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02-6130(CON), 02-6140(CON), 02-6200(CON), 02-6211(CON), 02-6219(CON),
02-6301(CON), 02-6131(XAP), 02-6151(XAP) and 02-6309(XAP)

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 PATAKI, as Governor of the State of New York, *et al.*, CAYUGA COUNTY
and SENECA COUNTY, MILLER BREWING COMPANY, *et al.*,

Defendants-Appellants-Cross-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

**BRIEF FOR THE SHINNECOCK INDIAN NATION AS
AMICUS CURIAE IN SUPPORT OF THE PETITION FOR
REHEARING BY THE PANEL OR REHEARING *EN BANC*
OF THE CAYUGA INDIAN NATION OF NEW YORK AND
THE SENECA-CAYUGA TRIBE OF OKLAHOMA**

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Other Authorities

123 Cong. Rec. 22166 (daily ed. July 11, 1977)	8
John Adams, A Treatise on the Principles and Practice of Ejectment 21 (2d ed., London 1818)	9-10
John Adams, A Treatise on the Principles and Practice of Ejectment (Philo Ruggles ed., New York 1821)	10-11
3 William Blackstone, Commentaries on the Laws of England *214 (1765-1769)	11
William Blanshard, A Treatise on the Statutes of Limitation 62 (London 1826)	7
Sir Geoffrey Gilbert, The Law and Practice of Ejectments 53, 94 (London 1741)	10
E. W. Hinton, <i>Equitable Defenses Under Modern Codes</i> , 18 Mich. L. Rev. 717 (1920)	5
Charles T. McCormick, Handbook on the Law of Damages 480-82 (1935)	11
Prosser and Keeton on the Law of Torts 77 (W. Page Keeton ed., 5th ed. 1984)	11
George E. Woodbine, The Origins of the Action of Trespass, 33 Yale L.J. 799 (1924)	11
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STATEMENT OF AMICUS

The Shinnecock Indian Nation (the “Nation”) is an Indian tribe, with lands in and around the Town of Southampton, Suffolk County, New York. The Nation is a nation or tribe of Indians within the meaning of the Indian Nonintercourse Act (the “NIA”).¹ The Nation has functioned continuously as an Indian tribe, and has interacted with the United States and state and local governments as an Indian tribe, for more than 300 years.² Congress never has terminated its status as an Indian tribe. It is one of very few tribes not forcibly displaced by the United States and still occupies lands within the aboriginal lands it possessed at the time of first European contact.

The Shinnecock Indian Nation is similarly situated to the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma, in that its ancestral land has been unlawfully encroached upon or taken from it by the State of New York, either directly or by individuals purportedly authorized to do so by the State of New York. The Congress of the United States never has authorized the taking of any Shinnecock land. Consequently, the taking of Shinnecock land

¹ Enacted as Act of July 22, 1790, Ch. 33, 1 Stat. 137 and now codified as 25 U.S.C. § 177.

² The Nation has petitioned the Office of Federal Acknowledgment of the United States Department of the Interior for administrative acknowledgment as an Indian tribe. Also, the Nation currently is being sued as an Indian tribe by the State of New York and by the Town of Southampton, *New York v. Shinnecock Indian Nation*, No. 03 Civ. 3243 (E.D.N.Y. filed Jul. 1, 2003) and *Town of Southampton v. Shinnecock Tribe*, No. 03 Civ. 3466 (E.D.N.Y. filed Jul. 14, 2003), and in that action is seeking judicial acknowledgment as an Indian tribe as a matter of federal common law.

purportedly authorized by the State of New York was in clear violation of the NIA. At present, the Shinnecock Indian Nation is pursuing land claim litigation against the State of New York and other defendants, *Shinnecock Indian Nation v. New York*, No. 05 Civ. 2887 (E.D.N.Y. filed June 15, 2005), seeking both money damages at law for the illegal taking, and restored possession, of tribal lands.

The Nation urges review of the opinion of the three-judge panel in *Cayuga Indian Nation of New York v. Pataki*, 413 F.3d 266 (2d Cir. 2005) (the "Panel Opinion"), pursuant to 28 U.S.C. § 46(c) and Federal Rule of Appellate Procedure 35. The Panel Opinion is inconsistent with Supreme Court precedent and, if not vacated, would radically and without basis overturn hundreds of years of settled precedent with respect to the non-applicability of equitable defenses to actions at law.

SUMMARY OF ARGUMENT

The Panel Opinion disregards the express preservation by the Supreme Court of the United States of a damages remedy at federal common law for violation of the NIA. It also radically, and contrary to long-settled precedent, expands the application of equitable defenses, for the first time making legal claims for money damages generally subject to the equitable defense of laches, undermining the express will of Congress. If not vacated, the Panel Opinion would limit radically the right of Indian tribes to seek relief for the illegal taking of their

land, guaranteed to them by the NIA, a result contrary to clearly expressed Congressional intent.

The Panel Opinion also seriously and fundamentally misconstrues the nature of ejectment. Ejectment is a term applied both to a certain form of action and to the remedies available if the elements of a claim of ejectment are established. The Panel Opinion conflates the two uses of the term, generating a holding that flies in the face of the history of the common law and the settled understanding of that law for hundreds of years. Finally, the Panel Opinion misunderstands the elements of trespass, an action at law, confusing a claim for damages at law for illegal occupancy of land with a claim in equity for repossession of land. For all of these reasons, the petition by the Cayuga Indian Nation of New York and the Seneca-Cayuga Tribe of Oklahoma for rehearing by the panel or rehearing *en banc* should be granted.

ARGUMENT

The Panel Opinion Is Inconsistent With Supreme Court Precedent In *City Of Sherrill And Oneida II*

Contrary to the Panel Opinion, *City of Sherrill v. Oneida Indian Nation of New York*, 125 S. Ct. 1478 (2005), does not hold, or support a holding, that equitable defenses apply to bar actions at law. Instead, the Supreme Court in *Sherrill* held that an equitable defense (laches) could be applied to a claim for equitable relief (an injunction prohibiting future real estate taxation of real property

purchased by an Indian tribe within the boundaries of its established reservation). Indeed, the opinion in *Sherrill* expressly stated 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*.”³

The *Sherrill* opinion plainly does not hold, or support a holding, that an Indian tribe may be barred by the passage of time from seeking money damages for a taking of its land in violation of the NIA. The plaintiff in *Sherrill* did not request money damages, and in that case the Supreme Court went to great lengths to avoid even appearing to countenance new defenses to a claim for money damages. Indeed, the holding of *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226 (1985) (“*Oneida I*”), as characterized in *Sherrill*, “recognized that the Oneidas could maintain a federal common-law claim for damages for ancient wrongdoing.”⁴ In *Oneida II*, the Supreme Court was not called upon to decide whether or not equitable time bars are available in the defense of an action for damages at law; however, it did note that “application of the equitable defense of laches in an action at law would be novel indeed.”⁵ The holding in *Oneida II*, addressing an ancient dispossession of Indian land virtually identical to the one at issue here, also emphasized that “application of laches would

³ *Sherrill*, 125 S. Ct. at 1494.

⁴ *Sherrill*, 125 S. Ct. at 1483.

⁵ 470 U.S. at 244 n.16.

