No. 05-905

IN THE
SUPREME COURT OF THE UNITED STATES

SENECA NATION OF INDIANS and TONAWANDA BAND OF SENECA INDIANS,

Petitioners,

-against-

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

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the 1815 treaty in which the Seneca Nation agreed to "sell, grant, convey and confirm" the Niagara River islands to the people of the State of New York complied with federal law because New York already owned the islands.

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STATEMENT OF JURISDICTION

For the reasons set forth below in Point I, the Eleventh Amendment precludes this Court's exercise of jurisdiction over the State of New York.

STATEMENT OF THE CASE

In this matter, the Seneca Nation of Indians and the Tonawanda Band of Seneca Indians ("petitioners") contend that the State of New York acquired the islands in the Niagara River from the historic Seneca Nation of Indians (the "Senecas") pursuant to an 1815 treaty that violated federal law.[1] Both the district court and the court of appeals rejected this claim because they found that any Seneca rights to the islands were extinguished before 1815. *Seneca Nation of Indians v. New York*, 206 F. Supp. 2d 448 (W.D.N.Y. 2002) (Pet. App. 57-269), *aff'd*, 382 F.3d 245 (2d Cir. 2004) (Pet. App. 1-53). Specifically, the court of appeals held that the British Crown extinguished Seneca rights to the islands in an August 1764 treaty, that New York succeeded to the Crown's title to the islands after the Revolution and that the United States did not divest New York of title to the islands

[1]The islands in issue are located south of Niagara Falls in the Niagara River, which flows between Lake Erie and Lake Ontario, but do not include Navy Island, which belongs to Canada. The islands include Grand Island, a populated, 19,000-acre land mass. *See* Pet. App. 6.

in the 1794 Treaty of Canandaigua. *See* Pet. App. 29-36, 39-42, 46-52.

The extensive history of the Niagara region and the transactions at issue is set forth in detail in the decisions below. *See* Pet. App. 6-25 (court of appeals), 67-165 (district court). That history is briefly recounted here because it establishes that nothing in this case merits this Court's review.[2]

Historical Background

A. The British Crown Extinguished Seneca Rights to the Islands in the August 1764 Treaty.

At the time of the first European contact with the region that is now western New York, the Senecas occupied an area around the Genesee River about 70 miles east of the Niagara River. *See* Pet. App. 73-74. In the middle of the seventeenth century, the Senecas conquered and dispersed the tribes that occupied the Niagara region, including the Neutrals, who had previously occupied the islands. *See* Pet. App. 74-75. The Senecas did not permanently occupy the Niagara region for over a century

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[2]Contrary to petitioners' claim, Pet. at 14 n.*, there is no need to defer action on the petition here until the Court acts on the petitions in *United States v. Pataki*, No. 05-978, and *Cayuga Indian Nation v. Pataki*, No. 05-982, because the questions presented in those petitions are entirely distinct from the question here.

afterwards; the area remained "a relatively deserted locality . . . open to all comers, Indian or white." *See* Pet. App. 75. The Senecas used the region only as a seasonal hunting and fishing grounds and worked for the French carrying goods over the portage around Niagara Falls. Pet. App. 75, 84-85.

The British ended the French presence in the Niagara region in 1759, during the French and Indian War, when they seized Fort Niagara at the mouth of the Niagara River on Lake Ontario. Pet. App. 88. Seneca hostility toward the British boiled over in 1763 when a group of Senecas joined the Indian uprising known as Pontiac's Rebellion. *See* Pet. App. 90-91. Following a bloody Seneca attack on the British at "Devil's Hole" along the Niagara River gorge, William Johnson, the Crown's Indian superintendent for the northern colonies, summoned Seneca leaders to a meeting in April 1764. In the treaty that resulted, the Senecas "cede[d]" to the King "for ever, in full Right," a four-mile wide strip of land on both sides of the Niagara River from Lake Ontario to a point just above (south of) Niagara Falls. Pet. App. 92, 261 (Appendix G).

