No. 20-1388

In the
Supreme Court of the United States

ALICE PERKINS, FREDRICK PERKINS,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE WILLIAM A. STARNA, Ph.D. IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Court of Appeals for the Second Circuit, the United States Tax Court, and other federal courts have found the Canandaigua Treaty has no textual or historical support to exempt Native Americans living and working *on the reservations* of the Six Nations from federal taxation. *See, Perkins v. Comm'r,* 970 F.3d 148 (2d. Cir. 2020), *aff'g,* 150 T.C. 119 (2018).

The question presented is whether these federal courts have given due regard to the treaty obligations of the United States by thoroughly examining the explicit language and history of the Canandaigua Treaty, in which the United States and the Six Nations mutually exchanged promises acknowledging and respecting the jurisdictional boundaries of the respective sovereign nations, and agreeing not to disturb any sovereign nation or its people in the free use and enjoyment of these treaty-defined sovereign lands.

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INTEREST OF AMICUS CURIAE[1]

William A. Starna, Ph.D., by and through his counsel, Joseph J. Heath, Esq., files this amicus curiae brief in support of the Petition for a Writ of Certiorari. William A. Starna is Professor Emeritus of Anthropology at the State University of New York, College at Oneonta, and has over 75 publications, including 35 peer-reviewed journal articles, and several books and monographs. He is the co-author of the article, *On the Road to Canandaigua: The Treaty of 1794*, 19 Am. Indian Q. (1995), cited in the opinion of the United States Court of Appeals for the Second Circuit in *Perkins v. Comm'r,* 970 F.3d 148, 156-158 (2d Cir. 2020).

From the perspective of the Amicus, the Second Circuit took liberties in citing the 1995 article, authored by the Amicus and Jack Campisi, as scholarly authority, supporting its narrow view of the language and the history of the Canandaigua Treaty. After the Second Circuit published its opinion, Professor Starna began working on a new scholarly essay entitled, *History and the Plain Meaning of Words: The 1794 Treaty of Canandaigua and the Taxation of Indian People,*[2] which references the *Perkins* case along with other federal and tax court cases involving the

[1]Counsel for the Petitioners and Respondent have consented in writing to the filing of this brief. Margaret A. Murphy, Petitioners' counsel of record, did assist the Counsel for the Amicus in the preparation and filing of this brief. Amicus William A. Starna, however, retained complete editorial control over the brief's contents and has received no compensation for his work. Neither the parties nor their counsel has provided any monetary contribution to the Amicus, or his counsel. Counsel for Amicus Starna paid for the costs relating to the filing and service of this brief.

[2] "For the purpose of full transparency," Professor Starna acknowledges in his essay that he "prepared a historical report on the 1784 to 1794 treaty period and the Six Nations for the plaintiffs in *Cook v. United States*, 32 Fed. Cl. 170 (1994)," *aff'd* 86 F.3d 1095 (Fed. Cir.)*, cert. denied* 159 U.S. 932 (1996).

federal taxation of the Haudenosaunee.[3] He undertook his scholarly endeavors without being commissioned or funded from any individual or entity. He has now circulated the essay to several law reviews and journals and expects the essay to be published in the 2021-22 academic year.

Professor Starna is aware the Court does not accept unpublished essays, and that Petitioners are not permitted, under Rule 15(8), to file a supplemental brief alerting the Court that the underpinnings of the Opinion for which review is sought has been clarified in a new essay by the author of the article cited within that Opinion. For this reason, Professor Starna seeks Amicus status, allowing the Court to examine the language and history of the Canandaigua Treaty based on the original source materials from which Professor Starna based his first article and his new essay.

[3] Haudenosaunee, "people of the longhouse," refers to the nations and their people historically called the Iroquois and aligned with the Confederacy, who at the time of the Canandaigua Treaty were also known as the Six Nations.

SUMMARY OF ARGUMENT

The United States has never ratified a treaty or enacted a law authorizing the taxation of income earned by a Haudenosaunee who lives and works on the sovereign lands of the Six Nations. To the contrary, the United States has directed, by statute, the Commissioner of Internal Revenue to give due regards to the treaty obligations of the United States. 26 U.S.C.A. § 894(a)(1). The imposition of a federal tax on income earned from working the treaty-protected lands of the Six Nations would disturb the free use and enjoyment of such lands, for which the United States promises, in the Canandaigua Treaty, never to disturb. Treaty with the Six Nations ("Canandaigua Treaty"), November 11, 1794, 7 Stat.45.

