14-4445(L)

and **14-4447(CON)**

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

THE SHINNECOCK INDIAN NATION,

Plaintiff-Appellant,

v.

STATE OF NEW YORK, ANDREW CUOMO, In His Individual Capacity and as Governor of the State of New York, COUNTY OF SUFFOLK, NEW YORK, TOWN OF SOUTHAMPTON, NEW YORK, TRUSTEES OF THE PROPRIETORS OF THE COMMON AND UNDIVIDED LANDS OF THE TOWN OF SOUTHAMPTON, AKA TRUSTEES OF THE PROPRIETORS OF THE COMMON AND UNDIVIDED LANDS AND MARSHES (OR MEADOWS), IN THE TOWN OF SOUTHAMPTON, TRUSTEES OF THE FREEHOLDERS AND COMMONALITY OF THE TOWN OF SOUTHAMPTON, AKA TRUSTEES OF THE COMMONALITY OF THE TOWN OF SOUTHAMPTON, SHINNECOCK HILLS GOLF CLUB, NATIONAL GOLF LINKS OF AMERICA, PARRISH POND ASSOCIATES, LLC, PARRISH POND CONSTRUCTION CORPORATION, PP DEVELOPMENT ASSOCIATES, LLC, SEBONAC NECK PROPERTY, LLC, SOUTHAMPTON GOLF CLUB INCORPORATED, 409 MONTAUK, LLC, SOUTHAMPTON MEADOWS CONSTRUCTION CORPORATION, LONG ISLAND RAILROAD COMPANY, and LONG ISLAND UNIVERSITY,

Defendants-Appellees.

Appeal from the United States District Court for the Eastern District of New York
Case No. 05-cv-02887-DRH-ARL

REPLY OF PLAINTIFF-APPELLANT SHINNECOCK INDIAN NATION

Steven J. Bloxham
Darcie L. Houck
FREDERICKS PEEBLES & MORGAN LLP
2020 L Street, Suite 250
Sacramento, California 95811
Phone: (916) 441-2700
Fax: (916) 441-2067
Attorneys for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutes

Rules

Other Authorities

INTRODUCTION

The Shinnecock Indian Nation ("Nation") saw its land claim under the Non-Intercourse Act ("NIA"), 25 U.S.C. § 177, dismissed for the same reason the Second Circuit has now directed or affirmed dismissal of similar land claims by four other Indian tribes. *Stockbridge-Munsee Community v. New York*, 756 F.3d 163 (2d Cir. 2014), *cert. denied*, 135 S.Ct. 1492; *Onondaga Nation v. New York*, 500 F. App'x 87 (2d Cir. 2012), *cert. denied*, 134 S.Ct. 419 (2013); *Oneida Indian Nation v. County of Oneida* ("*Oneida*"), 617 F.3d 114 (2d Cir. 2010), *cert. denied*, 132 S.Ct. 452 (2011); *Cayuga Indian Nation v. Pataki* ("*Cayuga*"), 413 F.3d 266 (2d Cir. 2005), *cert. denied*, 547 U.S. 1128 (2006). The Court's decisions have been fundamentally misguided from the beginning, when in *Cayuga* two judges (over one dissenter) falsely viewed the Cayugas' action to reclaim possession of their lands and to recover damages for trespass as equivalent to the effort to reestablish sovereign jurisdiction over a parcel already in tribal ownership, an effort the Supreme Court had recently rejected in *City of Sherrill v. Oneida Indian Nation* ("*Sherrill*"), 544 U.S. 197 (2005). Severing *Sherrill* from its moorings and turning its back on Circuit precedent, the Court in *Cayuga* (and the succession of decisions relying and building upon *Cayuga*) applied a selection of the *Sherrill* equitable principles – denial of an equitable remedy that would disrupt settled expectations as a consequence of the long delay in bringing suit on a claim not

subject to any federal statute of limitations – to bar legal and equitable relief alike, and indeed to require dismissal of the underlying legal claim itself – despite the unexpired federal statute of limitations.

One year ago, the Supreme Court confirmed what the Indian tribes and the United States had often argued, that a delay-based equitable defense cannot bar a legal claim that was timely under the federal statute, and further, that only in extraordinary circumstances may a timely claim for equitable relief be curtailed or barred at the pleading stage as a result of plaintiff's delay in filing suit. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S.Ct. 1962, 1967 (2014). One month later, in an unsigned opinion, this Court claimed to distinguish *Petrella* from the NIA land claim dismissals on grounds that were contrary to Supreme Court and Circuit precedent, including *Cayuga* itself. *Stockbridge-Munsee Community*, 756 F.3d at 166.

It is time for the judges of the Second Circuit to bury the line of decisions bent on denying Indian tribes their day in court to seek some measure of relief for the loss of their lands at the hands of State and local governments in violation of federal law. *Petrella* made clear that, with *Cayuga* and the decisions that followed, this Court was not applying the principles on which the Supreme Court decided *Sherrill*, but rather was ruling against the Indian tribes in violation of *Sherrill*. The Nation asks the Court to recognize the controlling validity of its earlier precedents,

repudiate the wholesale dismissal of tribal NIA land claims based on the inequitable *Cayuga-Oneida* defense, and reverse the judgment against the Nation.

