No. _____

In The
Supreme Court of the United States

SENECA NATION OF INDIANS and
TONAWANDA BAND OF SENECA INDIANS,

Petitioners,

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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QUESTION PRESENTED

Whether under the Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), the Senecas held title to the islands in the Niagara River so that New York's purchase of the islands from the Senecas in 1815 without federal approval violated the Nonintercourse Act, 25 U.S.C. § 177.

a. Whether this Court's precedents require that ambiguous treaty terms be read liberally in favor of the Indian parties, notwithstanding a State non-party's later claim of pre-existing rights to the land at issue and invocation of *United States v. Minnesota*, 270 U.S. 181 (1926).

b. Whether treaties made between Indian tribes and the British Crown before the Constitution should be interpreted according to the same rules applicable to treaties between Indian tribes and the United States after the Constitution, such that title to Indian land may not be extinguished without plain and unambiguous expression of intent by the sovereign.

PARTIES TO THE PROCEEDINGS

Petitioners are: The Seneca Nation of Indians and the Tonawanda Band of Seneca Indians

Respondents are: The State of New York; New York Thruway Authority, John R. Platt, Executive Director; Moore Business Forms, individually and as a representative of a class of landowners similarly situated; George E. Pataki, Governor, State of New York; Bernadette Castro, Commissioner of Parks, Recreation and Historic Preservation; Ronald W. Coan, Director, Erie County Industrial Development Agency; John Cahill, Commissioner, New York Department of Environmental Conservation; Joseph Boardman, Commissioner, New York Department of Transportation; Erie County, individually and as a representative of a class of landowners similarly situated; Inducom, Inc., individually and as a representative of a class of landowners similarly situated; Rado-Mart Holdings, U.S. Inc., individually and as a representative of a class of landowners similarly situated; Ilona H. Lang, individually and as a representative of a class of landowners similarly situated; Robert W. Weaver, individually and as a representative of a class of landowners similarly situated; Francis B. Pritchard, individually and as a representative of a class of landowners similarly situated.

United States of America

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OPINIONS BELOW

The opinion of the Second Circuit Court of Appeals is reported at 382 F.3d 245 (2d Cir. 2004) and is set forth in the Petition Appendix ("Pet. App.") at 1. The opinion of the United States District Court for the Western District of New York is reported at 206 F. Supp. 2d 448 (W.D.N.Y. 2002) and is set forth in Pet. App. at 57.

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on September 9, 2004. Rehearing was denied on September 2, 2005. Pet. App. 270. Associate Justice Ruth Bader Ginsburg extended the time for filing this petition to and including January 17, 2006. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND TREATIES INVOLVED

Trade and Intercourse Act of 1790, 25 U.S.C. § 177:

> . . . No purchase, grant, 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. . . .

Treaty between the Seneca Nation of Indians and the State of New York, Sept. 12, 1815, 51 N.Y. Assembly Papers 211, Pet. App. 273.

Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), Pet. App. 274.

Article III, Treaty of Ft. Stanwix, 7 Stat. 15 (Oct. 22, 1784):

> A line shall be drawn, beginning at the mouth of a creek about four miles east of Niagara, called Oyonwayea, or Johnston's Landing-Place, upon the lake named by the Indians Oswego, and by us Ontario; from thence southerly in a direction always four miles east of the carrying-place, between Lake Erie and Ontario, to the mouth of Tehoseroron or Buffaloe Creek on Lake Erie;

> then south to the north boundary of the state of Pennsylvania; thence west to the end of the said north boundary; thence south along the west boundary of the said state, to the river Ohio; the said line from the mouth of Oyonwayea to the Ohio, shall be the western boundary of the lands of the Six Nations, so that the Six Nations shall and do yield to the United States, all claims to the country west of the said boundary, and then they shall be secured in the peaceful possession of the lands they inhabit east and north of the same, reserving only six miles square round the fort of Oswego, the United States, for the support of the same.

Treaty of Peace and Alliance between His Britannick Majesty, and the Chenussio Indians, and other Enemy Senecas, August 6, 1764, Pet. App. 280.

Preliminary Articles of Peace Friendship and Alliance, Entered into between the English and Deputies from the whole Nation of the Seneca Indians, April 3, 1764, Pet. App. 283.

Royal Proclamation, Oct. 7, 1763, *reprinted in Colonies to Nation 1763-1786: A Documentary History of the American Revolution* 16-18 (Greene ed., 1975):

> . . . And whereas it is just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of Our Dominions and Territories as, not having been ceded to or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds – We do therefore, with the Advice of our Privy Council, declare it to be our Royal Will and Pleasure, that no Governor or Commander in Chief in any of our Colonies of Quebec, East Florida or West Florida, do presume, upon any Pretence whatever, to grant Warrants of Survey, or pass any Patents for Lands beyond the Bounds of

> their respective Governments as described in their Commissions: as also that no Governor or Commander in Chief in any of our other Colonies or Plantations in America do presume for the present, and until our further Pleasure be known, to grant Warrants of Survey, or pass Patents for any Lands beyond the Heads or Sources of any of the Rivers which fall into the Atlantic Ocean from the West and North West, or upon any Lands whatever, which, not having been ceded to or purchased by Us as aforesaid, are reserved to the said Indians, or any of them.
>
> And We do further declare it to be Our Royal Will and Pleasure, for the present as aforesaid, to reserve under our Sovereignty, Protection, and Dominion, for the use of the said Indians, all the Lands and Territories not included within the Limits of Our said Three new Governments, or within the Limits of the Territory granted to the Hudson's Bay Company, as also all the Lands and Territories lying to the Westward of the Sources of the Rivers which fall into the Sea from the West and North West as aforesaid.
>
> And We do hereby strictly forbid, on Pain of our Displeasure, all our loving Subjects from making any Purchases or Settlements whatever, or taking Possession of any of the Lands above reserved, without our especial leave and Licence for that Purpose first obtained.
>
> And We do further strictly enjoin and require all Persons whatever who have either wilfully or inadvertently seated themselves upon any Lands within the Countries above described or upon any other Lands which, not having been ceded to or purchased by Us, are still reserved to the said Indians as aforesaid, forthwith to remove themselves from such Settlements.
>
> And whereas great Frauds and Abuses have been committed in purchasing Lands of the Indians, to the great Prejudice of our Interests and to the great Dissatisfaction of the said Indians: In

order, therefore, to prevent such Irregularities for the future, and to the end that the Indians may be convinced of our Justice and determined Resolution to remove all reasonable Cause of Discontent, We do, with the Advice of our Privy Council strictly enjoin and require, that no private Person do presume to make any purchase from the said Indians of any Lands reserved to the said Indians, within those parts of our Colonies where We have thought proper to allow Settlement: but that, if at any Time any of the Said Indians should be inclined to dispose of the said Lands, the same shall be Purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for that Purpose by the Governor or Commander in Chief of our Colony respectively within which they shall lie: and in case they shall lie within the limits of any Proprietary Government, they shall be purchased only for the Use and in the name of such Proprietaries, conformable to such Directions and Instructions as We or they shall think proper to give for that Purpose . . .