ARGUMENT

I

THE DOCTRINE OF STARE DECISIS IS NOT A SUBSTITUTE FOR HISTORICAL TRUTHS

Before this Court, the Petitioners raise an issue of first impression relating to the treaty promises made by the United States in the Canandaigua Treaty of 1794 and the Treaty with the Senecas of 1842.[4] Petitioners' claims are narrowly focused on income derived and earned from working the sovereign lands of the Seneca Nation.

[4] Throughout its Opinion, the Second Circuit refers to it as the 1842 Treaty with the Seneca, instead of the 1842 Treaty with the Seneca***s***, as officially designated in the Statutes at Large, 7 Stat. 538-590 (emphasis added). *See, generally, Perkins,* 970 F.3d 148. Whether intentionally or unintentionally, the Second Circuit failed to acknowledge the 1842 Treaty was ratified for the "Senecas," with the word, "Senecas" having a similar meaning as the word, "Americans." The 1842 Treaty benefited not only the Seneca Nation but also its people.

(Cert. Pet.[5] at 8). In this brief, the Amicus focuses on the broader question of whether any income earned by a Haudenosaunee who resides and works on reservations are subject to federal taxation in accordance with the Canandaigua Treaty.

In the first article of the Treaty with the Senecas in 1842, the United States promised the Senecas would "continue in the occupation and enjoyment of the whole of the said two several tracts of land, called the Cattaraugus Reservation, and the Allegany Reservation with the same right and title in all things, as they had and possessed therein immediately before the date of the said indenture," conveying such lands to Thomas Ludlow Ogden and Joseph Fellows. Treaty with the Senecas, May 20, 1842, 7 Stat. 587 (the "1842 Treaty"). In *The New York Indians* case, this Court found the Senecas, despite the indenture and consistent with the Canandaigua Treaty, remain "in their ancient possessions and occupancy" of the Allegany and Cattaraugus Reservations "under their original rights," entitling them "to the undisturbed enjoyment" of such lands. 72 U.S. (5 Wall.) 761, 770-71 (1866).

> All agree that the Indian right of occupancy creates an indefeasible title to the reservations that may extend from generation to generation, and will cease only by the dissolution of the tribe, or their consent to sell to the party possessed of the right of pre-emption.

Id. at 771. Because the 1842 Treaty re-affirms that the Senecas, living on the Allegany or Cattaraugus Reservations, continue in possession and occupancy of sovereign lands "with the same right and title" as they had at the time of the

[5] "Cert. Pet." refers to the Petition for a Writ of Certiorari filed by Petitioners Alice and Fredrick Perkins in this matter.

Canandaigua Treaty, the Amicus limits its brief to the language and history of the Canandaigua Treaty.

A. The Second Circuit Did Not Thoroughly Examine the History Leading to the Canandaigua Treaty.

In 1790, President George Washington appointed Colonel Timothy Pickering as the federal government's *sole* agent, to meet and confer with the Six Nations "for the purposes of removing from their minds all causes of complaint, and establishing a firm and permanent friendship with them."[6] The result was the Canandaigua Treaty of 1794. Still, the history of the Canandaigua Treaty cannot be examined in a vacuum. Instead, it is the end-product of the historical circumstances caused by conflicts on the Ohio frontier between Native peoples and encroaching white settlers, and the immediacy for resolving these hostile conflicts with pragmatic solutions.

In the summer of 1789, Secretary of War Henry Knox proposed to President Washington two approaches to end the disturbance on the frontier. [7] First, he proposed "raising an army, and extirpating the refractory tribes entirely."[8] Second, he suggested "forming treaties of peace with them, in which their rights and limits should be explicitly defined."[9] As to the first approach, Knox raised the question of whether the United States has a "clear right" to take such action consistent with "the

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[6] Jack Campisi & William A. Starna, *On the Road to Canandaigua: The Treaty of 1794*, 19 Am. Indian Q. 467, 478-79 (1995)

[7] Class II, 1 *American State Papers, Indian Affairs* 13, Report from H. Knox, Secretary of War, to the President of the United States, Relative to the Northwestern Indians, June 15, 1789.