Johnson thereafter urged the Senecas to cede to the King the remainder of the Niagara River corridor including the islands. Pet. App. 93-94. Johnson reached a final agreement with the Senecas in August 1764 in which the Senecas "surrender[ed] up" to

the Crown the southern half of the Niagara River corridor, so that the entire corridor on both sides of the river from Lake Ontario to Lake Erie "shall become vested in the Crown." *See* Pet. App. 94. The Senecas specifically "bestow[ed] [the islands] upon Sir Wm. Johnson as proof of their regard and of their knowledge of the trouble he has had with them from time to time." *See* Pet. App. 94, 262 (Appendix H). Johnson repeatedly acknowledged that he accepted the islands on the Crown's behalf and made no mention of them in his will. *See* Pet. App. 12-14 and n.8, 191-192.

B. After the American Revolution, the Senecas Again Ceded their "Claims" to the Niagara Region.

In 1782, the western boundary of New York State was fixed west of the Niagara River so that the islands were included in New York. *See* Pet. App. 106. In the Hartford Compact of 1786, New York and Massachusetts settled their boundary dispute, confirming New York's sovereignty and right of preemption to the river and the islands.[3] *See* Pet. App. 20.

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[3]The "right of preemption" was the underlying fee title to lands that were subject to the Indian right of occupancy; the right of preemption ripened into fee simple absolute title when the Indian right of occupancy was extinguished. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 670 (1974); *see also United States v. Cook*, 86 U.S. 591, 593 (1874) ("[t]he possession, when abandoned by the Indians, attaches itself to the

The 1783 Treaty of Paris concluded the American Revolution but did not resolve hostilities with the Indian nations, including the Senecas, who had sided with the Crown. *See* Pet. App. 17-18, 107-108. In 1784, the United States signed the treaty of Fort Stanwix with the Six Nations, who agreed that they "shall and do yield to the United States, all claims to the country west" of a line running just east of the Niagara River south to the Pennsylvania line. *See* Pet. App at 18-19, 118-119; *see also* Treaty of Oct. 22, 1784, 7 Stat. 15. The lands to which the Senecas relinquished their claims included the islands. Congress' acceptance of the treaty was expressly conditioned on the stipulation that no federal treaty purchases from the Indians of lands within the limits of any state could interfere with the state's rights to "jurisdiction or soil." *See* Pet. App. 19.

C. The Treaty of Canandaigua Did Not Divest New York of its Title to the Islands.

In 1794, to address Seneca concerns over the Fort Stanwix treaty boundary and to keep the Senecas from joining ranks with hostile tribes to the west, the United States signed the Treaty of Canandaigua with the Senecas and other members of the Six

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fee without further grant"). The original thirteen states, including New York, held the right of preemption to lands within their boundaries. *Id.*

Nations. Treaty of Nov. 11, 1794, 7 Stat. 44. In the treaty, the United States "acknowledge[d]" the western boundary of the Seneca lands to run, in relevant part, "along the river Niagara to Lake Erie." *Id.*, 7 Stat. at 45. However, the treaty did not mention the islands. *See* Pet. App. 22. In correspondence with the Secretary of War, the United States treaty negotiator, Timothy Pickering, admitted that land within New York west of Buffalo that the United States purported to return to the Senecas in the Canandaigua Treaty did not belong to the United States. *See* Pet. App. 145-146 ("I knew therefore that the United States had no right to the lands which I relinquished").

Subsequently, in 1811, the New York Legislature authorized Governor Daniel Tompkins to purchase the islands from the Senecas. Tompkins, however, believed that New York owned the islands as a result of the August 1764 treaty and that the Canandaigua treaty boundary did not include the islands within the Seneca lands. *See* Pet. App. 23, 155-157. Tompkins also believed that New York's "purchase" of the islands from the Senecas would be a manifestation of the State's "friendship and liberality towards them" but was not required by law. *See* Pet. App. 23. In 1815, the Senecas agreed to sell the islands to New York. *See* Pet. App. 25.

D. The United States Relied Upon New York's Title to the Islands Before the Indian Claims Commission.

In the 1950s, petitioners brought claims against the United States before the Indian Claims Commission pursuant to the Indian Claims Commission Act. *See* Act of Aug. 8, 1946, 60 Stat. 939; *see also* Pet. App. 160-165. Petitioners claimed that the United States breached its fiduciary duty to protect the Seneca lands sold in the 1815 agreement with New York. *See* Pet. App. 162. After unsuccessfully arguing that it owed no fiduciary duty to the tribes, *Seneca Nation of Indians v. United States*, 173 Ct. Cl. 917, 925 (1965), the United States argued that the Senecas had no property interest in the islands because any interest they may have had was extinguished by the Crown in 1764 and by the United States in the 1784 Fort Stanwix treaty. *See* Pet. App. 162-163. The Indian Claims Commission agreed that the 1764 treaty extinguished any Seneca title to the islands, but held that the terms of the 1794 Canandaigua treaty equitably estopped the United States from denying that it granted the Senecas a compensable interest in the islands. *See* Pet. Ap. 164-165.

