No. 20-1388

In the Supreme Court of the United States

ALICE PERKINS AND FREDRICK PERKINS, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

BRIAN H. FLETCHER
Acting Solicitor General
Counsel of Record
DAVID A. HUBBERT
Acting Assistant Attorney General
FRANCESCA UGOLINI
JACOB CHRISTENSEN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Treaty Between the United States of America, and the Tribes of Indians Called the Six Nations, Nov. 11, 1794, 7 Stat. 44, exempts from federal taxation petitioners' income from selling gravel mined from land belonging to the Seneca Nation.

2. Whether the Articles of a Treaty, U.S.-Seneca Nation, May 20, 1842, 7 Stat. 586, exempt from federal taxation petitioners' income from selling gravel mined from land belonging to the Seneca Nation.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Treaties, statutes, and rules: Page

In the Supreme Court of the United States

No. 20-1388

ALICE PERKINS AND FREDRICK PERKINS, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-39a) is reported at 970 F.3d 148. The decision of the Tax Court (Pet. App. 40a-41a) is unreported. The opinion of the Tax Court (Pet. App. 42a-69a) is reported at 150 T.C. 119.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 2020. A petition for rehearing was denied on November 16, 2020 (Pet. App. 70a-71a). On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a timely petition for rehearing. The petition for a writ of certiorari was filed on March 31, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Seneca Nation of Indians (Seneca Nation or Nation) "was the largest of the Six Nations [within] the Iroquois Confederacy." Pet. App. 4a. "Historically, the Seneca Nation occupied territory throughout Central and Western New York." *Ibid.* Today, the Seneca Nation "continues to own and occupy land in Western New York, including an area known as the Allegany Indian Territories." *Ibid.*

The Seneca Nation retains fee-simple ownership of all the land within its territories. Pet. App. 5a. In accordance with its laws and customs, the Seneca Nation may grant to individual Seneca members a lifetime possessory interest in the surface of certain plots of its land (retaining the reversionary interest for itself). *Ibid.*; C.A. App. 90. The Seneca Nation may also grant to individual members or non-members a permit to mine gravel or other natural resources from the subsurface of particular plots. Pet. App. 5a, 38a. Obtaining such a permit requires approval by the Nation's government and the consent of the Seneca member (if any) who holds a possessory interest in the surface. *Id.* at 5a.

2. Petitioner Alice Perkins was an enrolled member of the Seneca Nation.[1] Pet. App. 6a. She resided with her husband, petitioner Fredrick Perkins (who is not a Seneca member), on the Nation's Allegany Territories in New York. *Ibid.* Together, petitioners operated A & F Trucking (A & F). *Ibid.*; C.A. App. 95.

In 2008, the Seneca Nation granted to Alice Perkins and A & F a permit to mine gravel from a 116-acre plot

---

[1] After the petition for a writ of certiorari was filed, petitioner Alice Perkins passed away. The government does not oppose the motion of the administrator of her estate to be substituted as a petitioner. See Sup. Ct. R. 35.1.

of land in the Allegany Territories. Pet. App. 6a-7a. Alton Jimerson, a Seneca member, held a possessory interest in the plot's surface and consented to the mining. *Ibid.* Petitioners mined and sold gravel from the plot in 2008 and 2009, *id.* at 44a, and paid the Seneca Nation and Jimerson royalties on the proceeds from their gravel sales, *id.* at 6a-7a.

In June 2009, the Seneca Nation imposed a moratorium on mining and withdrew A & F's permit. Pet. App. 6a. At that point, petitioners stopped mining, but they continued to sell, through 2011, gravel that they had already mined. *Id.* at 6a, 44a.

3. In October 2011, petitioners filed joint federal income tax returns for the 2008 and 2009 tax years. Pet. App. 7a. They attached a "detail sheet" to each return claiming that the income from their gravel sales was exempt from federal income taxation under the General Allotment Act of 1887, ch. 119, 24 Stat. 388. Pet. App. 7a; see C.A. App. 73-74, 84-85.[2]

The Commissioner of Internal Revenue (Commissioner) issued notices of deficiency to petitioners. C.A. App. 6-27. The Commissioner determined that petitioners' income from their gravel sales was subject to federal income taxation and that petitioners therefore owed additional taxes. Pet. App. 7a.

