No. 05-905

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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, because the 1794 Treaty of Canandaigua recognized that the historic Seneca Indian Nation owned the Niagara River Islands, the State of New York's purported purchase of the Niagara Islands in 1815 without ratification by Congress violated the Indian Trade and Intercourse Act, 25 U.S.C. 177.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-53) is reported at 382 F.3d 245. The order of the district court (Pet. App. 54-269) is reported at 206 F. Supp. 2d 448.

JURISDICTION

The judgment of the court appeals was entered on September 9, 2004. A petition for rehearing was denied on September 2, 2005 (Pet. App. 270). On November 21, 2005, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including January 17, 2006, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner Seneca Nation of Indians brought this action to obtain a judgment that the State of New York's purchase of Grand Island and other islands in the Niagara River (the Niagara Islands) from the Seneca Indian Nation in 1815 was invalid because the State did not comply with the Indian Trade and Intercourse Act, 25 U.S.C. 177. Pet. App. 63. The Tonawanda Band of Seneca Indians intervened as a plaintiff, and the United States intervened in support of the Tribes. *Ibid.* The district court granted the State's motion for summary judgment and dismissed the suit. *Id.* at 63-64. The court of appeals affirmed. *Id.* at 52-53.

1. The Framers of the Constitution vested Congress with plenary authority over Indian affairs. See *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 234 (1985) (*Oneida II*). Congress promptly acted to protect Indian interests through enactment of the Trade and Intercourse Act of 1790, ch. 33, 1 Stat. 137, and it reaffirmed its objective through the Trade and Intercourse Acts of 1793, 1796, 1799, 1802, and 1834. See *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661, 668 & n.4 (1974) (*Oneida I*). The Trade and Intercourse Act, as amended, remains in effect today. It provides that, unless ratified by Congress, "[n]o purchase * * * of lands * * * from any Indian nation * * * shall be of any validity in law or equity." 25 U.S.C. 177.

2. The Niagara River is a freshwater, nontidal river that connects Lake Erie and Lake Ontario, forming a portion of the boundary between the United States and Canada. Pet. App. 6; see *id.* at 257 (map of Niagara River region). The Niagara River contains approximately 40 islands, including Grand Island, which encom-

passes almost 19,000 acres. *Id.* at 6. The main channel of the Niagara River, which historically has been used in navigation, flows to the west of Grand Island. C.A. App. 455 (J. Stip. para. 57); Pet. App. 256-257 (maps). The Treaty of Paris, which concluded the American Revolution, placed the international boundary in the middle of this main channel. See C.A. App. 2532 (1804 map). Grand Island and the majority of the other Niagara Islands lie to the east of the international boundary, within the United States.[1]

3. In 1811, the State of New York initiated negotiations to acquire the Niagara Islands from the Seneca Nation. See Act of Mar. 8, 1811, N.Y. Laws ch. 37, at 120; see C.A. App. 1181 (authorizing the Governor "to make such contract with the Seneca Indians, or their agents, for the purchase of the islands in the Niagara river, between Lake Erie and the falls"). Those negotiations concluded in 1815 with the State's purchase of the Niagara Islands from the Seneca Nation (1815 Transaction) for $1000 and "an annuity of $500.00 to be paid * * * each year forever hereafter." *Report of Special Comm. to Investigate the Indian Problem of the State of New York*, Assembly No. 51, App. D at 212 (Troy Press Co. 1889); see Pet. App. 273.

The State neither sought nor obtained the United States' ratification of the 1815 Transaction pursuant to the Trade and Intercourse Act. See Pet. App. 25; C.A. App. 472 (J. Stip. para. 109). Whether the 1815 Trans-

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[1] Article II of the Treaty of Paris describes the international boundary as a line "through the Middle of said lake [Ontario] until it strikes the communication by water between that lake & lake Erie [Niagara River]; thence along the middle of said communication into Lake Erie." Treaty of Paris, Sept. 3, 1783, U.S.-Great Britain, 8 Stat. 81; see C.A. Special Appendix 218 (C.A. Spec. App.).

action violated the Trade and Intercourse Act depends on whether the Seneca reservation, as established by the Treaty of Canandaigua, Nov. 11, 1794, 7 Stat. 44 (Pet. App. 274-279), included the Niagara Islands. That issue in turn depends on whether the Treaty's boundary call describing the western limit of the Seneca reservation ran to the middle, or instead to the eastern bank, of the Niagara River.

