18-2607

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

ONEIDA INDIAN NATION,

Plaintiff-Appellant,

—against—

UNITED STATES DEPARTMENT OF INTERIOR,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

BRIEF FOR PLAINTIFF-APPELLANT ONEIDA INDIAN NATION

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INTRODUCTION

The Department of the Interior (DOI) approved an amendment to the Oneida Tribe of Indians of Wisconsin's constitution, changing the tribe's name to "Oneida Nation" despite DOI's recognition that this would cause confusion with Appellant Oneida Indian Nation, federally recognized at the time as the Oneida Nation of New York and long known as the Oneida Nation. *See Oneida Nation of New York v. Cuomo*, 645 F.3d 154 (2d Cir. 2011); *United States v. Markiewicz*, 978 F.2d 786 (2d Cir. 1992). DOI then federally recognized the Wisconsin tribe's new Oneida Nation name by publishing it in the Federal Register list of recognized tribes.

The Nation filed an Administrative Procedure Act challenge to DOI's decisions to approve the name-change amendment and to federally recognize it by Federal Register publication. The Nation alleged that after and because of DOI's actions the Wisconsin tribe demanded that the Nation cease using its Oneida Nation name, threatened to challenge Nation trademarks, and followed through by filing a petition to cancel them. The Nation alleged that the Wisconsin tribe explicitly invoked DOI's decisions when taking those actions. The

Nation also alleged that the name change caused confusion between the tribes and diminished the Nation's political and cultural stature.

By dismissing the Nation's complaint for lack of Article III standing, the district court erred procedurally and substantively. Procedurally, the district court erred by disregarding the complaint's factual allegations of injury even though DOI did not offer evidence to contradict those allegations. Substantively, the district court erred by speculating that the alleged harms to the Nation could have occurred from unilateral tribal action that could have been (but was not) taken without DOI's name-change approval and Federal Register recognition of the name change. In relying on a counterfactual theory of how injury could have occurred, the district court disregarded the causation implied by the actual sequence of events and the Wisconsin tribe's explicit invocation of DOI's actions as a source of legal rights. The court also disregarded the reality that the Wisconsin tribe could not have changed its legal name in its federally approved constitution without DOI's approval, and in any event that formal federal recognition by publication in the Federal Register is a solely federal decision with its own independent consequences.

STATEMENT OF JURISDICTION

On August 30, 2018, the Nation filed a notice of appeal from the district court's August 24, 2018 decision and order and the judgment of dismissal. JA 224 (decision and order), JA 242 (judgment) & JA 244 (notice of appeal). This Court has jurisdiction to review the order and judgment. 28 U.S.C. § 1291. The district court had subject matter jurisdiction. 5 U.S.C. §§ 702 & 703 and 28 U.S.C. §§ 1331 & 1362.

ISSUES PRESENTED

1. Whether a motion to dismiss for lack of Article III standing presents a factual challenge, permitting the district court to disregard the complaint's allegations of injury, when the defendant does not contradict those allegations and disclaims reliance on facts outside the complaint, and the district court does not resolve any factual disputes?

2. Whether allegations that DOI's decisions to give federal approval to the change of the Wisconsin tribe's name to Oneida Nation and to federally recognize that name injured the Nation with respect to its commercial interests, right to use its own name, trademark rights, and dignitary and reputation interests are sufficient to satisfy Article III standing requirements at the pleading stage?

STATEMENT

This is an appeal from an order of the United States District Court for the Northern District of New York (Hon. Mae A. D'Agostino) dismissing an APA action for lack of Article III standing. The unreported decision can be found at page 224 of the Joint Appendix.

A. The Oneida Nation of New York and the Oneida Tribe of Indians of Wisconsin

The Oneida Nation was one of the Six Nations of the Iroquois Confederacy that occupied much of what is now central New York from time immemorial. *City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 203 (2005). The Oneida chose to fight alongside the colonists in the Revolutionary War, and in turn the new national government repeatedly confirmed Oneida possession of tribal land. 25 J. Cont'l Cong. 681, 687 (Oct. 15, 1783); Treaty with the Six Nations, 7 Stat. 15 (Oct. 22, 1784); Treaty with the Six Nations, 7 Stat. 44 (Nov. 11, 1794); Treaty with the Oneida, 7 Stat. 47 (Dec. 2, 1794). Before long, however, illegal land purchases by New York and settlement pressure reduced Oneida landholdings. Many Oneida left New York and went to Canada or Wisconsin. *Sherrill*, 544 U.S. at 204-07.