---

[2] Petitioners likewise claimed that their income from selling gravel in 2010 was exempt from federal income taxation on their joint federal income tax return for the 2010 tax year. Pet. App. 7a-8a. That claim is the subject of separate litigation in federal district court. See *Perkins* v. *United States*, No. 16-cv-495 (W.D.N.Y. June 16, 2016); Pet. App. 7a-8a. The parties in that case have agreed that any further proceedings in the district court should be stayed pending this Court's disposition of the petition for a writ of certiorari in this case. 16-cv-495 D. Ct. Doc. 108, at 2 (W.D.N.Y. May 12, 2021).

Petitioners filed a petition in the Tax Court, disputing the Commissioner's determination. C.A. App. 4. Rather than rely on the General Allotment Act, petitioners asserted a new theory of tax exemption based on two treaties: the Treaty Between the United States of America, and the Tribes of Indians Called the Six Nations (Treaty of Canandaigua), Nov. 11, 1794, 7 Stat. 44; and the Articles of a Treaty, U.S.-Seneca Nation (1842 Treaty), May 20, 1842, 7 Stat. 586. Pet. App. 45a. Petitioners argued that those treaties exempted from federal taxation "income derived directly from" land belonging to the Seneca Nation—including, in their view, income from the sale of gravel mined from that land. C.A. App. 117 (citation omitted).

4. The Tax Court granted summary judgment to the Commissioner on the issue of taxability, Pet. App. 42a-60a, and issued a final decision ordering petitioners to pay approximately $500,000 in federal income taxes and penalties, *id.* at 40a-41a.

a. The Tax Court first held that petitioners' initial reliance on the General Allotment Act had been misplaced. Pet. App. 48a-49a. The court explained that the General Allotment Act does not extend to "'the reservations of the Seneca Nation'" and therefore "does not excuse [petitioners] from paying tax on the income they earned selling gravel." *Id.* at 49a (quoting General Allotment Act § 8, 24 Stat. 391); see 25 U.S.C. 339.

The Tax Court then rejected petitioners' "new arguments based on the Nation's treaties with the Federal Government." Pet. App. 49a. The court observed that the Treaty of Canandaigua provides that "[t]he United States will never claim the [Seneca Nation's lands], nor disturb the Seneka Nation, nor any of the Six Nations, or of their Indian friends residing thereon and united

with them, in the free use and enjoyment thereof." *Id.* at 49a-50a (quoting Treaty of Canandaigua art. III, 7 Stat. 45) (emphases omitted). The court declined to read that provision to "exempt [petitioners] from paying taxes on the gravel income." *Id.* at 55a. The court explained that "the phrase 'or of their Indian friends residing thereon and united with them'" is "part of a list that includes the Nation and any of the other nations of the Iroquois Confederacy" and therefore cannot "reasonably be read as creating personal rights." *Id.* at 50a. The court further explained that, "[b]y its express terms, the treaty protects the Seneca Nation's lands from being 'disturbed,' which is different from creating a tax exemption." *Id.* at 51a.

The Tax Court then turned to the 1842 Treaty, which the United States and the Seneca Nation entered into "to protect * * * the lands of the Seneca Indians * * * from all taxes, and assessments for roads, highways, or any other purpose until such lands shall be sold and conveyed by the said Indians." Pet. App. 56a (quoting 1842 Treaty art. IX, 7 Stat. 590) (emphases omitted). The court likewise declined to read that provision to exempt petitioners' gravel income from federal taxation. *Id.* at 56a-58a. The opinion of the court explained that "the 1842 Treaty 'clearly prohibits only the taxation of real property.'" *Id.* at 57a (brackets and citation omitted). And the opinion of the court held that, because gravel severed from the land is not real property, petitioners are not "exempt from tax on the sale of the gravel under the 1842 Treaty." *Id.* at 58a.

b. Judges Lauber and Pugh, joined by eight other judges, concurred in part and concurred in the result. Pet. App. 60a-67a. They agreed with the opinion of the court that neither the Treaty of Canandaigua nor the

1842 Treaty "exempt[s] from Federal income tax the revenues of petitioners' gravel mining business." *Id.* at 60a. With respect to the 1842 Treaty, however, the concurring judges expressed the view that "unresolved factual and legal issues as to whether gravel mined from Indian land is part of Indian land" precluded summary judgment on the ground on which the opinion of the court had relied. *Ibid.* The concurring judges would have instead granted summary judgment for the Commissioner "on two alternative grounds: first, that the 1842 Treaty, like the Canandaigua treaty, did not confer rights on individual members of the Seneca Nation, and second, that the 1842 Treaty addresses exemption only from State, not Federal, taxes." *Ibid.*

c. Judge Foley dissented. Pet. App. 67a-69a. In his view, the opinion of the court had "fail[ed] to address the requisite legal and factual issues" in concluding that "gravel mined from Indian land is not part of Indian land." *Id.* at 68a-69a.