ARGUMENT

I. The *Cayuga-Oneida* Defense Cannot Survive *Petrella*.

The Court correctly stated in *Cayuga* that "there is now a statute of limitations" for NIA land claims for damages, citing 28 U.S.C. § 2415. 413 F.3d at 279. *See also id.* at 273 (summarizing its holding that *Sherrill*'s equitable doctrines can "be applied to Indian land claims, even when such a claim is legally viable and within the statute of limitations"). The Court correctly stated the same thing two decades earlier: "Congress has repeatedly extended the federal statute of limitations applicable to [NIA land claim] suits by the federal government on behalf of Indian tribes, 28 U.S.C. § 2415[.]" *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1081 (2d Cir. 1982).

In both cases the Court was speaking of the statute of limitations applicable to the United States, rather than directly to the Indian tribe itself, but the Court held "[i]t would be anomalous to allow the trustee to sue under more favorable conditions than those afforded the tribes themselves," and that "at the very least suits by tribes should be held timely if such suits would have been timely if brought by the United States." 691 F.2d at 1084. *See also Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 538 (2d Cir. 1983), *aff'd in part, rev'd in part,*

County of Oneida v. Oneida Indian Nation ("*Oneida II*"), 470 U.S. 226 (1985). Based on the congressional policy expressed in 28 U.S.C. § 2415 (even though at the time it did not apply directly to suits by tribes), the Court held that no "delay-based defense founded on federal law may be asserted" against a tribal NIA land claim. 691 F.3d at 1084.

The Court subsequently disavowed this holding, *Cayuga*, 413 F.3d at 279, and later disregarded *Cayuga*'s recognition of § 2415 as the applicable statute of limitations for NIA claims brought by the United States on behalf of Indian tribes. *Stockbridge-Munsee Community*, 756 F.3d at 166. The Court is obligated to correct its unjustified breaks from Circuit precedent. *See McMellon v. United States*, 387 F.3d 329, 333 (4th Cir. 2004) (en banc) (among conflicting panel decisions within a Circuit, the earliest opinion is controlling).

Congress enacted the Indian Claims Limitation Act ("ICLA") on December 30, 1982, setting forth legislatively the same conclusion deduced by the Second Circuit a few months earlier, that claims covered by § 2415 would be subject to the same limitations period (or would be similarly subject to no time limit) when brought by Indian tribes on their own behalf. Indian Claims Limitation Act of 1982, Pub. L. 97-394, Title I, §§ 2-6, 96 Stat. 1966, note following 28 U.S.C. § 2415. With this Act, Congress extended the federal statute of limitations for the last time, mandated a listing of all pre-1966 claims, and expressly imposed a

specific limitations period on suits brought by the United States on behalf of Indian tribes – as well as directly on the same claims brought by Indian tribes themselves – for "those pre-1966 claims which, but for the provisions of this Act, would have been barred by the provisions of section 2415 of title 28, United States Code, unless such claims are included on either of the lists required by … this Act." ICLA § 5(a); *see id.* §§ 3 & 4 (directing the Secretary to list claims); §§ 5(c) & 6(b) (setting forth limitations periods for listed claims).

The Supreme Court found that § 2415 and the ICLA expressed Congress' will that an Indian tribe's NIA land claim for money damages must remain live until the expiration of the time limit set by statute. *Oneida II*, 470 U.S. at 243-44. The Court's comment at the outset of its analysis, that "[t]here is no federal statute of limitations governing federal common-law actions by Indians to enforce property rights," *Oneida II* at 240 (quoted in Appellees' Br. at 23[1]), is precisely accurate, in the sense of actions "to establish the title to, or right of possession of, real or personal property." 28 U.S.C. § 2415(c). Shortly following its initial comment, however, the Court stated: "With the enactment of the 1982 amendments, Congress for the first time imposed a statute of limitations on certain tort and contract claims for damages brought by individual Indians and Indian

[1] Appellees misquote the Supreme Court, omitting (without acknowledgement) the words, "*by Indians*." Appellees' Br. at 23.

tribes." *Oneida II* at 242-43. The Court's entire discussion was premised on the fact that the claims covered by § 2415 and the ICLA included "Indian land claims." *Id.* at 241.

The Court did not decide that all claims relating to the title or possession of property, much less claims for money damages, were excluded from the limitations periods of § 2415 and the ICLA, as the Appellees now urge. Instead, the Court was saying that however one looked at it – that the claim was brought *within* the limitations period applicable as of 1970; or that its inclusion on the Secretary's list indicates congressional intent that it not be barred; or that it involved "litigating the continued vitality of aboriginal title," and pursuant to § 2415(c) was not subject to the limitations of § 2415(a) and (b); or that it was brought by the tribe rather than the United States, and thus not subject to § 2415 as it stood in 1970 – the Oneidas' land claim was not barred by any statute of limitations. *Oneida II* at 240-43 & n.15.