By treaty in 1838, the United States recognized a distinct Oneida tribe located in Wisconsin. Treaty with the First and Second Christian Parties of the Oneida Indians Residing at Green Bay, 7 Stat. 566 (Feb. 3, 1838). In 1936, the Wisconsin tribe voted to reorganize under the Indian Reorganization Act (IRA), 48 Stat. 984 (June 18, 1934), adopting a Constitution and By-laws as the "Oneida Tribe of Indians of Wisconsin." JA 20, ¶21. The Secretary of the Interior exercised authority pursuant to 25 U.S.C. § 5123 to approve the Constitution and By-laws. *Id.* The Wisconsin tribe could only amend its Constitution, including to change its name, if DOI approved and agreed to conduct another federal election for that purpose. JA 25, ¶33; 25 U.S.C. § 5123.[1]

After the departures to Wisconsin and Canada, the Oneida Nation and its members remaining in New York held on to a small amount of the Nation's original landholdings there, including through litigation brought by the United States to recover Nation land that had been taken in a New York state court mortgage foreclosure. *United States v.*

[1]In New York, the Oneida Nation voted not to reorganize under the IRA, retaining a traditional form of government. JA 20, ¶21; *New York v. Salazar*, 2012 WL 4364452, at *10 (N.D.N.Y. Sept. 24, 2012).

Boylan, 265 F. 165 (2d Cir. 1920). This Court has held that the Nation's federal treaty reservation in New York was never disestablished, although for equitable reasons much of it is no longer subject to tribal sovereignty. *Upstate Citizens for Equality, Inc. v. United States*, 841 F.3d 556, 563 (2d Cir. 2016); *Oneida Indian Nation v. Madison County*, 665 F.3d 408, 443 (2d Cir. 2011). In recent years, the federal government has accepted thousands of acres of land within the reservation into trust for the Nation. *See Upstate Citizens*, 841 F.3d at 559 & 564. The Nation has also entered into a settlement of its longstanding disputes with the State of New York and county governments, and the settlement acknowledges the continued reservation status of the Nation's historic reservation. *See Town of Verona v. Cuomo*, 997 N.Y.S.2d 670, 2014 WL 4286916, at *1 (N.Y. Sup. Ct. June 27, 2014).

Federal law requires DOI to publish an accurate list of Indian tribes recognized by the United States. 25 U.S.C. § 5131; 25 U.S.C. § 5130 note (Pub. L. 103-454 § 103(7)). The Federal Register list identifies for federal agencies, states and the general public which tribes are recognized by the United States and the name by which each

tribe is recognized. JA 20, ¶22. DOI has included the Nation and the Wisconsin tribe in every published list of recognized tribes, beginning with the first list published in 1979. JA 21, ¶24; 44 Fed. Reg. 7235, 7236 (Feb. 6, 1979). The Nation was listed as the Oneida Nation of New York. JA 21, ¶24.a. The Wisconsin tribe was listed as the Oneida Tribe of Indians of Wisconsin, except between 1988-2000 when it was listed as the Oneida Tribe of Wisconsin. JA 22, ¶24.b. DOI's use of "Nation" and "Tribe" and geographic modifiers to distinguish present-day tribal governments with a single ancestral root is typical of the federal recognition of tribes as reflected in the list published in the Federal Register. JA 20, ¶20; JA 22, ¶25; *see* 83 Fed. Reg. 34863, 34865 (July 23, 2018).[2]

B. Federal Approval and Recognition of the Wisconsin Tribe as Oneida Nation

Although the Nation and the Wisconsin tribe were co-plaintiffs in the land claim litigation that sought damages for land illegally

[2]When it filed suit, Appellant was federally recognized as the Oneida Nation of New York. JA 14, ¶1; 82 Fed. Reg. 4915, 4917 (Jan. 17, 2017). It is now recognized as the Oneida Indian Nation. 83 Fed. Reg. 34863, 34865 (July 23, 2018).

purchased by New York,[3] they are business and governmental rivals. The Wisconsin tribe has periodically sought to interfere in New York with the Nation's governance. JA 23-24, ¶¶26-30. And it has sought to portray itself as the true or principal successor to the Oneida Nation that made Founding era treaties with the United States. JA 24, ¶31.