5. The court of appeals affirmed. Pet. App. 1a-39a.

Like the Tax Court, the court of appeals "reject[ed] [petitioners'] argument that any guarantee of 'free use and enjoyment' in the Treaty of Canandaigua exempts their gravel-mining income from federal income taxation." Pet. App. 29a. The court of appeals held that "guaranteeing the 'free use and enjoyment' of the land 'applies to the use of land,' not to taxes levied upon individuals who profited from the use of the land." *Id.* at 20a (citation omitted). The court further held that "the Treaty of Canandaigua's promise of 'free use and enjoyment'" does not extend to Alice Perkins "as a member of the Seneca Nation," because the phrase "'Indian friends'" is "better understood as referring to the affiliated nations making up the Six Nations, including the Onondagas

and Cayugas." *Id.* at 28a. The court explained that, "[b]ecause the Treaty of Canandaigua contains no textual support for an individual exemption from federal income taxation," the canon that Indian treaties should be interpreted "liberally" was inapplicable. *Id.* at 29a.

Like the Tax Court, the court of appeals also rejected petitioners' argument that the 1842 Treaty exempts from federal taxation their income from selling gravel. Pet. App. 29a-39a. The court of appeals explained that the 1842 Treaty "neither addresses taxing the income of individual members of the Nation, nor does it address income that derives from 'the lands of the Seneca.'" *Id.* at 34a; see *id.* at 39a (finding "neither textual nor contextual support for extending the tax exemption contained in Article IX to income derived by individuals from Seneca land"). The court further explained that Article IX of the 1842 Treaty "was intended to prevent the imposition of specific taxes imposed by the State of New York on land belonging to the Nation," not federal "income taxes on income earned from" such land. *Id.* at 34a. Thus, "even construing the [1842 Treaty] liberally," the court found "insufficient textual and historical support to read into the treaty an exemption for individual members of the Seneca Nation for taxes on income derived from Seneca land." *Ibid.*

6. The court of appeals denied rehearing en banc, without noted dissent. Pet. App. 70a-71a.

ARGUMENT

Petitioners contend (Pet. 9-24) that the court of appeals erred in determining that neither the Treaty of Canandaigua nor the 1842 Treaty exempts from federal taxation petitioners' income from selling gravel mined from land belonging to the Seneca Nation. The court of appeals' decision is correct and does not conflict with

any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 9-20) that the Treaty of Canandaigua exempts from federal taxation their income from gravel sales. That contention does not warrant this Court's review.

a. The "starting point" for interpreting a treaty "is the treaty language itself." *Minnesota* v. *Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 206 (1999). The language of an Indian treaty "must be interpreted in light of the parties' intentions, with any ambiguities resolved in favor of the Indians." *Herrera* v. *Wyoming*, 139 S. Ct. 1686, 1699 (2019) (citation omitted).

Article III of the Treaty of Canandaigua "describes the boundaries of the Seneca Nation's territory," Pet. App. 18a, and then provides as follows:

> Now, the United States acknowledge all the land within the aforementioned boundaries, to be the property of the Seneka nation; and the United States will never claim the same, nor disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them, in the free use and enjoyment thereof: but it shall remain theirs, until they choose to sell the same to the people of the United States, who have the right to purchase.

7 Stat. 45.

The court of appeals correctly held that the "Treaty of Canandaigua offers no textual support for an exemption to the federal income tax," for two independent reasons. Pet. App. 19a. *First*, although the Treaty of Canandaigua protects a right to the "free use and enjoyment" of the Seneca Nation's lands, that right "cannot be reasonably construed as" encompassing "an exemption from the income tax." *Id.* at 19a-20a (citation and internal

quotation marks omitted). Rather, the right that the treaty protects is a right to be free from "American encroachment onto Seneca lands, or interference with the Seneca Nation's use of its lands." *Id.* at 21a. That understanding of the right accords with the "great object of the treaty," which was to restore certain lands to the Seneca Nation that the Nation had ceded to the United States following the Revolutionary War. *Id.* at 20a (citation omitted); see *id.* at 17a ("The effect of the Treaty of Canandaigua was to restore to the Six Nations—in particular, the Seneca—land ceded to the United States, New York, and Pennsylvania."). The treaty thus protects "the use" of those lands, *id.* at 20a (citation omitted), but "creates no exemption from federal income taxation," *id.* at 21a.

