Nos. 10-1404 and 10-1420

In The Supreme Court of the United States

UNITED STATES,

Petitioner,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

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

Petitioners,

v.

COUNTY OF ONEIDA, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

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STATEMENT OF *AMICUS CURIAE*[1]

Established in 1944, the National Congress of American Indians ("NCAI") is the oldest and largest American Indian organization, representing more than 250 Indian tribes and Alaska Native villages. NCAI is dedicated to protecting the rights and improving the welfare of American Indians, Alaska Natives and Native Hawaiians. For nearly two centuries, this Court's jurisprudence has consistently recognized that Indian tribes, and the United States as their trustee, may sue and seek remedies for the violation of a tribe's long-standing treaty rights protected by federal law. Rather than adhere to a straight-forward application of these settled principles of law, the approach adopted by the United States Court of Appeals for the Second Circuit bars all "disruptive" Indian claims and, by extension, any remedy for violation of federally protected treaty and property rights.

In *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005), this Court applied equitable defenses to prevent the Tribe from "disrupting the governance of central New York's counties and towns" through its piecemeal open-market purchases of lands within its

[1] The parties have consented to the filing of this brief. Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

historic reservation. 544 U.S. at 202-03. The Court pointed out that when a tribe seeks to regain governmental authority over such lands, the appropriate remedy has been provided by Congress under 25 U.S.C. § 465 which authorizes the Secretary of the Interior to acquire land in trust for Indians in a manner that is "sensitive to the complex inter-jurisdictional concerns that arise." 544 U.S. at 220-21.

In the decision below, a divided panel extended an earlier divided-panel decision in *Cayuga Indian Nation of New York v. Pataki,* 413 F.3d 266 (2d Cir. 2005), which itself had extended this Court's holding in *Sherrill,* to deny any remedy for the unlawful dispossession of the Oneidas' treaty-secured lands.[2] Instead of limiting its analysis to whether the award of money damages is the type of remedy which would fall within the narrow ambit of "disruptive" remedies foreclosed by *Sherrill*, the court of appeals opined "that *Sherrill*'s concern with the New York Oneida's claim had been with the 'disruptive nature of the

[2] In addition to federal-common-law and federal-statutory claims, the Oneidas, in both this case and the test case that was the subject of *Oneida II*, asserted claims under Article II of the 1974 Treaty of Canandaigua. 7 Stat. 44, in which "the United States recognized the Oneida Nation's permanent right to title to and possession of the subject lands, ..." Amended Complaint, Civil Action No. 74-CV-187 at 20 ¶51 (filed Nov. 9, 2000). *See Oneida Indian Nation of New York State v. Oneida County,* 434 F.Supp. 527, 532 (N.D.N.Y. 1977) ("Plaintiffs claims [sic] that this purchase violated the treaties and the Indian Nonintercourse Act. . . .").

claim itself,' and that accordingly, the equitable defenses invoked in *Sherrill* apply not narrowly to claims seeking a revival of sovereignty, but to 'disruptive Indian land claims more generally,' whether such claims are legal or equitable in character, and whether or not the remedy sought is limited to an award of money damages." U.S. Pet. App. 19a-20a [internal citations omitted].

NCAI and its member tribes adhere to the view that the *Sherrill* equitable defenses were not intended to bar Indian claims, but rather to limit – in very specific circumstances – the type of relief available to tribes. Should the Second Circuit's misreading of *Sherrill* be applied to other treaty-secured rights, it will be to the grave detriment of Indian tribes throughout the country.

REASONS FOR GRANTING THE PETITIONS

The Court of Appeals purported to apply the principles set forth in *City of Sherrill v. Oneida Indian Nation,* 544 U.S. 197 (2005), which begins by recognizing that "when the Oneidas came before this Court 20 years ago in *Oneida II*, they sought money damages only. . . . The Court reserved for another day the question whether 'equitable considerations' should limit the relief available to the present-day Oneidas." 544 U.S. at 213 (citations omitted). The *Sherrill* Court then explained that "[t]he substantive questions whether the plaintiff has any right or the

defendant has any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is." *Id*. *quoting* Dan B. Dobbs, *Dobbs' Law of Remedies* § 1.2, p. 3 (1973). Applying this critical distinction, this Court in *Sherrill* held that the *remedy* sought by the New York Oneidas – a unilateral, piecemeal shift in governance – was too disruptive and pointed the Tribe instead to a less disruptive, congressionally authorized remedy that would account for the settled expectations of non-Indians. Significantly, this Court's analysis in *Sherrill* concludes by stating "[i]n 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*." 544 U.S. at 221.

