15 No. 1215

In The

Supreme Court of the United States

SHINNECOCK INDIAN NATION,

Petitioner,

v.

STATE OF NEW YORK, *et al.*,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner's case is the last in a long line of Indian land claim cases arising in the State of New York in which Indian tribes have been denied access to the courts by the U.S. Court of Appeals for the Second Circuit. *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005); *see also*, *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010); *Onondaga Nation v. New York*, 500 F. App'x 87 (2d Cir. 2012); *Stockbridge-Munsee Community v. New York*, 756 F.3d 163 (2d Cir. 2014). Based on its *Cayuga* "laches" defense, the court of appeals summarily dismissed all claims of Petitioner for legal and equitable relief for the loss of their lands in violation of the Trade and Intercourse Act of 1790, also known as the Indian Non-Intercourse Act, 25 U.S.C. § 177. Recently, however, this Court affirmed the general rule in equity that courts may not override Congress' judgment and apply laches to summarily dispose of all *claims* filed within a statute of limitations established by Congress, thereby foreclosing the possibility of any form of relief. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1975 (2014). In *Petrella*, this Court recognized that only *equitable remedies* may be foreclosed at the outset of litigation due to delay in commencing suit in "extraordinary circumstances." *Id.* at 1977. The questions presented are:

1. Whether at the outset of litigation a court may apply "laches" to foreclose an Indian tribe from bringing its federal statutory and common-law claims,

QUESTIONS PRESENTED – Continued

including one for money damages, if brought within the statute of limitations established by Congress.

2. Whether a court violates the Fifth Amendment's Due Process and Takings Clauses when it retroactively applies a new, judicially-formulated rule to dismiss an Indian tribe's viable claims *ab initio*, thereby extinguishing established property rights.

PARTIES TO THE PROCEEDING

Petitioner Shinnecock Indian Nation, a federally recognized Indian tribe, was plaintiff in the district court and appellant in the court of appeals. The State of New York, Andrew Cuomo, 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[1] were defendants in the district court and appellees below.

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[1] Stony Brook University now operates the campus formally operated by Long Island University's Southampton College.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

BLANK PAGE

PETITION FOR A WRIT OF CERTIORARI

Petitioner Shinnecock Indian Nation ("Shinnecock") respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 628 F. App'x 54 (2d Cir. 2015). *See* Appendix ("App.") at 1-5. The opinion of the district court, App. at 6-21, is reported at 2006 WL 3501099.

JURISDICTION

The judgment of the court of appeals was entered on October 27, 2015. App. at 1. A petition for rehearing and rehearing en banc was not filed in this case. On January 19, 2016, Justice Ginsburg granted the Petitioner an extension of time within which to file a petition for a writ of certiorari to and including March 25, 2016. This Court has jurisdiction under 28 U.S.C. § 1254(1).

APPLICABLE CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment of the Constitution of the United States, in pertinent part, states "No person shall be . . . deprived of life, liberty, or property,

without due process of law; nor shall private property be taken for public use, without just compensation."

The following statutory provisions are reproduced in the appendix to this petition: Trade and Intercourse Act: Act of July 22, 1790, ch. 33, § 4, 1 Stat. 137; Act of June 30, 1834, ch. 161, § 12, 4 Stat. 729, Revised Statutes § 2116, 25 U.S.C. § 177, App. at 22; 28 U.S.C. § 2415, App. at 22-27; Indian Claims Limitation Act of 1982, Pub. L. No. 97-394, Title I, §§ 2-6, 96 Stat. 1976, note following 28 U.S.C. § 2415, App. at 28-32; Chap. 46 of NY Laws of 1859, App. at 33-35.

STATEMENT OF THE CASE

At its heart, this case is about American property law and whether the rights of Petitioner Shinnecock Indian Nation ("Shinnecock") can be ignored and disregarded by the courts. Every year, law students are introduced to the study of property law through the seminal case of *Pierson v. Post*, 3 Cai. R. 175 (N.Y. Sup. Ct. 1805) – the famous fox case. A closer examination of the history behind the dispute over the fox reveals that the conflict involved the founding of the Town of Southampton, the story of the Shinnecock, and the struggle for community rights to the land. *See* Bethany R. Berger, *It's Not About the Fox: The Untold Story of Pierson v. Post*, 55 Duke L.J. 1089, 1141 (2006).

This case arises under the Trade and Intercourse Act of 1790, also known and the Indian Non-Intercourse Act, Act of July 22, 1790, § 4, 1 Stat. 137. It is the last in a long line of Indian land claims arising in New York to be dismissed by the U.S. Court of Appeals for the Second Circuit based on its unsanctioned expansion of this Court's application of the equitable doctrine of laches in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005) (*Sherrill*). *See Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005) (*Cayuga*); *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010) (*Oneida*); *Onondaga Nation v. New York*, 500 F. App'x 87 (2d Cir. 2012) (*Onondaga*); *Stockbridge-Munsee Community v. New York*, 756 F.3d 163 (2d Cir. 2014) (*Stockbridge-Munsee*).

In the Indian Claims Limitations Act of 1982 (ICLA), Act of Dec. 30, 1982, Pub. L. No. 97-394, 96 Stat. 1976, note following 28 U.S.C. § 2415, App. at 22-32, Congress established a limitations period for certain tort and contract claims brought by Indian tribes, and mandated that no time limit apply to actions to establish the title to, or right of possession of, real or personal property. In *Petrella v. Metro-Goldwyn-Mayer*, 134 S. Ct. 1962 (2014) (*Petrella*), this Court reaffirmed the broad rule of federal equity practice that laches may not be invoked to bar legal relief when faced with a statute of limitations enacted by Congress. In other words, judges may not substitute their judgment for that of Congress and apply the equitable doctrine of laches to bar a claim for damages brought within the statute of limitations. *Id.* at 1974.

In spite of the explicit directive from Congress and the clear guidance provided by this Court, the Second Circuit made no distinction between the legal and equitable relief sought by the Shinnecock and summarily dismissed all of its claims against defendants based on "equitable considerations, including laches, crystallized in" *Sherrill, Cayuga, Oneida* and *Stockbridge-Munsee* (hereinafter "*Cayuga* laches defense" or "*Cayuga* rule"). App. at 4. This decision creates a direct conflict with *Petrella*, as well as with this Court's opinions in *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) (*Oneida II*) and *Sherrill*.