a. At the time of the Treaty of Canandaigua, the Seneca Nation—the westernmost member of the alliance of Iroquois-speaking tribes known as the Six Nations—occupied much of present-day western New York and northwestern Pennsylvania, including lands along the Niagara River. See *Atlas of Great Lakes Indian History* 58-59 (Helen Hornbeck Tanner ed., 1987) (C.A. App. 2549). Article III of the Treaty of Canandaigua delineated the boundaries of the Seneca reservation and "acknowledge[d] all the land within the aforementioned boundaries, to be the property of the Seneka nation." Pet. App. 276. That article of the Treaty specified that the western boundary of the Seneca reservation ran "along the river Niagara to lake Erie; then * * * to the * * * state of Pennsylvania." *Ibid.* The western boundary of the Seneca territory had been the subject of considerable controversy since the conclusion of the American Revolution—a controversy that the Treaty of Canandaigua resolved with finality.

i. The Treaty of Paris, which brought peace between the United States and Great Britain following the American Revolution, did not provide for peace between the United States and the Seneca, Cayuga, Onondaga, and Mohawk Nations, which had fought alongside the British. Pet. App. 17. In October 1784, federal treaty commissioners commenced peace negotiations with the

Six Nations. 26 *J. of the Continental Cong.* 133-135 (GPO 1928) (Mar. 12, 1784). Under Article III of the Treaty of Fort Stanwix, Oct. 23, 1784, 7 Stat. 15 (C.A. Spec. App. 171), the Six Nations, to which the Seneca belonged, "yield[ed] to the United States" all claims to lands west of a line four miles to the east of the Niagara River (Niagara Corridor), as well as the lands to the east of Lake Erie (Lake Erie Lands). See Pet. App. 264 (map of land cessions of the Treaty of Fort Stanwix); C.A. App. 2527 (same).

ii. The Treaty of Fort Stanwix did not resolve the disputes between the United States and the Seneca, however, and the Seneca continued to occupy lands to the west of the 1784 Fort Stanwix cession line. See Pet. App. 120-123. That occupation, in conjunction with the British refusal to abandon forts on the east side of the Niagara River, as required by the Treaty of Paris, posed a threat to the United States of renewed hostilities. *Id.* at 123. To avoid further conflict and to confirm the cessions in the Treaty of Fort Stanwix, the United States once again entered into a treaty with the Six Nations in the Treaty of Fort Harmar, Jan. 9, 1789, 7 Stat. 33 (C.A. Spec. App. 167). See Pet. App. 123-124. Article I of the Treaty of Fort Harmar stated that the Six Nations "do release, quit claim, relinquish, and cede, to the United States of America, all lands to the west" of the Fort Stanwix cession line. 7 Stat. 33 (C.A. Spec. App. 167). That Treaty, however, proved no more effective in securing the Fort Stanwix boundary line.[2]

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[2] In *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 121 n.18 (1960), this Court referred to "the unratified Treaty of Fort Harmar of January 9, 1789." The Treaty of Fort Harmar was signed on January 9, 1789, after the Constitution was entered into, but before March 4, 1789, when the Constitution became effective, see *Owings* v. *Speed*, 18

iii. In the 1790s, the United States' relations with the Seneca became of urgent military concern in light of the conflicts that the United States faced with the tribes residing in the Northwest Territories, the strategic location of the Seneca in the Niagara region, and the proximity of the Seneca to British armies. Reginald Horsman, *Expansion and American Indian Policy, 1783-1812*, at 84-90 (1967) (C.A. App. 1686-1689); William N. Fenton, *The Great Law and the Longhouse* 632, 638-640 (1998) (C.A. App. 2237, 2243-2245). In 1794, the United States commissioned Timothy Pickering to negotiate a treaty securing a lasting peace with the Seneca and the other Six Nations. Fenton, *supra*, 622-623, 627, 638 (C.A. App. 2227-2228, 2232, 2233).