But instead of applying *Sherrill*'s principles, the Second Circuit abolished the distinction between rights and remedies, creating a dangerous new equitable standard that expands *Sherrill* to bar "disruptive" legal claims altogether rather than simply limit available relief. Thus, such claims are "subject to dismissal *ab initio,*" *Cayuga Indian Nation of New York v. Pataki,* 413 F.3d 266, 278 (2d Cir. 2005).[3] This

[3] In *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999), this Court cautioned against the aggressive expansion of traditional equitable powers, holding that the District Court lacked authority to issue a preliminary injunction preventing a debtor from disposing of assets pending adjudication of an unsecured creditor's contract claim for money

(Continued on following page)

newly minted standard is inconsistent with this Court's long-established Indian law jurisprudence, particularly its ruling in *Sherrill*. The conflict between the Second Circuit and this Court is confirmed by Justice Souter's lone concurrence in *Sherrill*, where he urged that the Tribe's inaction should bar the claim itself: "The Tribe's inaction cannot, therefore, be ignored here as affecting only a remedy to be considered later, it is, rather, central to the very claims of right made by the contending parties." 544 U.S. at 222 (Souter, J., concurring). This Court did not accept Justice Souter's view and went to some lengths to clarify that the decision limited a narrow type of disruptive remedy and did not bar Indian claims.

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damages. The discussion of the limitations on the federal courts' equitable powers in *Grupo Mexicano* is informative here:

> We do not decide which side has the better of these arguments. We set them forth only to demonstrate that resolving them in this forum is incompatible with the democratic and self-deprecating judgment we have long since made: that the equitable powers conferred by the Judiciary Act of 1789 did not include the power to create remedies previously unknown to equity jurisprudence. Even when sitting as a court in equity, we have no authority to craft a "nuclear weapon" of the law like the one advocated here. . . . The debate concerning this formidable power over debtors should be conducted and resolved where such issues belong in our democracy: in the Congress.

Id. at 332-33 (quotation omitted).

The notion that money damages can be the type of "disruptive" remedy that compels dismissal of Indian claims *ab initio* flies in the face of settled precedent. Thus, the question presented by petitioners – whether equitable considerations can entirely bar a claim by an Indian tribe, and by the United States as trustee for the tribe, for money damages as compensation for the unlawful acquisition of tribal lands in violation of federal law – is of exceptional importance, having broader legal and practical implications outside the context of the New York land-claims litigation. This Court, rather than a sharply divided panel of the Second Circuit, should decide this question of substantial importance to Indian tribes across the country.

1. Review Is Warranted Because the Second Circuit's Creation of an Expansive Standard to Bar Claims for Violation of Federally Protected Treaty Rights Is Inconsistent With this Court's Precedent and Threatens Treaty Rights of Tribes Throughout the Country.

In *City of Sherrill v. Oneida Indian Nation of New York,* 544 U.S. 197 (2005), this Court reaffirmed its holding in *County of Oneida v. Oneida Indian Nation of New York,* 470 U.S. 226 (1985) ("*Oneida II*"), that "the Oneidas could maintain a federal common-law claim for damages for ancient wrongdoing" – the unlawful acquisition of tribal lands by the State of New York in 1795 in violation of the Non-Intercourse Act (25 U.S.C. § 177), 544 U.S. at 202.

Amicus agrees with petitioners that the Second Circuit's decision eviscerates *Oneida II* and wholly ignores the rationale of *Sherrill*, which focused on the disruptiveness of the remedy rather than the vitality of the claim.

Contrary to *Oneida II,* the Second Circuit has expansively and incorrectly interpreted *Sherrill* to establish a broad rule that equitable defenses can bar all Indian claims as too "disruptive" regardless of the remedy sought:

> *Cayuga* expressly concluded that "possessory lands claims" – any claims premised on the assertion of a current, continuing right to possession as a result of a flaw in the original termination of Indian title – are by their nature disruptive, and that, accordingly, the equitable defenses recognized in *Sherrill* apply to such claims.