[8] *Id.*

[9] *Id.*

principles of justice and the laws of nature."[10] He then wrote, "[A] nation solicitous of establishing its character on the broad basis of justice, would not only hesitate at, but reject every proposition to benefit itself, by the injury of any neighboring community."[11]

As for the second, the "principle of the Indian right to the lands they possess" is "conceded," and moreover, "the dignity and interest of the [United States] will be advanced by making it the basis of the future administration of justice towards the Indian tribes," that is, an administration exercised through treaties.[12] This fundamental principle would dominate federal Indian policy until 1871, marking the end of the treaty-making period.

Incidents, including deaths of Native peoples, along the frontier provoked by white settlers, and the failure of the United States to intervene, set the Indians in the western region and the Six Nations on edge.[13] At the same time, the settlers' demands for land on the frontier and the unrelenting anger of the Senecas and the Six Nations over the Fort Stanwix Treaty of 1784 demanded immediate attention.[14]

In September 1790, Knox, frustrated by the continued unrest in the Ohio

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[10] *Id.*

[11] *Id.*

[12] *Id.*

[13] Campisi & Starna, *supra*, 19 Am. Indian Q. 467, 471 (1995)

[14] *Id.*

frontier, approved plans to launch a military operation to contain the Indians there.[15] Diplomatic efforts were undertaken to ensure the neutrality of the Six Nations, especially the Senecas.[16] The considerable task of dealing with these Indians and convincing them to remain disengaged from events along the Ohio was put into the hands of Colonel Pickering.[17] Pickering would spend the next four years in meetings and negotiations with representatives of the Six Nations, primarily the Senecas.

As reported by Pickering, Seneca Chief Red Jacket warned, "We wish Congress to be very careful how they speak; and to speak to us of nothing but peace; and we desire they would do the same among their own people."[18] Red Jacket's comment and tone clearly conveyed that neither the Senecas nor others of the Six Nations would bargain for peace at the expense of other Native people.

In March 1792, Six Nation chiefs gathered once again in Philadelphia to discuss farming and husbandry.[19] But instead, Knox wanted to persuade the Six Nations to join with the United States against the western Indian nations.[20]

Knox's interference infuriated Pickering who sent a sharply worded protest to

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[15] Class II, 1 *American State Papers, Indian Affairs* 100, The Secretary of War to Governor St. Clair, September 12, 1790.

[16] Class II, 1 *American State Papers, Indian Affairs* 139, H. Knox, Secretary of War, Summary of Facts, December 26, 1791.

[17] *Id.*; Class II, 1 *American State Papers, Indian Affairs* 165, Instructions to Colonel Timothy Pickering, May 2, 1792.

[18] The Timothy Pickering Papers, Massachusetts Historical Society 60: 79.

[19] Campisi & Starna, *supra,* 19 Am. Indian Q. at 474.

[20] *Id.,* Randolph C. Downes, *Council Fires on the Upper Ohio* 318, 320-21 (1940); Edward Hake Phillips, *Timothy Pickering at His Best: Indian Commissioner, 1790-1794,* 102 Essex Inst. Press 178 (1966).

President Washington arguing that any negotiations with the Six Nations should follow from what was offered to them in his invitation.[21] Complicating matters was the pro-British Mohawk war chief Joseph Brant's warning to the Indians that "the real design of [Pickering's] invitation was not *on* the paper but *behind* it" and that "the *avowed object* of the invitation was merely *ostensible:* while the *real object* was *kept out of sight*."[22] But Pickering's message to Washington could not have been clearer:

> Indians have been so often deceived by white people that *White Man* is, among many of them, but another name for *Liar*. Really, Sir, I am unwilling to be subjected to this infamy. I confess I am not indifferent to a good name even among the Indians. Besides, they viewed, and expressly considered me, as '*your Representative*. . . . Sir, for your honour & the honour & interest of the United States, I wish them to *know* that *there are some white men who are incapable of deceiving*.[23]

Knox quickly withdrew his proposal, granting Pickering a free hand in the meetings and negotiations he would conduct with the Six Nations. Pickering's integrity, a mark of his character throughout his diplomatic career and in his professional and personal relationship with Indians, was intact.[24]

The situation in the Ohio Valley did not change through the remaining months

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[21] Pickering Papers, *supra*, 62:11-12; *Enclosure: Timothy Pickering to George Washington,* 21 March 1792, Founders Online, National Archives, https://founders.archives. gov/documents/Hamilton/01-11-02-0303-0002.