Second, although the Treaty of Canandaigua protects the "free use and enjoyment" of the land by the Seneca Nation and "any of * * * their Indian friends residing thereon," art. III, 7 Stat. 45, the phrase "Indian friends" refers to "the nations affiliated with the Senecas," not "individual members of the Seneca Nation or of any of the other Six Nations," Pet. App. 28a-29a. Indeed, another treaty with the Seneca Nation specifically identifies the Nation's "friends * * * residing among them" as other Indian tribes—namely, "the Cayugas and Onondagas." Treaty with the New York Indians (Treaty of Buffalo Creek) art. 10, Jan. 15, 1838, 7 Stat. 553 (providing that "the Senecas * * * shall have for themselves and their friends, the Cayugas and Onondagas, residing among them, the easterly part of the tract set apart for the New York Indians"); see *Fellows* v. *Blacksmith*, 60 U.S. (19 How.) 366, 368 (1857) (explaining that Article 10 of the Treaty of Buffalo Creek concerns the Seneca Nation and "their friends," *i.e.*, "the Onondagas

and Cayugas"). Thus, the Treaty of Canandaigua's reference to the Seneca Tribe's "Indian friends" cannot "reasonably be read as creating personal rights," including any personal exemption from federal income taxation. Pet. App. 50a. And taxing petitioners' gravel-mining income will not interfere with the Seneca Nation's own "'free use and enjoyment'" of its land because petitioners' failure to pay personal income taxes "will not create a lien or encumbrance on the land." *Id.* at 27a.

b. Petitioners' counterarguments lack merit. Petitioners emphasize that the Treaty of Canandaigua was "a treaty between sovereigns." Pet. 16 (citation omitted); see Pet. 12 (arguing that "[t]he history between, and the relationship of, the United States and the Six Nations, show each regarded the other as independent sovereign nations"). But that is true of any treaty between the United States and an Indian tribe. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 675 (1979) (explaining that "[a] treaty, including one between the United States and an Indian tribe, is essentially a contract between two sovereign nations"); *United States* v. *Wheeler*, 435 U.S. 313, 323 (1978) (describing "Indian tribes" as "unique aggregations possessing attributes of sovereignty over both their members and their territory") (citation omitted). The question remains whether this particular treaty—the Treaty of Canandaigua—"creates an exemption applicable to [petitioners'] gravel-mining income." Pet. App. 11a. For the reasons above, the answer is no. See pp. 8-10, *supra*.

Petitioners invoke (Pet. 16-20) the canon that any ambiguities in an Indian treaty should be resolved in favor of the Indians. But that canon has no application where, as here, no relevant ambiguity in the treaty

exists. See *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 506 (1986) (explaining that the "canon of construction regarding the resolution of ambiguities in favor of Indians * * * does not permit reliance on ambiguities that do not exist"). Because the Treaty of Canandaigua "cannot be 'reasonably construed as supporting an exemption from the income tax,'" there is no ambiguity to which the canon could apply. Pet. App. 19a-20a (citation omitted); see *id.* at 29a ("Because the Treaty of Canandaigua contains no textual support for an individual exemption from federal income taxation, we need not proceed to interpret the treaty liberally.").

Petitioners' reliance (Pet. 29) on 26 U.S.C. 894(a)(1) and 7852(d)(2) is likewise misplaced. Section 894(a)(1) states that the provisions of the Internal Revenue Code "shall be applied to any taxpayer with due regard to any treaty obligation of the United States which applies to such taxpayer." 26 U.S.C. 894(a)(1). Section 7852(d)(2) states that no provision of the Internal Revenue Code "shall apply in any case where its application would be contrary to any treaty obligation of the United States in effect on August 16, 1954." 26 U.S.C. 7852(d)(2). As explained above, the Treaty of Canandaigua imposes no obligation on the United States that is applicable here. See pp. 8-10, *supra*. Thus, the court of appeals' decision is consistent with Sections 894(a)(1) and 7852(d)(2).

c. Petitioners do not identify any disagreement in the lower courts on the interpretation of the Treaty of Canandaigua. Indeed, other courts of appeals have rejected similar arguments that the Treaty of Canandaigua creates federal tax exemptions. See *Lazore* v. *Commissioner*, 11 F.3d 1180, 1186-1187 (3d Cir. 1993) (holding that the Treaty of Canandaigua does not exempt wages earned by members of the Mohawk Nation from

federal income taxation); *Cook* v. *United States*, 86 F.3d 1095, 1097-1098 (Fed. Cir.) (holding that the Treaty of Canandaigua does not exempt diesel-fuel sales on Indian land from federal excise taxes), cert. denied, 519 U.S. 932 (1996).