To secure peace with the Seneca, Pickering offered to retrocede the Lake Erie Lands to the Seneca. See *A Journal of William Savery* 78-79 (Jonathan Evans ed., 1844) (*Savery*) (C.A. App. 1109). The Seneca demanded the return of the Niagara Corridor, as well. See *Savery* 84-85, 87 (C.A. App. 1112-1113). Pickering eventually agreed to return the Niagara Corridor to the south of Niagara Falls (the Southern Niagara Corridor), as well as the Lake Erie Lands. *Savery* 88-89 (C.A. App. 1113-1114); Letter from Timothy Pickering to Secretary of War Knox (Nov. 12, 1794), in 60 *Timothy Pickering Papers* 207-209 (Frederick S. Allen ed., 1966) (C.A. App. 1065) ("The strip four miles wide along the Strait of Niagara, I strove to secure * * * but it was in vain. They

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U.S. (5 Wheat.) 420, 422 (1820). When the Articles of Confederation were in force, it appears that "treaties with Indian tribes," unlike treaties with foreign nations, "were not submitted to the states for ratification * * * becom[ing] effective when [they were] signed." *Oneida Indian Nation* v. *New York*, 860 F.2d 1145, 1154 (2d Cir. 1988).

were extremely tenacious of this tract * * * [and I] gave it up.").

The Treaty of Canandaigua thus returned to the Seneca all of the lands within present-day New York that the Seneca had given up at Fort Stanwix, except the Niagara Corridor to the north of Niagara Falls (the Northern Niagara Corridor). See Pet. App. 266 (map of western portion of Seneca reservation following the Treaty of Canandaigua); C.A. App. 2527 (map showing lands retroceded to Seneca in 1794).[3]

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[3] Article III of the Treaty of Canandaigua excludes from the Seneca reservation the Northern Niagara Corridor, referred to as the "strip of land * * * which the Seneka nation ceded to the King of Great-Britain, at a treaty held about thirty years ago with Sir William Johnson." 7 Stat. 45; see Pet. App. 275-276. The reference to a cession to Great Britain refers to an April 1764 Agreement (*id.* at 283) between the Seneca and Sir William Johnson, agent for Britain. See Pet. App. 261 (map). Pickering did not reference the subsequent agreement between the Seneca and Johnson that was reached on August 6, 1764 (*id.* at 280), in which the Seneca ceded to Britain a four-mile strip along both sides of the entire length of the Niagara River and sought to convey the Niagara Islands to Johnson personally. See *id.* at 262 (map). The August 1764 document was apparently forgotten until the State sent an agent to Europe in 1839 to find colonial documents. The State later hired Edmund Bailey O'Callaghan to compile, translate, and edit those documents. Joseph F. Meany, *New York: The State of History* (1944) <http://www.nysm.nysed.gov/services/meanydoc.html>. Those publications eventually resulted in a 15-volume collection that was published between 1849 and 1887. The August 1764 Treaty was published in 7 *Documents Relative to the Colonial History of the State of New York* 621 (E.B. O'Callaghan ed., 1856). Although the court of appeals states that Governor Tompkins "further explained that the Islands belonged to New York because they were given by the Iroquois Nations to Sir William Johnson in the August 1764 Cession," Pet. App. 23, Tompkins' letter makes no mention of the August 1764 Agreement, referring instead to the "supposed right of Sir John Johnson [son of William Johnson] * * * to those Islands." Letter from Governor

b. After the Treaty of Canandaigua, the Seneca entered into two Senate-ratified treaties that altered their reservation boundaries and alienated a portion of the lands that the United States had returned to the Seneca through the Treaty of Canandaigua. On September 15, 1797, the Seneca entered into the Treaty of Big Tree (1797 Treaty), 7 Stat. 601 (C.A. Spec. App. 158). The 1797 Treaty conveyed approximately four million acres of land—the majority of the Seneca reservation land acknowledged by the 1794 Treaty of Canandaigua. See Pet. App. 268 (map); C.A. App. 2527 (map). In the 1797 Treaty, the Seneca retained a one-mile-wide strip adjacent to the southern portion of the Niagara River and eleven other reservations, including the Seneca's current Allegany and Cattaragus Reservations. See *Seneca Nation of Indians* v. *United States*, 12 Ind. Cl. Comm. 755, 764-765 (1963) (C.A. App. 1610-1611).

c. In 1802, the State sought to purchase from the Seneca the one-mile wide strip of land along the eastern bank of the Niagara River, 1802 N.Y. Laws 73-75 (C.A. Spec. App. 154-155). During the final negotiations, the Seneca explicitly excluded the islands from the proposed cession:

> We propose to sell you the whole tract, with the reservation however of all the islands [in the Niagara River]; the line to run at 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.