U.S. Pet. App. at 22a.[4] In *Sherrill,* this Court applied equitable defenses to a fact-specific situation and

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[4] This rule was first announced by a divided three-judge panel in *Cayuga Indian Nation of New York v. Pataki,* 413 F.3d 266, 274 (2d Cir. 2005):

> Although we recognize that the Supreme Court did not identify a formal standard for assessing when these equitable defenses apply, the broadness of the Supreme Court's statements indicates to us that *Sherrill*'s holding is not narrowly limited to claims identical to that brought by the Oneidas, seeking a revival of sovereignty, but rather, that these equitable defenses apply to "disruptive" Indian land claims more generally.

request for relief that bears no resemblance to the situation below. In *Sherrill,* the Oneidas sought injunctive and declaratory relief from the imposition of property taxes on fee lands they had purchased within their historic reservation. This Court viewed the requested relief in the context of the long history of state sovereign jurisdiction over the lands and justified societal expectations regarding regulatory authority. Based on these equitable considerations and the resulting disruption to "the governance of central New York's counties and towns," this Court denied the requested relief, holding that "the Tribe cannot unilaterally revive its ancient sovereignty," having "relinquished the reins of government" long ago. 544 U.S. at 202-03. But this Court was careful to not bar the Oneidas' claim based on these equitable considerations.[5] Instead, the Court pointed the Oneidas to an appropriate remedy:

> Recognizing these practical concerns, 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. Title 25 U.S.C. § 465 authorizes the Secretary to take land in trust for Indians and provides that the land "shall be exempt from State and local taxation." The

[5] As noted above, Justice Souter's solitary concurring opinion in *Sherrill* bears this point out. Justice Souter urged that the Tribe's inaction should bar the claim itself, not just the requested relief. 544 U.S. at 222 (Souter, J., concurring).

> regulations implementing § 465 are sensitive to the complex interjurisdictional concerns that arise when a tribe seeks to regain sovereign control over territory. [internal citation omitted]

544 U.S. at 220-21.

This Court intended that its holding in *Sherrill* be narrowly applied to bar disruptive remedies in extreme cases, and to have no effect whatsoever on legal claims themselves.

Although the *Sherrill* Court explicitly recognized that "the question of damages for the Tribe's dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*," 544 U.S. at 221, the Second Circuit found that the *Sherrill* equitable defenses apply to bar disruptive Indian land claims and therefore preclude any relief, including money damages. However, this Court has clearly and repeatedly recognized that monetary relief can and should be available when the alternative remedy is for some reason unavailable or inappropriate. In *Yankton Sioux Tribe v. United States,* 272 U.S. 351, 358 (1926), this Court considered the proper remedy available to a tribe when its lands have been taken illegally and found that if ejectment is impossible, then "in accordance with ordinary conceptions of fairness" the tribe is entitled to monetary compensation. The Court reached a similar result in *Felix v. Patrick,* 145 U.S. 317, 334 (1892) (justice requires payment for original value of land even though other considerations weigh against returning land to

Indian possession). In addition to precluding the unjust "no-remedy" outcome, both *Yankton Sioux* and *Felix v. Patrick* make clear that monetary damages are generally the least disruptive remedy.[6] After four decades of litigation, including two trips to this Court, for the Second Circuit to apply the *Sherrill* equitable defenses to bar the claims *ab initio* and preclude any remedy whatsoever, even the payment of monetary damages for the unlawful dispossession of treaty-secured lands is not only wrong, it once again inflicts the "past injustices suffered by the Oneidas." U.S. Pet. App. 83a.

This Court has never suggested that a claim for damages is not viable because it would be too "disruptive." In fact, this Court rejected the argument in *Oneida II*. This is illustrated by the history of that argument in the Second Circuit itself, before *Oneida II* came before this Court. In *Oneida Indian Nation v. New York,* 691 F.2d 1070, 1082 (2d Cir. 1982), the Second Circuit had considered an argument that the land claims were not justiciable because "an appropriate judicial remedy cannot be molded." At that

[6] Outside of Indian law, the Court has consistently rejected the argument that monetary remedies – even those hundreds of times larger than the amounts at issue here – should be barred because they are disruptive or otherwise too big. *See, e.g.*, *United States v. Winstar Corp.*, 516 U.S. 1087 (1996) (savings and loan litigation); and *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003) (asbestos litigation). There is no reason to treat Indian claims in a uniquely harsh manner.

time, the court of appeals rejected that argument, concluding:

> [A]s the Supreme Court held in *Yankton Sioux Tribe v. United States*, 272 U.S. 351, 47 S.Ct. 142, 71 L.Ed. 294 (1926), if the ejectment of current occupants and the repossession by the Indians of a wrongfully taken land is deemed an 'impossible' remedy . . . the court has authority to award monetary relief for the wrongful deprivation. * * * The defendants point to the scale of the wrong alleged and the size of the remedy sought as rendering the claims nonjusticiable. . . . [W]e know of no principle of law that would relate the availability of judicial relief inversely to the gravity of the wrong sought to be redressed. Rather, the courts have in numerous contexts treated as justiciable claims that resulted in wide-ranging and 'disruptive' remedies.

