No. 20-1388

In the
Supreme Court of the United States

ALICE PERKINS, ET VIR
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

REPLY TO BRIEF IN OPPOSITION

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INTRODUCTION

Petitioners request a writ of certiorari to review a judgment entered against them by the United States Tax Court, after it granted a summary judgment motion brought by the Commissioner of Internal Revenue (the "Commissioner") (Pet. App. 46a). Pursuant to Supreme Court Rule 15.6, Petitioners respectfully submit this Reply to the Brief in Opposition, addressing only new factual or legal points raised by the Commissioner.

POINTS IN REPLY

I

CONGRESS NEVER INTENDED A FEDERAL INCOME TAX BE IMPOSED ON INDIVIDUAL INDIANS RESIDING AND LABORING ON THE SOVEREIGN SENECA NATION TERRITORY

Petitioners, Alice[1] and Fredrick Perkins, have not raised a "new theory" or "new argument" before this Court, which was not previously presented to the United States Tax Court ("Tax Court") or the United States Court of Appeals for the Second Circuit ("Second Circuit"). Based on the Canandaigua Treaty and the 1842 Treaty, this Court is asked to decide whether Congress ever intended to

[1] Alice J. Perkins has died. The Administrator of her Estate filed a motion pursuant to Supreme Court Rule 35 to be substituted as the estate representative. The Commissioner does not oppose the motion. Brief in Opposition [hereinafter "Br. Op."], filed August 20, 2021, at 2 fn. 1. The Rule 35 motion still remains pending before this Court.

impose a federal income tax on the Seneca Nation, its people, or its "Indian friends" residing and laboring on the aboriginal territory of the Seneca Nation of Indians (the "Seneca Nation").

In his Brief in Opposition, the Commissioner misstates the "question presented in the petition" as being "whether the two treaties . . . create 'an *exemption* from federal income tax applicable to an enrolled Seneca member whose income is derived from the lands of the Seneca Nation." (Br. Op. at 16). After misstating the question presented, the Commissioner urges the Court not to consider whether Congress authorized the Internal Revenue to assess or collect a federal income tax from an enrolled Seneca living and working on the Seneca Nation territory. (*Id.*). In the Commissioner's view, "[t]hat issue is not fairly included in the question presented in the petition for a writ of certiorari," based on Rule 14.1 (a). (*Id. citing Wood v. Allen*, 558 U.S. 290, 304 [2010]).

"The question presented [in the Petition] is whether the United States Court of Appeals and the United States Tax Court have given 'due regards' to the treaty obligations of the United States . . . ." (Petition for a Writ of Certiorari [hereinafter "Pet."], filed March 31, 2021, at i). Petitioners have consistently focused their argument on whether Congress ever intended to impose a federal income tax on the Seneca Nation, its people, or its Indian friends, and not on whether specific words within these two treaties could be read to explicitly create an exemption from a federal income tax that would

not be contemplated by Congress for more than 100 years, with the enactment of the Sixteenth Amendment in 1913. (Pet. at 8-25). U.S. Const. amend. XVI.

The Second Circuit found, "it is nearly impossible for parties to treaties concluded prior to 1913 to have contemplated an exemption to a tax on income." *Perkins v. Comm'r. of Internal Revenue*, 970 F.3d 148, 155 (2d Cir. 2020). This is contrary to the liberal rules of construction established by this Court in *Squire v. Capoeman*, 351 U.S. 1 (1956).

In *Squire*, this Court reviewed the General Allotment Act of 1837 and the protection given to individual Indians whose tribes had no reservations, but who were given lands in trust by the United States. The Court acknowledged the 1837 Act was "not couched in terms of nontaxability" and had been enacted prior to 1913, but found Congress intended by using the general words "charge or incumbrance" to protect these Indian lands and the income derived from such lands from federal taxation. *Id.* at 6-7. More importantly, the Court found income earned in 1942 from harvesting timber was exempt from federal income tax, *id.* at 3-5, even though the statute "antedated the federal income tax by 10 years." *Id.* at 7.