On November 10, 2010, as required by the Wisconsin tribe's constitution and 25 U.S.C. § 5123, the Wisconsin tribe's government (the Business Committee) passed a resolution requesting a federal election to amend its constitution.[4] JA 24, ¶33. The amendments included changing the tribe's name from "Oneida Tribe of Indians of Wisconsin" to "Oneida Nation." *Id.*[5]

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[3]*See Oneida Indian Nation of New York v. County of Oneida*, 617 F.3d 114 (2d Cir. 2010) (land claim litigation brought by "Oneida Indian Nation of New York" and "Oneida Tribe of Indians of Wisconsin").

[4]www.loc.gov/law/help/american-indian-consts/PDF/37026494.pdf.

[5]DOI has promulgated a Final Rule permitting tribes to request a federal election to amend constitutions to remove the requirement for federal elections for *future* amendments, which the Wisconsin tribe has done. 80 Fed. Reg. 63094 (Oct. 19, 2015). DOI conceded below that the Wisconsin tribe was required, at the times relevant here, to obtain DOI's approval of the name-change and other amendments. JA 182-83.

In January 2011, the Wisconsin tribe sent the Midwest Regional Office of the Bureau of Indian Affairs (BIA), a resolution asking the BIA to approve and conduct a federal election. JA 25, ¶34. In a letter dated October 11, 2011, the Regional Office advised the tribe that "[n]one of the proposed amendments appear to be contrary to law," and thus "a secretarial election can proceed." JA 26, ¶36. The Regional Office raised "[a] concern," however, that the proposed name change would increase confusion between the Wisconsin tribe and the Nation but left it to the Wisconsin tribe to consider the problem:

> [T]he name "Oneida Tribe of Indians of Wisconsin" has a long history including the reorganization under the Indian Reorganization Act. Changing the name will cause confusion for a number of entities engaged in business with the Oneida Tribe as well as other governments. Compounding this difficulty will be the name of the tribe in the state of New York, called the "Oneida Nation of New York." While the two names would not be exactly the same they are close enough so that they will undoubtedly be confused more often than they are now. The Oneida Nation of New York is often referred to as the Oneida Indian Nation, including some self-determination contracts with the Bureau of Indian Affairs, which will compound the existing confusion over this matter.

Id. & JA 48.

In response to the BIA, the tribe acknowledged the BIA's concern but put it aside and emphasized its motive regarding the name change.

JA 27, ¶39. The tribe announced that it "believe[s] strongly in the proposed amendment as being more responsive to the Tribe's governmental status" – an elliptical way of saying that the whole point of the name change was to make a claim about which tribe (New York or Wisconsin) was *the* true Oneida Nation. *Id.* Nevertheless, the BIA accepted the Wisconsin tribe's resolution of the confusion problem that BIA itself had declined to consider, and so on May 2, 2015, conducted an election and certified that voters in the election approved the constitutional name change. JA 28, ¶40. The BIA approved the amendments effective June 16, 2015. *Id.* ¶41.

DOI never gave the Nation notice of the Wisconsin tribe's amendment or of the BIA Regional Office's decision to approve the election and the name change. JA 42, ¶75. In fact, the Midwest Regional Office did not even consult with the BIA Eastern Regional Office that oversees tribes in New York, including the Nation. *Id.*

The following year, DOI published the list of federally-recognized tribes that is required by 25 U.S.C. § 5131. JA 28, ¶ 42 (citing 81 Fed. Reg. 26826, 26829 (May 4, 2016)). In that list, DOI federally recognized the Wisconsin tribe as the "Oneida Nation" for the first time. *Id.* DOI

did not give notice to the Nation or to the BIA Eastern Regional Office before deciding to federally recognize the new name by publication and did not consider the impact of that decision on the Nation. JA 29, ¶44; JA 42, ¶75. Publication was authorized by an Acting Assistant Secretary who is a member of and a former lawyer for the Wisconsin tribe. JA 29-30, ¶¶46-47.