STATEMENT OF THE CASE

I. Historical Background

In 1815, the State of New York purchased from the Seneca Indians "all the islands in Niagara river between Lake Erie and Lake Ontario." Treaty between the Seneca Nation of Indians and the State of New York, Sept. 12, 1815, 51 N.Y. Assembly Papers 211, Pet. App. 273. There is no dispute that the purchase lacked the approval of the United States required by the Trade and Intercourse Act, 25 U.S.C. § 177. The State purchase followed the Treaty of Canandaigua, 7 Stat. 44 (Nov. 11, 1794), Pet. App. 274, which confirmed Seneca title to most of western New York and established the Senecas' western boundary "along the river Niagara to Lake Erie." *Id.*, art. III, Pet. App. 275-76.

The Canandaigua Treaty

During the Revolutionary War, the Senecas allied with the British. However, the Treaty of Paris, which concluded the war and drew the international boundary, did not address peace with the Senecas or other tribes. The United States therefore entered into a treaty with the Senecas in an attempt both to achieve peace and to exact retribution from them for their support of the British. Under the Treaty of Ft. Stanwix, 7 Stat. 15 (Oct. 22, 1784), *supra* at 2-3, Special Appendix[1] 170, the Senecas were forced to "yield to the United States" their vast western territory without compensation, the eastern boundary of which was a line approximately four miles east of the Niagara River, including the Niagara corridor and the Niagara islands. *Id.*, art. III. *See* Map App. J., Pet. App. 164. Although the Treaty was entered into by the federal government in the exercise of its peace-making powers, *Oneida Indian Nation v. County of Oneida*, 691 F.2d 1070, 1088 (2d Cir. 1982), the Senecas were treated as a defeated enemy. The Senecas continued to occupy the ceded lands, and their unhappiness with the Treaty hindered a lasting peace in the Niagara area. The United States attempted unsuccessfully to rectify the situation through the Treaty of Fort Harmar, 7 Stat. 33 (Jan. 9, 1789), SPA 166, which sought to confirm the cession. However, the Senecas continued to occupy the ceded land and to object to both treaties. 4 American State Papers 140-144 (1832), JA 1014.

In order to regulate Indian land transactions and thereby preserve the peace on the fragile frontier of the newly formed United States, Congress in 1790 passed the Trade and Intercourse Act, which prohibited such transactions without United States approval. *See* 25 U.S.C. § 177. The Act remains in force. *See City of Sherrill v. Oneida Indian Nation*, 125 S.Ct. 1478, 1484 (2005).

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[1] Document citations to the record in the court below are to the Special Appendix ("SPA") and the Joint Appendix ("JA").

At this same time, the United States was suffering defeat at the hands of the tribes in the Northwest Territories. There was concern that the Senecas, who had significant ties to those tribes, would join them. This potential, along with the possibility of renewed Seneca alliance with the British, brought about yet a third treaty. *See* Jack Campisi and William A. Starna, *On the Road to Canandaigua: The Treaty of 1794*, 19 Amer. Indian Quarterly (1995), JA 2064.

Timothy Pickering was commissioned by the United States to negotiate this "Peace and Friendship Treaty." *See* William N. Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* 627 (1998), JA 2224. At the Canandaigua negotiations, Pickering offered to return to the Senecas lands southeast of Lake Erie between the Fort Stanwix line and the Pennsylvania border. The Senecas, through their representative, Red Jacket, demanded return of the four mile tract along the Niagara:

> With respect to the four-mile path [along the eastern side of the Niagara River], we are in want of it on account of the fisheries. * * * we see that you want that strip of land for a road, that when you have vessels on the lake you may have harbours, &c. But we wish, that in respect to that land, the treaty at For Stanwix may be broken.

Jonathan Evans, comp., *A Journal of William Savery* 84 (1884), JA 1105.

Ultimately, Pickering agreed to return the southern Niagara corridor, reserving only limited rights to the United States. In the treaty, the United States described the boundaries of Seneca land, including those "along the river Niagara," and acknowledged that the lands "belong" to the Senecas, and pledged "never to claim the same, nor to disturb them, or any of the Six Nations, or their Indian friends residing thereon and united with them, in the free use and enjoyment thereof." Pet. App. 275-276. In return, the Senecas, agreed to:

> cede to the United States the right of making a waggon road from Fort Schlosser to Lake Erie, as far south as Buffaloe Creek; and the people of the United States shall have the free and undisturbed use of this road for the purposes of travelling and transportation. And the Six Nations, and each of them, will forever allow to the people of the United States, a free passage through their lands, and the free use of the harbours and rivers adjoining and within their respective tracts of land for the passing and securing of vessels and boats, and liberty to land their cargoes where necessary for their safety.

Pet. App. 277. Pickering wrote in his report on the treaty: "The strip four miles wide along the Strait of Niagara, I strove to secure . . . but it was in vain. They were extremely tenacious of this tract." Letter to Knox (Nov. 12, 1794), JA 1065. The 1794 Treaty returned to the Senecas the southern Niagara Corridor and the lands south of Lake Erie and east of the Erie Triangle, an area that includes almost all of the lands within New York that the Senecas had "yielded to the United States" at Fort Stanwix. *Compare* Map App. J, Pet. App. 264 *and* Map App. L, Pet. App. 266.

The 1764 Treaties

The Indian nations of the Iroquois confederacy (or Six Nations) were a formidable force in the European settlement of this country. From the mid-seventeenth century on, the Senecas were the dominant Indian power in the Niagara area, a particularly critical trade and transportation corridor. From the late seventeenth century until the conclusion of the French and Indian War in 1759, France and Britain competed for dominion over modern day western New York, including the Niagara islands. Each viewed relations with the Senecas as key to asserting its authority in the area.

The rivalry between the British and French culminated in the French and Indian War, during which the

Senecas allied with the French. In 1759, the French surrendered Fort Niagara to the British under Sir William Johnson. *Seneca Nation v. United States*, 20 Ind. Cl. Comm. 177, 191-193 (1968), SPA 290-92. In the 1763 Treaty of Paris, France ceded to Britain all claims to Canada. SPA 245. Nonetheless, Seneca hostilities against the British continued, including Seneca participation in Pontiac's Rebellion and a direct Seneca attack upon British troops at the Niagara portage in 1763. SPA 245.