The extinguishment of Petitioner's claims by the Second Circuit under *Cayuga* can also be viewed as a violation of the Fifth Amendment's Due Process Clause and Takings Clause. In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010) (*Stop the Beach*), this Court considered a test equally applicable to takings and due process theories when a court extinguishes a property right. "If . . . a court declares that what was once an established right of private property no longer exists," then either "it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation," and the judgment should be set aside in the absence of just compensation, *id.* at 716 (Scalia, J., writing for a four-Justice plurality); or the court's "judgment could be set aside as a deprivation of property without due process of law," *id.* at 735 (Kennedy, J., concurring

in part for two justices). The Shinnecock's right to their homelands as secured under the Indian Non-Intercourse Act and their right to sue for compensation preserved by Congress under the ICLA, are property rights extinguished by the Second Circuit under its *Cayuga* rule.

Based on the foregoing, this case calls for an exercise of this Court's supervisory powers to ensure adherence by the lower courts to the accepted and usual course of judicial proceedings.

A. Factual Background

The Shinnecock have owned and occupied lands in and around the Town of Southampton, Suffolk County, State of New York, since time immemorial. The Shinnecock specialized in the manufacture of wampum on the eastern end of Long Island and were one of the predominant groups within a far-reaching political-economic trade system. Their local economy consisted of hunting, fishing, whaling and horticulture (especially maize, beans and squash). *See generally* GAYNELL STONE, THE SHINNECOCK INDIANS: A CULTURE HISTORY (Vol. VI, Lexington: Ginn Custom Publishing, 1983) ("STONE").

Between 1640 and 1686, a series of land transactions occurred between the Shinnecock, groups of colonists, and eventually the Town of Southampton ("Town") who sought exclusive control over Indian lands. *See* STONE, at 67-87. In order to lessen conflicts resulting from these transactions, on August 16,

1703, the Trustees of the Commonality of the Town executed a 1000-year lease for approximately 5,258 acres of land, which include Shinnecock Hills at issue in this case and the present day Shinnecock Reservation at Shinnecock Neck (the "1703 Lease").[2] *See* STONE at 96-98; *see also* Wm. S. Pelletreau, *Introduction* to THE SECOND BOOK OF RECORDS OF THE TOWN OF SOUTHAMPTON LONG ISLAND, N.Y., WITH OTHER ANCIENT DOCUMENTS OF HISTORIC VALUE, at x (Sag-Harbor: John H. Hunt, Printer. 1877). The 1703 Lease for 1000 years recognized and confirmed the Shinnecock's rights to the Shinnecock Hills in perpetuity. App. at 9. The Shinnecock continued to reside, hunt, gather, plant on their lands, even beyond the lease area, well into the 19th century and have a sacred, protected burial site dating back to 1000 B.C. located within the 1703 Lease area at Sugar Loaf Hill. *See* DAVID GODDARD, COLONIZING SOUTHAMPTON: THE TRANSFORMATION OF A LONG ISLAND COMMUNITY, 1870-1900, 175 (Excelsior ed., State University of New York Press 2011) ("GODDARD").

After the Revolutionary War, the State of New York sought aggressively to gain land cessions from Indian tribes. After the Articles of Confederation were signed in 1781 granting the federal government exclusive control over Indian affairs, Congress passed the Indian Non-Intercourse Act. The 1790 Act was

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[2] According to New York State Law, a lease for a term in excess of three years is a "conveyance." *See* JAMES PEDOWITZ, REAL ESTATE TITLES, 702 (NY State Bar Assoc., June 1, 1984).

reenacted several times with minor modifications, with the restraint on conveyances with Indian tribes continued and codified in 1834: "No purchase, grant or lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution." 25 U.S.C. § 177, Act of June 30, 1834, c. 161, § 12, 4 Stat. 730.

The State of New York and its political subdivisions ignored the exclusive authority of Congress over Indian affairs and the prohibitions of the Indian Non-Intercourse Act. In 1792, the State passed legislation establishing the Shinnecock Trustee system mandating annual votes among the male Shinnecock adults to select three Trustees for the sole purpose of facilitating subleases of Indian lands to non-Indian farmers. *See* GODDARD, at 189. Not until 1793, three years after the Indian Non-Intercourse Act was passed, were the Shinnecock Trustees formally presented with a copy of the 1703 Lease. *See* GODDARD at 190. In 1816, the State of New York passed legislation extending the Shinnecock Trustee system, expressly subordinating the Trustees to the Town's Justices and Clerk. Statutes at Large of the State of New York, Second Edition, Vol. IV, Published by Weed Parsons & Company, Albany, N.Y., at 358 (1869). Conflicts over the lands continued to arise and persist. Economic pressures and the need to extend the railroad throughout Long Island led the Trustees of the Proprietors of Common and Undivided Lands in the

Town of Southampton ("Town Proprietors") to petition the Legislature in January 1859 for a division of the Shinnecock's 1703 Lease lands. *See* Steve Wick & Thomas Maier, *Shinnecocks and Montauketts fight to regain areas taken in questionable deals*, NEWSDAY, Mar. 22, 1998, at A14 ("The Chace map of 1858 shows railroad tracks crossing Shinnecock Hills years before they were laid.... Both the Shinnecock and Montaukett land deals were motivated by the expansion of the Long Island Rail Road in the mid-1800s.").

On March 16, 1859, without any prior notice to or consent from the United States, the State of New York enacted legislation purporting to authorize the transfer of the Shinnecock's lands to the Town Proprietors. *See* Ch. 46 of the New York Laws of 1859; App. at 33-35. On April 21, 1859, the deed was signed by the Shinnecock Trustees for approximately 4,422 acres of land in the 1703 Lease, still known today as the "Shinnecock Hills." On July 25, 1859, anger over the transaction resulted in a lawsuit filed in the Supreme Court of Suffolk County on behalf of the Shinnecock. App. at 77-85. The 1859 complaint alleged misrepresentation and fraud on the part of the Town Proprietors in their original petition and the subsequent conveyance of the lands:

> That the passage of the said act was procured by misrepresentations to the Legislature on the part of the said Proprietors, that a minority only of the said tribe of Indians signed the petition to the Legislature for the passage of the said act, and their signatures

> with those of the said Indian trustees were procured by undue influence and unjust and oppressive conduct and threatenings towards the Indians on the part of the said proprietors and their Trustees.

App. at 82. The complaint was ignored and the case never came to trial despite the Suffolk County Clerk's listing the complaint in the Clerk's Index and Register of Lis Pendens on July 26, 1859 (Suffolk Lis Pendens Index, 1825-ca 1862, Case #337). *See* GODDARD at 46.