2. Petitioners also contend (Pet. 21-24) that the 1842 Treaty exempts from federal taxation their income from gravel sales. That contention likewise does not warrant this Court's review.

a. Article IX of the 1842 Treaty provides as follows:

> The parties to this compact mutually agree to solicit the influence of the Government of the United States to protect such of the lands of the Seneca Indians, within the State of New York, as may from time to time remain in their possession from all taxes, and assessments for roads, highways, or any other purpose until such lands shall be sold and conveyed by the said Indians, and the possession thereof shall have been relinquished by them.

7 Stat. 590.

The 1842 Treaty "cannot be construed to create an exemption to income taxes on income earned from land owned by the Seneca Nation," for four independent reasons. Pet. App. 34a. *First*, the 1842 Treaty exempts only "the *lands* of the Seneca Indians" "from all taxes." Art. IX, 7 Stat. 590 (emphasis added). Thus, by its "plain language," the 1842 Treaty "'prohibits only the taxation of real property.'" Pet. App. 36a (brackets and citation omitted). It does not prohibit the taxation of resources severed from such property. *Id.* at 37a-38a, 57a-58a. Here, "[t]he gravel wasn't attached to the land when it was sold, so [petitioners] aren't exempt from tax on the sale of the gravel under the 1842 Treaty." *Id.* at 57a-58a; see *id.* at 38a ("Article IX of the Treaty with the Seneca

was aimed at preventing the State of New York from taxing land belonging to the Seneca Nation, not the sale of resources derived from that land."); cf. *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 156 (1973) (explaining that, "absent clear statutory guidance, courts ordinarily will not imply tax exemptions and will not exempt off-reservation income from tax simply because the land from which it is derived, or its other source, is itself exempt from tax").

Second, the 1842 Treaty confers "rights on the Seneca Nation, not its constituent members." Pet. App. 61a (Lauber and Pugh, JJ., concurring in part and concurring in the result). The "lands" that the 1842 Treaty "protect[s]" are "lands of the Seneca Indians"—*i.e.*, lands that belong to the Seneca Nation. Art. IX, 7 Stat. 590. The treaty thus protects the interests of the Nation, not those of its individual members. Here, the income at issue is income that petitioners generated "for themselves, not for the Seneca Nation." Pet. App. 63a (Lauber and Pugh, JJ., concurring in part and concurring in the result). The 1842 Treaty therefore "has no application to this case." *Ibid.*

Third, even if the 1842 Treaty could be read as conferring rights on individual Seneca members, it would protect from taxation only those members in "possession" of the land. Art. IX, 7 Stat. 590. By its terms, the treaty "protect[s]" from taxation only "such of the lands of the Seneca Indians * * * as may from time to time remain in their *possession*," and only "until such lands shall be sold and conveyed by the said Indians, and the *possession* thereof shall have been relinquished by them." *Ibid.* (emphases added). The Seneca Nation granted a possessory interest in the land at issue here to Alton Jimerson. Pet. App. 6a-7a. Alice Perkins and

A & F held only a permit to mine gravel from the land (with Jimerson's consent). *Id.* at 6a. Because petitioners themselves were not in "possession" of the land, 1842 Treaty art. IX, 7 Stat. 590, the 1842 Treaty cannot be read as protecting them from taxation.

Fourth, the 1842 Treaty "addresses exemption only from State, not Federal, taxes." Pet. App. 60a (Lauber and Pugh, JJ., concurring in part and concurring in the result). The introductory words of Article IX of the 1842 Treaty refer to the parties' "mutual[] agree[ment] to solicit the influence of the Government of the United States to protect * * * the lands of the Seneca Indians." 7 Stat. 590. Given that a "sovereign Government cannot 'influence' itself," the "natural interpretation of those introductory words is that the United States would exercise its influence to prevent *New York* from taxing the Seneca's land." Pet. App. 65a (Lauber and Pugh, JJ., concurring in part and concurring in the result). That interpretation accords with the history of the 1842 Treaty, which was signed in the wake of "New York's attempt to impose road and highway taxes on the land comprising the Allegany and Cattaraugus reservations." *Id.* at 66a. As the court of appeals explained, "Article IX as a whole was intended to prevent the imposition of [those] specific taxes." *Id.* at 34a. Thus, "the 'taxes' to which the 1842 Treaty refers are taxes imposed by the State of New York"—not taxes imposed by the federal government. *Id.* at 63a (Lauber and Pugh, JJ., concurring in part and concurring in the result).