The threat of war with Indian tribes in the Crown's newly expanded territory led to the issuance in 1763 of the Royal Proclamation, which confirmed Indian occupancy rights to much of this territory and prohibited acquisition or possession of Indian land "without special leave first obtained" from the Crown. Royal Proclamation, Oct. 7, 1763, *reprinted in Colonies to Nation 1763-1786: A Documentary History of the American Revolution* 16-18 (Greene ed., 1975), *supra* at 3-5, SPA 235.

Continuing Seneca hostilities also necessitated a treaty of peace between the British and the Senecas. Sir William Johnson negotiated on the Crown's behalf, wrote and presented the articles to the Senecas, and insisted on Seneca agreement to all articles. 11 *Papers of Sir William Johnson* 152 (Milton W. Hamilton ed., 1921), JA 797. Johnson detailed the British complaints against the Senecas and summarized the terms of peace:

> You agree to the following Terms. – First, to Deliver up the Murderers of Kanestio – Secondly, all the Prisoners, Deserters, and Frenchmen amongst you without Distinction, and that you engage never more to admit any amongst You. – *Thirdly a free use of the Carrying Place of Niagara, with the Lands from the Fort to the Creek above little Niagara, the Breadth of 4 miles from the River, and free liberty to Cut Timber for Building, Fire Wood &c – Fourthly a free open Road through your Country for the Passage of the English with Cattle, Carriages or otherwise with the free Occupancy of the Lakes, Rivers, Creeks, &c.* – Fifthly – the use of the Harbours of Orundequat, and Asserotus with liberty of erecting Places of Security at them. – Sixthly – that you stop up the Road to the Shawanese, and Delawares, and never treat with them without our Permission – Seventhly – That you never hold any Conferences, correspond, or treat with any of his Majesties Enemies, but hold fast the Covenant Chain for ever – Eighthly – to Observe the several Articles, and leave Hostages for the Performance of them untill the Meeting of all the Nations at Niagra took place. –

Id. at 154-155, JA 798-800 (emphasis added). These terms contained no reference to or suggestion of any cession of Seneca territory to the Crown.

On April 3, 1764, the Senecas and the Crown concluded a treaty captioned "Preliminary Articles of Peace Friendship and Alliance." Pet. App. 283. The Senecas agreed to cease all hostilities immediately and to collect and deliver up prisoners of war within three months, at which point final articles of peace would be executed. *Id.* at 283-285. The Senecas also agreed to "cede to His Majesty and his Successors for ever, in full Right, the lands from the Fort of Niagara, extending easterly along Lake Ontario," " . . . provided the Tract be always appropriated to his Majesty's sole Use." *Id.* at 284; *see also* Map App. G, Pet. App. 261. Finally, the Senecas agreed not to "obstruct the passage of the Carrying Place, or the free Use of any part of the said Tract, and [to] likewise give free liberty of Cutting Timber for the Use of His Majesty, or that of the Garrisons, in any other part of their Country, not comprehended therein." Pet. App. 284.

The preliminary articles of peace were finalized on August 6, 1764. Pet. App. 280. Article 5 provided for an addition to the grant previously made in April by the following terms:

> the Chenussios now, surrender up all the lands from the upper end of the former Grant (and of the same breadth) to the Rapids of Lake Erie, to His Majesty, for His sole use, and that of the Garrison, but not as private property, it being

> near some of their hunting grounds; so that all that Tract, of the breadth before mentioned, from Lake Ontario to Lake Erie, shall become vested in the Crown, in the manner as before mentioned excepting the Islands between the great Falls and the Rapids, which the Chenussios bestow 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.

Id.; *see also* Map App. H., Pet. App. 262. In a report submitted to the British Lords of Trade along with the Treaty, Johnson offered the islands to the Crown. Letter of William Johnson to Earl of Halifax, August 30, 1764, JA 831. The Crown did not respond and Johnson never asserted possession or title to the islands. 382 F.3d at 252, Pet. App. 13.

In 1768, the British Crown completed negotiations over a boundary line to be drawn between Indian and non-Indian land pursuant to the Royal Proclamation. The Niagara region and the Niagara river islands were on the Indian side of the line.

1802 and 1815 State Purchases

As British colonies, New York and Massachusetts maintained competing claims to lands in western New York. After the Revolutionary War, they settled this dispute in the 1786 Hartford Compact (Dec. 16, 1786), SPA 264. As part of the agreement, Massachusetts was granted the right of preemption to Indian lands in western New York, with the exception of a one mile wide strip along the east side of Niagara. In return, New York's jurisdiction over the lands was recognized. SPA 270-71.

Massachusetts later sold its preemptive rights over much of the area to land speculators. In 1797, one of these speculators purchased most of the Senecas' territory in western New York in a federally-supervised agreement that is commonly known as the Treaty of Big Tree, 7 Stat. 601 (Sept. 18, 1797), SPA 157. In 1802, New York exercised its right of preemption to the one mile strip along the east side of the Niagara by purchasing the strip from the

Senecas. Treaty between the State of New York and the Seneca Nation of Indians, Aug. 30, 1802, 40 N.Y. Assembly Papers 398, SPA 155. Red Jacket, who represented the Senecas in the negotiations, explicitly excluded the islands from the proposed cession:

> We propose to sell you the whole tract, with the reservation however of all the islands; the line to run to the edge of the water but the use of the river to be free to you. We wish to reserve also the privilege of using the beach to encamp on, and . . . the uninterrupted use of the river for the purpose of fishing.

Id. at 156. The purchase was attended by a federal treaty commissioner appointed for the purpose, and was ratified by the Senate. 1 J.Exec. Sen. 427-38 (1828).

Subsequently, the New York Legislature authorized Governor Tompkins "to make such contract as [he] shall judge proper, with the Seneca Indians or their agents, for the purchase of the Islands within this state situate in Niagara River, between Lake Erie and the falls in said river, within this State, on such terms as he shall judge most advantageous to the state." 1811 Laws of N.Y. Chap. XXXII, JA 1181. Those negotiations were concluded in 1815 without any federal presence or approval. Treaty between the Seneca Nation of Indians and the State of New York, 51 N.Y. Assembly Papers 211, Pet. App. 273. The validity of that purchase is at issue in this case.

II. Procedural History

The Seneca Nation of Indians of New York filed this suit in 1993 asserting a claim to islands in the Niagara River within the jurisdiction of the United States. The Tonawanda Band of Seneca Indians intervened in the suit as a plaintiff. The Nation and the Band (collectively, "Senecas") are successors in interest to the historical

Seneca Nation.[2] The Senecas allege that the 1794 Treaty of Canandaigua confirmed their ownership of the Niagara river islands, and the State's purported purchase of the islands in 1815 – a transaction never ratified by the United States – was void for violation of the Trade and Intercourse Act.