[22] *Id.*

[23] *Id.*

[24] Phillips, *supra*, 102 Essex Inst. Press at 179; Campisi & Starna*, supra*, 19 Am. Indian Q. at 474. Pickering continued to work in Indian relations while he was postmaster general from 1791-1795, secretary of war from 1795-1796, and secretary of state from 1795-1800. As a Massachusetts representative and senator, he was a strong proponent for justice of Indians. Campisi & Starna*, supra*, 19 Am. Indian Q. at 487 n. 3.

of 1792.[25] Envoys from the western Indian nations demanded return of their lands north of the Ohio River.[26] The United States rejected their demands and prepared for war.[27]

The Senecas and the Six Nations remained resolute, refusing to form an alliance against the western Indian nations while in the shadows lingered the threat of British intervention.[28] The thorny matter of setting a boundary line to protect the western lands and restoring and ensuring the security of the territories of the Six Nations went unresolved.

By mid-1794 the Six Nations' anger and resentment regarding their lands reached a dangerous level. "We pay no attention to what has heretofore been done by Congress," declared Cornplanter, a Seneca speaking for the Six Nations, putting the United States on notice:

> We, the Six Nations, have determined on the boundary we want established, and it is the warriors who now speak . . . . It is not because that we are afraid of dying that we have been so long trying to bring about a peace. We now call upon you for an answer, as Congress and

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[25] Campisi & Starna, *supra*, 19 Am. Indian Q. at 475.

[26] Downes, *supra*, *Council Fires* at 320-22; Phillips, *supra, Timothy Pickering* at 183. After their demands were rejected, their reply was dark:

> We desire you to consider Brothers, that our only demand is the peaceable possession of a small part of our once great Country ---Look back & view the lands, from whence we have been driven, to this spot: -- We can retreat no further, because the Country behind, hardly affords food for its present inhabitants; and we have therefore resolved to leave our bones, in this, small space, to which we are confin'd.

Pickering Papers, *supra*, 60: 173A (Commissioners Journal, August 16, 1793). Their backs against the wall, the Indians in Ohio country would go to war.

[27] Campisi & Starna, *supra*, 19 Am. Indian Q. at 475-76.

[28] *Id.*

> their commissioners have oftentimes deceived us; and, if these difficulties are not removed, the consequences will be bad.[29]

Cornplanter's threats were real. The patience of the Six Nations, especially that of the Senecas, had worn thin.[30] The Senecas' land had to be restored. On this issue, the United States would have to act quickly to avoid war.[31]

After finalizing the terms of the Canandaigua Treaty in November of 1794, Pickering assured the Senecas and the other Six Nations they could "rely on the complete performance of every Article of the treaty on the part of the United States," and that, in turn, the United States would "rely with confidence on the faithful execution" of the treaty's provisions by the Six Nations.[32] The United States intended the provisions of the Canandaigua Treaty to be understood based on "the liberal and generous principles on which this treaty has been formed."[33]

Article VII, setting forth the government-to-government relationship between the United States and the Six Nations, recognized the sovereign status of all parties. Canandaigua Treaty, *supra*, art. VII, 7 Stat. 46. A central element of the treaty is the promise made to each of the Six Nations, found in articles II, III, and IV. Of the

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[29] Class II, 1 *American State Papers, Indian Affairs* 521, Proceedings of a Council holden at Buffalo Creek, by the Six Nations of Indians, June 18, 1794. Questioning how Native people could be slaughtered while the federal government talked about peace, Cornplanter declared, "We want room for our children. It will be hard for them not to have a country to live in after . . . we are gone." *Id.* His declaration demonstrates the object of preserving these sovereign lands for future generations.

[30] Campisi & Starna, *supra*, 19 Am. Indian Q. at 478.

[31] *Id.*

[32] E. A. Cruikshank ed., *The Correspondence of Lieut. Governor John Graves Simcoe, with Allied Documents Relating to His Administration of the Government of Upper Canada* 339–40 (1923-1931).