Contrary to Appellees' ill-supported effort to lump all Indian land claims into § 2415(c), the statute specifies that "*every* action for money damages" founded upon contract or tort is governed by subdivisions (a) or (b). § 2415(a), (b) (emphasis added). *See also* ICLA §§ 5(a) & (c), 6(b) (supplying the limitations periods for the same actions, originally accruing before 1966, when brought by Indian tribes). Section 2415(b) and the ICLA even expressly provide several

alternate limitations periods for any "action to recover damages resulting from a trespass on lands of the United States … including actions relating to allotted trust or restricted Indian lands[.]" 28 U.S.C. § 2415(b); ICLA §§ 5(a) & (c), 6(b).[2] Thus, even though an action for trespass damages requires a plaintiff to establish her right of possession exclusive of the defendant at the time the trespass occurred, the statutory language reflects Congress' intent to categorize such actions separately from those where establishing a current right of possession (or title) to real property is the objective of the action, rather than previous possession being merely an element of proving a legal right to money damages for interference with that right to possession in the past. *See* § 2415(c), *Oneida II* at 273 n.15 (noting the Oneidas' test case seeking "rent" for the two years immediately preceding filing the complaint, as a "damages action[] that involve[s] litigating the *continued vitality* of aboriginal title" [emphasis added], might be construed as exempt from the limitations period established in the ICLA pursuant to § 2415(c)).

[2] Where an action for damages resulting from a trespass on restricted Indian lands originally accrued prior to 1966, the time limit for the United States or an Indian tribe to file a complaint depends on whether it is: (i) left off the Secretary's lists (60 days from publication of the second list, § 2415(b), ICLA § 5(a)); or (ii) listed and rejected for litigation (1 year from publication of that decision, § 2415(b), ICLA § 5(c)); or (iii) listed and submitted to Congress (3 years from submission, § 2415(b), ICLA § 6(b)); or (iv) listed and not yet acted upon by the Secretary. "So long as a listed claim is neither acted upon nor formally rejected by the Secretary, it remains live." *Oneida II* at 243.

Acting pursuant to the ICLA's instructions, the Secretary of the Interior identified the Nation's NIA land claim as one of the claims subject to the ICLA's limitations framework. Statute of Limitations Claims List, 48 Fed. Reg. 13698, 13920 (Mar. 31, 1983). Acting Assistant Secretary—Indian Affairs John W. Fritz explained in the material preceding the list:

> The Indian Claims Limitation Act of 1982, Pub. L. 97-394, extends the federal statute of limitations governing pre-1966 Indian damage claims (28 U.S.C. § 2415) which was due to expire on December 31, 1982. A claim subject to the statute of limitations in Pub. L. 97-394 is an Indian claim for money damages which arose prior to July 18, 1966. Claims against the United States are not governed by this law, only money damage claims against persons, corporations, states, or any other entities except the federal government. *Claims for title to land are also not governed by this statute of limitations. The vast majority of the listed claims involve trespasses to Indian land.*
>
> This notice lists all potential Indian damage claims which have at any time been identified by or submitted to the Bureau of Indian Affairs under the Department of the Interior's Statute of Limitations Program.
>
> ***
>
> It is important to remember that for claims contained on either of the lists, the statute of limitations does not begin to run until such time as the Secretary formally rejects a claim or submits to Congress a legislative proposal or report.

Id. at 13698 (emphasis added). The Nation's claim was thus listed because it had been identified as a claim for money damages, not solely for "title to land," subject to the ICLA's statute of limitations. Notably, the "vast majority" of the claims listed, including the Nation's claim, "involve trespasses to Indian land," and the

Secretary of the Interior determined, in a straightforward application of the statute he was charged with implementing, that to the extent these claims seek to recover money damages, they are governed by the ICLA. *Id.*[3]

This Court has recognized that § 2415 can require the application of different time limits to claims arising from a single alleged wrongdoing, depending on the type of relief sought. *Westnau Land Corp. v. U.S. Small Business Admin.*, 1 F.3d 112, 114-16 (2d Cir. 1993). Appellees rebuff *Westnau*, asserting the Nation is "just like a plaintiff seeking to foreclose," Appellees' Br. at 26, which would be beside the point even if accurate (which it is not), but more importantly they fail to acknowledge the critical fact that the Nation's suit is in part an action for money damages. Moreover, with respect to approximately two-thirds of the land claim area, to which the Nation makes no claim to current title or current right of possession, it is *solely* an action for money damages. As such it is expressly within the scope of § 2415(a) and (b) alone.[4]

---

[3] Appellees' protestation that the Secretary's inclusion of a claim on the ICLA list did not signify the claim had merit is entirely beside the point. Regardless of its merit, each listed claim was included because it was identified by or submitted to the Secretary as a claim accruing to an Indian tribe or individual for money damages founded upon a contract or tort, which would be barred by § 2415 if not for the provisions of the ICLA. *See* ICLA § 3(a). On the other hand, the Secretary *was* authorized to "exclude from such list any matter which was erroneously identified as a claim and which has no legal merit whatsoever." *Id.*