On February 19, 1861, the Town Proprietors held an auction for the sale of the Shinnecock Hills having disregarded the Shinnecock's complaint. *See* GODDARD at 218, 220. In 1861, the New York State Legislature issued a Warranty Deed to the Proprietors for the Shinnecock Hills. *See* Suffolk Cnty. Clerk's Office, Liber 113 of Deeds CP 389. Nonetheless, the purported extinguishment of Indian title remained an open question. The subsequent 1881 Warranty Deed in the title chain for control of Shinnecock Hills contained explicit language in the form of a covenant to advert liabilities for the continuing claims of the Shinnecock:

> including all suits, choses in action, choses in possession, choses local and choses transitory; any covenants and warranty not to be construed as applying to any title claim or demand which the Shinnecock Indians now have or may hereafter have to the lands or any part thereof herein described and intended to be conveyed.

Suffolk Cnty. Clerk's Office, Liber 258 of Deeds CP 190, at 191. Newspaper accounts in the 1880s further suggested the possibility of additional lawsuits by the Shinnecock to assert their title to Shinnecock Hills. *See* GODDARD at 216.

The Shinnecock continued to press their claims. In 1888, hearings were held in Southampton by the State's "Special Committee to Investigate the Indian Problem of the State of New York." In questioning by the Committee, James Bunn, a 75-year-old Shinnecock tribal member testified:

> Q. Did they pay you for it [Shinnecock Hills]? A. No, sir; they never gave us a cent; never a recompense.
>
> Q. Have you tried to get it back? A. Yes, sir; we have been trying to get it back.
>
> Q. Are any of your people needy? A. Yes, sir; some of us crippled; got some widows; and in winter we are short.
>
> Q. If you had that back, do you think it would help you? A. Yes, sir; they built on our land and never paid us for it.
>
> Q. Do you still claim to own the land?
>
> A. Yes, sir; we still claim the land is ours.

See Report of Special Comm. to Investigate the Indian Problem of the State of N.Y, Appointed by the Assembly of 1888, at page 844 (Albany: Troy Press Co., 1889).

Then, on September 22, 1900, a Subcommittee of the U.S. Senate Committee on Indian Affairs held a hearing in New York regarding *Certain Claims of the Montauk, Shinnecock, Narragansett, and Mohegan Indians*, 56th Cong., recess, 21 (1900) (statement of L.B. Treadwell on behalf of Montauk and Shinnecock Indians). The specific interest of the Shinnecock concerned the loss of Shinnecock Hills and a request for Congress to authorize a court to hear their claims.

But despite these requests, Indian tribes in New York remained unable to prosecute their lawsuits in state court without the express consent of the Legislature. *See* Judgment in *Shinnecock Tribe of Indians v. William W. Hubbard*, Sup. Court Suffolk County (Dec. 24, 1922); *Johnson v. Long Island R.R. Co.*, 56 N.E. 992, 993 (N.Y. Ct. App. 1900); *Oneida Indian Nation of N.Y. v. Burr*, 132 A.D.2d 402, 403-06 (N.Y. App. Div. 1987). In 1974, with this Court's decision in *Oneida Indian Nation of New York v. County of Oneida*, (*Oneida I*), 414 U.S. 661 (1974), Indian tribes were finally able to seek redress of their land claims under the Indian Non-Intercourse Act through the federal courts.

On February 8, 1978, the Shinnecock formally requested that the federal government bring litigation for their land claims. But, as with many Indian tribes located within the original thirteen colonies, the Shinnecock were not a "federally-recognized" Indian tribe. The federal government declined the litigation request based on its refusal to acknowledge a trust relationship with the Shinnecock under the

Indian Non-Intercourse Act. Instead, the federal government proposed to treat the litigation request as a "letter of intent to petition" for federal recognition. Thus, in 1979, the Shinnecock became Petitioner #4 in the newly minted federal acknowledgment process. 25 C.F.R. Part 83. Thirty years later, on June 18, 2010, the Department of the Interior issued its Final Determination of Federal Acknowledgment of the Shinnecock Indian Nation. 75 Fed. Reg. 34760.

B. Congressional Action on Indian Land Claims: The Indian Claims Limitation Act of 1982 (amending 28 U.S.C. § 2415)

In 1966, Congress for the first time enacted a general statute of limitations for suits by the United States, including a six-year limitations period for claims brought by the government on behalf of Indian tribes. Pub. L. No. 89-505, 80 Stat. 304 (1966) (codified as amended 28 U.S.C. § 2415). Prior claims, not previously subject to any limitations period, accrued by operation of law on the date of enactment, July 18, 1966.

With the increasing number of potential claims, including Indian land claims, the Department of the Interior urged Congress to extend the limitations period. A failure to allow potential claims to proceed in court would "result in a considerable loss to Indians through no fault of their own, losses which Indians can ill afford." S. Rep. No. 92-1253, at 4 (1972), *reprinted in* 1972 U.S.C.C.A.N. 3592, 3595. Congress

responded in 1972 by extending the statute of limitations an additional five years, Pub. L. No. 92-485, 86 Stat. 803 (1972), and in light of the backlog of potential claims provided additional extensions in 1977 and 1980. Pub. L. Nos. 95-103, 91 Stat. 842 (1977) & 96-217, 94 Stat. 126 (1980).

When considering these extensions to the statute of limitations, Congress was well aware that many of the Indian land claims at issue had their origins in centuries-old wrongdoing by the States. *See, e.g.*, *The Extension for Commencing Actions on Behalf of Indians: Hearing on S. 3377 and H.R. 13825 Before the Subcomm. on Indian Affairs of the S. Comm. on Interior and Insular Affairs*, 92d Cong. 23 (1972) (testimony of William A. Gershunty) ("[I]n fairness to a third party we simply have to litigate questions of title going back 100 years, 150 years, 200 years in some cases[.]"); S. Rep. No. 95-236, at 2 (1977) ("Many of these claims go back to the 18th and 19th centuries[.]").

Congress was also well aware of the fact that some of the Indian land claims involved significant tracts of land that had passed into private ownership. *See, e.g.*, H.R. Rep. No. 96-807, at 4 (1980) (testimony of private landowners); S. Rep. No. 96-569, at 9 (1980) (letter of Assistant Secretary of Indian Affairs Forrest Gerard to Senate Committee on Indian Affairs) ("This committee is well aware of the magnitude of the eastern land claims and the effect such claims are having in the jurisdiction where they may be litigated.").