Tompkins to the New York Assembly on Indian Affairs (Feb. 12, 1812), in 2 *Public Papers of Daniel D. Tompkins*, 481 (Hugh Hastings ed., 1902)(Pet. App. 156).

40 N.Y. Assembly Papers 398 (Aug. 19, 1802) (C.A. App. 1168). The agreement, which was concluded the following day, conveyed "all that tract of land one mile wide on the Niagara River, extending from Buffalo to Stedman's Farm, including Black Rock, and bounded Westward by the shore or waters of said river." C.A. Spec. App. 156; see Pet. App. 269 (map). The Senate later ratified the Treaty of 1802. 1 *Journal of the Executive Proceedings of the Senate of the United States of America* 427-428 (1828).

4. The Seneca Nation of Indians, a federally recognized tribe, 70 Fed. Reg. 71,194 (2005), filed this suit in 1993 asserting a claim to the Niagara Islands in the southern Niagara Corridor (roughly to the south of Niagara Falls) that are within the jurisdiction of the United States, alleging that the 1815 Transaction violated the Trade and Intercourse Act. The Tonawanda Band of Seneca Indians—a band that separated from the historical Seneca in 1848, and is now a distinct federally recognized tribe (*id.* at 71,197)—intervened in the suit as a plaintiff. The United States also intervened as a plaintiff. Civ. Docket #137 (C.A. App. 22). On cross-motions for summary judgment, the district court conducted an extensive evaluation of the history of the land transactions at issue and ultimately concluded that the Niagara Islands were not Seneca lands at the time of the 1815 Transaction. Pet. App. 58-246. The court accordingly concluded that the Trade and Intercourse Act did not apply and that ratification of the 1815 Transaction by the United States was not required. *Id.* at 251-252.

5. The court of appeals affirmed the district court's judgment. The court's holding rested upon the following analysis: (1) the Seneca ceded the Islands to the British in August 1764 (Pet. App. 29-36); (2) title to the Islands

passed to the State when it ceded its western claims to the Continental Congress in 1782 (*id.* at 39-42); (3) the boundary call "along the river Niagara" in the Canandaigua Treaty is ambiguous (*id.* at 47-50); and (4) the ambiguous 1794 Canandaigua Treaty should not be interpreted to divest the State of its ownership of the Islands based on the court of appeals' understanding of the presumption in *United States* v. *Minnesota*, 270 U.S. 181, 209 (1926), favoring state retention of title to previously granted lands (Pet. App. 50-52).

ARGUMENT

The United States agrees with petitioners that the court of appeals erred in ruling that the Niagara Islands were not Indian lands in 1815, when the State purchased those lands from the Seneca, and that the court of appeals therefore also erred in concluding that the Trade and Intercourse Act did not apply to that purchase. The United States nevertheless submits that further review of the issues raised here is not warranted.

The determination whether the Niagara Islands were Indian lands at the time of the State's purchase, in 1815, implicates three arcane and complex legal issues: (1) the proper interpretation of treaty boundaries along navigable-in-fact, nontidal waterways, such as the Niagara River, which, under early nineteenth century common law, were presumed to include to the middle of the waterway; (2) the scope of a separate presumption, set out in *United States* v. *Minnesota*, *supra*, favoring state retention of title to previously granted lands; and (3) the scope of the confederal government's Indian affairs authority under the Articles of Confederation.

Neither this Court, nor any other court of appeals, has previously addressed this unique confluence of com-

plex and overlapping historical and legal issues. As a result, the court of appeals' decision in this case does not give rise to a clear and direct conflict with any decision of this Court or another court of appeals. Furthermore, the holding in this case directly affects only the claims of two Tribes to specific land. The United States and the Tribes have had a full opportunity to present their claims, and after exhaustive analysis, both courts below rejected the claims on the merits. The unique amalgam of issues presented here is unlikely to arise again or to affect other potential litigants. The issues of this case, while of great importance to petitioners, and of concern to the United States, which sought to vindicate their claim, do not present issues of broader and recurring significance. For those reasons, review by this Court is not warranted.