The Proceedings Below

Petitioner Seneca Nation of Indians commenced this action in 1993 and petitioner Tonawanda Band of Seneca Indians intervened as a plaintiff. *See* Pet. App. 64. Petitioners alleged that New York's 1815 purchase of the islands was void because it violated the Trade and Intercourse Act, 25 U.S.C. § 177. *See id.* Defendants included New York State, Erie County, the defendant class of landowners on the islands, and others. *See id.* Following this Court's decision in *Idaho v. Coeur D'Alene Tribe of Idaho*, 521 U.S. 261 (1997), the United States intervened as a plaintiff and the district court then denied New York's motion to dismiss petitioners' claims against it on Eleventh Amendment grounds. *See* Pet. App. 65-66. The court of appeals affirmed. *See Seneca Nation of Indians v. New York*, 178 F.3d 95 (2d Cir. 1999), *cert. denied*, 528 U.S. 1073 (2000). The parties then cross-moved for summary judgment.

In a comprehensive opinion, the district court granted respondents' motion. Pet. App. 57-269. The district court held that Great Britain extinguished any claim of Seneca title to the islands in 1764 and that the United States again extinguished any claim of title that the Senecas may have had to the islands in the 1784 Fort Stanwix treaty, so that New York as the holder of the right of preemption obtained fee simple absolute title. *See* Pet. App. 251. Finally, the district court held that the 1794

Treaty of Canandaigua did not divest New York of its title to the islands because such a purpose was not "shown in the treaty with such certainty as to put it beyond reasonable question," as required by this Court's decision in *United States v. Minnesota*, 270 U.S. 181, 209 (1926).

The court of appeals affirmed. Pet. App. 1-53. First, the court held that Great Britain extinguished any Seneca title to the islands in the August 1764 treaty. *See* Pet. App. 29-36. Applying the "plain and unambiguous" standard for extinguishment of Indian title articulated in this Court's decision in *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 346 (1941), the court concluded that the cession language in the treaty, including the grant of the islands to Johnson, plainly negated any continued Seneca possessory right in the islands. *See* Pet. App. 33-34. Further, the court held that the grant to Johnson did not violate the ban on private Indian land purchases contained in the 1763 Royal Proclamation because Johnson as the Crown's agent accepted the islands on the Crown's behalf. *See* Pet. App. 34-36.

The court next determined that the British title to the islands passed to New York State after the American Revolution. *See* Pet. App. 39-40. The court did not address the district court's holding that New York obtained title to the islands as a

result of the 1784 Fort Stanwix Treaty. However, the court held that the treaty did not divest New York's title to the islands because the Senecas no longer had any title to convey and because under the Articles of Confederation the confederal government lacked the power to take state land. *See* Pet. App. 42-45.

Finally, the court held that the United States did not divest New York's title to the islands in the 1794 Treaty of Canandaigua. *See* Pet. App. 46-52. The court acknowledged that the treaty must be construed "in light of the common notions of the day and the assumption of those who drafted [it]." *See* Pet. App. 47 (quoting *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 666 [1979]). The court concluded that the treaty's Seneca boundary description "along the river Niagara" was ambiguous because "there was considerable confusion at the time" under the common law whether such a description stopped at the water's edge or, as petitioners argued, included the riverbed (and thus any islands) to the middle of the channel. *See* Pet. App. 49-50.

