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IN THE
United States Court of Appeals
FOR THE SECOND CIRCUIT

CAYUGA INDIAN NATION OF NEW YORK,

Plaintiff-Appellee/Cross-Appellant,

SENECA-CAYUGA TRIBE OF OKLAHOMA,

Plaintiff-Intervenor-Appellee/Cross-Appellant,

UNITED STATES OF AMERICA,

Plaintiff-Intervenor-Appellee,

v.

GEORGE E. PATAKI, as Governor of the State of New York, CAYUGA COUNTY
and SENECA COUNTY, and MILLER BREWING CO.,

Defendants-Appellants/Cross-Appellees.

*On Appeal from the United States District Court
for the Northern District of New York*

**PETITION FOR PANEL REHEARING OR REHEARING EN BANC
BY APPELLEES/CROSS-APPELLANTS
CAYUGA INDIAN NATION OF NEW YORK and
SENECA-CAYUGA TRIBE OF OKLAHOMA**

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The Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma (collectively, the “Cayugas”) petition for rehearing by the panel, or rehearing en banc, of the majority decision in Cayuga Indian Nation of New York v. Pataki, 413 F.3d 266 (2d Cir. 2005).

Statement Pursuant to FRAP Rule 35(b)(1)

(A) The majority opinion conflicts with City of Sherrill v. Oneida Indian Nation, ___ U.S. ___, 125 S. Ct. 1478, 1494 (2005). In Sherrill, the Court expressly stated that “the question of damages for the Tribe’s ancient dispossession is not an issue in this case, and we therefore do not disturb our holding in [County of Oneida v. Oneida Indian Nation, 470 U.S. 226 (1985)] Oneida II.” In Oneida II, the Court had upheld an award of monetary damages for the taking of tribal lands in 1795 in violation of the Non-Intercourse Act. 25 U.S.C. §177. Despite this clear statement that Sherrill did not disturb that holding, the majority opinion in this case expansively and erroneously read Sherrill to require dismissal of the Cayugas’ claim for money damages and their \$247.9 million judgment against the State of New York, based upon Non-Intercourse Act violations similar to those in Oneida II.

In addition to Sherrill and Oneida II, the majority’s unprecedented decision also conflicts with the following:

- A prior decision of this Court, Oneida Indian Nation of New York v. County of Oneida, 719 F.2d 525 (2d Cir. 1983), upholding the right of Indian

tribes to obtain damages as a remedy for violations of their possessory rights following an ancient dispossession.

- Decisions of the Supreme Court and of this Court holding that where passage of time and changed circumstances render restoration of tribal sovereignty over unlawfully taken lands impossible, the Court may award monetary damages to dispossessed tribal plaintiffs. Yankton Sioux Tribe v. United States, 272 U.S. 351, 357-59 (1926); Oneida Indian Nation v. State of New York, 691 F.2d 1070, 1082-83 (2d Cir. 1982).

- Decisions of the Supreme Court and of this Court holding that ancient Indian land claims are timely if brought in compliance with 28 U.S.C. §2415, Oneida II, 470 U.S. at 244; Oneida Indian Nation v. County of Oneida, 719 F.2d at 538; Oneida Indian Nation v. State of New York, 691 F.2d at 1084, and that laches may not be applied to actions filed within an applicable statute of limitations. United States v. Mack, 295 U.S. 480, 489 (1935); Ivani Construction Corp. v. City of New York, 103 F.3d 257, 259-60 (2d Cir.), cert. denied, 520 U.S. 1211 (1997).

- In finding the United States subject to laches, the majority opinion conflicts with long-settled Supreme Court authority, including United States v. Minnesota, 270 U.S. 181, 194 (1926) and Heckman v. United States, 224 U.S. 413, 437 (1912), holding that the United States is acting in its sovereign capacity when it sues to enforce Indian property rights protected by federal law.

- The majority ruling that a claim for monetary damages may be dismissed because it is “disruptive” conflicts with prior decisions of this Court in two Oneida cases. 719 F.2d at 539; 691 F.2d at 1083.

Consideration by the full Court is therefore necessary to secure and maintain uniformity of the Court’s decisions.

(B) This case is of extraordinary importance because the intricate jurisprudence of Indian land claims and related issues that have developed over many years in the Supreme Court, and to a very large extent in this Court, has been completely undermined by the majority’s opinion. That opinion obliterates much of that jurisprudence, holding that no claim or remedy is available in law or equity for an historical taking of Indian land in violation of federal statute and a federal treaty. All Indian land claims based upon historic takings are now subject to dismissal.

Statement of the Case

Shortly before the U.S. Constitution went into effect on March 4, 1789, the State of New York acquired three million acres of land from the Cayuga Nation, promising to protect the Cayugas’ remaining 64,015 acres. In State Treaties of 1795 and 1807, the State acquired all of the Cayugas’ remaining lands, but by then those lands were federally protected by the Non-Intercourse Act and the 1794 Treaty of Canandaigua, both of which the State disregarded and violated.

In the present epic litigation to remedy this injustice, the district court granted summary judgment on liability to the plaintiffs in 1991, and in 2001, after extensive further litigation, awarded the Cayugas a \$247.9 million monetary judgment as the sole remedy for their dispossession.

On June 28, 2005, a majority of a panel of this Court dismissed the entire case, relying solely upon the recently decided Sherrill case, and improperly reading it in a manner that violates well-established principles of federal Indian law.