1. Petitioners correctly assert (Pet. 15 n.4) that the court of appeals erred in finding that the boundary call "along the river Niagara," as used in the 1794 Treaty of Canandaigua, was ambiguous. The court suggested that there was "no clear common law rule as to riverbed ownership." Pet. App. 50. But the court of appeals failed to reconcile that statement with substantial contrary authority. For example, this Court stated in *Jones* v. *Soulard*, 65 U.S. (24 How.) 41 (1860), that "from the days of Sir Matthew Hale to the present time all grants of land bounded by fresh-water rivers * * * confer the proprietorship on the grantee to the middle thread of the stream * * * [and this is] too well settled, as part of the American and English law of real property, to be open to discussion." *Id.* at 65. Under the English and early American common law presumption, "[p]rima facie every proprietor upon each bank of a [freshwater] river is entitled to the land, covered with water, in front of his

bank, to the middle thread of the stream," *Tyler* v. *Wilkinson*, 24 F. Cas. 472, 474 (D.R.I. 1827) (No. 14,312) (Story, J.), including "all islands between the shore and the center," 1 Henry Philip Farnham, *Law of Waters and Water Rights* 277 (1904).[4]

There is no dispute in this case that if that early presumption applies, the boundary call "along the river Niagara," in the Treaty of Canandaigua, included the Niagara Islands. The interpretation of that boundary call, however, is complicated by this Court's subsequent replacement of the early presumption with a new common law rule. As a result of that change in presumptions, there is no direct and precise conflict with this Court's precedent.

a. In the mid-1800s, this Court expanded admiralty jurisdiction beyond tidal waters to include commerce on waters that are navigable-in-fact. See *The Propeller Genesee Chief* v. *Fitzhugh*, 53 U.S. (12 How.) 443, 456-457 (1851). Building upon the concept of navigability-in-fact, the Court began to adopt a new common law presumption that States are presumed to own the soil of "freshwater river bottoms as far as the rivers are navigable." *Phillips Petroleum Co.* v. *Mississippi*, 484 U.S. 469, 479 (1988); see *Barney* v. *Keokuk*, 94 U.S. 324 (1876). The Court correspondingly suggested the view

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[4] See *Idaho* v. *Coeur d'Alene Tribe*, 521 U.S. 261, 285 (1997) (according to the early common law, "[t]he riparian proprietor was presumed to hold title to the stream to the center thread of the [non-tidal] waters"); *Soulard*, 65 U.S. (24 How.) at 64 (the boundary call "by the Mississippi" in a grant was presumed to carry to the "middle thread of the Mississippi river"). See generally Daniel J. Hulsebosch, *Writs to Rights: "Navigability" and the Transformation of the Common Law in the Nineteenth Century*, 23 Cardozo L. Rev. 1049, 1066-1067, 1076-1079 (2002).

that boundary calls along such waterways extend only to the water's edge. See *id.* at 336-338. In 1926, this Court applied that current presumption to determine that lands under a navigable-in-fact lake passed to the State of Minnesota at statehood. *United States* v. *Holt State Bank*, 270 U.S. 49, 55-59 (1926).

b. Although treaties and grants generally are construed "in light of the common law notions of the day," *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 666 (1979) (quoting *Oliphant* v. *Suquamish Indian Tribe*, 435 U.S. 191, 206 (1978)), this Court has departed from that approach in the case of ownership of the beds of waterways that are navigable-in-fact. For example, in *Massachusetts* v. *New York*, 271 U.S. 65 (1926), this Court interpreted the 1786 Hartford Compact between New York and Massachusetts, which followed the international boundary through Lake Ontario, in light of the subsequently adopted current presumption, holding that the Compact "did not convey to Massachusetts, which took in private ownership, any title in the bed of [Lake Ontario]." *Id.* at 88.

This case presents the similar but distinct issue of whether the early presumption, which prevailed in 1794 at the time of the Treaty of Canandaigua, governs the boundary call "along the river Niagara," or whether the current presumption should be applied retroactively to the *islands* in the river—rather than to the bed—in a navigable-in-fact, nontidal river. This Court's decision in *Scott* v. *Lattig*, 227 U.S. 229 (1913), indicates that the river bed is distinct from the islands within the stream for purposes of determining what lands pass to a State by operation of law under the equal footing doctrine at the time of statehood. The Court concluded in *Scott* that the river bed of a navigable-in-fact river passed to the

State at the time of statehood, but the islands in the river remained in federal possession. *Id.* at 244.