[33] *Id.*

land returned and acknowledged to be sovereign lands of the Six Nations, the United States pledged it would "never claim the same, nor disturb them or either of the Six Nations, nor their Indian friends residing thereon and united with them, in the free use and enjoyment [of the sovereign lands reserved and defined within the treaty boundaries]: but the said reservations shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase." *Id.* at 45. In Article IV, the "Six Nations and each of them" pledged "they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof." *Id.*

B. The Second Circuit Did Not Recognize the Uniqueness and Significance of the Canandaigua Treaty.

The language and form of the Canandaigua treaty, when compared to previous treaties, is instructive on several levels. The acknowledgment of the government-to-government relationship among the parties and of the independent sovereignty of each signatory Nation is demonstrated by the reciprocal language regarding the land within jurisdictional boundaries defined by the treaty. As stated in Article IV, "Now, the Six Nations, and each of them, hereby engage that they will never claim any other lands within the boundaries of the United States; nor ever disturb the people of the United States in the free use and enjoyment thereof." *Id.* This reciprocal language is evidence of the treaty protection extended to these separate and independent sovereign Nations *and their people*, including the people of the United States and the people of the Seneca Nation. Contrary to the Second Circuit Opinion, *Perkins*, 970 F.3d at 158, the Canandaigua Treaty was intended to protect enrolled Senecas, like

Petitioner Alice Perkins.

Further acknowledgement of the sovereign status of the Six Nations is found in Article VII of the Canandaigua Treaty, which draws a jurisdictional equivalency or mutuality between the parties. *Id.* at 46. Addressing unenumerated transgressions, described as "the misconduct of individuals," the United States and the Six Nations agreed, "no private revenge or retaliation shall take place" for injuries done by persons on either side. *Id.* Instead, complaints of the aggrieved party would be presented to representatives of the other. *Id.* The President of the United States or his representative was specifically named to hear complaints from the Six Nations with any complaint from the United States to be heard by "principal chiefs of the Six Nations, or of the nation to which the offender belongs." *Id.* The Canandaigua Treaty also left the door open for Congress to take "prudent measures" to ensure the "firm peace and friendship now established" by the treaty. *Id.* ("such prudent measures shall then be pursued[,] as shall be necessary to preserve our peace and friendship unbroken until the legislature (or great council) of the United States shall make other equitable provision for the purpose.") *Id.*

In treaties ratified during this period, American and Native people generally are required to report misconduct directly to their sovereign nation.[34] However, an

[34] Treaty with the Delawares, Sept. 17, 1778, art. IV, 7 Stat. 14; Treaty with the Six Nation ["Fort Stanwix Treaty"], Oct. 22, 1784, art. IX, 7 Stat. 17; Treaty with Cherokees, Nov. 28, 1785, arts. VI-VII, 7 Stat. 19; Treaty with Choctaws, Jan. 3, 1786, arts. V-VI, 7 Stat. 22; Treaty with Chickasaws, Jan. 31, 1786, arts. V-VI, 7 Stat. 25; Treaty with Shawnees, Jan. 31, 1786, art. III, 7 Stat. 26; Jan. 31, 1786, arts. V-VI, 7 Stat. 29; Treaty with Creeks, Jan. 31, 1786, arts. VIII-IX, 7 Stat. 37; Jan. 31, 1786, arts. X-XI, 7 Stat. 40-41.

Indian who commits a "murder, or robbery, or other capital crime" against an Indian or an American is to be delivered to American authorities and "punished according to the ordinances of the United States"[35] or, in some cases, "the laws of the state or territory."[36] In turn, an American committing a crime against an Indian or American "shall be punished in the same manner as if the murder or robbery, or other capital crime, had been committed on a citizen of the United States."[37] Although provisions are sometimes made for Indians to witness the punishment meted out by American authorities,[38] there is nothing to suggest they took part in judging the offender or in fixing the penalty.[39] In stark contrast to these treaty provisions, Article VII of the Canandaigua Treaty resorts to the use of diplomatic channels, on a government-to-government basis, to redress the "misconduct of individuals." 7 Stat. 46.

Prior to the Canandaigua Treaty, the United States had ratified twelve other treaties with Indian nations.[40] Of the twelve ratified treaties, dating from 1778 to

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[35] Fort McIntosh Treaty, *supra*, art. IX, 7 Stat. 17; Treaty with Cherokees, *supra*, arts. VI-VII, 7 Stat. 19; Treaty with Choctaws, *supra*, arts. V-VI, 7 Stat. 22; Treaty with Chickasaws, *supra*, arts. V-VI, 7 Stat. 25; Treaty with Shawnees, *supra*, art. III, 7 Stat. 26; Treaty with Creeks, *supra*, art. VIII, 7 Stat. 37; Treaty of Holston, *supra*, art. X, 7 Stat. 40.