As in *Squire*, the Court has the "modest" task of not only determining the congressional intent behind these two treaties but also to "give effect to the terms as the Indians themselves would have understood them." *Washington State Dep't of*

Licensing v. Cougar Den, Inc., 139 S. Ct. 1000, 1016 (2019). First, the Court must examine whether the parties to the Canandaigua Treaty intended and agreed to exercise exclusive jurisdiction over their respective people and sovereign lands and to govern themselves free from the interference of other sovereign nations. If the Court finds such a congressional intent, it must then examine whether Congress has expressly abrogated these rights. *McGirt v. Oklahoma,* 140 S. Ct. 2452, 2468 (2020).

A. The Canandaigua Treaty's Great Object Was the Mutual and Reciprocal Promises Not to Disturb the People of Other Recognized Sovereign Nations from the Use and Enjoyment of their Treaty-Protected Sovereign Lands.

The Commissioner, like the Second Circuit, has a one-sided, narrow view of the "great object" of the Canandaigua Treaty. (Br. Op. 9).

> [T]he 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. (Citation omitted). 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.…The treaty thus protects "the use" of those lands

> (citation omitted), but "creates no exemption from federal income taxation ...."

(Br. Op. at 9). Amicus William A. Starna who co-authored *On the Road to Canandaigua: The Treaty of 1794,* 19 Am Indian Q. (1995), the article which is the underpinning to the Second Circuit's historical analysis, has provided the Court with original source materials proving the Canandaigua Treaty's "great object" was accomplished by the mutual and reciprocal promises not to disturb the people residing on, and united with those, within the boundaries of sovereign lands under the protection of other independent sovereign nations. *See* Brief of Amicus Curiae William A. Starna, Ph.D. in Support of Petition for a Writ of Certiorari ("Amicus Br."), filed May 7, 2021. *See, also,* William A. Starna, *The 1794 Treaty of Canandaigua and the Taxation of Native Americans,* 171 Tax Note Federal. 1915 (June 21, 2021).

In Professor Starna's view, the Senecas and the other Six Nations "are only dependent upon the United States honoring the promises made more than 236 years ago upon the ratification of the Canandaigua Treaty." (Amicus Br. at 18). "The reciprocal promise[s] made in articles II, III, and IV [of the Canandaigua Treaty] [are] plain, direct, understandable, and unambiguous, conveying the clear intent of the parties." (*Id.* at 19).

> 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.

(*Id.* at 18). 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," is denoted in the Supremacy Clause. (*Id.* at 17) *citing* U.S. Const. art. VI, cl. 2. The word, "land", thus defines the respective realm of each sovereign nation.

B. The Canandaigua Treaty Promises Not to Disturb <u>People</u> in the Free Use and Enjoyment of Land.

In the Canandaigua Treaty, the object of the verb "disturb" is not "land" but "people." The United States promised not to "disturb the Seneka nation, nor any of the Six Nations, or of their Indian friends residing thereon and united with them . . . ." This phrase must be interpreted as the Seneca and Haudenosaunee Nations would have understood its meaning at the time of the Canandaigua Treaty.

Traditional Haudenosaunee society, as any historian and anthropologist would attest, depended upon individual Indians collectively working together and being part of its governance through a clan system. Individual Haudenosaunee are identified as members of one of six clans having a kinship with clan members of other Haudenosaunee Nations. The Haudenosaunee would have understood a treaty could not protect its sovereign interests if it did not protect its individual members or the relationship formed as part of its Confederacy.