In 1982, Congress enacted the Indian Claims Limitation Act (ICLA), which established a mechanism for the final resolution of Indian land claims. Pub. L. No. 97-394, 96 Stat. 1966 (1982). App. at 22-32. ICLA directed the Secretary of the Interior to publish two lists identifying all pre-1966 Indian claims that remained unaddressed. Subsection (b) set a six-year-90-day period for damages claims for trespass to Indian lands, while subsection (c) mandated that no time limit apply to actions to establish title to, or right of possession of, real or personal property. App. at 24-25. The Secretary included the Shinnecock land claims on the list prepared in accordance with the ICLA, 48 Fed. Reg. 13698, 13920 (March 31, 1983), App. at 46, and has not taken any action under sections 5(b), 5(c), or 6(a) of the ICLA which would bar the Shinnecock's land claims.

C. This Court's Decisions in *Oneida I* and *Oneida II*

In *Oneida I*, this Court held that Indian land claims could be heard in federal court since the right to possess Indian land is a matter of federal law. *See Oneida I*, 414 U.S. at 666-67, 682. In the wake of *Oneida I*, several northeast tribes brought Indian land claims to vindicate rights protected by federal statutory and common law. Most states, and tribes with land claims within those states, resolved these claims through hard-fought negotiation, most reaching settlements that were approved by Congress. *See, e.g.*, Rhode Island Indian Claims Settlement

Act, 25 U.S.C. § 1701; Maine Indian Claims Settlement and Land Acquisition Act, 25 U.S.C. § 1724; Connecticut Indian Land Claims Settlement Act, 25 U.S.C. § 1751; Florida Indian Land Claims Settlement Acts, 25 U.S.C. § 1741 and § 1772; Massachusetts Indian Land Claims Settlement Act, 25 U.S.C. § 1771.

On remand, the Second Circuit affirmed liability, finding that the land claims were timely and had been brought within the applicable statute of limitations. *Oneida Indian Nation v. County of Oneida*, 719 F.2d 525, 544 (2d Cir. 1983). This Court again granted certiorari and held that "an Indian tribe may have a live cause of action for a violation of its possessory right that occurred 175 years ago." *Oneida II*, 470 U.S. at 230. This Court recognized that under 28 U.S.C. § 2415 Congress had established the limitations period for every Indian land claim listed by the Secretary and "[s]o long as a listed claim is neither acted upon nor formally rejected by the Secretary, it remains live." *Id.* at 243.

In analyzing whether laches could apply to bar Indian land claims under state or federal law, *Oneida II* recognized that "application of the equitable defense of laches in an action at law would be novel indeed." *Id.* The Court reiterated that the restraint on alienation of Indian lands under the Indian Non-Intercourse Act of 1790 is still good law, therefore "the application of laches would appear to be inconsistent with established federal policy." *Id.* But this Court reserved the "question whether equitable

considerations should limit the relief available to the present day Oneida Indians. . . ." *Oneida II* at 253 n.27.

D. This Court's Decision in *Sherrill*

In *Sherrill*, a property tax dispute had arisen between the Oneida Indian Nation and the City of Sherrill. 544 U.S. 197. The tribe had purchased certain parcels on the open market within its historic reservation and sought judicial recognition of tribal sovereignty over those lands, including immunity from state and local taxes.

In resolving the dispute, *Sherrill* emphasized both the extraordinary nature of the relief requested by the tribe – a judicial restoration of tribal sovereignty over land long subject to State and local control – and the practical consequences that would follow from awarding such relief. *Id.* at 219. Specifically, the Court concluded that "[a] checkerboard of alternating state and tribal jurisdiction in New York State – created unilaterally at [the tribe's] behest – would seriously burde[n] the administration of state and local governments and would adversely affect landowners neighboring the tribal patches." *Id.* at 219-20 (alteration in original; internal quotation marks omitted).

Accordingly, the Court held that equitable considerations grounded in the doctrines of laches, acquiescence, and impossibility "preclude[d] the Tribe from rekindling embers of sovereignty that long ago

grew cold." *Id.* at 214. The Court emphasized, however, that "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*." *Id.* at 221.

E. The Second Circuit's Decisions in *Cayuga, Oneida, Onondaga* and *Stockbridge-Munsee*

Despite *Sherrill*'s explicit admonition that liability for money damages in *Oneida II* remain intact, a divided panel of the Second Circuit abruptly reversed an award of damages in the amount $248 million to the Cayuga arising from over 200 years of illegal occupation of their lands on the basis of laches. *Cayuga*, 413 F.3d at 276. The majority explained: "whatever the state of the law in this area before *Sherrill*, . . . after *Sherrill*, equitable defenses apply to possessory land claims of this type."[3] *Id.* at 273. The majority confided that something ineffable about the "unusually complex and confusing" nature of Indian land claims makes them unique, justifying departure from the "doctrines and categorizations

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[3] Although the Second Circuit acknowledged this Court's finding in *Sherrill* that 28 U.S.C. § 2415 established a statute of limitations for Indian land claims, it concluded that *Sherrill* had "addresse[d] the question reserved in *Oneida II*," and overruled its 1982 decision that "laches and other time-bar defenses should be unavailable." *Cayuga* at 277 & n.6, citing *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1084 (2d Cir. 1982).

applicable in other areas" of law and equity. *Id.* at 276.

In the majority's view, *Sherrill* and *Cayuga* involved comparably disruptive claims and remedies: "Indeed, the disruptiveness is inherent in the claim itself . . . rather than an element of any particular remedy which would flow from the possessory land claim." *Id.* at 275. Since laches would bar the possessory claims of the tribe, laches must also bar damages, either as a substitute for the remedy of ejectment, or arising from a trespass claim. *Id.* at 277-78. *Ergo*, regardless of the remedy, the possessory claim itself "was subject to dismissal *ab initio*." *Id.* This Court denied the Cayuga's and the United States' petitions for certiorari. 547 U.S. 1128 (2006).

The Second Circuit re-visited its *Cayuga* decision in *Oneida Indian Nation v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010). A divided panel extended the *Cayuga* equitable defense to hold that all of the Oneidas' claims were subject to dismissal as a matter of law – possessory and non-possessory. Since *Sherrill* did not involve a possessory claim, the majority reasoned that the possessory quality repeatedly emphasized in *Cayuga* is immaterial. *Id.* at 135. Rather "the equitable defense originally recognized in *Sherrill* is potentially applicable to all ancient land claims that are disruptive of justified societal interests that have developed over a long period of time, of which possessory claims are merely one type, and regardless of the particular remedy sought." *Id.* at

136. This Court denied the Oneidas' and the United States' petitions for certiorari. 132 S. Ct. 452 (2011).

In its summary order dismissing the land claims of the Onondaga Nation, the Second Circuit outlined its *Cayuga* "laches" defense to bar Indian claims on equitable grounds: (1) length of delay; (2) disruptive nature of claims; and (3) degree to which the justifiable expectations of non-Indians is upset. *Onondaga Nation v. New York*, 500 F. App'x at 89 (internal citations omitted). This Court denied the Onondaga's petition for certiorari. 134 S. Ct. 419 (2013).