[36] Treaty with Wyandots *et al.*, *supra*, arts. V-VI, 7 Stat. 29; Treaty with Creeks, *supra*, art. IX, 7 Stat. 37; Treaty of Holston, *supra*, art. XI, 7 Stat. 41.

[37] Treaty with Cherokees, *supra*, art. VII, 7 Stat. 19; Treaty with Choctaws, *supra*, art. VI, 7 Stat. 22; Treaty with Chickasaws, *supra*, art. VI, 7 Stat. 25; Treaty with Wyandots *et al.*, *supra*, art. VI, 7 Stat. 29; Treaty of Holston, *supra*, art. XI, 7 Stat. 41.

[38] Treaty with Cherokees, *supra*, art. VII, 7 Stat. 19; Treaty with Choctaws, *supra*, art. VI, 7 Stat. 22; Treaty with Chickasaws, *supra*, art. VI, 7 Stat. 25.

[39] *Id. But see* Treaty with the Delawares, *supra*, art. IV, 7 Stat. 14.

[40] Treaty with the Delawares, *supra*, 7 Stat. 13; Fort Stanwix Treaty, *supra*, 7 Stat. 15; Fort McIntosh Treaty, *supra*, 7 Stat. 16; Treaty with Cherokees, *supra*, 7 Stat. 18; Treaty with Choctaws, *supra*, 7 Stat. 21; Treaty with Chickasaws, *supra*, 7 Stat. 24; Treaty with Shawnees, *supra*, 7 Stat. 26; Treaty with Wyandots, *et al.*, *supra*, 7 Stat. 28-32; Fort Harmar Treaty, *supra*, 7 Stat. 33-34; Treaty with

1794, all but the two prior treaties with the Six Nations[41] list what are standard-form treaty provisions. [42] Except for the 1788 Delaware treaty, all are decidedly one-sided, privileging and regulated by the United States.[43] The sovereign status of the Six Nations is defined by the absence of language within the Canandaigua Treaty, routinely found in treaties ratified on or before 1794.

For example, each standard treaty contains a provision declaring Indian nations being "under the protection of the United States," with the occasional added qualification "and of no other sovereign whatever." [44] All, except the treaties with the Six Nations and the Delaware Nation,[45] refer to the signatory Indian nation being placed "under the protection of the United States."[46] Although this phrasing may appear altruistic, the historical context and intent of these treaties, marked by the Revolution, frontier warfare, and forced land cessions, support a relegation of the

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Creeks, *supra*, 7 Stat. 35; Treaty of Holston, *supra*, 7 Stat. 39; Treaty with Cherokees, *supra*, 7 Stat. 43.

[41] Fort Stanwix Treaty, *supra*, 7 Stat. 15; Fort Harmar Treaty, *supra*, 7 Stat. 3.

[42] Treaty with the Delawares, *supra*, art. IV, 7 Stat. 14; Fort McIntosh Treaty, *supra*, art. IX, 7 Stat. 17; Treaty with Cherokees, *supra*, arts. VI-VII, 7 Stat. 19; Treaty with Choctaws, *supra*, arts. V-VI, 7 Stat. 22; Treaty with Chickasaws, *supra*, arts. V-VI, 7 Stat. 25; Treaty with Shawnees, *supra*, art. III, 7 Stat. 26; Treaty with Wyandots *et al.*, *supra*, arts. V-VI, 7 Stat. 29; Treaty with Creeks, *supra*, arts. VIII-IX, 7 Stat. 37; Treaty of Holston, *supra*, arts. X-XI, 7 Stat. 40-41.

[43] *Id.*

[44] Fort McIntosh Treaty, *supra*, art. II, 7 Stat. 16; Treaty with Cherokees, *supra*, art. III, 7 Stat. 19; Treaty with Choctaws, *supra*, art. II, 7 Stat. 21; Treaty with Chickasaws, *supra*, art. II, 7 Stat. 25; Treaty with Wyandots *et al.*, *supra*, art. XIII, 7 Stat. 31; Treaty with Creeks, *supra*, art. II, 7 Stat. 35; Treaty of Holston, *supra*, art. II, 7 Stat. 39.

[45] Fort Stanwix Treaty, *supra*, 7 Stat. 15; Fort Harmar Treaty, *supra*, 7 Stat. 3; Treaty with the Delawares, *supra*, 7 Stat. 13.