The Senecas moved for certification of a defendant class, which was granted in May 1994. Docket 36, A-0008. In August 1996, the State defendants moved to dismiss the Senecas' claims against them based on the Eleventh Amendment. In September 1996, the Magistrate Judge stayed proceedings pending consideration and decision in *Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261 (1997). In light of *Coeur d'Alene's* ruling that the Eleventh Amendment did not permit the Coeur d'Alene Tribe's suit against Idaho State officials, the Senecas sought intervention by the United States.

The United States intervened as a plaintiff in 1998. On November 3, 1998, the district court denied the defendants' motion to dismiss, rejecting their Eleventh Amendment defense against the Senecas' claims. Docket 171, SPA 101. The State filed an interlocutory appeal and the Second Circuit affirmed the district court's order denying the State's Eleventh Amendment defense. *Seneca Nation, et al. v. New York, et al.*, 178 F.3d 95 (2nd Cir. 1999), *cert. denied*, 528 U.S. 1073 (2000), Pet. App. 54-55.

The District Court Decision

On cross-motions for summary judgment, the district court held that the Niagara Islands were not Seneca lands at the time of the 1815 Transaction, and therefore, the Trade and Intercourse Act did not apply and no Congressional ratification was required. *Seneca Nation, et al. v. State of New York, et al.*, 206 F. Supp. 2d 448 (W.D.N.Y. 2002), Pet. App. 57-269.

[2] The Seneca Nation and the Tonawanda Band split in 1848. Both are federally recognized Indian tribes. *See* 70 Fed. Reg. 71194 (2005).

The district court adopted verbatim large portions of the United States' proposed finding of facts in earlier litigation before the Indian Claims Commission ("ICC"), as well as an expert report submitted in that action. 206 F. Supp. 2d at 456, Pet. App. 68. Many of these proposed facts were not adopted by the ICC and the United States did not prevail before the ICC with respect to the Niagara Islands.

Second Circuit Decision

On appeal, the Second Circuit affirmed the judgment of the district court. *Seneca Nation of Indians, et al. v. New York, et al.*, 382 F.3d 245 (2d Cir. 2004). Pet. App. 1-53. The court held that the 1764 treaties extinguished Seneca title to the Niagara islands, that title passed to New York after the Revolutionary War, and that the 1794 Canandaigua Treaty did not return the islands to the Senecas because the western boundary call in the Treaty, "along the river Niagara," was ambiguous. The 1815 purchase of the Niagara islands by New York was therefore held not to violate the Nonintercourse Act. 382 F.3d at 272, Pet. App. 52-53.

As to the 1764 treaties, the court held that the separate provision in the August 1764 treaty purporting to convey the islands to Sir William Johnson extinguished Seneca rights to the islands regardless of the effect of the treaty as a whole, 382 F.3d at 259-63, Pet. App. 27-34, and that this conveyance did not violate the provisions of the 1763 Proclamation prohibiting individuals from acquiring Indian lands because "Johnson effectively accepted the land on behalf of the Crown and [] could not and, in fact, did not accept the land on his own behalf," 382 F.3d at 262-63, Pet. App. 34.

The Court further held that New York's title was not divested by the 1784 Ft. Stanwix Treaty, which was intended to bring peace with the Senecas at the end of the

Revolutionary War, and by the terms of which the United States took title to certain Seneca territory, including the Niagara corridor and the islands. 382 F.3d at 265-68, Pet. App. 39-46.

Finally, as to the 1794 Treaty of Canandaigua, the Court held that the islands were not included within the western boundary call "along the river Niagara." The Court concluded that while the boundary call should be construed under the early common law, there was confusion about the law of navigability at the time and no clear rule on riverbed ownership. 382 F.3d 269-270, Pet. App. 47-50. It therefore held that the boundary call was ambiguous, and that the Canandaigua treaty therefore could not be interpreted to dispossess the State of title "unless the purpose to do so [be] shown in the treaty with such certainty as to put it beyond reasonable question." 382 F.3d at 271, *quoting United States v. Minnesota*, 270 U.S. at 209, Pet. App. 51. The court held that *Minnesota* barred application of the canons of construction that ambiguous provisions must be construed in the Indians' favor. 382 F.3d at 270-71, Pet. App. 50-52.

The court denied the Seneca petition for rehearing and rehearing en banc on September 2, 2005. Pet. App. 270-272. It denied the United States' petition for rehearing and rehearing en banc on July 8, 2005. Justice Ginsburg granted the Seneca's request for an extension of time to file a petition for certiorari until January 17, 2006.*

* The Petitioners request the Court to defer ruling on this Petition until after it acts on the Petition for Certiorari expected to be filed in *Cayuga Indian Nation v. Pataki*, 413 F.3d 266 (2d Cir. 2005) on or before February 6, 2006. If the *Cayuga* petition is granted, Petitioners request the Court to defer ruling on this Petition until after it decides the *Cayuga* case. *Cayuga* raises fundamental issues relating to the available remedies in land claim cases that may impact this case.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals Decision Conflicts with Prior Decisions of this Court Governing the Rules of Construction of Indian Treaties, and is Inconsistent with *United States v. Minnesota*, Which it Invokes to Avoid Such Rules of Construction

In the decision below, the Court of Appeals avoided application of the fundamental canons of construction of Indian treaties to the defining boundary call governing the Senecas' claims to the Niagara islands under the 1794 Canandaigua Treaty. In reliance on this Court's decision in *United States v. Minnesota*, 270 U.S. 181 (1926) (*Minnesota*), the court fashioned a new rule prohibiting application of the canons of liberal construction of Indian treaties where state lands are involved.[3] This Court has never articulated such a per se rule barring application of the canons of construction, and such a rule is inconsistent with the holding in *Minnesota*, which was based on Congress' presumed knowledge of prior federal grants and not the involvement of state lands.

Although the court concluded that the boundary call "along the river Niagara" was ambiguous,[4] it declined to

[3] The Senecas dispute that the Niagara islands were state lands at the time of the 1794 Canandaigua Treaty. *See* Part II below.

[4] The Second Circuit's finding of ambiguity was premised on its incorrect conclusion that there is "no clear common law rule as to riverbed ownership," 382 F.3d at 270, Pet. App. 49-50. The court neither cited nor addressed this Court's decisions, which have consistently articulated and applied the common law of navigability and riverbed ownership. *See, e.g., Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 285 (1997):

> English law made a distinction between waterways subject to the ebb and flow of the tide and large enough to accommodate boats (royal rivers) and nontidal waters (public highways). With respect to the royal rivers, the King was presumed to hold title to the riverbed and soil while the

(Continued on following page)

apply the canons of construction so as to construe the provision in the Senecas' favor, invoking *Minnesota* as prohibiting construction of the treaty to divest the state of title unless the intention to do so is certain "beyond a reasonable question." 382 F.3d at 270-71, Pet. App. 51. *Minnesota* does not cite or address the canons of construction of Indian treaties, however, and no other court has

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> public retained the right of passage and the right to fish. With public highways, as the name suggests, the public retained the right of passage, but title was typically held by a private party. See J. Angell, a Treatise on the Common Law in Relation to Water-Courses 14-18 (1824). The riparian proprietor was presumed to hold title to the stream to the center thread of the waters (*usque ad filum aquae*), . . .