[4] The Nation did not sue the owners of two-thirds of the land claim area. It does not seek ejectment or to vindicate any current possessory right regarding any of

Appellees also propose another reading of § 2415(a) and (b) that is contrary to the intent of Congress and the *Oneida II* decision. Placing the Nation's claim on the ICLA list, Appellees assert (entirely inaccurately), somehow "exempted" the claim from any limitations bar unless the Secretary takes further action, and consequentially courts have free rein in the interim to impose their own time limits. *See* Appellees' Br. at 27. But § 2415 reaffirmed that congressional policy was to keep these damages claims alive for as long as necessary until their final resolution. *See Oneida II* at 240-43. Congress assigned to the Secretary of the Interior, not the courts, the job of fixing when the applicable congressionally-imposed limitations period would run. *Id.* at 243; 28 U.S.C. § 2415(a), (b); ICLA §§ 5 & 6. It is accurate instead to say the placement of the Nation's claim on the list tolls the statute of limitations until the Secretary takes action, leaving no gap for courts to fill. *See Petrella* at 1975 (explaining that tolling "lengthens the time for commencing a civil action in appropriate circumstances," and that it "applies when there is a statute of limitations"); *id.* at 1974 (laches' role is "essentially gap-filling, not legislation-overriding"). Section 2415 and ICLA §§ 5 and 6 *do* provide the "Congressionally-prescribed fixed statutory bar date" Appellees want the Court

---

that land. *See* Appx. 32, ¶ 71 ("The Nation is not seeking in this action to displace, eject or claim damages from owners of residential real property located within the Subject Lands."). For that two-thirds of the land claim area, the Nation will need to establish its possessory interest only at the time of the 1859 violation, supporting its claim against original wrongdoers for the damages they caused.

to believe is absent, *see* Appellees' Br. at 27, and they fix that date at one year or three years after the Secretary takes the action needed to start the statute of limitations running. § 2415(a), (b); ICLA §§ 5(c), 6(b).

Turning to the Nation's action to restore possession of one-third of its land (as distinct from its damages action premised on the 1859 loss of the entire land claim area), Appellees refer to two federal statutes which shed no light on the application of laches to a claim for equitable relief based on "wrongs occurring within a federally prescribed limitations period." *Petrella*, 134 S.Ct. at 1975.[5] Appellees here mischaracterize the Nation's argument in a subtle but significant way. The Nation's argument is not that Congress "intended to bar laches" with the ICLA or § 2415. *See* Appellees' Br. at 28. The Nation does not ask the Court to make the absurd straw-man finding against which Appellees set themselves, "that Congress intended to disallow delay-based equitable defenses to ancient land claims." Appellees' Br. at 29. Congress does not need to have had any intent with respect to laches or any other judicial doctrine applied by courts. Rather, the relevant question is whether Congress has identified a category of claims and said: "These claims are timely" – either for all time, or until the end of a prescribed

[5] Notably, the *Oneida II* dissent relied on one of the same statutes now cited by Appellees to make the same point. *Oneida II* at 271 & n.30 (Stevens, J., dissenting). The majority did not agree. Appellees also reference "this Court's precedents," but none are cited. Appellees' Br. at 28.

period. If so, the ordinary rules apply, as summarized in *Petrella*, to guide the application of judge-made timeliness doctrines.

Petrella is based on the unexceptional premise that the judicially-created doctrine for determining a suit's timeliness must not interfere with the applicable statutory determination. In a suit that "seeks relief for conduct occurring within the limitations period, … *courts are not at liberty to jettison Congress' judgment on the timeliness of suit*." *Petrella* at 1967 (emphasis added). The judicial doctrine is at its most forceful when Congress has not spoken, but when Congress has spoken, the judicial doctrine recedes. Even then, however, laches is not "barred," but still has a role in determining appropriate equitable relief. *Id.*

Petrella explained that the Copyright Act's statute of limitations, 17 U.S.C. § 507(b), with its three-year look-back period, made "the starting trigger an infringing act committed three years back from the commencement of suit, while laches, as conceived by the Ninth Circuit and advanced by MGM, makes the presumptive trigger the defendant's *initial* infringing act." 134 S.Ct. at 1975. This conception of laches, the Court held, does impermissible violence to the "statutory prescription." *Id.* The application of laches in the face of § 2415 and the ICLA similarly invades congressional prerogatives. Like a statute of limitations, the laches clock generally begins running at the time the claim accrues. *See, e.g., Pro Football, Inc. v. Harjo*, 565 F.3d 880, 884 (D.C. Cir. 2009). The premise

underlying § 2415 and the ICLA was that all pre-1966 claims, whether decades or centuries old, and whether for damages or for current title or right to possession, were given a new 1966 accrual date. § 2415(g); *Oneida II* at 242. This established the point from which delay may be measured. And the "starting trigger" for damage claims is an act of the Secretary which, in this case, has not occurred. ICLA §§ 5, 6. The *Cayuga-Oneida* defense, however, measures the Nation's delay beginning with the defendants' initial infringing act in 1859. *Cf. Cayuga* at 279 (disregarding § 2415 in favor of laches on grounds that the statute was not enacted "until one hundred and fifty years after the cause of action accrued"). For these claims, Congress reset the clock, not only erasing whatever sense of repose or settled expectations might have been felt by those affected by the claims, but moreover, legislating a timeliness regime the Court is not at liberty to disregard.