And in its *per curiam* order dismissing the land claims of the Stockbridge-Munsee, the Second Circuit rejected the application of this Court's recent 2014 holding in *Petrella*. The court of appeals found that the rule in *Petrella* does not apply to Indian land claims since Congress has not established a statute of limitations for such claims and "even if a statute of limitations applied [to Indian land claims], the equitable defense recognized in *Sherrill* . . . does not focus on the elements of traditional laches." *Stockbridge-Munsee*, 756 F.3d at 166 (citing *Oneida*, 617 F.3d at 127). This Court denied Stockbridge-Munsee's petition for certiorari. 135 S. Ct. 1492 (2015).

F. The Shinnecock Land Claims Litigation

On June 15, 2005, the Shinnecock filed the underlying action in the district court alleging violations of the Indian Non-Intercourse Act and seeking ejectment, damages, and other relief for the unlawful

taking of their lands. *Shinnecock Indian Nation v. New York*, No. 05-CV-2887 (TCP), 2006 WL 3501099 (E.D.N.Y. Nov. 28, 2006). When the Shinnecock filed suit, the district court had already awarded judgment in favor of Cayuga for the dispossession of their land in violation of the Indian Non-Intercourse Act – awarding approximately $248 million in damages and prejudgment interest. *Cayuga Indian Nation v. Pataki*, 165 F. Supp. 2d 266 (N.D.N.Y. 2001).

On June 28, 2005, less than two weeks after the Shinnecock filed their initial complaint, the U.S. Court of Appeals for the Second Circuit issued its decision in *Cayuga*, finding that this Court's decision in *Sherrill* "dramatically altered the legal landscape" against which the lower courts are to consider Indian land claims. 413 F.3d at 273. In this case, the district court granted the defendants'/respondents' motions to dismiss under Fed. R. Civ. P. 12(b)(6), arguing, *inter alia*, the Shinnecock's claims were barred by laches.[4] App. at 8, 13, 20. The Second Circuit summarily affirmed dismissal of all claims. App. at 3-5.

REASONS FOR GRANTING THE PETITION

Under the *Cayuga* "laches" defense, the Second Circuit has fashioned an equitable rule that only

[4] The defendants also asserted other defenses, but the court only addressed laches. App. at 8, n.3.

applies to bar legal claims brought by Indians. The court of appeals admits as much under the guise that the "unusually complex and confusing" nature of Indian land claims justifies its departure from well-settled "doctrines and categorizations applicable in other areas" of law and equity. *Cayuga*, 413 F.3d at 276. In essence, the Second Circuit has extended the language and holding of this Court's decision in *Sherrill* to bar all Indian land claims *ab initio* as disruptive of justified non-Indian interests, even though the claims are viable and brought within the statute of limitations enacted by Congress.

The application of the *Cayuga* "laches" defense in this matter is in direct conflict with this Court's 2014 decision in *Petrella*. In *Petrella*, this Court held "in the face of a statute of limitations enacted by Congress, laches cannot be invoked to bar legal relief." 134 S. Ct. at 1974. The Court reiterated its observation from *Oneida II* that "application of the equitable defense of laches in an action at law would be novel indeed." *Id.* at 1973-74, quoting, 470 U.S. at 244, n.16. The ill-conceived *Cayuga* rule purports to bar the Shinnecock's claims for relief – legal and equitable – in the face of the Indian Claims Limitation Act (ICLA) wherein Congress effectively preserved and prescribed a statute of limitations for these claims. Pub. L. No. 97-394, 96 Stat. 1966 (1982). Thus, the Second Circuit has run afoul of *Petrella* since neither laches, nor any other judicially-created equitable delay-based defense can be invoked to bar the legal relief requested by the Shinnecock. Review by this

Court is warranted to correct the course set by the Second Circuit that decided *Cayuga*, and hold that, because Congress has prescribed a statute of limitations for land claims under the Indian Nonintercourse Act, neither laches nor any other equitable delay-based defense can bar Petitioner's claim in its entirety.

The application of the *Cayuga* rule to dismiss the Shinnecock's complaint *ab initio* under Rule 12(b)(6) also raises substantial constitutional questions. The *Cayuga* "laches" defense constitutes a new, judicially-formulated rule which departs from settled legal principles, is premised on irrebuttable presumptions and was retroactively applied to extinguish the Shinnecock's claims in violation of the Fifth Amendment's Due Process Clause. The extinguishment of viable Indian land claims, preserved by Congress through the ICLA, without payment of just compensation, constitutes a judicial taking in violation of the Fifth Amendment's Takings Clause. Shinnecock was not a party in *Cayuga* which was decided after its claims were filed and, regardless of whether the *Cayuga* rule reflects established legal principles (which it does not), its application by the court of appeals extinguished valuable property rights.

A. This Court Must Exercise Its Supervisory Powers to Ensure Adherence by the Court of Appeals to the Accepted and Usual Course of Judicial Proceedings in Matters Effecting Federal Equity Practice.

The direct conflict between the decision below and *Petrella* warrants this Court's review. Under the norms of federal equity practice, judges may not substitute their judgment for that of Congress and apply equitable defenses to summarily dispose of claims filed within the time allowed by Congress. *Petrella*, 134 S. Ct. at 1975. *Petrella* stated unequivocally that the substantive and remedial principles that applied before the merger of law and equity in 1938 have not changed, *id.* at 1974, and that this Court has "never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period.[5] *Id.* at 1975.

In this case, there is nothing to distinguish the application of the rule in *Petrella* to the claims brought by the Shinnecock under the Indian Non-Intercourse Act, 25 U.S.C. § 177, which were timely filed in accordance with the ICLA.[6] *See* note following

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[5] This statement was made in response to the dissent in *Petrella* which relied in part on *Cayuga* that modern litigation rules and practice often sanctioned the applicability of laches despite a fixed statute of limitations. 134 S. Ct. at 1984.

