No. 15-1215

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents contend that in *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005), the Second Circuit simply followed this Court's lead in *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197 (2005), when, based on the equitable doctrines of "laches, acquiescence and impossibility," this Court denied the equitable claims and relief sought by the Oneidas. Br. in Opp. 2-3. Respondents are mistaken.

In *Sherrill*, this Court was clear:

> In sum, the question of *damages* for the Tribe's ancient dispossession is not at issue in this case, and we therefore do not disturb our holding in *Oneida II*. However, the distance from 1805 to the present day, the Oneidas' long delay in seeking *equitable* relief against New York or its local units, and developments in the City of Sherrill spanning several generations, evoke the doctrines of laches, acquiescence, and impossibility, and render inequitable the piecemeal shift in *governance* this suit seeks unilaterally to initiate.

544 U.S. at 221 (emphasis added).

The Second Circuit ignored the careful balancing between the principles of federal Indian law and standards of federal equity practice underpinning the analysis by this Court in *Sherrill*:

> "The substantive questions whether the plaintiff has any right or the defendant has

> any duty, and if so what it is, are very different questions from the remedial questions whether this remedy or that is preferred, and what the measure of the remedy is." D. Dobbs, Law of Remedies §1.2, p.3 (1973); see also *Navajo Tribe of Indians v. New Mexico*, 809 F.2d 1455, 1467 (10th Cir. 1987) ("The distinction between a claim or a substantive right and a remedy is fundamental."). "[S]tandards of federal Indian law and federal equity practice" led the District Court, in the litigation revived after *Onieda II*, to reject OIN's plea for ejectment of 20,000 private landowners. *Oneida Indian Nation of N.Y.*, 199 F.R.D., at 90 ("[T]here is a sharp distinction between the *existence* of a federal common law right to Indian homelands and how to *vindicate* that right. . . ."). In this action, OIN seeks declaratory and injunctive relief recognizing its present and future sovereign immunity from local taxation on parcels of land the Tribe purchased in the open market, properties that had been subject to state and local taxation for generations. We now reject the unification theory of OIN and the United States and hold that "standards of federal Indian law and federal equity practice" preclude the Tribe from rekindling embers of sovereignty that long ago grew cold.

Id. at 213-14 (emphasis in the original) (internal citations omitted). In the wake of its decision in *Cayuga*, the Second Circuit has now ventured well beyond the scope of the equitable rule established by this Court in *Sherrill*. In its stead, the lower court has established

its own rule of "laches" – the *Cayuga* rule – which has been applied by the lower courts to categorically bar *all* historic claims brought by Indian tribes *ab initio*, regardless of whether: (1) the tribe is seeking legal or equitable relief; or (2) the claims have been specifically preserved by Congress under the Indian Claims Limitations Act of 1982. 28 U.S.C. § 2415.

The time has come for this Court to exercise its supervisory powers to ensure adherence by the lower courts to the accepted and usual course of judicial proceedings under the "standards of federal Indian law and federal equity practice" set out in *Sherrill*. This case is the right vehicle for the Court to now review the question of whether *Sherrill* provides authority for lower courts to apply an equitable rule at the outset of litigation to completely foreclose an Indian tribe from bringing its statutory and common-law claims, including one for money damages, even when such claims are brought within the statute of limitations established by Congress. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1962, 1974 (2014).

A. The Second Circuit has Now Considered the Full Extent of the Issues and Claims Encircling the Question Presented Which is Ripe for Review by This Court.

As a basis to deny review, Respondents point to "a well-settled line of cases in which the Second Circuit has applied *Sherrill* to bar ancient Indian land claims,

and which this Court has repeatedly declined to review." Br. in Opp. 22-32. But for Petitioner, this line of cases provides a compelling basis for granting review here. The error committed by the Second Circuit in *Cayuga* has been compounded in its subsequent decisions, leading to an inequitable rule which only applies to Indians and denies any relief for the historic wrongs suffered.

First, in *Cayuga*, a divided panel of the Second Circuit equated the disruptiveness of the claims and remedies in *Sherrill* to the claims and remedies in *Cayuga.* 413 F.3d at 284-85. As noted above, in *Sherrill* the Oneidas only sought equitable relief – a declaration of its right of sovereign dominion over selected parcels recently purchased in fee in direct conflict with existing state governance and with the settled expectations of non-Indians. 544 U.S. at 198-99. In *Cayuga*, similar to Petitioner here, the tribe sought legal and equitable relief for the unlawful transfer and illegal occupation of their lands. 413 F.3d at 268-70. And similar to the district court in *Oneida II*, the district court in *Cayuga* denied the equitable remedy of ejectment, but granted the legal relief sought *Id*. at 275 ("monetary damages will produce results which are as satisfactory to the Cayugas as those which they could properly derive from ejectment"). In reversing the award of money damages, the Second Circuit stylized the claims by the tribe as "possessory land claims" to hold that since laches would bar the possessory claims of the tribe,

laches must also bar money damages, either as a substitute for the remedy of ejectment, or arising from a trespass claim. *Id.* at 277-78.