See also Jones v. Soulard, 65 U.S. 41, 65 (1860); *Banks v. Ogden*, 69 U.S. 57, 68 (1864); *Shively v. Bowlby*, 152 U.S. 1, 57 (1894).

The early common law distinction between tidal (navigable) and freshwater (non-navigable) rivers was not carried forward in later American law, which looked to navigability in fact. *See, e.g., United States v. Holt State Bank*, 170 U.S. 49, 55-59 (1926). But the early common law has nevertheless been consistently articulated and applied by the Court to resolve historical ownership issues. *See Phillips Petroleum Company v. Mississippi*, 484 U.S. 469, 478 (1988), applying early common law of "Crown ownership to the soil under tidal waters" to hold that the soil under tidal waters belonged to the state even though the tidal waters were not navigable in fact, stating, "we will not now enter the debate on what the English law was with respect to land under such waters, for it is perfectly clear how this Court understood the common law of royal ownership," and stating further that "[w]e are unwilling, after its lengthy history at common law, in this Court, and in many state courts, to abandon the ebb-and-flow rule now. . . ." *Id.* at 481.

applied *Minnesota* to bar liberal construction of Indian treaties.[5]

The rule fashioned by the court below is starkly inconsistent with this Court's long-held rule that ambiguous provisions in Indian treaties must be construed in favor of the Indians:

> When we are faced with [] two possible constructions, our choice between them must be dictated by a principle deeply rooted in this Court's Indian jurisprudence: "statutes are to be construed liberally in favor of the Indians, with ambiguous provision interpreted to their benefit."

County of Yakima v. Yakima Indian Nation, 502 U.S. 251, 268 (1992), *quoting Montana v. Blackfeet Tribe*, 471 U.S. 759, 766 (1985). These canons of construction have governed Indian law questions "since early in the 19th century." *Mountain States Telephone & Telegraph Co. v. Pueblo of Santa Ana*, 472 U.S. 237, 276 (1985) (Brennan, J. dissenting). Certiorari should be granted to remedy the restriction placed on the canons of construction as a result of the rule fashioned by the Second Circuit in its misplaced reliance on *Minnesota*.

A. The Decision Conflicts with the Canons of Indian Treaty Construction

The Court has consistently acknowledged in Indian treaty and statutory cases that "the standard principles of [] interpretation do not have their usual force in cases involving Indian law." *Montana v. Blackfeet Tribe*, 471 U.S.

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[5] The Second Circuit cited its prior decision in *Oneida Indian Nation v. State of New York*, 860 F.2d 1145, 1163 (2d Cir. 1988), *cert. denied*, 493 U.S. 871 (1989), for its reliance on *Minnesota*. *See* 382 F.3d at 259, Pet. App. 27. In *Oneida*, however, the court stated the rule in *Minnesota* but did not apply it. Indeed, the court applied the canons of liberal construction to Art. II of the Fort Stanwix Treaty in analyzing whether the treaty prohibited state purchases of Oneida land, 860 F.2d at 1162, but found the provision unambiguous. 860 F.2d 1166.

at 766. Instead, Indian treaties are construed liberally in favor of the Indians. *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 196 (1999); *Choctaw Nation v. United States*, 318 U.S. 423, 431-32 (1943); *Choate v. Trapp*, 224 U.S. 665, 675 (1912). They are construed as the Indians would have understood them, and all ambiguities in the treaties are resolved in the Indians' favor. *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (*Oneida II*) ("treaties should be construed liberally in favor of the Indians [citation omitted], with ambiguous provisions interpreted to their benefit"); *McClanahan v. Arizona Tax Comm'n*, 411 U.S. 164, 174 (1973) ("any doubtful expression in [treaties] should be resolved in the Indians' favor"); *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631 (1970) ("any doubtful expressions in [treaties] should be resolved in the Indians' favor"); *Winters v. United States*, 207 U.S. 564, 576-77 (1908) ("[b]y a rule of interpretation of agreements and treaties with the Indians, ambiguities occurring will be resolved from the standpoint of the Indians").

The canons of construction "are rooted deeply in the unique trust relationship between the United States and the Indians," *Oneida II* at 247. The canons are especially important where Indian property interests are involved, and Indian treaties are accordingly construed broadly in favor of protecting those tribal property interests. *Minnesota v. Mille Lacs Band of Chippewa Indians, supra* (hunting, fishing and gathering rights); *Oneida II, supra* (land claim); *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 407 (1968) (hunting and fishing rights); *Winters v. United States, supra* (water rights); *United States v. Winans*, 198 U.S. 371, 380-381 (1905) (fishing rights).

These canons continue to be vital rules of construction. Most recently, in *Minnesota v. Mille Lacs Band of Chippewa Indians, supra*, the Court applied the canons to conclude that Indian hunting and fishing rights reserved in an 1837 treaty were not extinguished by a later 1855 treaty, even though the later treaty relinquished "all right, title, and interest, of whatsoever nature the same may be,

which they may now have in, and to any other lands in the Territory of Minnesota or elsewhere." The Court looked to "the history of the treaty, the negotiations, and the practical construction adopted by the parties," to determine the meaning of the treaty. It concluded:

> at the very least, the historical record refutes the States' assertion that the 1855 Treaty 'unambiguously' abrogated the 1837 hunting, fishing, and gathering privileges. Given this plausible ambiguity, we cannot agree with the State that the 1855 Treaty abrogated Chippewa usufructuary rights.

526 U.S. at 200. In so holding, the Court cited and relied on the rule of liberal construction of Indian treaties and the canon that "any ambiguities are to be resolved in their favor." *Id.*

B. The Decision Conflicts with *United States v. Minnesota*

In conflict with the long established canons of construction of Indian treaties, the Court of Appeals fashioned a per se rule from *Minnesota* barring favorable construction where state lands are involved. 382 F.3d at 270-271, Pet. App. 50-52. Such a per se rule is in conflict with the Court's holding in *Minnesota*. At issue in *Minnesota* were Chippewa Treaties of 1863, 1864 and 1867 by which the United States "set apart" over a million acres of land "for the future home of the Chippewas of the Mississippi," and out of which reservations were to be established. 270 U.S. 181, 197-200. Included within the lands set apart were approximately 152,000 acres that had been granted to Minnesota under the 1850 Swamp Lands Act, 9 Stat. 519, as specifically extended by Congress to Minnesota in 1860, 12 Stat. 3. *Id.* The *Minnesota* Court expressed uncertainly about the scope of the treaty authority to include such state lands within the lands set apart for the Chippewas, and held that the state lands were "impliedly excepted" from the treaty lands because nothing in the treaties indicated a purpose to include them.