Although *Scott* stands for the proposition that islands generally will not transfer to States along with the beds of navigable-in-fact waterways, neither this Court nor any court of appeals appears to have addressed the ownership of islands in the context of interpreting a boundary call on a navigable-in-fact waterway, rather than in the context of determining a State's equal footing entitlement at statehood. As a result, the court of appeals' decision in this case does not conflict squarely with any relevant decision of this Court and does not give rise to a conflict among the court of appeals.[5]

2. Petitioners are also correct (Pet. 19-23) in urging that the court of appeals misconstrued the distinct presumption, respecting state retention of previously granted lands, that this Court announced in *Minnesota*, 270 U.S. at 209. The court of appeals relied on that presumption to reach the dubious conclusion that a 1764 British colonial agreement with the Seneca—of which neither the Executive Branch nor the Senate was aware, see note 3, *supra*—takes precedence over the then-applicable interpretation of boundary calls in the Treaty of Canandaigua. The court's error, however, is complicated by the presence of overlapping questions regarding the authority of the confederal government over In-

[5] This Court applied nineteenth century law in its 1988 decision in *Phillips Petroleum*, 484 U.S. at 472-477, but that case addressed whether States were presumed to acquire the beds of nonnavigable-in-fact, *tidal* waterways at statehood, rather than whether a boundary call that reached the water of a navigable-in-fact, nontidal, waterway extended to the midcourse of the stream. The current presumption, of course, altered the controlling legal principles only with regard to navigable-in-fact nontidal waterways. See *id.* at 479-480.

dian affairs. As a result, this case does not present an appropriate vehicle for this Court to address the scope of the *Minnesota* presumption.

a. This Court's decision in *Minnesota* addressed whether Congress had implicitly revoked an 1860 congressional grant of scattered swamplands to Minnesota by creating Indian reservations, through treaties from 1863 through 1867, that encompassed the swamplands. See 270 U.S. at 203-208. The Court effectively presumed that the Senate knew, or should have known, that it had made grants to the State at the time that it created the reservations and that it did not intend that the creation of the reservations would divest the State of those lands. Congress's actions—which involved the granting of selected swamplands to the State followed by the creation of "'future homes' for the Indians [without] reference to any particular lands," *id.* at 209—also were not necessarily inconsistent. The Court concluded, under those facts, that the treaties at issue should not be presumed to divest Minnesota of its preexisting property rights "unless the purpose so to do be shown * * * [with] certainty." *Ibid.*

The *Minnesota* presumption applies where: (1) Congress has made a grant and can be presumed to be aware of it when making a subsequent grant; and (2) the two grants are consistent. The court of appeals, in contrast, employed the *Minnesota* presumption untethered from its context, and asserted that an earlier agreement by a different sovereign trumps the then-applicable interpretation of the boundaries that the United States established in the Treaty of Canandaigua. The court's conclusion appears particularly strained in this context, because neither the Senate nor the Executive Branch knew of the August 1764 Agreement at the time of the

Canandaigua and Stanwix Treaties, note 3, *supra*, nor can it be presumed that the Senate should have known of an obscure colonial agreement by a prior sovereign.

Additionally, the grants at issue here, by their very nature, are inconsistent. In this case, the very boundaries of the Treaty of Canandaigua are at issue, instead of scattered swamplands within a much larger area set aside as "future homes" for Indians. The language of Article III of the Treaty of Canandaigua, by designating all the lands within the boundaries as "the property of the Seneka Nation," Pet. App 276, is inconsistent with the survival of an earlier grant. Cf. *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 122 n.18 (1960) (describing the Treaty of Canandaigua as "supersed[ing] the prior treaties" and "recogniz[ing] that the Senecas alone had possessory rights to the western New York area here involved").

b. The issue whether the *Minnesota* presumption applies in this case is complicated, however, by unresolved issues regarding the authority of the confederal government over Indian affairs. Article III of the Treaty of Fort Stanwix provides "that the Six Nations shall and do *yield to the United States* all claims to the country west of the said boundary." 7 Stat. 15-16 (C.A. Spec. App. 171) (emphasis added). According to the district court, the Seneca cession of the Niagara Corridor nevertheless redounded to the benefit of the State, because the confederal government lacked authority under Article IX, paragraph 4, of the Articles of Confederation (1777) to extinguish Indian title and hold that title for itself. Pet. App. 205-206.[6]