C. Exploitation of Federal Approval and Recognition

The Wisconsin tribe wasted little time exploiting the imprimatur created by the federal approval of the new name. On January 16, 2017, the Wisconsin tribe's lawyer wrote to a Nation lawyer, flagging DOI's approval of the Wisconsin tribe's name change and the Federal Register publication of the name on the list of federally recognized tribes. JA 31, ¶50; JA 58. The letter relied on those federal actions and asserted the Wisconsin tribe's right to use "Oneida Nation" without even a geographic modifier, while demanding that the Nation cease referring to itself as the Oneida Nation as it had done for centuries: "I remind you that your client's federally recognized name is Oneida Nation of New York, and that your client should not abbreviate that as Oneida Nation or otherwise refer to itself as the Oneida Nation, which is the federally

recognized name of my client." JA 58-59. The letter explicitly invoked DOI's actions as giving the Wisconsin tribe a superior right to call itself the Oneida Nation: "Your client, unlike ours, has never been federally recognized as Oneida Nation." JA 58. The letter threatened to seek cancellation of the Nation's registered trademarks for Oneida Indian Nation and Oneida unless the Nation agreed to joint use of Oneida, Oneida Tribe, Oneida Indian Tribe, Oneida Nation and Oneida Indian Nation without geographic limitation. JA 58-59.

Before long, the Wisconsin tribe made good on its threat to seek cancellation of the Nation's trademarks. It petitioned for cancellation before the Trademark Trial and Appeal Board (TTAB) on June 27, 2017. JA 31, ¶51. The petition explicitly relied on DOI's actions to recognize the Wisconsin tribe's change of name to Oneida Nation. JA 32, ¶52 & JA 61-64, ¶¶4, 8, 11 (alleging that the Wisconsin tribe is "now recognized as the Oneida Nation," that "the Bureau of Indian Affairs approved" the name and "published" it in the Federal Register, and that the tribe is entitled to the "use of its federally recognized name"). The petition went out of its way to stake the Wisconsin tribe's claim to the Oneida Nation name to its alleged status as the Oneida Nation that

forged the Founding era relationship with the United States, in contrast with the Nation which is on the Oneida reservation in New York. JA 62, ¶4 (inaccurately contrasting "several hundred Oneidas" who relocated to Wisconsin in the 1820s "with only a small number remaining in New York"). With an extra measure of chutzpah, the Wisconsin tribe's petition charged that the Nation's use of its Oneida trademark was "likely to cause confusion, mistake or deception" because of the Wisconsin tribe's "superior rights in the ONEIDA mark." JA 32, ¶52.d; JA 86, ¶114.

D. Allegations in the Nation's Complaint Regarding Harm and DOI's Motion to Dismiss for Lack of Standing

Following the Wisconsin tribe's trademark cancellation petition, the Nation filed its complaint in the Northern District of New York on August 17, 2017. JA 12. The complaint challenged DOI's two actions as unlawful under the APA – both the decision to approve a federal election to change Oneida Tribe of Indians of Wisconsin to Oneida Nation and the decision to federally recognize the new name by publication in the Federal register list of recognized tribes. JA 34-44, ¶¶56-80. The complaint alleged that the decisions harmed the Nation:

> [T]he Nation has suffered and will suffer injury by reason of the confusion of federal agencies and the public that has occurred and will continue to occur regarding the Nation and the Wisconsin tribe (including the need to pay consultants and lawyers to attempt to limit that confusion); by reason of the Wisconsin tribe's claims to greater legal rights as against the Nation and that the Nation cannot refer to itself as the Oneida Nation; and by reason of the cultural and political diminishment of the Nation.

JA 38, ¶65; JA 44, ¶80.

DOI moved under Fed. R. Civ. P. 12(b)(1) to dismiss the complaint for lack of Article III standing and under Fed. R. Civ. P. 12(b)(6) to dismiss on other grounds not reached by the district court. ECF 14. Regarding standing, DOI made three arguments: (1) that the confusion alleged in the complaint is not a sufficiently "concrete injury"; (2) that any injury resulted from action by the Wisconsin tribe, independent of action by DOI; and (3) that injury could not be redressed by reversing DOI's federal approval and recognition of the Wisconsin tribe's name change because the Wisconsin tribe could continue "to call itself what it wishes." ECF 14-2 at 7-11.

DOI did not base its arguments for dismissal on a factual challenge to the allegations in the complaint. In its reply papers, DOI affirmatively disclaimed reliance on facts outside the complaint:

"Plaintiff takes issue with the Department's discussion of facts drawn from outside the Complaint. These are not necessary to any of the Department's legal arguments and were provided for background." ECF 23 at 1 n.1. Presumably in that same vein, DOI's reply mentioned two isolated, unauthenticated documents purporting to be press releases from the Wisconsin tribe in 1997 and 1998, with the words Oneida Nation in large print along the seal of the "Sovereign Oneida Nation of Wisconsin." ECF 23 at 5; JA 9-11. DOI also cited an online news article about an historic scrapbook of no discernible relevance. ECF 23 at 5 & n.4.