Oneida, 691 F.2d at 1083.

The State and the counties raised this same argument again in *Oneida Indian Nation v. Oneida County*, 719 F.2d 525, 539 (2d Cir. 1983) when they charged that the district court's holding of liability "will have catastrophic ramifications" and therefore deemed the claim non-justiciable. The court of appeals reiterated its view that "[t]o our knowledge no Indian claim has ever been dismissed on nonjusticiability grounds." *Id.* at 539 (citing *Oneida*, 691 F.2d at 1081). On appeal to the Supreme Court in *Oneida II,* the State's brief argued that "chaos" would result

from a judicial resolution of the claims. Brief for the State of New York, County of Oneida v. Oneida Indian Nation of New York, 470 U.S. 226 (1985) (Nos. 83-1065, 83-1240), 1984 WL 566152, *29. Thus, the potentially disruptive nature of the claims was argued to this Court in *Oneida II* and the Court was not persuaded. This Court in *Oneida II* declined to overturn the Second Circuit's holding that the claims for money damages were justiciable, and it affirmed liability in the "test case" presented there. 470 U.S. at 253, n.27.

This Court's implicit rejection of disruption as a test for the validity of Indian claims for violation of treaty-secured rights was correct and is reflected in many of this Court's earlier decisions recognizing tribal rights to what non-Indians no doubt considered a disruptive remedy. For example, in the contentious area of reserved water rights, while the policy of placing Indians on fixed reservations began in the 1850s, *see* Felix S. Cohen, *Handbook of Federal Indian Law*, 65 (2005 ed.), whether water had been reserved with the land was not addressed until a half century later in *Winters v. United States*, 207 U.S. 564 (1908). In *Winters,* this Court held that an undetermined quantity of water, *i.e.*, an amount sufficient to fulfill the reservation's purposes, with a priority date of the reservation's establishment, had been reserved for Indian reservations under federal law. 207 U.S. at 577-78. In the arid West, where non-Indians relied heavily on the prior-appropriation system, this had substantial potential for disrupting societal expectations. These Indian (federal) reserved-water rights

could pre-empt continued use of state-law-based water rights by non-Indians. Decades later, in a dispute among seven states over their rights to water from the Colorado River, this Court affirmed the *Winters* doctrine in *Arizona v. California*, 373 U.S. 546 (1963) (*Arizona I*).

In *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n,* 443 U.S. 658, 668-69 & n.14, 676-77 & n.22, 685-87 (1979), this Court, over the State of Washington's strong opposition and contrary to "settled expectations" of the non-Indian commercial fisheries, upheld the tribal treaty fishing right to harvest up to 50 percent of the total fish runs despite present-day domination by non-Indian commercial fisheries, the long-standing exclusion of Indian participation in fisheries under state law and the impact on the livelihoods of numerous non-Indians. *See also United States v. John,* 437 U.S. 634, 652-54 (1978) ("the long lapse in the federal recognition of tribal organization," and significant periods of unchallenged assertions of state jurisdiction over Indians and Indian lands, does not authorize a state to exercise criminal jurisdiction over Indians contrary to federal law); *Minnesota v. Mille Lacs Band of Chippewa Indians,* 526 U.S. 172, 204-08 (1999) (affirming Indian treaty hunting, fishing and gathering rights on ceded lands within the state and finding that such tribal rights "are not inconsistent with state sovereignty over natural resources").

The fact that the vindication of tribal rights secured by treaties and protected under federal law, but ignored or trampled on by state governments,

may result in "disruption" of settled non-Indian expectations is rarely justification for denying a remedy vindicating those rights themselves and is certainly no justification for barring the claim altogether.

2. Review Is Appropriate Because the Second Circuit's Decision May Eliminate Any Potential for Negotiated Resolution of Disputes Between States and Indian Tribes.

This Court has long recognized the importance of resolving disputes between states and Indian tribes on a government-to-government basis. *See Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma,* 498 U.S. 505 (1991) (state-tribal tax agreements as an alternative in lieu of litigation); *Nevada v. Hicks,* 533 U.S. 353, 393 (2001) (O'Connor, J., concurring) (encouraging intergovernmental cooperative agreements for resolution of complex questions of law).