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[6] Under that interpretation, virtually all confederal dealings with Indians within a State violated that State's legislative rights and

The district court's analysis is also at odds with the express language of the Treaty of Fort Stanwix, as well as that of the Treaty of Fort Harmar.[7] Furthermore, the court's narrow construction of the powers of Congress under the Articles of Confederation ignores the practical realities of the confederal era. During that period, Congress exercised essential authority in resolving the Indian controversy here, which implicated both its peace-making and Indian affairs powers. Congress understandably sought to acquire the Seneca interest in strategic lands in the Niagara Corridor—lands still controlled by the British and over which there were overlapping and disputed state claims—and to retain that disputed land interest for the United States for the purpose of maintaining peaceful relations. That acquisition created a buffer zone, preventing either the British or the States from acquiring that land, antagonizing the Seneca, and pushing the United States to the brink of a war that it was ill-prepared to fight. Nevertheless, the interpretation of Article X, paragraph 4 of the Articles of Confederation presents a complex and unresolved historical dispute concerning a provision that James Madison termed "absolutely incomprehensible." *The Federalist No. 42*, at 269 (James Madison) (Clinton Rossiter ed., 1961). As a matter of history, both the

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therefore were precluded. Such a narrow construction of the confederal congress's authority would effectively "annul the power itself," because all lands within the United States lay within claimed state boundaries at that time. *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 559 (1832).

[7] Article I of the Treaty of Fort Harmar states that the Six Nations "do release, quit claim, relinquish, and cede, to the United States of America, all the lands west of the said boundary or division line, * * * [for the] United States of America, to have and to hold the same, in true and absolute propriety, forever." 7 Stat. 33-34 (C.A. Spec. App. 167).

States and the confederal congress asserted authority over Indian affairs and, at times, exclusive authority to treat with Indian tribes.[8]

If Congress actually lacked authority under the Articles of Confederation to extinguish and hold Seneca title in the Niagara Corridor, the applicability of the *Minnesota* presumption presents a closer question. In the Treaties of Fort Stanwix and Fort Harmar, the Seneca ceded its interest in the Niagara Corridor. If as a matter of law, that property interest devolved to the State, rather than to the United States, the Senate in theory could have been aware of that possible consequence in 1794, when it entered into the Treaty of Canandaigua. Whether the court of appeals erred in applying the *Minnesota* presumption, therefore, potentially is intertwined with a complex question regarding the authority of Congress over Indian affairs under the Articles of Confederation. This case accordingly presents a problematic vehicle for addressing the scope of the *Minnesota* presumption.

3. Petitioners also assert that the court of appeals erred in determining that the August 1764 British colonial agreement extinguished Seneca title to the Niagara Islands, and they ask this Court to establish a "uniform

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[8] Congress entered into numerous treaties with Indian Tribes under the Articles of Confederation, settling tribal boundaries and regulating affairs with Tribes. See 1784 Treaty of Fort Stanwix, 7 Stat. 15; Treaty with the Wyandot, Jan. 21, 1785, 7 Stat. 16; Treaty of Fort Hopewell with the Cherokee, Nov. 28, 1785, 7 Stat. 18; Treaty with the Choctaw, Jan. 3, 1786, 7 Stat. 21; Treaty with the Chickasaw, Jan. 10, 1786, 7 Stat. 24; Treaty with the Shawnee, Jan. 31, 1786, 7 Stat. 26. There also are two federal treaties that were entered into after the Constitution was ratified but before the Constitution took effect: the Treaty with the Wyandot, Jan. 9, 1789, 7 Stat. 28; and the 1789 Treaty of Fort Harmar, 7 Stat. 33. See note 2, *supra*.

national rule on the matter." Pet. 24. This Court's review of that question is also not warranted. The court of appeals determined that the issued depended on whether there was "plain and unambiguous" evidence of extinguishment of Indian title by a prior sovereign. Pet. App. 29-30 & n.17. The court accordingly applied the same legal standard that petitioners advocate. See Pet. 24. The court's application of that standard appears to be directly relevant only to the claim of the two Tribes to the specific lands at issue in this case. That specific issue, although understandably important to petitioners, does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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