> But if the treaty-making power be as far reaching as contended – which we are not now prepared to hold – we are of the 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. And, of course, the rule before stated, that where lands have been appropriated for a lawful purpose they are to be regarded as impliedly excepted from subsequent disposals which do not specially include them, applies to treaty disposals as well as to statutory disposals.

270 U.S. at 209.

By its terms, this holding is limited to the "rights of property – such as the state possessed in respect of these lands," i.e., those rights of property based on express prior federal grants. The limited nature of the holding is confirmed by the Court's explanation of the "familiar" rule that public lands already appropriated for a lawful purpose are excepted from subsequent disposals:

> The restriction was not expressed, but implied according to a familiar rule. That rule is that lands which have been appropriated or reserved for a lawful purpose are not public, and are to be regarded as impliedly excepted from subsequent laws, grants, and disposals which do not specially disclose a purpose to include them.

Id. at 206. Each of the cases cited for the rule involve a prior appropriation of public lands by express federal action. *Id. See Wilcox v. Jackson*, 38 U.S. 498 (1839) (lands previously set aside as a military reservation by Secretary of War); *Leavenworth, Lawrence & Galveston Railroad Company v. United States*, 92 U.S. 733 (1875) (lands previously reserved by treaty for an Indian tribe); *Missouri, K & T Railroad Company v. Roberts*, 152 U.S. 114 (1894) (lands previously appropriated for an Indian tribe); and *Scott v. Carew*, 196 U.S. 100 (1905) (lands acquired for military purposes by Secretary of War).

The rights of property Minnesota possessed in the swamp lands were rights based on express and well known grants by the federal government under the Swamp Lands Act, which had been extended to Minnesota only a few years prior to the relevant treaty. Congress was presumed to know of the prior federal swamp land grants in setting aside land for the Chippewas. Thus the Court held the state swamp lands to be impliedly excepted from the Chippewa treaty. 270 U.S. at 209.

In contrast, New York's assertion of title to the Niagara islands in this case is based not on a prior federal grant, but on an obscure 1764 treaty entered into by a different sovereign. New York claims title to the islands as the successor to title from Great Britain, but there is no indication that it claimed title to the islands at the time of the Canandiagua Treaty or at any time prior. Under these circumstances, there is simply no basis to presume congressional knowledge of the 1764 Treaty or New York's claimed title when the United States confirmed Seneca title in the 1794 Canandaigua Treaty.[6]

The purpose of the Canandaigua Treaty was to restore to the Senecas lands that had been ceded in the 1784 Ft. Stanwix Treaty. The Niagara region, including the islands, was clearly within the boundary of the lands yielded to the United States at Ft. Stanwix. *See* Map App. J, Pet. App. 264. Therefore, if any congressional presumption is to be applied, it is that the islands, which are encompassed within the description of the lands ceded at Ft. Stanwix, were included in the lands restored to the Seneca in 1794.

Finally, *Minnesota* is limited by the conditional nature of the language in the Chippewa treaties. This language was central to the Court's holding that the grant did not

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[6] There is no evidence that Congress or the federal treaty negotiator had any actual or constructive knowledge of the August 1764 Treaty at the time of Canandaigua. The April 1764 Treaty, which did not address the islands, was apparently known at the time of Canandaigua Treaty, *see* art. III, Pet. App. 275-276.

indicate a purpose to disturb or extinguish any existing rights under prior grants:

> . . . we do not find anything in [the treaties] which may be said to be certainly indicative of a purpose to divest the state of her right to these lands. The areas reserved by the treaties were described in general terms – as by indicating the exterior boundaries or designating the area as a stated number of townships around a particular lake. The areas were very large – one comprising more than a million acres. 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 or to extinguish existing rights under them. True, it was said that the reservations were established as "future homes" for the Indians; but this meant that the Indians were to live within the reservations, and did not have reference to any particular lands within their limits. The areas were vastly in excess of what would be needed for individual homes and farms, and included many lands wholly unfit for that purpose. The areas were dotted with lakes – some navigable – and with swamps – some almost impassable. In short, it is apparent that the treaties dealt with extensive areas in a general way and not with particular lands in a specific way. So we think they must be read as impliedly excepting swamp lands therefore granted to the state and leaving her right to them undisturbed.

Id. at 209-210. The Court's holding is thus based on the particular conditional language of the Chippewa treaty. Lands were set apart for future homes for the Chippewa Indians, but without reference to any particular lands within the designated boundaries, and without any confirmation of Chippewa title to particular lands. Under these circumstances, the Court construed the treaties as "impliedly excepting" the state swamp lands that had been previously granted to Minnesota.

In this critical respect, the Canandaigua Treaty is vastly different. In Canandaigua, the United States "acknowledge[d] all the land within the aforementioned boundaries to be the property of the Seneka Nation," which "shall remain theirs, until they choose to sell the same. . . ." Art. II, Pet. App. 275. This language has been construed as confirmation of Seneca title. *See Oneida Indian Nation v. County of Oneida*, 414 U.S. 661, 671-672 (1994), *citing Fellows v. Blacksmith*, 60 U.S. 366 (1856); *The New York Indians*, 72 U.S. 761 (1866); *United States v. Forness*, 125 F.2d 928 (2d Cir.), *cert. denied, City of Salamanca v. United States*, 316 U.S. 694 (1942). Against such confirmed title to all lands within the boundaries, there can be no "implied exception" of state lands, particularly if Congress had no presumed knowledge of any state ownership or claim to ownership of such lands.

Minnesota therefore provides no basis to bar the application of traditional canons of construction to the ambiguous boundary call "along the river Niagara." The Court should grant certiorari to clarify the relationship between *Minnesota* and the long established canons of construction governing Indian treaties.

II. The Court of Appeals Decision Creates Confusion and Uncertainty About the Proper Rule for Determining Whether the Actions of Prior Sovereigns Extinguished Indian Title

In the proceedings below, the Second Circuit decided an important question of federal law that has not been, but should be, settled by the Supreme Court. The Second Circuit's ruling noted the existence of this Court's rule that a sovereign's intention to extinguish Indian title must be "plain and unambiguous." 382 F.3d at 260, Pet. App. 29 (citing *Mountain States Tel. & Tel. Co. v. Pueblo of Santa Ana*, 472 U.S. 237 (1985)). Nonetheless, the Second Circuit employed a lesser standard in its consideration of pre-Constitutional treaties.