Appellees rely on the dissenting opinion from *Oneida II* to argue that Congress did not intend § 2415 "to revive ancient land claims seeking possession of or title to land that were barred by laches over a century before." Appellees' Br. at 28. The majority in *Oneida II*, however, rejected this argument when made by the dissent, and refuted the premise that laches ever could have defeated the claims. *Oneida II* at 241-44 & n.16. Congress was legislating on the understanding that these were *live* claims, not dead claims already barred by laches which needed to be "revived," *Oneida II* at 241-43, and the Court recognized

Congress' will that until the Secretary takes action on a claim, "it *remains* live." *Id.* at 243 (emphasis added).

What Congress was doing with § 2415 and the ICLA was setting new time limits for certain claims – damages claims – and codifying the federal policy that other claims – those for current possession or title – were not subject to the new limitations periods. It would upend Congress' intent to hold that under § 2415(c), courts are invited to impose, through laches or any other equitable delay-based doctrine, a time limit on actions for title and possession of property that is *shorter* than the limit for damages claims. This is not a situation where Congress has failed to enact a statute of limitations for federal and tribal actions seeking to restore title or possession to property; rather, Congress has established a federal statutory framework designed to keep such actions alive. *See Oneida II* at 243 & n.15; *Westnau* at 117.

To the extent there is any doubt regarding Congress' intent in setting forth the time limits for an Indian tribe to bring actions for damages or to establish current title to or current right to possession of property based on pre-1966 wrongs, the Court must be guided by the general rule that statutes passed for the benefit of Indian tribes are to be liberally construed in favor of the tribes. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 767 (1985).

As the Nation did in its brief, Appellees note the *Cayuga-Oneida* defense is not traditional laches. *See* Appellees' Br. at 29-30; Nation's Br. at 40-41. However, what Appellees describe as the "unique panoply of equitable principles" joining forces to defeat Indian tribes' claims for their stolen land, comes down to a subset of the same equitable principles behind traditional laches, albeit in a uniquely one-sided guise. Appellees offer no explanation of what makes the *Cayuga-Oneida* defense any different from traditional laches in terms of whether it can defeat a claim which, though old, was brought within the window judged timely by Congress. Both are based on the assertedly disruptive consequences of the plaintiff's delay in bringing suit. The *Cayuga-Oneida* defense does not uniquely give courts the authority to override Congress. When courts find that equity compels them to curtail relief because of "the consequences of a delay in commencing suit," *Petrella* at 1977, they must do so consistent with *Petrella*. And *Petrella* demands that courts refrain from acting contrary to Congress' judgment.

II. The Dismissal of the Nation's Claim Violated the Fifth Amendment.

A majority of the Supreme Court has held that a judgment must be set aside, either as an uncompensated taking of property, or as an arbitrary and irrational deprivation of property without due process of law, if the judgment "declares that what was once an established right of private property no longer exists[.]" *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S.

702, 715, 717 (2010) (lead opinion); *id.* at 735, 736 (Kennedy, J., concurring). It is not necessary for this Court to decide which clause of the Fifth Amendment was violated (nor to decide whether to recognize a theory of "judicial takings") because both the legal standard and the remedy are the same either way.

The Nation's argument that the dismissal of its claim violated the due process or just compensation clauses of the Fifth Amendment should not be rejected as "unpreserved," as the Appellees argue. "'[P]arties are not limited to the precise arguments they made below'" in support of a claim advanced in the lower court. *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 375 (1995) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992)); *see LeGras v. Aetna Life Ins. Co.*, --- F.3d ----, 2015 WL 3406182, *3 n.6 (9th Cir. May 28, 2015). The argument that dismissal of the Nation's action violates the Fifth Amendment is merely an alternate way to frame the question that has always been the focus in this case, whether *Cayuga-Oneida* laches is a valid defense to the Nation's claim under applicable law. Furthermore, even if it were viewed as a truly new issue, "[t]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases. … Certainly there are circumstances in which a federal appellate court is justified in resolving an issue not passed on below…." *Singleton v. Wulff*, 428 U.S. 106, 121 (1976). The Court exercises its "broad discretion to

consider issues not raised initially in the District Court" where consideration is necessary "to avoid manifest injustice" or "where the issue is purely legal and there is no need for additional fact-finding." *Baker v. Dorfman*, 239 F.3d 415, 420-21 (2d Cir. 2000); *see Commack Self-Service Kosher Meats, Inc. v. Hooker*, 680 F.3d 194, 208 n.11 (2d Cir. 2012).