b. Petitioners contend that "[t]he original meaning of the 1842 Treaty is clear from its text and extratextual sources should not be used to cloud the meaning of the text." Pet. 21 (emphasis omitted). But as explained above, see pp. 12-14, *supra*, the 1842 Treaty does not

exempt petitioners' income from federal taxation for four reasons, each grounded in the "original meaning" of the treaty's text. *Washington State Dep't of Licensing* v. *Cougar Den, Inc.*, 139 S. Ct. 1000, 1016 (2019) (Gorsuch, J., concurring in the judgment). And to the extent that the courts below consulted extratextual sources, they did so only to discern that original meaning—*i.e.*, to understand the treaty's "terms as the Indians themselves would have understood them." *Ibid.* (quoting *Mille Lacs*, 526 U.S. at 196); see, *e.g.*, Pet. App. 33a (explaining that "th[e] Court must construe the treaty liberally, interpreting it as the Seneca would have understood it, and analyzing the language employed in light of its historical background"). The approach followed by the courts below was therefore consistent with well-established principles of treaty interpretation. See *Mille Lacs*, 526 U.S. at 196 (explaining that an examination of "'the history of the treaty, the negotiations, and the practical construction adopted by the parties'" may "provide[] insight into how the parties * * * understood the terms of the agreement") (citation omitted).

Petitioners also contend (Pet. 23) that the court of appeals "erred by refusing to read the Canandaigua Treaty and the 1842 Treaty *in pari materia*." But the court correctly found no basis for reading the two treaties *in pari materia*, explaining that, whereas the 1842 Treaty "was concluded in large part to remedy a specific grievance related to state taxes and liens placed upon Seneca land," the Treaty of Canandaigua was concluded for a different purpose—namely, to "restor[e] to the Seneca Nation autonomy and control over specific lands that were [previously] ceded" by the Nation. Pet. App. 29a. In any event, neither treaty can be construed to exempt from federal taxation petitioners' income in this

case. See pp. 8-10, 12-14, *supra*. Thus, even if they were read *in pari materia*, the outcome would be the same.

c. Petitioners do not allege the existence of any disagreement in the lower courts on the interpretation of the 1842 Treaty. The court of appeals' interpretation of that treaty does not conflict with any decision of another court of appeals.

3. Petitioners additionally contend that "Congress has not enacted any law allowing respondent * * * to assess or collect income tax from enrolled Senecas, living and working on the Seneca Nation territory." Pet. 25 (capitalization altered; emphasis omitted). That issue is not fairly included in the question presented in the petition for a writ of certiorari, which asks whether the two treaties discussed above create "an *exemption* from federal income tax applicable to an enrolled Seneca member whose income is derived from the lands of the Seneca Nation." Pet. i (emphasis added). This Court therefore should not consider the issue. See Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."); *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) (explaining that "the fact that petitioner discussed [an] issue in the text of his petition for certiorari does not bring it before" this Court, because "Rule 14.1(a) requires that a subsidiary question be fairly included in the question presented for [the Court's] review") (brackets, citation, and emphasis omitted).

In any event, petitioners' contention that Congress has not enacted any law authorizing the assessment or collection of the tax at issue here lacks merit. The Internal Revenue Code taxes every individual—including Indians—on "all income from whatever source derived." 26 U.S.C. 61; see 26 U.S.C. 1; Indian Citizenship Act of

1924, ch. 233, 43 Stat. 253 (declaring Indians to be citizens of the United States). This Court has therefore held that, "in ordinary affairs of life, not governed by treaties or remedial legislation, [Indians] are subject to the payment of income taxes as are other citizens." *Squire* v. *Capoeman*, 351 U.S. 1, 6 (1956); see *Superintendent of Five Civilized Tribes* v. *Commissioner*, 295 U.S. 418, 419-420 (1935) (similar). Thus, "absent a specific exemption," which petitioners have not established here, their income from gravel sales is subject to federal income taxation. Pet. App. 10a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

BRIAN H. FLETCHER
Acting Solicitor General
DAVID A. HUBBERT
Acting Assistant Attorney General
FRANCESCA UGOLINI
JACOB CHRISTENSEN
Attorneys

AUGUST 2021