The question of whether the actions of a sovereign extinguished Indian title before the United States was

created is perhaps the sole remaining unsettled issue in the otherwise uniform body of law that governs extinguishment of Indian title to land. It is settled that a sovereign action expressing a plain and unambiguous intention is necessary to extinguish Indian title for the period following the formation of the United States. *United States v. Santa Fe Pac. R. Co.*, 314 U.S. 339 (1941), *see* discussion *infra*. Although this Court has repeatedly addressed the issue of what actions of the United States lawfully meet this standard, it has not directly considered the application of the standard to pre-Constitution governmental actions and has therefore not established a consistent and uniform national rule on the matter.

The treatment of this issue by federal and state courts reveals the doctrinal confusion and uncertainty which confront Indian tribes, states, and private landowners in addressing disputes over land that depend in some way on the meaning to be given treaties between those Indian tribes and Great Britain and other European sovereigns. *See, e.g., Delaware Nation v. Commonwealth of Pennsylvania,* 2004 WL 2755545 *9 (E.D. Pa. 2004); *State v. Elliott*, 159 Vt. 102, 616 A.2d 210 (Vt. Sup. Ct. 1992), *cert. denied*, 507 U.S. 911 (1993) (finding extinguishment of Abenaki title through early British Crown grants based on the "weight of [Vermont's] history"); *United States ex rel. Chunie v. Ringrose,* 788 F.2d 638, 642 (9th Cir. 1986) (applying rule that extinguishment "cannot be lightly implied" and finding that grants of Indian land made during the sovereignty of Mexico over parts of what is now California did not extinguish the tribes' aboriginal title).

Adding to this doctrinal confusion, the Second Circuit decision, unless corrected by this Court, will affect the claims of numerous Indian tribes and of the states and private parties with whom their rights must be reconciled. Although the court of appeals paid lip service to the plain and unambiguous rule, its interpretation of the 1764 treaties with the British Crown reveals a far less stringent test. The Second Circuit's approach would find extinguishment even where the words of the treaty in question are plainly contrary to that result. This casts doubt not

only on the 1764 treaties but also on the time-honored post-Constitutional treaty that is the basis for the Senecas' claims in this case, the 1794 Treaty of Canandaigua.

A. Logic, History and Precedent Counsel for Extension of the Plain and Unambiguous Extinguishment Rule to the Pre-Constitutional Context

This Court has long held that extinguishment of Indian title can be accomplished only through the plain and unambiguous expression of sovereign intent to do so. *Oneida II*, 470 U.S. at 247-248 (rejecting argument that later federal acts implicitly ratified earlier Indian land sales); *Santa Fe Pac. R.*, 314 U.S. at 354 (finding that act creating reservation for Indians did not extinguish their rights to aboriginal lands outside the reservation).[7] The requirement that extinguishment of Indian land title be plain and unambiguous is based upon the "strong policy of the United States 'from the beginning to respect the Indian right of occupancy,'" *Oneida II* at 248 (internal citations omitted).

The rationale underlying the plain and unambiguous extinguishment rule in the post-Constitutional context applies equally to the pre-Constitutional period and counsels for application of the same rule there. Like the United States, the British Crown and other European sovereigns have long recognized and respected the rights of Indian tribes to use and occupy their territories. *See Worcester v. State of Georgia*, 31 U.S. 515, 543-545 (1832) (describing European view that discovery of North American territories gave discovering European authority vis a

[7] This rule is akin to that governing abrogation of treaty-protected rights of Indian tribes, for which the clearly and plainly expressed intention of Congress is also required. *See United States v. Dion*, 476 U.S. 734, 738-740 (1986) (because "Indian treaty rights are too fundamental to be easily cast aside," abrogation of such rights must be "clear and plain").

vis other European sovereigns but did extinguish Indian title). The plain and unambiguous extinguishment rule ensures that these important rights are not lightly or carelessly extinguished.

In addition, extension of the plain and unambiguous rule to pre-Constitutional treaties and agreements provides consistency in interpretation of such agreements throughout this nation's early history. Such consistency is particularly important in this case, where the Court of Appeals' application of a lesser standard to the 1764 treaties subverts the post-Constitutional treaty that lies at the heart of the Senecas' claims. Because the court's construction of the pre-Constitutional 1764 treaties determined the rules of construction applied to, and therefore the Seneca's rights under, the later post-Constitutional 1794 Canandaigua treaty, it is especially important that the 1764 treaties be governed by a standard no less protective than that applied to post-Constitutional treaties.

B. The Court of Appeals Applied a Less Stringent Standard to the 1764 Treaties

The Court of Appeals did not expressly articulate a rule for construing pre-Constitutional treaties, though it noted the standard applicable to treaties between tribes and the United States and suggested in a footnote that it would apply a "similar" standard. 382 F.3d at 260, 261 n.17, Pet. App. 30. Nonetheless, the court proceeded to apply a standard that falls far short of that required by this Court for treaties between Indians and the United States, reaching a confusing, inconsistent and erroneous result. Properly conceived and applied, the plain and unambiguous extinguishment rule would preclude a finding of extinguishment in this case because of pervasive ambiguities in the 1764 agreements. The general provisions of the treaties cannot be said to plainly extinguish title in favor of the Crown. Further, the provisions excepting the islands cannot have extinguished title because their very terms violated the 1763 Royal Proclamation and

to construe them as complying with the Proclamation is to flatly contradict those terms.

General Treaty Provisions

In its review of the 1764 treaties, the court of appeals noted that "the District Court concluded that the 1764 Treaties, on their face, 'manifest[] a plain and unambiguous intent on the part of the British Crown to extinguish any title the Senecas may have had to the Northern and Southern Niagara strips and the Niagara islands" and held that "[t]his conclusion is correct." 382 F.3d at 260, Pet. App. 30. Elsewhere, however, the court of appeals "agree[d]" with the Senecas that the terms of negotiation of the treaties "do not conjure the imagery of a fee simple owner asserting absolute authority over his territory," 382 F.3d at 262 n.18, Pet. App. 32, and stated that "the effect of the 1764 Treaties on the lands reserved for the use of the Crown" was "a matter on which we need express no opinion." 382 F.3d at 262, Pet. App. 34. These conflicting conclusions belie the requirements of the plain and unambiguous extinguishment rule and suggest carelessness and confusion.

In fact, like earlier agreements respecting Seneca rights to western New York,[8] the 1764 April and August treaties served not to extinguish Seneca title, but to meet the British Crown's need to confirm its newly established right of preemption to strategically important Seneca territory. All the Crown uses of Seneca territory proposed by William Johnson and incorporated into the final agreements were consistent with Seneca title, *see* Pet.