[6] *Petrella* reconfirmed the long-standing rule applicable when Congress has provided a statute of limitations. In addition to the Copyright Act at issue in *Petrella*, this Court has strictly adhered to the rule in a broad array of federal statutes: the

(Continued on following page)

28 U.S.C. § 2415. The majority in *Cayuga* justified their departure from the rule in *Petrella* based on their understanding that *Sherrill* "dramatically altered the legal landscape" by "hold[ing] that equitable doctrines, such as laches, acquiescence, and impossibility, [require the dismissal of] Indian land claims *ab initio*, even when such a claim is legally viable and within the statute of limitations." 413 F.3d at 273. In *Sherrill*, this Court neither dramatically altered the legal landscape for consideration of Indian land claims, nor did it hold that Indian claims at law, brought within the applicable federal statute of limitations, can be completely barred by equitable doctrines.

Judge Hall's well-reasoned dissent in *Cayuga* is instructive here. Judge Hall agreed with the majority that *Sherrill* supports a conclusion that Cayuga's possessory remedy was barred, but the "conclusion that laches bars all . . . remedies, including those for money damages" finds no such support. 413 F.3d at 280. Judge Hall cautioned that resolution of the issue before the court of appeals in *Cayuga* – "the application of a nonstatutory time limitation in an action for damages" – was not addressed by the Supreme Court.

Prohibition Act (*United States v. Mack*, 295 U.S. 480 (1935)); the Federal Farm Loan Act (*Holmberg v. Armbrecht*, 327 U.S. 392 (1946)); the Civil Rights Act (*Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002)); the Securities & Exchange Act (*Merck & Co., Inc. v. Reynolds*, 559 U.S. 663 (2010)); and, most significantly here, the Indian Claims Limitation Act (*Oneida II*, 134 S. Ct. at 1973).

See Sherrill, 125 S. Ct at 1494 n.14 (citing *Oneida II*, 470 U.S. at 244). Judge Hall's approach would be to have the court of appeals rely on relevant precedent and established principles:

"Congressional action and centuries of precedent with regard to both Indian land claims and foundational distinctions between rights and remedies, coercive relief and damages, and legal claims and equitable relief, should guide the attempt to resolve this historic dispute." 413 F.3d at 283 (Hall, dissenting).

1. In *Sherrill*, this Court addressed the first issue reserved in *Oneida II* – "whether 'equitable considerations' should limit the relief available to the present day Oneida Indians." 544 U.S. at 209 (quoting 470 U.S. at 253, n.27). *Sherrill* ruled that the standards of federal Indian law and federal equity practice preclude the Oneida's unilateral assertion of sovereign governmental authority (and immunity from payment of taxes) over lands within its historic reservation purchased in fee on the open-market. *Id.* at 214.

This Court was careful to emphasize that it was not disturbing its earlier holding in *Oneida II* that "an Indian tribe may have a live cause of action for violation of its possessory rights that occurred 175 years ago." 470 U.S. at 230. *Sherrill* emphasized that the distinction between a claim or substantive right and a remedy is fundamental: the substantive questions of whether the plaintiff has any right or the

defendant has any duty, and if so what it is, are very different questions whether this remedy or that is preferred, and what the measure of the remedy is." 544 U.S. at 213 (quoting DAN B. DOBBS, HANDBOOK ON THE LAW OF REMEDIES: DAMAGES – EQUITY – RESTITUTION § 1.2, p.3 (1973)). To help illustrate this distinction, this Court in *Sherrill* referenced the district court's decision on remand after *Oneida II*. The district court took the equitable remedy of evicting 20,000 landowners off the table, but allowed the claim for damages to proceed. *Id.* *Sherrill* explicitly noted the district court's observation that there is a "sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right." *Id.* at 210 (internal quotation omitted) (emphasis in original).

The Second Circuit's fundamental misunderstanding of *Sherrill* lies at the heart of this petition. The *Cayuga* rule is based on the mistaken assumption that this Court in *Sherrill* dramatically altered the landscape and affirmatively answered the second issue reserved in *Oneida II* – whether the equitable doctrine of laches can bar Indian land claims in their entirety. But it is *Petrella* rather than *Sherrill* that answers the second issue in *Oneida II* and affirmed the accepted and usual course of judicial proceedings against which all legal claims, including Indian land claims, must be considered.

2. *Petrella* requires that delay-based defenses, such as the *Cayuga* "laches" defense, must yield to an applicable federal statute of limitations, and recognizes

that such defenses are limited to adjusting the equitable relief that may ultimately be available. In *Stockbridge-Munsee*, the Second Circuit side-steps *Petrella* by announcing that "Congress has not fixed a statute of limitations for Indian land claims," 756 F.3d at 166, citing (out of context) a portion of a sentence in *Oneida II*, 470 U.S. at 253, that "neither petitioners nor we have found any applicable statute of limitations." The sentence fragment from *Oneida II* used by the court of appeals in *Stockbridge-Munsee* is troubling since it derives from a more expansive statement that no limitations period barred the Oneidas' land claim – it does not state that Congress did not provide a statute of limitations for Indian land claims generally. *See* 470 U.S. at 253. Contrary to the cursory analysis by the Second Circuit in *Stockbridge-Munsee, Oneida II* recognized that Congress has established a statute of limitations for Indian claims and specifically defined the circumstances under which Indian land claims would be treated as time-barred.[7] *See id.* at 241-43.

This announcement is also troubling based on the fact that the Second Circuit's own precedent at least

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[7] Congress mandated that Indian claims accruing before July 18, 1966 shall be deemed to accrue on that date and, "[w]ith 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 . . . Indian tribes. These amendments, enacted as [ICLA], . . . established a system for the final resolution of pre-1966 claims cognizable under § 2415 (a) and (b).

twice recognized that Congress had established a statute of limitations for Indian land claims. In *Cayuga*, the court of appeals succinctly declared: "There is now a statute of limitations, *see* 28 U.S.C. § 2415(a). . . ."). 413 F.3d at 279. This statement flows from its decision two decades earlier in *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1081 (2d Cir. 1982), wherein the Second Circuit discussed the issue at length, recognizing that Congress had enacted and repeatedly extended the statute of limitations applicable to Indian land claims. Although the court of appeals was addressing the statute of limitations applicable to the United States, rather than directly to the Indian tribe itself, 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, Oneida II*. In concluding its earlier discussion, the court of appeals went further to hold that based on the congressional policy expressed in ICLA, 28 U.S.C. § 2415, no "delay-based defense founded on federal law may be asserted" against an Indian land claim. 691 F.3d at 1084.