Addressing the complaint's allegations that confusion would occur, as DOI itself had predicted during the administrative process, DOI's moving papers challenged the Nation to identify confusion that already had occurred. ECF 23 at 3. After argument on the motion, the Nation submitted a letter from the Indian Health Service, a branch of the Department of Health and Human Services, confusing the Nation and the Wisconsin tribe and erroneously demanding that the Nation remedy an administrative violation committed by the Wisconsin tribe. JA 215-

16. The Nation also submitted a contractor's invoice intended for the Wisconsin tribe but, out of confusion, sent to the Nation. JA 148-50

The Nation also pointed to the TTAB's judicially-noticeable order imposing a stay in the TTAB proceedings on the Wisconsin tribe's petition to cancel the Nation's trademarks. ECF 19 at 15. The TTAB concluded that the outcome of the Nation's APA action in the district court might affect the outcome of the TTAB proceedings. JA 162-63 (TTAB order). DOI countered with the Wisconsin tribe's motion to reconsider the TTAB stay and the amended petition for cancellation that the tribe had attempted to file with the TTAB in response to the stay. ECF 23 at 4. The amended petition excised some of the original petition's references to DOI's actions. JA 98-147. The TTAB rejected the Wisconsin tribe's motion to reconsider the stay, and denied permission to file the amended petition. JA 218-21.

E. The District Court's Decision

The district court granted DOI's motion to dismiss for lack of standing. JA 224 (decision); JA 242 (judgment). The court treated the motion as if it presented a factual challenge to jurisdiction, allowing the court to disregard the allegations in the complaint. JA 230-31. The

court disagreed with the TTAB about whether reversing DOI's actions might affect the outcome of the trademark cancellation petition before the TTAB. JA 234-35. The district court undertook its own analysis of the trademark claims and concluded that DOI's approval of the Wisconsin tribe's name change was "not material to the [Wisconsin tribe's] grounds for cancellation," notwithstanding the tribe's references to the approval in its petition in the TTAB. JA 234. The court did not address the different question of whether DOI's actions, which preceded the tribe's TTAB petition to cancel the Nation's trademarks and followed the tribe's threat to file such a petition if the Nation did not stop using the tribe's federally-approved Oneida Nation name, caused the Wisconsin tribe to file the petition.

The district court treated confusion injury as limited to two examples of confusion provided during briefing – a federal agency saddling the Nation with the Wisconsin tribe's administrative violations and a creditor of the Wisconsin tribe that mistakenly billed the Nation. The court dismissed the examples as "little more than 'secretarial confusion'" failing to demonstrate the requisite Article III injury. JA 237. The court also concluded that the two incidents of confusion were

not traceable to DOI, apparently concluding that DOI's change of the Wisconsin tribe's name on the official list used to identify tribes eligible for government services could not affect whether a federal agency would be confused about which tribe needed to submit a corrective action plan. JA 237-38.

The district court addressed whether confusion between the New York and Wisconsin tribe was "fairly traceable to" DOI's actions approving the name-change election and recognizing the new name in the official Federal Register list of tribes. JA 236. As the district court framed the issue, "[w]here an 'alleged injury flows not directly from challenged agency action, but rather from independent action of third parties,' the plaintiff must show 'that the agency action is at least a substantial factor motivating the third parties' actions.'" *Id.* (quoting *Tozzi v. HHS*, 271 F.3d 301, 308 (D.C. Cir. 2001)). The court concluded that DOI's approval of the constitutional amendment "only amounted to approving a change to an internal tribal governance document" and that publication of the new "Oneida Nation" name in the Federal Register list of federally recognized tribes was ameliorated by a

temporary parenthetical notation stating that the tribe previously was listed as the Oneida Tribe of Indians of Wisconsin.[6]

The court also ruled that DOI's approval of the Wisconsin tribe's name change was not a "substantial factor" in the tribe's use of the name (even if it engendered confusion) because it did not give the Wisconsin tribe the equivalent of a trademark. JA 238. Finally, disregarding the similarity of the names Oneida Nation and Oneida Nation of New York – which DOI noted during the administrative process – the district court focused on whether the Wisconsin tribe's use of the single word "Oneida" (not "Oneida Nation") was traceable to DOI action given that the Wisconsin tribe could use the word "Oneida" in any event. JA 179; JA 240; JA 225.