[46] *Id.*

Indian nations to a subordinate, dependent position relative to the United States. The Canandaigua Treaty, as well as the treaties signed at Fort Stanwix and Fort Harmar, contains no such provision. Nor is there anything in the extensive record of the negotiations to suggest other than the United States and the Six Nations having acknowledged their opposite as a distinct, equal, and autonomous polity.

Also distinguishing the Canandaigua Treaty from the twelve that preceded it are the treaty provisions relating to trade. Nearly all describe how trade would be conducted and regulated.[47] The United States never sought a treaty provision, regulating trade, conduct, or other activities of the Haudenosaunee within the boundaries of the Six Nations.

Unlike any of the previous federal treaties, the United States had never agreed to a *retrocession* of land, some 1,600 square miles or one million acres, taken by the United States in the 1784 Fort Stanwix Treaty.[48] Nonetheless, in Article III, the United States acknowledged these lands to be the property of the Senecas, and agreed to never claim the same, nor disturb the Seneca Nation, nor any of their Indian friends residing and united with them, in the free use and enjoyment of these lands.

Unique in treaty construction from any period, the reciprocal language contained in articles II, III, and IV was insisted on by the chiefs of the Six Nations in their negotiations with Pickering.[49] Pickering later explained their concerns in a

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[47] Treaty with Cherokees, *supra*, arts. IX-X, 7 Stat. 20; Treaty with Choctaws, *supra*, arts. VII-IX, 7 Stat. 22-23; Treaty with Chickasaws, *supra*, arts. VIII-IX, 7 Stat. 25; Treaty with Wyandots *et al.*, *supra*, art. VII, 7 Stat. 35; Treaty of Holston, *supra*, art. VI, 7 Stat. 40.

[48] *See,* footnote 28.

[49] Pickering Papers, *supra*, 60: 206–8.

letter to Knox four days before the treaty was signed.[50]

Pickering explained that while the Six Nations wanted a confirmation of their lands, they would not agree to words in the treaty suggesting they had given up or relinquished lands claimed to have been ceded to the United States by the 1784 Fort Stanwix Treaty.[51] Instead, their chiefs would and did agree to "never claim land out of their acknowledged boundaries,"[52] those to be set out by the provisions of the Canandaigua Treaty. Underlying their reasoning was to ensure they remained in a favorable position with the British and the western Indians with whom they would continue to be engaged.[53]

II

THE PLAIN TEXT OF THE CANANDAIGUA TREATY ESTABLISHED JURISDICTIONAL BOUNDARIES WITH RECIPROCAL PROMISES NOT TO DISTURB THE PEOPLE LIVING WITHIN THE SOVEREIGN BOUNDARIES DEFINED BY THE TREATY

The Amicus cautions this Court against the narrow, result-oriented, historical examination of treaties, like the one conducted by the Second Circuit in *Perkins*, 970 F.3d at 156-63. As shown by the Second Circuit's opinion in *Perkins,* federal courts engaging in such result-oriented decision making usurps the role of Congress and violates the Constitution of the United States, in which treaties, like the

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[50] *Id.*

[51] *Id.*

[52] *Id.*

[53] *Id.*

Canandaigua Treaty, are to be regarded as "the supreme Law of the Land." U.S. Const., art. VI, cl. 2. Ironically, the Second Circuit, as have other courts,[54] refused to acknowledge that the use of the word "land" within the Canandaigua Treaty refers to the jurisdictional boundaries separating each of the Six Nations and the United States, used in the same context as the word, "Land," appears in the Supremacy Clause.

Nonetheless, lower federal appellate and trial courts have not engaged in a scholarly review of the language or the history of the Canandaigua Treaty. Instead, these courts have applied a form of presentism where the antecedent narrative, the treaty, and its historical context, is defined or interpreted in terms of the consequent, here a post-facto application of law. Thereby, the courts, not Congress, have abrogated treaty promises, "not to disturb the free use and enjoyment" of sovereign land, generally citing support from judicial opinions involving different treaties or limiting the scope of the treaty "to the use of the land." *Id.* at 158, *citing Cook v. United States,* 86 F.3d 1095, 1097-98 (Fed. Cir.), *cert. denied* 159 U.S. 932 (1996). Although the efficacy and relevance of drawing an analogy to an entirely different treaty deserves serious questioning, any court's placing such limits on "the use of the land" does not reflect a historical or cultural reality. More importantly, hidebound adherence to the doctrine of stare decisis is not a substitute for historical truths.