Each Haudenosaunee Nation has the right to decide who will live amongst them. At the time of the Canandaigua Treaty, individual Cayugas and Onondagas resided on the territories of the Seneca Nation. Marian E. White, William E. Engelbrecht, and Elisabeth Tooker. "Cayuga." In Bruce G. Trigger, ed., *Handbook of North American Indians,* vol. 15, *Northeast*, 502. Washington DC: Smithsonian Institution Press, 1978; Harold Blau, Jack Campisi, and Elisabeth Tooker. "Onondaga." In Bruce G. Trigger, ed., *Handbook of North American Indians,* vol. 15, *Northeast*, 495. Washington DC: Smithsonian Institution Press, 1978. The United States promised not to "disturb the Seneka nation . . . of their Indian friends residing thereon and united with them." 7 Stat. 45. The Senecas would have understood this phrase to mean that <u>they</u>, not the United States, would decide who would benefit from the "free use and enjoyment" of its sovereign lands.

In 1838, the United States sought to remove the Seneca people, as well as their "friends," the

individual Cayugas and Onondagas living amongst the Senecas, from the aboriginal lands of the Seneca Nation. Treaty with the New York Indians, Apr. 4, 1840, art. 10, 7 Stat. 553. The Treaty with the New York Indians, also known as the Buffalo Creek Treaty, sought the removal of native people from their aboriginal lands to lands reserved on the Kansas Territory. *Id.* Many Senecas and other native "friends" refused to leave, thus eventually leading to a new federal treaty. Treaty with the Senecas ("1842 Treaty"), May 20, 1842, 7 Stat. 586.

The United States later ratified the 1842 Treaty restoring to the Senecas and their friends the same title and rights they had prior to 1838 on the Cattaraugus and Allegany territories. The first article of the 1842 Treaty confirms 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 1838 conveyance. 1842 Treaty, *supra*, 7 Stat. 587; *see, also, The New York Indians,* 72 U.S. (5 Wall.) 716, 767 (1866). In *The New York Indians* case, this Court held:

> Until the Indians have sold their lands and removed from them in pursuance of the treaty stipulations, they are to be regarded as still in their ancient possession, and … under their original rights, … entitled to the undisturbed enjoyment of them.

Id. Since the 1842 Treaty restores to the Seneca people "the same rights and title in all things, as they had and possessed" at the time of the Canandaigua Treaty, the Second Circuit erred by refusing to read these two treaties *in pari materia* -- another point of law the Commissioner has failed to concede. (Br. Op. at 15).

C. The Seneca Nation Still Remains in Ancient Possession of its Sovereign Lands.

The Commissioner states, "The Seneca Nation retains ***fee-simple ownership*** of all land within its territories." (Br. Op. at 2, emphasis added). While it may appear to the Court as splitting hairs, the statement is not the best description of this acknowledged sovereign land. Afterall, the Seneca Nation has never been given rights or fee to its lands by a superior lord or sovereign, from which the word fee has its origin.

As this Court confirmed in *The New York Indians,* 72 U.S. (5 Wall.) 716, 771 (1866), the Senecas remain "in ancient possession" of their aboriginal lands, creating "indefeasible title" to such lands "that may extend from generation to generation" until the Senecas surrender such lands. In 1842, the New York State Senate's Committee on Indian Affairs found:

> The natives are the allodial lords of the soil and their title is not divested by discovery, royal charters, nor bargain

> between strangers . . . . Their title to the small patches of land which remain to them is untouched, and remains as perfect as it was before a European had placed a foot upon the Continent. The soil is theirs as far as human property can reach, by the providence of God, and the laws of nations.

Committee on Indian Affairs, New York State Senate, Senate Report No. 95 (April 8, 1842), 10.

Contrary to the Commissioner's position, this case does not turn on whether Alice Perkins owned or had "a lifetime possessory interest" in the subject land. At the time these treaties were ratified, the Haudenosaunee did not recognize the Anglo-European concept of "ownership." *In Defense of* Property, 118 Yale L. J. 1022, 1066 (April 2009). Instead of ownership, they embraced the notion of stewardship. *Id.* Therefore, it would be antithetical to interpret any rights under these treaties based on ownership.