There can be no doubt that many Indian claims, including Indian land claims, present difficult issues whose resolution will have far-reaching implications for Indian tribes and their members, as well as for non-Indian communities and their citizens. Both sides believe they are aggrieved. That is why many who have confronted these issues agree that the best solution is for the parties to come to a negotiated settlement of the dispute. Negotiated settlement is the preferred solution because it gives the parties

an opportunity to work cooperatively to fully address the myriad of issues that inevitably flow from these disputes – jurisdiction, boundaries, land ownership, and adequate compensation.

Other states, faced with illegal land transactions such as those at issue here, have almost uniformly sought to resolve those claims by settlement. Moreover, Congress has consistently encouraged and endorsed negotiated settlement of Indian claims. For example, when considering the extension of the statute of limitations for Indian claims under 28 U.S.C. § 2415, Congress recognized and encouraged the ongoing efforts of the parties to resolve their disputes through negotiated settlements. *See* 123 Cong. Rec. 22,166 (1977) (statement of Rep. Emery) ("Indian claim extension is critical to the careful and equitable resolution of the problem."); 126 Cong. Rec. 3288 (1980) (statement of Rep. Cohen) ("[Maine] would like to see an extension of the statute of limitations in order to allow the parties to continue to try to work out a settlement. . . ."); S. Rep. No. 96-569, at 9 (1980) (statement of Forrest Gerard, Asst. Secretary for Indian Affairs, Dept. of the Interior) ("We have been attempting to achieve negotiated settlements in a number of these claims. . . ."); H.R. Rep. No. 96-807, at 9 (1980), *reprinted in* 1980 U.S.C.C.A.N. 206, 213 ("We believe, in view of the serious nature of this situation, that we must negotiate fair and honorable compromises for presentation to the Congress and

that, in the absence of such compromises, we must be prepared to recommend appropriate legislative solutions.")

Congress has also enacted numerous laws to implement negotiated land-claim settlements between Indian tribes and states, from Maine to California. *See* Rhode Island Indian Claims Settlement Act, 25 U.S.C. §§ 1701-1716; Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735; Florida Indian Land Claims Settlement Acts, 25 U.S.C. §§ 1741-1750e and 1772-1772g; Connecticut Indian Land Claims Settlement Act, 25 U.S.C. §§ 1751-1760; Massachusetts Indian Land Claims Settlement Act, 25 U.S.C. §§ 1771-1771i; Washington Indian Land Claims Settlement Act, 25 U.S.C. §§ 1773-1773j; Mohegan Nation Land Claims Settlement Act, 25 U.S.C. §§ 1775-1775h; Santo Domingo Pueblo Land Claims Settlement Act, 25 U.S.C. §§ 1777-1777e; Torres-Martinez Desert Cahuilla Indians Claims Settlement Act, 25 U.S.C. §§ 1778-1778h; Catawba Indian Tribe of South Carolina Settlement Act, 25 U.S.C. §§ 941-941n. Negotiated resolution has worked everywhere but New York. *See Oneida Indian Nation v. New York,* 691 F.2d 1070, 1083 (2d Cir. 1982): "[E]very major Indian land claim to date has been settled with the United States and states, not private parties, providing the settlement funds."

In short, the tribes' right to sue has resulted in negotiated settlements that have done justice, or at least come closer to doing justice, for all concerned

parties. The Second Circuit's decision threatens to disrupt this mechanism for accommodating all relevant interests, rewarding New York's intransigence, and leaving the tribes with nothing – not a remedy or even a justiciable claim for the plain violations of the Non-Intercourse Act at issue here. Nothing in this Court's decisions, in congressional statutes, or in any sensible articulation of federal Indian policy permits that result.

CONCLUSION

This Court, not a sharply divided panel of the Second Circuit, should finally decide if the Indian land claims it has considered in three separate cases over the past thirty years are no longer viable claims. The Second Circuit erred in interpreting this Court's decision in *Sherrill* as an instruction to foreclose all relief – even monetary relief – for Indian land claims based on the fact that they are, at bottom, disruptive, and as disruptive claims, subject to the equitable doctrine of laches. The prospect of disrupting the *status quo* has never been a basis for leaving an Indian tribe with absolutely no remedy for the vindication of its treaty-secured rights. This Court has recognized that monetary relief can and should be available when the alternative remedy is disruptive. Based on the foregoing, this Court should grant

review to provide clear guidance on this question of exceptional importance.

Date: June 15, 2011

Respectfully submitted,

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