At the time of the Canandaigua Treaty and moving forward to the present, the

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[54] *See, e.g., Cook v. United States*, 86 F.3d 1095 (Fed. Cir.0, *cert. denied* 159 U.S. 932 (1996); *Lazore v. Comm'r,* 11 F.3d 1180 (3d. Cir. 1993); *Snyder v. Wetzel*, 193 A.D.2d 329 (3d Dep't 1993), *aff'd* 84 N.Y.2d 941 (1994); *Sylvester v. Comm'r*, 77 T.C.M. (CCH) 1346 (Tax 1999).

people of the Six Nations, including Petitioner Alice Perkins, remain "in their ancient possessions and occupancy" of these treaty-defined sovereign lands "under their original rights," entitling them "to the undisturbed enjoyment" of such lands. *The New York Indians,* 72 U.S. at 770-71. The Senecas and the Six Nations continue to govern themselves, build homes, establish businesses, raise families, sustain themselves by employing a range and variety of subsistence practices, subject to and under the protection of their respective sovereign governments, and the treaties acknowledging and preserving the sovereignty of the Six Nations.

Today, courts describe Indian nations as "dependent" nations under the protection of the United States. For the Six Nations, they are only dependent upon the United States honoring the promises made more than 236 years ago upon the ratification of the Canandaigua Treaty. As the Second Circuit noted in *Perkins*, however, "Congress has passed neither a statute specifically abrogating the provisions of Indian treaties nor a statute of general application that has the effect of abrogating Indian treaties." *Perkins*, 970 F. 3d at 154.

The plain unambiguous text of the Canandaigua Treaty makes clear that the sovereign and autonomous Six Nations would continue to remain in possession and control of their lands with the exclusive right to govern and make laws without interference from the United States. In return, the Six Nations made the reciprocal promise "not to disturb" the people of the United States in "the free use and enjoyment" of lands outside of the boundaries of the Six Nations. Canandaigua Treaty, *supra*, 7 Stat. 45. William Fenton, an authority on the Canandaigua Treaty

and the Six Nations, put it best, "The very essence of the treaty centers on the mutual agreement to quit claim and never disturb each other in the free use and enjoyment of their respective property."[55]

Senecas, like Petitioner Alice Perkins, are not painted into a corner because it would be "nearly impossible for parties to treaties concluded prior to 1913 to have contemplated" a federal income tax. *Perkins,* 970 F.3d at 155. Although the United States and the Six Nations did not negotiate treaties in anticipation of possible future tax laws, the plain and unambiguous language of the Canandaigua Treaty made such discussions unnecessary. Each party agreed not to disturb the sovereignty or autonomy over lands under the exclusive jurisdiction of the other. The Canandaigua Treaty preserved the sovereignty and autonomy of the Senecas, protecting them from state and federal taxation so long as they live and work on the Seneca Nation territory.

The reciprocal promise made in articles II, III, and IV is plain, direct, understandable, and unambiguous, conveying the clear intent of the parties. After a decade of negotiations, Pickering, as the sole agent of the United States, assured the Six Nations they could "rely on the complete performance of every article of the treaty on the part of the United States," and in turn, the United States would "rely with confidence on the faithful execution of your part of a treaty so entirely calculated to

[55] William N. Fenton, *The Great Law and the Longhouse: A Political History of the Iroquois Confederacy* 626 (1998).

promote the best interests of yourselves, and your posterity, the liberal and generous principles on which this [Canandaigua] treaty has been formed." [56]

The Second Circuit, as well as other courts, have not given "due regard" to the obligations of the United States under the Canandaigua Treaty. As shown by the Canandaigua Treaty, Congress never authorized federal or state taxation for whatever purpose be imposed against any of the Six Nations or its people, including the taxation of personal income of a Haudenosaunee living and working on the sovereign lands of the Six Nations.

CONCLUSION

The language and history of the Canandaigua Treaty, standing alone, should have been sufficient proof for the United States Court of Appeals for the Second Circuit to reverse the opinion of the United States Tax Court in favor of the Petitioners. For this reason, Professor Starna, through his counsel, respectfully request this Court to grant the Petition for a Writ of Certiorari.

Respectfully Submitted,

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[56] E. A. Cruikshank ed., *The Correspondence of Lieut. Governor John Graves Simcoe, with Allied Documents Relating to His Administration of the Government of Upper Canada* 339–40 (1923-1931).