Petitioners have shown Alice Perkins had a superior and exclusive right to operate a gravel pit on the Seneca Nation Allegany Territory. Under these treaties, the United States promised not to disturb the "free use and enjoyment" or the right of "occupation and enjoyment" of the lands from which she operated the gravel pit and while she lived and worked on the Allegany Territory in accordance with the laws of the Seneca Nation.

II

THE COMMISSIONER HAD NO AUTHORITY TO ASSESS OR COLLECT A TAX ON INCOME EARNED BY AN ENROLLED SENECA FROM THE OPERATION OF A GRAVEL PIT ON THE SENECA NATION ALLEGANY TERRITORY

Congress has directed the Commissioner to give "due regard" to the treaty obligations of the United States. 26 U.S.C.A. § 894(a)(1)(West 2021). The Internal Revenue Code further provides, "No provision of this title (as in effect without regard to any amendment thereto enacted after August 16, 1954) 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." 28 U.S.C.A. § 7852(d)(2)(West 2021). Since the treaties at issue in this case were in effect on August 16, 1954, these treaties continue to protect the land within the treaty-defined boundaries and any income derived from such land.

The Commissioner summarily denies the United States has any treaty obligation applicable in this case. (Br. Op. at 11). While he is willing to accept the favorable rulings issued by two lower courts, the Commissioner rejects the dicta offered by these same courts if presented with factual allegations as presented in this case. (*Id.* at 11-12) *citing Lazore v. Comm'r,* 11 F.3d 1180 (3d Cir. 1993) and *Cook v. United States,* 86 F.3d 1095 (Fed. Cir. 1996). The Commissioner suggests this case is a typical tax case brought by a Native American based

solely on her status, instead of a case of first impression.

The Commissioner asserts the Second Circuit's decision "does not conflict with any decision of this Court …." (Br. Op. at 7-8). Despite the fact that neither the Commissioner nor the Tax Court created a record based on historical evidence, the Commissioner defends the Tax Court's and Second Circuit's use of extratextual sources to narrow the interpretation of the plain text of these treaties. (Br. Op. at 14-15). *Contra McGirt* 140 S. Ct. at 2469; *Washington State Dep't of Licensing v. Cougar Den, Inc.,* 139 S. Ct. 1000, 1016 (2019)("[W]e normally construes any ambiguities against the drafter who enjoys the power of the pen.")

More importantly, the Commissioner never addressed the historical findings offered to the Court by Professor Starna in his Amicus Brief. As Professor Starna pointed out in his brief, the Canandaigua Treaty is unique among other Indian treaties. Yet, the Commissioner ignored these historical references, proving the Six Nations were treated by the United States as independent sovereign nations. (Br. Op. at 10). In response, he flippantly states, "But that is true of any treaty between the United States and an Indian tribe." (Br. Op. at 10).

Finally, with regards to the 1842 Treaty, the Commissioner argues the treaty prohibits state, not federal, taxation, citing the following provision within the 1842 Treaty.

> 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 . . . .

1842 Treaty, *supra.*, art. 9th, 7 Stat. 590. After reading this provision, the Tax Court and the Commissioner concluded that, since a "sovereign Government cannot 'influence' itself," the "natural interpretation of those introductory words is the United States would exercise influence" over the State of New York. (Br. Op. at 14). The phrase actually means the parties negotiating the treaty would seek to have the President and Senate ratified the terms of the compact in accordance with the Constitution of the United States. U.S. Const. art. II, §2, cl. 2. Nothing in the 1842 Treaty limits its scope to only state taxation.

CONCLUSION

The Second Circuit has decided an important question of federal law that has not been, but should be, settled by this Court, in a way that is consistent with the Court's precedents. This Court must honor the promises made in treaties to the Seneca Nation and its people, as Congress has directed. For these

reasons, the Court should grant certiorari and hear the merits of this case.

Respectfully submitted,

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