Second, in *Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114, 135-38 (2d Cir. 2010), a different (but still divided) panel expanded the reach of the *Cayuga* rule to bar the "non-possessory claims" of the tribe – the federal common law claim for violation of the Indian Non-Intercourse Act and a contract claim based on unconscionability. The lower court's reasoning is suspect. According to the majority, since *Sherrill* did not involve a possessory claim, the possessory quality repeatedly emphasized in support of its holding in *Cayuga* is immaterial.

Third, with its *Cayuga* rule firmly in place, the Second Circuit simply issued a summary order affirming the Rule 12(b)(6), Fed. R. Civ. P. 12(b)(6), dismissal of the land claims brought by the Onondaga Nation. *Onondaga Nation v. New York*, 500 F. App'x 87, 90 (2d Cir. 2012). Remarkably, in analyzing the three factors for the application of the *Cayuga* rule – delay, disruption and justified expectations of non-Indians – the Second Circuit made it clear that tribes are not entitled to engage in discovery or to provide any evidence in rebuttal. *Id*. Accordingly, under the *Cayuga* rule, lower courts may presume: (1) long delay means that the tribe sat on its rights without any consideration of whether defendants are prejudiced or possess "clean hands"; (2) any historic claim of a tribe is "inherently" disruptive as a matter of law with no regard to the nature of the remedy requested; and (3) changed

demographics alone can be judicially noticed to support upsetting justified expectations of non-Indians. *Id*. at 89-90.

Finally, in *Stockbridge-Munsee Community v. New York*, the Second Circuit summarily affirmed the Rule 12(b)(6) dismissal of the tribal land claims based on its *Cayuga* rule, and tersely rejected the tribe's *Petrella* argument, stating: "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." 756 F.3d 163, 166 (2d Cir. 2014) (internal quotations omitted).

Thus, the Second Circuit has now considered the full extent of the issues and claims encircling the question presented. Under the Second Circuit's *Cayuga* rule, any historic claim of a tribe must be dismissed *ab initio*, regardless of the nature of the claim (possessory or non-possessory), or the relief sought (legal or equitable), or whether the claim was brought within the statute of limitations. Further, according to the Second Circuit, this is an equitable rule that only applies to claims brought by Indian tribes, with no opportunity for the tribes to present evidence to rebut the judicial presumption of delay, disruptiveness, and justified expectations of non-Indians.

B. There is an Open Question of Whether the *Cayuga* Rule Bars All Historic Indian Claims Preserved by Congress under the Indian Claims Limitations Act.

Indian tribes are concerned that all of their pre-1966 money claims to property that were preserved by Congress in 1982 under the Indian Claims Limitations Act (ICLA) are now foreclosed. Sharon Haensly, *Sherrill and Cayuga: A Call to Revisit Pre-1966 Indian Monetary Claim*s, Indian Law Newsletter, Jan. 2007, at 7. Hundreds of tribes registered their claims for trespass damages involving roads, pipelines, and power lines, as well as money damages claims for fisheries destroyed, or lands flooded by dams. *Id*. In 1983, the Bureau of Indian Affairs (BIA) published a list of over 38,000 ICLA claims. BIA Notice of All Statute of Limitations Claims, 48 Fed. Reg. 13698 (March 31, 1983); 48 Fed. Reg. 51204 (Nov. 7, 1983).

In establishing time limitations for these Indian claims, Congress determined that the six-year statutory deadline for money damages based on a contract, and the three-year statutory deadline for money damages based on a tort (six-year for trespass on lands), would be tolled *until* the Secretary of the Interior either: (1) rejected a claim or category of claims; or (2) submitted to Congress a legislative proposal for resolving the claims. 28 U.S.C. §§ 2415(a) and (b). In 1989, the BIA published a list of several thousand ICLA claims that were rejected, triggering the running of the applicable statute of limitations for those claims. BIA Notice of Rejected Claims, 54 Fed. Reg. 52071 (Dec. 20,

1989). Thus, the tribes understood that all of their remaining claims had been preserved, including any claims to establish title to, or possession, of lands. 28 U.S.C. § 2415(c). By preserving these claims, the United States was provided additional time to either reject or legislatively resolve the claims.[1]

Since the lower federal courts have uniformly rejected the § 2415(c) possessory claims by tribes on equitable grounds, the question of whether the policy choice made by Congress to preserve these claims in perpetuity constitutes a "statute of limitations" under *Petrella* appears to be inconsequential. However, the remaining Indian claims for money damages based on contract and tort are clearly subject to the statute of limitations enacted by Congress under §§ 2415(a) and (b) and remain "live" claims under *Petrella*.