But the majority in *Cayuga* disavowed the holding in the 1982 *Oneida* case, and disregarded § 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." *Cayuga*, 413 F.3d at 279. Although the break from precedent on this issue is currently only within the Second Circuit, without this Court's intervention, the *Cayuga* rule may spread to other circuits in which Indian claims for lands, waters, rights to hunting and fishing, etc., have been preserved by Congress and listed by the Secretary of the Interior under the ICLA. The Second Circuit has reversed the policy judgment of Congress to reset the clock for these long-standing, unresolved claims, balancing the interests and settled expectations felt by those affected by the claims and legislating a timeliness regime the courts are not at liberty to disregard. The rule of *Petrella*, not *Cayuga*, should apply to all claims for legal relief, including viable claims of Indian tribes brought within the statute of limitations established by Congress under 28 U.S.C. § 2415.

3. The Second Circuit ruled that *Petrella* was only concerned with the traditional laches defense, and does not apply to Indian land claims which are all "inherently disruptive" and subject to the *Sherrill* equitable defenses. *Stockbridge-Munsee*, 746 F.3d at 165. But the well-established "substantive and remedial principles" upon which *Petrella* is based are not confined to traditional laches. 134 S. Ct. at 1974 (citing *Holmberg, Merck*, and *Oneida II*). Rather, these principles are properly understood to prevent courts of equity from "reject[ing] the balance that Congress has struck in a statute." *United States v. Oakland Cannabis Buyers' Co-op.*, 532 U.S. 483, 497 (2001).

Where Congress has specifically preserved a claim, courts of equity are not free to reject Congress' judgment: "Their choice (unless there is statutory language to the contrary) is simply whether a particular means of enforcing the statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all." *Id. See Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332-33 (1999) (*Grupo Mexicano*) ("Even when sitting as a court in equity, we have no authority to craft a 'nuclear weapon' of the law. . . . The debate concerning this formidable power . . . should be conducted and resolved where such issues belong in our democracy: in the Congress.").

When Congress was considering extending the federal statute of limitations, it recognized that a failure to act and allow Indian claims to proceed through the courts would "result in a considerable loss to Indians through no fault of their own. . . ." S. Rep. No. 92-1253, at 4 (1972), *reprinted in* 1972 U.S.C.A.A.N. 3592, 3595. Congress was also aware that many of the Indian land claims at issue had their origins in the 18th and 19th centuries; they involved substantial tracts of lands that had passed into private ownership; and their magnitude would have substantial effect on the jurisdictions where the claims were to be litigated. *See supra* pp. 12-14; *see also* App. at 48-76.

The extended debate over the potential disruption of Indian land claims and whether they should

be preserved for resolution in the federal courts occurred in Congress. With the enactment of ICLA in 1982, Congress established the mechanism for final resolution of Indian land claims. This Court found that 28 U.S.C. § 2415 and the ICLA expressed Congress' will that an Indian tribe's 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.

Acting pursuant to the requirements of the ICLA, the Secretary of the Interior identified the Shinnecock's land claim as one of the claims subject to the federal limitations framework. Statute of Limitations Claims List, 48 Fed. Reg. 13698, 13920 (Mar. 31, 1983). Thus, the Shinnecock's land claims are still viable and must be considered by the federal courts.

B. The Second Circuit's Application of the *Cayuga* Rule to Dismiss the Shinnecock's Land Claims *Ab Initio* Violates the Fifth Amendment's Due Process and Takings Clauses.

Judicial rulings resulting in divestment of established property rights violate the Fifth Amendment's Due Process Clause, *Stop the Beach*, 560 U.S. at 735, 737 (Kennedy, J., concurring, joined by Sotomayor, J.), or the Takings Clause. *Id.* at 716 (Scalia, J., writing for a four-Justice plurality). It is well-established law that these Fifth Amendment protections extend not only to real property interests, but also to the extinguishment of a cause of action. *Ware*

v. Hylton, 3 U.S. (3 Dall.) 199, 245 (1796); *All. of Descendants of Texas Land Grants v. United States*, 37 F.3d 1478, 1480-81 (Fed. Cir. 1994) (citing *Cities Servs. Co. v. McGrath*, 342 U.S. 330, 335-36 (1952)); *accord In re Aircrash In Bali, Indonesia on Apr. 22, 1974*, 684 F.2d 1301, 1312 (9th Cir. 1982); and *Ross v. Artuz*, 150 F.3d 97, 100 (2d Cir. 1998).

In this case, two valuable property rights were extinguished by the lower courts. First, the foundation of Shinnecock's claims is the 1703 Lease. *See supra* pp. 5-6. The New York legislature's attempt in 1859 to nullify the 1703 Lease and terminate the rights of the Shinnecock violated the Indian Non-Intercourse Act and was, therefore, void. Notably, neither the district court nor the court of appeals considered the validity of the original leasehold or the legislative conveyance of the Shinnecock's land to the Town Proprietors. *See supra* pp. 19-20; *see also* App. at 1-21. The property rights secured under the 1703 Lease gives rise to a second valuable property interest: the right to bring a cause of action for violations of federal statutory and common law under the Indian Non-Intercourse Act as preserved by Congress and the Secretary under the ICLA.

After the Shinnecock filed this suit, the Second Circuit issued its opinion in *Cayuga*, announcing a new rule that Indian land claims are subject to dismissal *ab initio*, irrespective of their viability. *Cayuga*, 413 F.3d at 273; *Shinnecock*, 2006 WL 3501099, at *4, *6. The Second Circuit deployed this rule

in *Cayuga* by first assuming that all Indian land claims are "inherently disruptive," and then concluding that this judge-imposed presumption by itself is sufficient to satisfy the affirmative defense of "laches." *Cayuga*, 413 F.3d at 275; *Shinnecock*, 2006 WL 3501099, at *6; *see also Grupo Mexicano*, 527 U.S. at 332 (courts have no authority to craft a "nuclear weapon" of the law where Congress has already clearly spoken). Thus, the *Cayuga* rule became the sole basis for the extinguishment of the Shinnecock's real property interests and damages claims by the lower courts. *Shinnecock*, 2006 WL 3501099, at *4, *6.

1. Due process protections for property rights "incorporate our settled tradition against retroactive laws of great severity." *E. Enterprises v. Apfel*, 524 U.S. 498, 548-49 (1998) (Kennedy, J., concurring). "Groups targeted by retroactive laws, were they to be denied all protection, would have a justified fear that a government once formed to protect expectations now can destroy them." *Id.* Therefore, confidence in the constitutional form of government is secured by due process restrictions against severe retroactive legal rules. *Id. See also Stop the Beach*, 560 U.S. at 735-36 (Kennedy, J., concurring). As such, the Due Process Clause acts as a limitation on judicial power, preventing courts from abandoning settled principles of law. *Stop the Beach*, 560 U.S. at 738.