The Cayuga Majority Misapplied The Supreme Court's Holding In Sherrill

In Sherrill, the Supreme Court held that the Oneida Indian Nation, because of laches and related equitable considerations, could not reestablish sovereignty by reacquiring its reservation lands through open market purchases.

The Cayuga majority did not find the Supreme Court's statement in Sherrill, that its ruling did not affect damage remedies in land claim litigation, to be "dispositive".¹ On that basis, it purported to apply the equitable considerations discussed in Sherrill, including laches, to dismiss all of the Cayugas' claims and the judgment for monetary damages. 413 F.3d at 273-74. The Cayuga majority

¹ Dissenting Justice Stevens clearly understood that sustaining the monetary damage remedy in Oneida II, with which he alone disagreed, was part of the Sherrill holding: "It seems perverse to hold that the reliance interests of non-Indian New Yorkers that are predicated on almost two centuries of inaction by the Tribe do not foreclose the Tribe's enforcement of judicially created damages remedies for ancient wrongs, but do somehow mandate a forfeiture of a tribal immunity...." 125 S. Ct. 1497 (Stevens, J. dissenting).

quotes, but fails to act upon, the Sherrill Court's description of the Oneidas' claim as involving "grave, but ancient, wrongs, and the relief available must be commensurate with that historical reality." 413 F.3d at 274, quoting Sherrill, 125 S. Ct. at 1491 n. 11. Clearly, Sherrill did not contemplate that a tribe such as the Cayugas, all of whose lands had been taken in violation of federal law and federal treaty, would be left with no remedy whatsoever for these "ancient wrongs."

The majority opinion conflicts with the decision of this Court in Oneida Indian Nation of New York v. County of Oneida, 719 F.2d 525 (2d Cir. 1983), and the Supreme Court's affirmance in Oneida II, upholding the right of an Indian tribe to recover monetary damages for an ancient dispossession. In Oneida II, the Court stated that the application of laches or other equitable defenses to a claim for damages "would be novel indeed" and "would appear to be inconsistent with established federal policy." 470 U.S. at 245 n.16.

The Cayuga majority's enlargement of Sherrill to overrule not only its own precedent, but also that of the Supreme Court in Oneida II, violates the repeated admonition of the Supreme Court that Courts of Appeals should leave "to this Court the prerogative of overruling its own decisions." Rodriguez de Quijos v. Shearson/American Express, Inc., 490 U.S. 477, 484 (1989). See also, Agostini v. Felton, 521 U.S. 203, 237 (1997).

The majority's misapplication of Sherrill is largely grounded on its failure to properly distinguish between rights and remedies. The Sherrill Court, which

clearly understood that it was dealing only with the latter, recognized this distinction.² Citing D. Dobbs, *Law of Remedies* §1.2, p. 3 (1973), the Supreme Court noted that “[t]he substantive questions whether the plaintiff has any right ... are very different questions from the remedial questions ... what the measure of the remedy is.” 125 S. Ct. at 1489. The Supreme Court put this general principal into the specific context of Indian land claim cases by citing with approval Navajo Tribe of Indians v. New Mexico, 809 F.2d 1455, 1467 (10th Cir. 1987) (“The distinction between a claim or substantive right and a remedy is fundamental”), and a decision by Judge McCurn in which he had precluded the Oneida Nation from seeking ejectment against private landowners while maintaining a damage claim against the State of New York, by noting the “sharp distinction between the existence of a federal common law right to Indian homelands and how to vindicate that right [emphasis in original].” 125 S. Ct. at 1489. Thus, Sherrill clearly recognized that a tribe could maintain a Non-Intercourse Act-based land claim, and obtain money damages for its dispossession, even if equitable considerations might bar other, more disruptive, forms of relief for the same claim.

The majority opinion failed to apply this “fundamental” distinction by repeatedly mischaracterizing the nature of the Cayugas’ underlying claim and how

² Judge Hall’s dissent collects five quotes demonstrating that Sherrill “confines its holding to the use of laches to bar certain relief, not to bar a claim or all remedies[.]” 413 F.3d at 288.

it had been treated in the district court. Thus, the majority refers to the Cayugas' cause of action here as a "possessory claim," 413 F.3d at 274-76; one that "is and always has been one sounding in ejectment." Id. at 274. Yet, as the dissent correctly notes, and as the complaints filed by the Cayugas and the United States in the district court clearly bear out, the plaintiffs here "sought several forms of relief, including declaratory relief, ejectment,³ an accounting, and trespass damages ..." Id. at 280. Thus, it is correct, as the dissent finds, that "the plaintiffs here have sought money damages from the filing of this case," Id. at 281.

The majority's failure to distinguish claims from relief, and the devastating results that flow from that failure, is also demonstrated by the majority's inaccurate statement that the "District Court found that laches barred the possessory land claim, and the considerations identified by the Supreme Court in Sherrill mandate that we affirm the District Court's finding that the possessory land claim is barred by laches." 413 F.3d at 277. In fact, the district court did not find the Cayugas' "claim" barred by laches. As the dissent correctly notes, citing to the relevant district court decisions, the district court held that laches did not bar the Cayugas' claim, but subsequently held that equitable considerations "did prevent the award of the equitable remedy of possession," Id. at 290 n.14. In fact, contrary to the

³ While the majority appears to assume that possession is the only available remedy for an ejectment claim, as Judge Hall correctly states, mesne profits, which are damages for lost use of land during dispossession, is an established remedy for ejectment. 413 F. 3d at 283.