The court held that *Minnesota* precluded a construction of the ambiguous boundary line that would deprive New York of its land. *See* Pet. App. 50-52. The court observed that *Minnesota* "involved litigation over the disposition of swamp lands granted by the federal government to Minnesota in 1860 that were then included by the federal government in land grants to the Chippewa

Indians in various treaties in the 1860s." Pet. App. 50-51. In *Minnesota*, this Court did not read the later treaties as divesting rights to the land previously granted to Minnesota because the treaty did not show a purpose to do so beyond reasonable question. *Minnesota*, 270 U.S. at 209. In the present case, the court of appeals noted that the rule of *Minnesota* was based on uncertainty over whether a federal treaty can divest a state of its property for the benefit of another sovereign. *See* Pet. App. 51-52. The court found nothing in the Canandaigua treaty that "expresses any intention to convey the [i]slands, and certainly nothing expressed" beyond reasonable question. *See* Pet. App. 51. Thus, the court held that *Minnesota* bars a construction of the Canandaigua treaty that would include the islands in the Seneca territory. *See* Pet. App. 52.

REASONS FOR DENYING THE PETITION

Because the United States has not petitioned for certiorari, the Eleventh Amendment precludes this Court's exercise of jurisdiction over New York. The petition must be dismissed as to New York and should be denied as to the other respondents whose titles to the islands derive from New York. *See, e.g.*, Fed. R. Civ. P. 19(b).

In addition, petitioners' claims are not cert-worthy. In holding that the Treaty of Canandaigua did not divest New York of its title to the islands, the court of appeals correctly applied this Court's decision in *United States v. Minnesota*, 270 U.S. 181 (1926). In holding that the Senecas' August 1764 treaty with the Crown extinguished any Seneca title to the islands, the court of appeals applied the plain and unambiguous standard that petitioners urge this Court to apply. Petitioners merely seek error correction on these points; they did not claim -- nor could they -- that the state courts or lower federal courts are divided on the questions at issue in this case.

POINT I

THE ELEVENTH AMENDMENT BARS THIS COURT'S EXERCISE OF JURISDICTION OVER THE STATE OF NEW YORK

The United States intervened in this action to overcome New York State's assertion of its Eleventh Amendment immunity. *See* Pet. at 12. After the United States intervened, the district court denied New York's Eleventh Amendment motion to dismiss, the State took an interlocutory appeal and the court of appeals affirmed. *Seneca Nation of Indians v. State of New York*, 178 F.3d 95 (2d Cir. 1999); Pet. App. 54-56. However, the court noted that the State "retains its Eleventh Amendment immunity to

the extent that the [Senecas] raise claims or issues that are not identical to those made by the United States," citing this Court's decision in *Arizona v. California*, 460 U.S. 605, 614 (1983) (holding that granting tribes leave to intervene in suit commenced in this Court in which the United States had previously intervened on the tribes' behalf does not violate the Eleventh Amendment because the tribes did not seek to bring new claims or issues against the states). *See Seneca Nation,* 178 F.3d at 97; Pet. App. 56. This Court denied New York's petition for certiorari. *State of New York v. Seneca Nation of Indians*, 528 U.S. 1073 (2000).

The United States has not sought review here of the Second Circuit's decision on the merits in favor of the State and the other respondents. As a result, the ground upon which the lower federal courts exercised jurisdiction over the State of New York -- the presence of the United States as plaintiff-intervenor -- no longer exists and New York is immune from suit here. *See generally Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261 (1997); *Blatchford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991) (States are immune from tribal suits under the Eleventh Amendment). Accordingly, this Court should dismiss the petition with respect to New York. *See*, *e.g.*, *Ex parte McCardle*, 74 U.S. 506, 514 (1869) ("[j]urisdiction is

the power to declare the law, and when it ceases to exist, the only function remaining to the [C]ourt is that of announcing the fact and dismissing the cause"); *see also* Sup. Ct. Rule 15.4 (objections to the jurisdiction of the Court to grant a petition for a writ of certiorari must be included in the brief in opposition). The Court should also deny the writ as to the other respondents, whose titles to the lands in question derive from New York. *See*, *e.g.*, Fed. R. Civ. P. 19(b) (dismissal where absent party is indispensable).

POINT II

THE COURT OF APPEALS DECISION IS CONSISTENT WITH WELL-ESTABLISHED LIMITS ON THE CANONS OF INDIAN TREATY INTERPRETATION AND THE RULE OF *UNITED STATES v. MINNESOTA*

A. The Decision Below Is Consistent With This Court's View That The Canon of Liberal Construction May Be Offset or Countered By Competing Principles.

