate "deviation" from the history of dealing with Indian nations in good faith, and is contrary to Congressional intent to uphold that good faith. Cohen, *supra*, at 34 ("We are probably the one great nation in the world that has consistently sought to deal with an aboriginal

population on fair and equitable terms. *We have not always succeeded in this effort but our deviations have not been typical*.") (emphasis added).

Dismissing tribal claims before allowing Shinnecock to develop a factual record to combat the equitable defenses constitutes a basic and fundamental inequity. *See National R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 121-22 (2002) ("*this defense requires proof* of . . . prejudice to the party asserting the defense.") (internal quotations omitted; emphasis added). This also precludes Shinnecock from beginning a constructive dialogue that could lead to positive outcomes as in the Saginaw Chippewa experience discussed above.

As Judge Learned Hand wrote, "It is, of course, true that equity will at times affirmatively restore the status quo ante pending the suit. But never, so far as I know, will it take jurisdiction over a legal claim merely to hurry it along by granting final relief at the outset of the cause." *Sims v. Stuart,* 291 F. 707, 708 (S.D.N.Y. 1922) (citations omitted).

II. The Lower Court Violates Separation of Powers Principles in Upsetting Congress' Judgment in Enacting the Indian Claims Limitation Act.

Congress has established a limitations statute and federal policy favoring Indian land claims analogous to the one brought by Shinnecock that is upended by the Second Circuit's ruling. In this case, the Second Circuit's common law bar on Shinnecock's efforts to seek a remedy for violations of the Nonintercourse Act is "novel indeed," *Oneida II*, 470 U.S. at 244 n.16 (1985), and constitutes a rule this Court has previously rejected. *Id*. In fact, this common law rule upsets a federal statutory scheme and federal policy

established by democratic contemplation through which Indian tribes may seek relief for Nonintercourse Act violations. *Cf. Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1974 (2014) ("[I]n face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief[.]").

Congress enacted the Indian Claims Limitation Act of 1982 ("ICLA"), now codified at 28 U.S.C. §§ 2415(a) and (b), and established a statutory scheme for the proper enforcement of the federal government's obligations under the Nonintercourse Act. ICLA evidences Congress' understanding of the "ancient" nature of the claims and their potential "disruption." *See* H.R. Rep. No. 375, 95th Cong., 1st Sess. 5-6 (1977) (Letter from Leo Krulitz, Solicitor, Department of Justice to Hon. Peter W. Rodino, Chairman, Committee on the Judiciary, House of Representatives (May 18, 1977)). The Act allows these claims to be brought in federal courts. That structure requires the Secretary of Interior and the Attorney General to first make a policy decision on whether Indian claims of the type contemplated here oblige the federal government to resolve either through litigation or legislation.

Prior to the enactment of ICLA, this Court confirmed a federal common law cause of action to enforce Nonintercourse Act claims brought directly by Indian tribes. *Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 674 (1974) ("There being no federal statute making the statutory or decisional law of the State of New York applicable to the reservations, the controlling law remained federal law; and, absent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law."). This is the avenue chosen by Shinnecock in the instant

matter. Importantly, through ICLA, Congress legislated in light of the status of the law, and enacted legislation favoring resolution of Nonintercourse Act claims through the courts and, later perhaps, in legislation.

In short, Congress has effectively ratified and approved Indian claims like the one brought by the Nation. ICLA is the end result of a decade-long series of statutes that now serves as the final congressional judgment on the procedure for the United States to bring claims for money damages on behalf of Indians and Indian tribes. ICLA's history is directly relevant to the proper understanding of the operation of the statute. On July 18, 1966, Congress enacted a general statute of limitations on the United States as a plaintiff seeking money damages for tort and contract claims. Act of July 18, 1966, Pub. L. No. 89-505, § 1, 80 Stat. 304. The 1966 statute was silent as to claims brought by the United States on behalf of Indians and Indian tribes. As a result of concerns expressed by the Department of Interior in late 1971, "Congress extended the statute of limitations for pre-1966 claims brought by the United States on behalf of Indians to July 7, 1977." *Covelo Indian Community v. Watt*, 1982 U.S. App. LEXIS 23138, at *6 (D.C. Cir., Dec. 21, 1982) (per curiam), *aff'g,* 551 F. Supp. 366 (D.D.C. 1982) (citing Act of Oct. 13, 1972, Pub. L. 92-485, 86 Stat. 803). *See also* H.R. Rep. No. 375, 95th Cong., 1st Sess. (1977).