The Nation's Fifth Amendment argument was not available prior to the judgment below; it was the judgment as rendered (not the acts of the defendants) which directly caused the claimed constitutional violations. The takings claim in particular would have been "premature." *Preseault v. I.C.C.*, 494 U.S. 1, 11 (1990). The Nation did assert a Fifth Amendment argument in its motion for reconsideration, but withdrew the motion following the *Oneida* decision, which made clear that the district court had not misinterpreted *Cayuga* but had applied it just as the Second Circuit intended, leaving no grounds for reconsideration. *See Shrader v. CSX Transp., Inc.*, 70 F.3d 255, 257 (2d Cir. 1995) (reconsideration generally requires the moving party to "point to controlling decisions or data that the court overlooked"). The district court would not have had authority to reconsider its ruling on this basis. This Court, however, has authority to correct its own course and avert the manifest injustice of a judicially-perpetrated constitutional violation. Furthermore, the issue is purely legal and requires no

additional fact-finding. Appellees have briefed their arguments on the issue, and it is appropriate for the Court's consideration on appeal.

Due process forbids the government from erecting a new rule of limitations and applying it retroactively to extinguish a party's claims, denying the party an opportunity to try its right in court. *See Ross v. Artuz*, 150 F.3d 97, 100 (2d Cir. 1998). The traditional doctrine of laches is a "rule of limitations" equivalent to a statute of limitations, premised on "the principle that equity will not aid a plaintiff whose unexcused delay, if the suit were allowed, would be prejudicial to the defendant." *Russell v. Todd*, 309 U.S. 280, 287 (1940); *see also Petrella*, 134 S.Ct. at 1977 ("For laches, timeliness is the essential element."). Undoubtedly, traditional laches requires more than simply the passage of time, and calls for a showing of inequity – lack of diligence by the plaintiff and consequential prejudice to the defendant. *Oneida*, 617 F.3d at 127. Such showings are unnecessary, however, to the *Cayuga-Oneida* defense. Their replacements – the general "disruptive nature" of the plaintiff's claims and the "degree to which these claims upset … justifiable expectations" – are treated as "inherent in the claim itself." *Id.*, *see also id.* at 128 (distinguishing between "unreasonable delay" and "delay alone"). What remains is a rule requiring the dismissal of NIA land claims at the pleading stage based on no more than the passage of time, as if the Second Circuit had legislated and applied a statute of limitations.

Appellees deny the *Cayuga-Oneida* rule was new when it was announced in *Cayuga* and applied to dismiss the Nation's claims, noting that the Court has twice described its version of laches as "one of several preexisting equitable defenses" invoked in *Sherrill*. What was unprecedented, however, was the Second Circuit's extension of *Sherrill*'s equitable principles, which precluded the *Sherrill* plaintiffs "from rekindling embers of sovereignty," *Sherrill* at 214 – equitable relief as to which Congress had not legislated a statute of limitations – to claims for legal relief brought within the time allowed by a congressionally-imposed statute of limitations – territory never before embraced by the preexisting equitable doctrines.[6] This free-ranging delay-based defense, constructed specifically for NIA land claims and separated from its native context of equitable claims not subject to a statute of limitations, established a new rule.

[6] Moreover, the other "preexisting equitable defenses" invoked by *Sherrill* – acquiescence and impossibility – were never part of the Second Circuit's reasoning for extending *Sherrill* to damages claims under the NIA. Acquiescence applies to foreclose questions of sovereignty over territory. *Sherrill* at 218. *Sherrill*'s impossibility discussion also focused entirely on the attempted reassertion of "sovereign control" over the land. *Id.* at 219-20. Ownership rights to land – the issue at hand in the NIA land claim cases – are completely separable from sovereign rights over that land – the issue in *Sherrill*. *California v. Nevada*, 447 U.S. 125, 132-33 (1980); *Sherrill* at 218-19. While *Cayuga* and its progeny incanted the words "acquiescence" and "impossibility," they directed their analytical attention on the plaintiffs' "delay" and its consequences for the current landowners.

The district court alternatively committed a judicial taking when it dismissed the Nation's claim for damages for the loss of its land. Of course, a taking of property is not unconstitutional so long as just compensation is afforded. However, the Federal Circuit recently held the Tucker Act, 28 U.S.C. § 1491, did not provide jurisdiction for the Nation to sue the United States in the Court of Federal Claims to seek compensation for this taking. *Shinnecock Indian Nation v. United States*, 782 F.3d 1345, 1352-53 (Fed. Cir. 2015). It held the Court of Federal Claims "has no jurisdiction to review the decisions of district courts and cannot entertain a takings claim that requires the court to scrutinize the actions of another tribunal." *Id.* at 1353 (internal quotation marks and alterations omitted). The Federal Circuit explained, "Permitting parties aggrieved by the decisions of Article III tribunals to challenge the merits of those decisions in the Court of Federal Claims would circumvent the statutorily defined appellate process and severely undercut the orderly resolution of claims." *Id.* With just compensation determined to be unavailable, it has now become the province of this Court through the appellate process to address and remedy the unconstitutional, uncompensated taking of the Nation's property interest. *Id.*; *see Preseault*, 494 U.S. at 4-5; *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164-65 (1980).