Petitioners argue that the decision below conflicts with this Court's decisions regarding the canons of Indian treaty construction because, having found the Canandaigua Treaty boundary call "along the river Niagara" to be ambiguous, the court rejected petitioners' interpretation that the boundary call included the islands. *See* Pet. at 15-19. Contrary to petitioners' claim, the court of appeals did not disregard the

canons of Indian treaty construction. *See* Pet. App. 47 (recognizing canon of construction). Instead, the court's decision comports with the settled rule that canons favoring liberal construction of federal Indian treaties and statutes are "not mandatory rules" but are simply "guides that 'need not be conclusive.'" *See Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001) (citing *Circuit City Stores, Inc. v. Adams*, 532 U.S. 105, 115 (2001)). Indeed, specific canons "'are often countered . . . by some maxim pointing in a different direction.'" *Id*. (quoting *Circuit City*, 532 U.S. at 115). Thus, in *Chickasaw*, the Court held that "the canon that assumes Congress intends its statutes to benefit the tribes is offset by the canon that warns us against interpreting federal statutes as providing tax exemptions unless those exemptions are clearly expressed." 534 U.S. at 95.

The Court's acknowledgment that a competing rule requiring a "clear expression" may override a liberal interpretation in favor of Indians is particularly apt in this case because the competing rule applied below was *Minnesota*'s requirement that a federal treaty cannot be interpreted to divest a state of its lands "unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question." *See Minnesota*, 270 U.S. at 209. Thus, the court of appeals' decision

is consistent with this Court's limitations on the applicability of the canon of liberal construction.[4]

B. The Decision Below Is Consistent With *United States v. Minnesota*.

Petitioners posit a false conflict between the decision below and *Minnesota* based on a strained reading of that case. The court of appeals correctly determined that this Court's holding in *Minnesota* was not limited to a State's "rights of property" based on "express prior federal grants" but instead applied to any state lands. *See Minnesota*, 270 U.S. at 209; Pet. at 20. As a result, the court below did not create a "new rule";

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[4]The decision below also comports with this Court's well established rule that treaties are to be construed according to the ordinary meaning of their words, not the "technical meaning of their words to learned lawyers." *Washington v. Washington St. Comm. Passenger Fishing Vessel Assn.* ("Fishing Vessel"), 443 U.S. 658, 675 (1972) (quoting *Jones v. Meehan*, 175 U.S. 1, 11 (1899)). But here, petitioners' argument relies on a technical and legal interpretation of the boundary call "along the river" -- they insist that the phrase would have been understood by the Senecas in 1794 as having a meaning other than its ordinary meaning, i.e., a line formed on the shore by the water's edge. Petitioners' view presumes that the Senecas were versed in the British common law of watercourses and as a result saw no need to mention the islands -- including 19,000-acre Grand Island -- in the treaty. Their interpretation conflicts with this Court's observation that it is "highly dubious" that Indians understood English common law and intended to ascribe a technical legal meaning to otherwise plain language in a treaty. *See Fishing Vessel*, 443 U.S. at 678 n.23.

it correctly applied this Court's long-established rule. *See* Pet. at 15.

Minnesota squarely addressed whether a treaty between an Indian tribe and United States may be read to divest a state of her interest in land. In that case, Minnesota based its title on an 1860 federal statute that granted the state an interest in certain public swamp lands. In later treaties with the Chippewas, the United States reserved lands for the use of the tribe that appeared to include the prior grants to Minnesota. *Minnesota*, 270 U.S. at 196-197. The United States argued that patents to the state based on the 1860 statute were issued in error because the treaties had reserved the lands for the Chippewas. *Id*. at 207-08. Among other issues, the Court addressed whether "in virtue of the treaty-making power the United States could, and did, by [the Chippewa treaties] divest the state of her right in lands and appropriate them for the use and benefit of the Chippewas." *Id*. The Court observed that the underlying premise -- that the United States had the power to

make such a grant -- was doubtful,[5] but did not decide the issue, holding instead:

> we are of opinion that no treaty should be construed as intended to divest rights of property—such as the State possessed in respect of these lands—unless the purpose so to do be shown in the treaty with such certainty as to put it beyond reasonable question.