Because "hundreds of newly identified claims could not be researched, identified, and filed by the deadline and would, as a result be lost[,]" Congress again extended the deadline in 1977 to April 1, 1980. *Covelo Indian Community*, 1982 U.S. App. LEXIS 23138, at *6 (citing Act of Aug. 15, 1977, Pub. L. No. 95-103, 91

Stat. 842). *See also* H.R. Rep. No. 807, 96th Cong., 2d Sess. (1980). In 1980, for reasons similar to earlier extensions, Congress again extended the deadline; that time, to December 31, 1982. *Covelo Indian Community*, 1982 U.S. App. LEXIS 23138, at *7 (citing Act of March 27, 1980, Pub. L. No. 96-217, 94 Stat. 126). *See also* S. Rep. No. 569, 96th Cong., 2d Sess. (1980). Congress added a requirement to the 1980 extension that the Secretary of Interior and the Attorney General must submit legislative proposals to Congress by June 30, 1981 "to resolve those Indian claims . . . that the Secretary of Interior or the Attorney General believes are not appropriate to resolve by litigation." Pub. L. No. 96-217, 94 Stat. 126, § 2 (1980). The government's failure to produce the proposals by the deadline prompted litigation by tribal interests that culminated in a federal court order mandating the government submit the legislative proposals by December 31, 1982. *See Covelo Indian Community v. Watt*, 551 F. Supp. 366, 384 (D.D.C. 1982), *aff'd*, 1982 U.S. App. LEXIS 23138, at *36-37.

On December 30, 1982, Congress enacted ICLA, helping the Department of Interior avoid the *Covelo* court order. Act of Dec. 30, 1982, Pub. L. 97-394, 96 Stat. 1966. That statute established a one-year limitations period for tribal claimants to bring suit once the Secretary of Interior published in the Federal Register a notice rejecting a claim, and a three-year limitation period for tribal claims once the Secretary submitted legislation or a legislative report to Congress to resolve those claims. 28 U.S.C. § 2415(a). Congress incorporated a modified form of section 2 of the 1980 enactment, granting extensive agency discretion to bring suit, decline to bring suit, or submit proposed legislation to Congress.

The Second Circuit's decision ignores the direction of Congress by applying equitable factors to dismiss congressionally preserved claims brought by the executive branch in accordance with a federal statute. In barring the claim entirely, the Second Circuit conflicts with the settled precedents of this Court respecting the judgment of the Legislature in ordering and managing such claims. "Courts of equity cannot, in their discretion, reject the balance that Congress has struck in a statute." *United States v. Oakland Cannabis Buyers' Coop.,* 532 U.S. 483, 497 (2001). *See also Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 194 (1978) ("Once Congress, exercising its delegated powers, has decided the order of priorities in a given area, it is for the Executive to administer the laws and for the courts to enforce them when enforcement is sought."). More recently, this Court in *Petrella v. Metro-Goldwyn-Mayer, Inc.*, reaffirmed the critical principle that "in face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief . . . ." 134 S. Ct. at 1974.

ICLA represents Congress' judgment on how to deal with the complexity and consequences of Indian claims, and its final decision on the proper procedure for identifying, investigating, adjudicating, and otherwise resolving Indian land claims. The Second Circuit's decision incorrectly applies amorphous equitable factors to bar federal claims for money damages in the enforcement of a federal statute, thereby violating separation of powers principles, and straining traditional equity jurisprudence. *Cf.*, *Petrella*, 134 S. Ct. at 1974; *Oakland Cannabis Buyers' Coop.,* 532 U.S. at 497; *Tennessee Valley Authority*, 437 U.S. at 193.

CONCLUSION

This Court's review of the lower court's holding is required to address the broad national interests at stake in the application of equitable defenses to federal claims enforcing federal statutes.

Respectfully Submitted,

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APPENDIX

APPENDIX

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