[8] *See, e.g.*, agreements signed in 1701 and 1726, which have generally been construed to preserve Seneca title and to confirm Britain's right of preemption or dominion over the territory. Donald H. Kent, "Historical Report on the Niagara River & the Niagara River Strip to 1759" (report before the Indian Claims Commission, prepared for the U.S. Dept. of Justice Lands Division) (as published in *Iroquois Indians II*, Garland American Indian Ethnohistory Series, 1974) at 41-42, 102-103, JA 1955, 1986.

App. 280-287; *Wichita Indian Tribe v. United States*, 696 F.2d 1378, 1385 (Fed. Cir. 1983) (holding that use of territory by tribe's allies need not be inconsistent with tribe's aboriginal title). Further, it is well-settled that grants from Indian tribes reserve to the Indians all rights not expressly ceded. *United States v. Winans,* 198 U.S. at 381. The grant of particular rights of use to the Crown means that the Senecas retained the unenumerated rights they held in the lands.

Niagara Island Provisions

The court of appeals also applied a lesser standard to the islands. Although it found that Johnson "received the Islands from the Senecas" and later conveyed them to the Crown, 382 F.3d at 263, Pet. App. 36, the court also held that "viewing the transaction practically . . . Johnson, as the Crown's agent, accepted the Islands from the Senecas on behalf of the Crown." 382 F.3d at 263, Pet. App. 36. To read away the express terms of the agreement in favor of practical considerations contravenes the plain and unambiguous extinguishment rule. If, as the plain language of the agreement states, title to the islands was intended to pass to Johnson, the transaction violated the 1763 Proclamation and could have been cured, if at all, by approval by the Crown. There was no such approval, as the appeals court acknowledged. 382 F.3d at 252, Pet. App. 13. If, on the other hand, title is read to have passed to the Crown, the plain language of the agreement is violated. Neither result remotely squares with the requirement of plain and unambiguous intent to extinguish.

III. The Court of Appeals Has Decided Two Important and Recurring Issues of Federal Indian Law That Will Have Significant Consequences for Litigants in Many Other Cases

Both of the issues addressed above implicate important and recurring issues in land disputes involving Indian tribes, states, and private landowners, and – because of the nature of Indian land tenure – necessarily

implicate the relationship between Indian tribes and the United States. Certiorari is particularly warranted under such circumstances. *See, e.g., United States Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 7 (2001) (granting *certiorari* "in view of the [lower court] decision's significant impact on relations between Indian tribes and the government"); *Oneida II*, 470 U.S. at 230 (granting *certiorari* because of "the importance of the Court of Appeals' decision not only for the Oneidas, but potentially for many Eastern Indian land claims"); *Affiliated Ute Citizens of Utah v. United States*, 406 U.S. 128, 141 (1971) (granting *certiorari* because of "the importance of the issues for [certain] Indians").

In recent years, Indian tribes have filed a number of lawsuits challenging non-Indian title to lands in the northeastern United States. In many instances, these suits implicate land transactions and treaties entered into by prior sovereigns. *See, e.g., Golden Hill Paugussett Tribe of Indians v. Weicker*, 39 F.3d 51 (2d Cir. 1994) (staying claim to land set aside in 1765 pending resolution of federal recognition question); *Greene v. Rhode Island*, 398 F.3d 45 (1st Cir. 2005); *Western Mohegan Tribe and Nation v. Orange County*, 395 F.3d 18 (2d Cir. 2004) (dismissing on Eleventh Amendment grounds tribal claim to lands in New York protected by the 1621 treaty with the British and the federal Trade and Intercourse Act).[9] These cases and others like them require the fair and consistent application of the canons of construction of Indian treaties, including the rule that ambiguous provisions must be construed in favor of the Indians and the plain and unambiguous extinguishment rule. The large number of treaties between Great Britain (and other foreign sovereigns) and

[9] The Unalachtigo Band of the Nanticoke-Lenni Lenape Nation and the Shinnecock Nation have also recently filed such claims. *See* Troy Graham, "Tribe Seeks Land in New Jersey Sold in 1801," *Philadelphia Inquirer*, Jan. 8, 2006; Andrew Harris, "Shinnecock's Suit to Retake Vast Stretch of Suffolk County Faces Difficult Legal Battle," 231 *New York Law Journal* 3, June 21, 2005.

Indian nations strongly suggests that these issues will recur. By one count, there are at least 175 such British treaties, many of which concern land cessions and purported extinguishments of Indian title. David Wilkins, *Quit-Claiming the Doctrine of Discovery: A Treaty-Based Appraisal*, 23 Okla. City U. L. Rev. 277, 291 (Spring-Summer 1998).

The interpretation of pre-Constitutional treaties, agreements, and other documents respecting Indian land rights is also a critically important issue of federal law with prospective impacts on countless litigants. The Court of Appeals' analysis in this case reflects inconsistency and confusion and distorts this Court's guiding principles concerning extinguishment of Indian land title. This Court should therefore settle the question of whether such instruments should be subject to the rule requiring plain and unambiguous expression of sovereign intent to extinguish.

CONCLUSION

For these reasons, certiorari should be granted. The "strong policy of the United States 'from the beginning to respect the Indian right of occupancy'" will otherwise not be honored. *Oneida II* at 248.

Respectfully submitted,

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382 F.3d 245

United States Court of Appeals,
Second Circuit.
SENECA NATION OF INDIANS,
Plaintiff-Appellant,
Tonawanda Band of Seneca Indians,
United States of America,
Plaintiffs-Intervenors-Appellants,
v.
The State of NEW YORK, New York Thruway
Authority, John R. Platt, Executive Director,
New York Thruway Authority,
Defendants-Appellees,
Moore Business Forms Corp., individually
and as a representative of a class of
landowners similarly situated,
Defendant-Appellee-Cross-Appellant,
George E. Pataki, Governor, State of New York,
Bernadette Castro, Commissioner, Parks, Recreation
and Historic Preservation, Ronald W. Coan, Director,
Erie County Industrial Development Agency,
John Cahill, Commissioner, New York Department
of Environmental Conservation, Joseph Boardman,
Commissioner, New York Department of Transportation,
Erie County, Individually and as a representative of
class of landowners and similarly situated,
Moore Business Forms, Individually and as a
representative of a class of landowners similarly situated,
Indicom, Inc., Individually and as a representative of
a class of landowners similarly situated,
Rado-Mart Holdings, U.S., Inc., Individually and
as a representative of a class of landowners
similarly situated, Ilona H. Lang, Individually and
as a representative of a class of landowners similarly
situated, Robert W. Weaver, Individually and as a
representative of a class of landowners similarly