The *Cayuga* rule departs from settled legal principles by imposing a new rule of dismissal based on irrebuttable factual conclusions. At the outset, the

Cayuga rule presumes that all Indian land claims are "inherently disruptive," without probing the facts and circumstances of the specific case and regardless of the remedy sought. *Shinnecock Indian Nation*, 2006 WL 3501099, at *6 (quoting *Cayuga*, 413 F.3d at 275). Likewise, it presumes any and all expectations developed by the defendants are justifiable. Because these presumptions are imposed by the court even before an answer is filed, it deprives plaintiffs of any opportunity for rebuttal evidence, making the presumptions conclusive. The creation of such legal presumptions without the opportunity to present contrary evidence has been long disfavored under the Due Process Clause of the Fifth Amendment. *See Vlandis v. Kline*, 412 U.S. 441, 446 (1973).

This fixation on the claim's presumed disruptiveness led the Second Circuit to disregard fundamental principles of equity. Under the Second Circuit's rule, it does not matter if the plaintiff diligently pursued the claim or whether any purported delay was reasonable; it does not matter if the defendant is a bad actor and has unclean hands due to a violation of federal law. *See Shinnecock*, 2006 WL 3501099, at *5, *6. These basic facts, which are typically highly relevant in equity, are cast aside in favor of the judicially-presumed "disruptiveness" of an Indian tribe's claim. *See Shinnecock*, 2006 WL 3501099, at *6. The Second Circuit identifies no limiting principle to its dismissal rule – when an Indian tribe asserts a land claim, all the facts and circumstances alleged in

the complaint are rendered irrelevant surplusage in the face of the *Cayuga* rule.

Although the Second Circuit bases this departure from settled legal principles on its reading of *Sherrill*, the application of equity in *Sherrill* was informed by a well-developed record. *See Oneida Indian Nation of New York v. City of Sherrill*, 337 F.3d 139, 145 (2d Cir. 2003). Indeed, because laches is fact-intensive, lower courts rarely apply this affirmative defense before a record is developed. *See, e.g.*, *Advanced Cardiovascular Sys., Inc. v. Scimed Life Sys., Inc.*, 988 F.2d 1157, 1161 (Fed. Cir. 1993); *Leimer v. State Mut. Life Assur. Co.*, 108 F.2d 302, 305 (8th Cir. 1940); *Pelt v. Utah*, 611 F.Supp.2d 1267 (D. Utah, Central Div. 2009); *Mishewal Wappo Tribe of Alexander Valley v. Salazar*, 2011 WL 5038356 (N.D. Cal. 2011) ("In contrast to the sparse materials presented here, the *Sherrill* Court had before it a record developed through a litany of summary judgment and related motions simultaneously decided by the trial court.").

Finally, by barring damages claims filed within a statute of limitations, the Second Circuit's rule departs from this Court's legal rule to the contrary. *See Holmberg*, 327 U.S. at 395, 396; *Merck & Co.*, 559 U.S. at 652; *Oneida II*, 470 U.S. at 244, n.16; *Petrella*, 134 S. Ct. at 1974. Moreover, this divergence from established legal principles is specific to Indian land claims. *Contrast Ikelionwu v. United States*, 150 F.3d 233, 238 (2d Cir. 1998) (holding laches inapplicable to damages claim filed within statute of limitations) and *Ivani Contracting Corp. v. City of New York*, 103 F.3d

257, 260-61 (2d Cir. 1997) *with Stockbridge-Munsee*, 756 F.3d at 166 (applying *Cayuga* "laches" to bar timely-filed damages claim) and *Shinnecock Indian Nation v. New York*, 628 F. App'x 54, 55 (2d Cir. 2015). The Second Circuit justifies its departure from "doctrines and categorizations applicable in other areas" of law by citing the "unusually complex and confusing" nature of Indian land claims. *Cayuga*, 413 F.3d at 274. These are not valid reasons for eschewing this Court's precedent and creating a new rule solely targeted at Indian land claims.

The lower courts' invocation of the *Cayuga* rule retroactively extinguishes the Shinnecock's property rights. Importantly, prior to *Cayuga*, there was no rule that equitable doctrines could bar Indian land claims and remedies in their entirety. Moreover, *Cayuga* was not a pre-existing rule of limitations since it was decided after Shinnecock's complaint was filed. If Congress were to enact a statute of limitations that applied retroactively, barring claims already filed, it would violate the Fifth Amendment. *Block v. North Dakota*, 461 U.S. 273, 286 n.23 (1983); *Wilson v. Iseminger*, 185 U.S. 55, 62 (1902); *Herrick v. Boquillas Land & Cattle Co.*, 200 U.S. 96, 102 (1906); *Ross*, 150 F.3d at 100. If Congress cannot retroactively subject litigants to new legal rules, then certainly the Second Circuit cannot do so by judicial fiat. This is even more troubling because the *Cayuga* rule extinguishes the very land claims preserved by Congress through ICLA and this Court in *Oneida II*.

2. Invocation of the *Cayuga* rule in this case also deprived the Shinnecock of established property rights in violation of the Takings Clause of the Fifth Amendment. The Takings Clause is not addressed to a specific branch of government, therefore, "if a legislature or a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State physically appropriated it or destroyed its value by regulation." *Stop the Beach*, 560 U.S. at 713-15. Even if the court effecting a taking is applying precedent to reach a predictable result, it is no less a taking. "What counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established." *Id.* at 728. In *Stop the Beach*, the following hypothetical was provided to illustrate a situation where a judicial taking would exist:

> For example, a state court held in one case, to which the complaining property owner was not a party, that it had the power to limit the acreage of privately owned real estate to 100 acres, and then, in a second case, applied that principle to declare the complainant's 101st acre to be public property, the state would have taken an acre from the complainant even though the decision was predictable.

Id. This case follows that exact pattern. After the Shinnecock filed this suit, the Second Circuit issued its opinion in *Cayuga* to hold that possessory Indian land claims are inherently disruptive and subject to

dismissal *ab initio*. 413 F.3d at 273. Even though Shinnecock was not a party to *Cayuga*, the rule was relied on by the lower courts here, resulting in extinguishment of the Shinnecock's real property interest and a valuable cause of action, irrespective of their viability. *See Shinnecock*, 2006 WL 3501099, at *6. As *Stop the Beach* instructs, in the absence of just compensation, this is a governmental taking that violates the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted. The judgment of the court of appeals should be vacated and the case remanded for a decision on the merits.

Respectfully submitted,

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