The property interest taken by the court is not the Nation's land itself, but the Nation's "legal right to sue for compensation for that land," which courts have recognized as a valid property interest for purposes of the takings clause. *Alliance of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1481 (Fed. Cir. 1994). *See Adams v. United States*, 391 F.3d 1212, 1225-26 (Fed. Cir. 2004); *In re Aircrash in Bali, Indonesia*, 684 F.2d 1301, 1310-12 (9th Cir. 1982). The Nation's right to sue for damages arising from the loss of what was once undisputedly its land was an established property right, secured against uncompensated government taking because the cause of action itself "protects a legally-recognized property interest." *Adams* at 1226.

Following this Court's decision in *Cayuga*, the district court decided the property interest once owned by the Nation – its right to sue for the illegal acquisition and occupation of its land – no longer existed: the suit could not be brought under any present or future circumstances. Under *Stop the Beach*, this violated either the due process clause or the takings clause of the Fifth Amendment, and under either, the remedy is to reverse the judgment below. 560 U.S. at 715, 735.

III. The Dismissal Based on Improper Factual Findings Violated the Nation's Constitutional Right to a Jury Trial.

To the extent (if any) that factual determinations are required – as opposed to merely being "inherent in the claim itself" – the Nation was entitled to have a

jury decide the fact questions underlying the *Cayuga-Oneida* defense. The facts were contested and were far from being "not subject to reasonable dispute," and therefore could not be determined through judicial notice. Fed. R. Evid. 201(b). The facts properly before the court – those stated on the face of the complaint, incorporated therein, or suitable for judicial notice – not only did not support applicability of *Cayuga-Oneida* laches, but supported only non-applicability of the doctrine. *See Kelly-Brown v. Winfrey*, 717 F.3d 295, 308 (2d Cir. 2013) (affirmative defenses are inappropriate to resolve on a motion to dismiss unless the necessary facts are evident on the face of the complaint; plaintiff's burden to rebut the defense is only to plead sufficient facts to plausibly suggest it is entitled to relief).

The Nation did not waive for appeal its argument that the district court infringed upon the Nation's right to a jury trial by deciding such contested facts. Again, this argument simply supports the Nation's main claim, that it is entitled to have its action heard notwithstanding the *Cayuga-Oneida* defense. *See Lebron*, 513 U.S. at 379 (parties are not limited to the precise arguments made below). The Nation argued below that the pleadings did not contain the facts necessary to dismiss the complaint on the basis of *Cayuga*'s laches, and that any such dismissal required findings of fact with respect to the "disruptive nature" of the Nation's claims. *See* Plaintiff's Memorandum of Law in Opposition to Defendant Long

Island Railroad Company's Motion to Dismiss the Complaint, ECF No. 22, at 2, 8-12. Furthermore, the time to request a jury trial had not expired when judgment was issued, because the defendants had not answered the complaint. *See McCarthy v. Bronson*, 906 F.2d 835, 840 (2d Cir. 1990); Fed. R. Civ. P. 38(b). The Nation's right to jury trial remains intact and unwaived, and it is necessary for the Court to consider argument in support of that right in order to avoid the "injustice [that] might otherwise result." *Hormel v. Helvering*, 312 U.S. 552, 557 (1941).

Addressing the merits of the Nation's argument, Appellees point to other decisions in which an aspect of the *Cayuga-Oneida* laches defense, the changed character of the subject land, was established by reference to census data and the "types of defendants named" in the complaint. Appellees' Br. at 32-33. The Nation has explained, however, that in this case the complaint requires a contrary conclusion when tested by a 12(b)(6) motion, namely that in 2005 a significant part of the land remained undeveloped and maintained its historical character, and that the "types of defendants named" were either original wrongdoers or developers merely seeking to profit from development of such undeveloped land, diminishing both the "justifiable expectations" with respect to those lands and the "degree to which [the Nation's] claims upset" any such expectations. *See Oneida* at 127 (identifying the elements of the *Cayuga-Oneida* defense). The pleadings and

readily determined actual facts controvert the inaccurate conclusions the court drew from census data and the case's caption. The findings that may have been made in other cases, incontrovertible in light of the pleadings there and the facts that were capable of ready and accurate determination in those cases, cannot govern the permissible factual findings made in the face of the particular facts alleged and those readily determinable in this case. These contested facts are not subject to resolution by judicial notice and should be decided by a jury.

IV. The Court Should Not Reach the Eleventh Amendment Immunity and Rule 19 Issues Appellees Raise as Alternative Grounds for Dismissal.