The Court recently granted review in *SCA Hygiene Products Aktiebolag v. First Quality Baby Products, LLC*, 807 F.3d 1311 (Fed. Cir. 2015), *cert. granted*, 84 U.S.L.W. 3428 (S. Ct. May 2, 2016) (No. 15-927), on the question of whether, based on its holding in *Petrella*, the defense of laches may bar a claim for patent

[1] Contrary to respondents' assertions, the fact that the United States has not *yet* intervened as a party in this case is not grounds for denial of the petition. Shinnecock's request for their participation in this matter is still pending before the Secretary of the Interior. The request was renewed recently with the Secretary's visit to the Shinnecock's Reservation on October 1, 2015. *See Secretary Jewell to Kick off Tribal Solarthon with Shinnecock Nation in New York*, U.S. Department of Interior (Sept. 30, 2015), https://www.doi.gov/mediaadvisories/secretary-jewell-kick-tribal-solarthon-shinnecock-nation-new-york.

infringement brought within the Patent Act's six-year statutory limitations period. Respondents contend that *Petrella* only applies to "traditional laches," and that this Court intended to treat Indians differently based on *Sherrill*'s equitable doctrine, even where Congress has established a limitations period. Br. in Opp. 23-24. This Court should grant review to clarify whether the equitable principle followed in *Petrella* applies to all parties who come before the federal courts. 134 S. Ct. at 1975 (this Court has "never applied laches to bar in their entirety claims for discrete wrongs occurring within a federally prescribed limitations period").

C. This Court's Review is Warranted Because the Second Circuit has Fashioned a Legal Rule That Extinguishes Established Property Rights in Violation of the Fifth Amendment.

According to Respondents, not even the U.S. Constitution protects Indian tribes who have been unlawfully dispossessed of their property rights. Without analysis and with no citation to supporting case law, Respondents gloss over the District Court's Fifth Amendment violations by baldly asserting that the judiciary did not extinguish Shinnecock's established property rights. Br. in Opp. 24-26. This is incorrect. Shinnecock lost its ability to sue for compensation for loss of its land, which is itself a protected property right under the Fifth Amendment. *See All. of Descendants of Texas Land Grants v. United States*, 37 F.3d

1478, 1481 (Fed. Cir. 1994) ("Because a legal cause of action is property within the meaning of the Fifth Amendment . . . claimants have properly alleged possession of a compensable property interest.") (citing *Cities Servs. Co. v. McGrath*, 342 U.S. 330, 335-36 (1952); *Ware v. Hylton*, 3 U.S. (3 Dall.) 199, 245 (1796)); *see also Adams v. United States*, 391 F.3d 1212, 1225-1226 (Fed. Cir. 2004); *Aureus Asset Managers, Ltd. v. United States*, 121 Fed. Cl. 206, 210 (2015).[2]

Both the Due Process and Takings Clauses of the Fifth Amendment impose vital limits on governmental power to extinguish property rights. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Prot.*, 560 U.S. 702, 716 (2010) (Scalia, J.); *id*. at 738 (Kennedy, J., concurring). As such, a majority of this Court found 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

[2] Shinnecock has consistently pressed its Fifth Amendment claims since their accrual. A claim under the Fifth Amendment accrues when the taking action occurs. *All. of Descendants of Texas Land Grants*, 37 F.3d at 1481 (Fed. Cir. 1994) (citing *Steel Improvement & Forge Co. v. United States*, 355 F.2d 627, 631 (Ct. Cl. 1966)). In this instance, the extinguishment of Shinnecock's property rights occurred when the District Court entered its judgment and, therefore, the proper time to raise the takings and due process violations was on appeal. Shinnecock did so at the Second Circuit and the issues were fully briefed by all parties. *See City of Oklahoma City v. Tuttle*, 471 U.S. 808, 815 (1985) (holding issue presented to the court of appeals and raised in petition for certiorari was sufficiently preserved for review).

established right of private property no longer exists[.]" *Stop the Beach*, 560 U.S. at 715, 717, 735, 736. The *Cayuga* rule, if unrestrained by the Fifth Amendment, would create a negative feedback loop in the judicial system, depriving citizens of property and sanctioning the violation of a federal statute, yet providing no mechanism for obtaining compensation. *See Arrigoni Enters., LLC v. Town of Durham, Conn.*, 136 S. Ct. 1409, 1411 (2016) (Thomas, J., joined by Kennedy, J., dissenting from denial of petition for certiorari) ("This gamesmanship leaves plaintiff with *no* court in which to pursue their [takings] claims. . . .").[3]

This case provides the Court with the opportunity to consider the question of whether a judicially-created rule extinguishing an established and valuable property rights *ab initio* violates the Fifth Amendment.

[3] Contrary to Respondents' suggestion that the District Court was merely adjudicating competing and disputed claims, the Second Circuit's rule is to uniformly dismiss Indian land claims *ab initio*, irrespective of their viability. *Cayuga*, 413 F.3d at 273; *Shinnecock Indian Nation v. New York*, No. 05-CV-2887 (TCP), 2006 WL 3501099, at *4, *6 (E.D.N.Y. Nov. 28, 2006). Because the District Court abided by this dismissal rule, there was no opportunity for the underlying merits of Shinnecock's land claim to be heard.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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