Id., at 209. *See also Montana v. United States*, 450 U.S. 544, 554 (1981) (text of Indian treaty not strong enough to overcome the presumption against the conveyance of riverbed where result would be to divest future state of its interest in land); *United States v. Holt State Bank*, 270 U.S. 49, 57-58 (1926) (underlying Indian treaty could not be read to confer the right to the land under navigable waters because to do so would be contrary to the requirement under the equal footing doctrine that the United

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[5]As the court of appeals recognized, this Court "has expressed considerable skepticism about this power." Pet. App. 51-52. *See, e.g.*, *Goodtitle v. Kibbe*, 50 U.S. (9 How.) 471, 478 (1850) (Congress has no authority "to grant or confirm a title to land when the sovereignty and dominion over it had become vested in the State."); *Geofroy v. Riggs*, 133 U.S. 258, 267 (1890) ("It would not be contended that [the treaty-making power of the United States] extends so far as to authorize what the Constitution forbids, or a change in the character of the government or in that of one of the States, or a cession of any portion of the territory of the latter, without its consent."); *Green v. Biddle*, 21 U.S. (8 Wheat.) 1, 42-43 (1823) ("It is incontestable that there are some attributes of sovereignty, of which a State cannot be deprived, even with the concurrence of Congress and the State itself. . . . Of all the attributes of sovereignty, none is more indisputable than that of its action upon its own territory.").

States held lands underlying navigable waters for the benefit of future states).

Indeed, the treaty language in *Minnesota* presented a stronger case for divestment of state title than the present case. Here, there is nothing in the Treaty of Canandaigua indicating that the United States intended to divest New York of the islands -- in fact, the islands were not mentioned. In contrast, the state lands at issue in *Minnesota* were apparently included within the terms of the purported grants to the Chippewas. *See Minnesota*, 270 U.S. at 209 ("No doubt the descriptions were sufficient to carry the whole of each area, if free from other claims; but there was nothing in them or in the other provisions signifying a purpose to disturb prior disposals to extinguish existing rights under them."). Nevertheless, this Court refused to construe the Indian treaties to divest Minnesota of its lands. Accordingly, in this case the court of appeals' application of *Minnesota* is consistent with this Court's decision.

Petitioners' attempts to demonstrate a conflict with *Minnesota* are unpersuasive. Nothing in *Minnesota* limits its holding to prior federal statutory land grants to the state. As the court of appeals acknowledged, *Minnesota* was based on this Court's doubts about the scope of the federal treaty power. *See*

Pet. App. 51-52. Petitioners' assertion, Pet. at 21, that New York's title to the islands, based on its succession to the Crown's rights following the 1764 extinguishment of Seneca claims, stood on a weaker footing than title based on federal grants is itself contrary to this Court's established equal footing jurisprudence. *See* Pet. App. 51, n.27.[6]

Finally, petitioners argue that *Minnesota* does not apply because it turns on the "particular conditional language of the Chippewa treaty" that impliedly excepted prior grants to Minnesota, whereas the Treaty of Canandaigua purportedly "confirmed" Seneca title. *See* Pet. at 21-23. This purported distinction is meaningless as well -- nothing in the Canandaigua Treaty expressed any intent to take the islands away from New York. *Minnesota* establishes that, because "the purpose so to [divest New York of its title to the islands was not] . . . shown in the treaty with such certainty as to put it beyond reasonable question," the Treaty of Canandaigua could not have divested New York's title. *See Minnesota*, 270 U.S. at 209.

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[6]The court of appeals' rejection of petitioners' argument that the confederal government divested New York's title to the islands in the 1784 Fort Stanwix treaty raises no cert-worthy issues. *See* Pet. at 21, Pet. App. 42-45. Indeed, the district court held that the United States extinguished Seneca title (if any) to the islands in the 1784 Treaty of Fort Stanwix for the benefit of New York as the holder of the right of preemption. *See* Pet. App. 199-213.

POINT III

THE PETITION DOES NOT RAISE AN IMPORTANT QUESTION OF FEDERAL LAW CONCERNING WHETHER A COLONIAL-ERA TREATY EXTINGUISHED INDIAN POSSESSORY RIGHTS

Petitioners do not argue that the court of appeals' holding that the August 1764 treaty extinguished Seneca possessory rights to the Islands conflicts with any decision of this Court, another court of appeals, or any state court. *See* Sup. Ct. R. 10(a), (c). Instead, they claim only that this Court should determine the appropriate standard governing whether a colonial-era Indian treaty extinguished the Indians' possessory rights. *See* Pet. at 23-30. But there is no important question of federal law here. Because the court of appeals in fact applied the "plain and unambiguous" standard that petitioners argue should apply, their question boils down to an alleged "misapplication of a properly stated rule of law" that does not merit review. *See* Sup. Ct. R. 10. Additionally, the court of appeals' holding regarding the August 1764 treaty is based on the Senecas' unique history in the Niagara region and will affect few beyond the present litigants.