While the Court has the ability to affirm on grounds different from those relied upon by the district court, it should decline to do so in circumstances where deciding questions reserved by the lower court would not be appropriate. *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970); *United States v. Ballard*, 322 U.S. 78, 88 (1944); *Fisher v. JPMorgan Chase & Co.*, 303 F.App'x 979, 981 (2d Cir. 2008). Where, as here, the district court's and appellant's attention is centered on a primary issue, and the alternative grounds are not fully presented on appeal, it is more appropriate to allow the district court to pass on the secondary issue in the first instance. *Aetna Casualty & Surety Co. v. Flowers*, 330 U.S. 464, 468 (1947); *Ballard* at 88; *Securities Investor Protection Corp. v. Morgan, Kennedy & Co., Inc.*, 533 F.2d 1314, 1322 (2d Cir. 1976).

Furthermore, if the Court reverses the judgment below based on *Petrella*, it is virtually certain the United States will join the Nation's suit against the State, as it regularly did in NIA land claim cases before *Cayuga* pulled the rug out from under such cases.[7] As the Appellees recognize (Appellees' Br. at 34), the federal government's intervention, asserting the same claims as the Nation, will overcome any Eleventh Amendment immunity the State may possess in a suit by the Nation alone. *Arizona v. California*, 460 U.S. 605, 614 (1983); *Oneida*, 617 F.3d at 131-32; *Seneca Nation of Indians v. New York*, 178 F.3d 95, 95 (2d Cir. 1999) (per curiam), *aff'g* 26 F.Supp.2d 555, 564 (W.D.N.Y. 1998); *Cayuga Indian Nation v. Cuomo*, 1999 WL 509442, *13 (N.D.N.Y. Jul. 1, 1999). Judicial economy

[7] The Nation requested litigation assistance in December 2005, shortly after filing its complaint in this action. At the time the Nation was not federally-recognized, and the government denied any trust obligation to provide litigation assistance. (The government had denied the Nation's earlier 1978 request on the same basis.) Upon APA review, the court determined the United States owed a duty to the Nation, but that the government had not made a final decision whether to assist the Nation. *Shinnecock Indian Nation v. Kempthorne*, 2008 WL 4455599, *19-20 (E.D.N.Y. Sept. 30, 2008). The Nation was federally recognized effective October 1, 2010. *See* Indian Entities Recognized…, 75 Fed. Reg. 66124, 66124 (Oct. 27, 2010). The government then began actively considering the Nation's request. By this time, the United States had petitioned the Supreme Court to review *Cayuga* and was about to follow with an exceedingly rare second certiorari petition on the same issues in *Oneida*. Both petitions were denied, and the United States has since been unwilling to intervene on the Nation's behalf because of the nonviability of NIA land claims in the Second Circuit following *Cayuga* and *Oneida*. Based on years of communications between the Nation and the United States, the Nation is nearly certain that if the *Cayuga-Oneida* obstacle is removed, the United States will intervene as a co-plaintiff or file a new action in support of the Nation's claims in this action.

counsels against upholding dismissal on the alternative basis of sovereign immunity while vacating the district court's *Cayuga*-based dismissal, because upon the reinstatement of the action by the United States as an intervenor (or the commencement of a new action by the United States) the Nation will be compelled to seek relief from the judgment, a cumbersome procedure leading to a virtually foregone conclusion. This unnecessary process can be averted by leaving the question of sovereign immunity for the district court.

In the event this Court reverses and the United States, however unlikely, declines to intervene, the district court will be in the best position, with full briefing, to address the parties' arguments regarding the existence *vel non* of the State's sovereign immunity from the Nation's suit and, if necessary, the question of whether, under Fed. R. Civ. P. 19, the action should continue against the remaining defendants in the State's absence.[8]

---

[8] The Nation's arguments against the State's immunity include the availability of suit against the Governor under *Ex parte Young*, 209 U.S. 123 (1908), as well as the State's surrender of sovereignty over the subject of Indian affairs at the time it ratified the Federal Constitution, and attendant surrender of sovereign immunity from tribal suits to protect their rights under federal Indian law. *Cf. Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006) (Constitution's bankruptcy clause was intended "to authorize limited subordination of state sovereign immunity in the bankruptcy arena"); *id.* at 393 (Thomas, J., dissenting, suggesting the majority had effectively overruled *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996)).

Among other reasons, Rule 19 would not require dismissal of the other defendants in the State's absence because with or without an adjudication of the

CONCLUSION

The Nation asks that the Court reverse the judgment of the district court.

Respectfully submitted,

Dated: June 17, 2015 by: /s/ Steven J. Bloxham

Steven J. Bloxham
Darcie L. Houck
FREDERICKS PEEBLES & MORGAN LLP
2020 L Street, Suite 250
Sacramento, CA 95811
Phone: (916) 441-2700
Fax: (916) 441-2067

Attorneys for Plaintiff-Appellant
Shinnecock Indian Nation

State's alleged wrongdoing (authorizing conveyance of the Nation's land) the alleged acts of the other defendants – the actual purchases and conveyances – still violate the NIA.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,914 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman.

June 17, 2015

/s/ Steven J. Bloxham

Attorney for Plaintiff-Appellant
Shinnecock Indian Nation