It is clear that petitioners seek only error correction. They grudgingly acknowledge that the court of appeals "paid lip service" to the plain and unambiguous standard. *See* Pet. at 24. Petitioners argue in effect that the court erred because it

misapplied the standard: the August 1764 treaty was ambiguous, they contend, and the court's construction of it violated the terms of the treaty and 1763 Royal Proclamation. *See* Pet. at 26-28.

Requests for error correction rarely merit this Court's attention. Sup. Ct. R. 10. More importantly, petitioners are wrong -- the court of appeals' decision is fully consistent with this Court's standard governing extinguishment of Indian title by the United States. The court of appeals amply documented its analysis of the August 1764 treaty in its opinion, *see* Pet. App. 29-36, as did the district court in its, *see* Pet. App. 181-192. The court of appeals first observed that the intention to extinguish Indian title must be plain and unambiguous. Pet. App. 29-30, citing, inter alia, *United States v. Santa Fe Pacific R.R. Co.*, 314 U.S. 339, 346 (1941). The court recognized that this Court articulated the plain and unambiguous standard in connection with treaties entered into by the United States based in part on the federal government's policy to respect the Indian right of occupancy. *See* Pet. App. 30 n.17. Nevertheless, the court concluded that a similar standard should apply to colonial-era Indian treaties negotiated by the British Crown. *Id*. The court's conclusion is consistent with those of the two other courts that have addressed the question. *See United States ex*

rel. Chunie v. Ringrose, 788 F.2d 638, 642 (9th Cir. 1986); *Vermont v. Elliott*, 616 A.2d 210, 213 (Vt. 1992); *see also Delaware Nation v. Commonwealth of Pennsylvania*, 2004 U.S. Dist. LEXIS 24178 at *24, 28-29 (E.D. Pa. Nov. 30, 2004) (concluding that a colonial-era extinguishment must be "intentional," citing the plain and unambiguous standard applied by the court of appeals below).[7]

Applying the plain and unambiguous standard, the court of appeals held that "the [Senecas'] grant of possessory rights in, if not title to, the Islands" to the Crown's agent William Johnson unambiguously "extinguished the Senecas' own possessory rights in that property," regardless of the effect of their grant of other lands to the Crown itself. Pet. App. 31-34. This holding is firmly supported by this Court's precedents including *Santa Fe*. Indeed, the Senecas' unambiguous cession of the Islands in the August 1764 treaty presents an even stronger case for extinguishment than *Santa Fe*, where this Court equated the creation of a reservation at the tribe's request and its acceptance by the tribe with a "voluntary cession" that

[7]The three decisions petitioners cite at page 29 of the petition in support of their claim of importance do not address the question of the standard governing whether colonial-era treaties extinguished Indian occupancy.

relinquished and extinguished any tribal claims to lands outside the reservation. *Santa Fe*, 314 U.S. at 358.

Additionally, the court of appeals held that "Johnson effectively accepted the land on behalf of the Crown and . . . he could not and, in fact, did not accept the land on his own behalf." Pet. App. 35. As explained by the courts below, *see* Pet. App. 34-36, 187-192, this holding is consistent with both the treaty terms and the Royal Proclamation, as well as the conclusion of petitioners' own expert that the Crown took title to the Islands as a result of the 1764 treaty. *See* Pet. App. 191-192.

Finally, the holdings of the courts below turned on the application of the plain and unambiguous standard to a distinctive historical record that is unlikely to be repeated elsewhere. *See* Pet. App. 29-36, 181-192. For this reason as well, this case is not a vehicle for considering whether the plain and unambiguous standard should apply to colonial-era treaty extinguishments of Indian title. Contrary to petitioners' assertion, this issue is not "important and recurring." *See* Pet. at 28-30. The isolated decisions adopting the plain and unambiguous standard applied by the court of appeals here do not establish either doctrinal confusion or importance meriting this Court's exercise of its certiorari jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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