The court did not address at all the complaint's allegations concerning the Wisconsin tribe's demand that the Nation stop using its own name or concerning cultural and political diminishment of the Nation.

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[6]The formerly-known-as parenthetical is a temporary measure that will be discontinued. 83 Fed. Reg. 34863, 34863 (July 23, 2018).

SUMMARY OF ARGUMENT

Well-pleaded allegations in the Nation's complaint described the Nation's injuries attributable to DOI's challenged decisions. The district court erroneously disregarded those allegations and decided that the Nation's harm from the Wisconsin tribe's use of the Oneida Nation name is attributable solely to the tribe. The complaint clearly alleged otherwise. It was error to disregard those allegations.

The black-letter rule is that, unless the defendant launches a factual challenge to jurisdictional allegations by presenting contradictory evidence, the court must accept those allegations as true, draw reasonable inferences in the plaintiff's favor and construe them as embracing necessary specifics. DOI did not offer evidence contradicting allegations in the complaint. But the district court seemed to conclude that every Rule 12(b)(1) motion to dismiss necessarily presents a factual challenge allowing disregard of a complaint's allegations of injury. The court certainly did disregard them. It restricted its analysis of injury to two specific examples of confusion the Nation had presented during briefing, and on documents from the TTAB trademark cancellation proceeding, finding that evidence insufficient to show injury.

The complaint alleged facts showing concrete and particularized injury. First, the Wisconsin tribe relied on DOI's decisions to assert that the Nation's legal rights were reduced – demanding that the Nation stop using its own name (never addressed by the district court) and petitioning to cancel Nation trademarks. The TTAB actually stayed trademark proceedings based on its conclusion that this APA litigation could affect the outcome of the TTAB proceedings, but the district court differed, concluding there could be no such effect. Even if the court's lack of deference to the TTAB regarding legal issues before it were supportable, the district court erred. The Wisconsin tribe had flatly demanded that the Nation stop using its own Oneida Nation name, without regard to trademark usage. And it had threatened trademark cancellation proceedings absent capitulation by the Nation – proceedings that it commenced only after and in reliance on DOI's actions. Even if the resolution of the claims in this APA litigation end up having no effect on the TTAB's decision, the Wisconsin tribe's use of the DOI approvals as weapons has injured the Nation.

Second, DOI's approval and recognition of Oneida Nation in place of Oneida Tribe of Indians of Wisconsin poses an obvious likelihood of

confusion with Oneida Nation of New York or Oneida Indian Nation, confusion predicted by DOI during the administrative process and acknowledged by the Wisconsin tribe. The historic practice of differentiating the tribes by the words Tribe and Nation and Wisconsin and New York avoided the confusion, as underscored by the parties' need below to use some version of the former names to avoid confusion.

Third, federal recognition of the Wisconsin tribe as the Oneida Nation diminished the Nation's reputation and dignity. The Wisconsin tribe admitted that its name change was meant to enhance its governmental status, and the complaint alleged the tribe's intention vis-à-vis the Nation to wear the mantle of the true Oneida Nation or to be the true root of the Oneida Nation. The resulting dignitary and reputational harm to the Nation is particularly acute because it bears the imprimatur of the United States. The district court did not address these allegations of harm either.

The district court also erred by attributing any injury to the Nation to unilateral tribal action rather than to DOI's decisions, despite the court's recognition that Article III traceability requirements are met if the challenged governmental action is a "substantial factor" and not

the sole or direct cause of claimed injuries. The fact that a tribe may decide to call itself by one name or another is distinct from the harm that can flow from federal approval and recognition.

DOI's actions were a substantial factor in causing harm to the Nation because the Wisconsin tribe could not have changed its official name without DOI's approval, did not demand that the Nation stop using its own name or threaten its copyrights until it had DOI's approval, and expressly relied on DOI's approval in taking those actions. The dignitary harm and confusion alleged by the Nation are also a function of DOI's decisions. Whether and how DOI federally recognizes a tribe is reflected in the Federal Register list whose publication is required by Congress so that federal agencies, courts, states and others will know by what name a tribe is recognized and whether a tribe by that name can claim rights under federal law. That listing decision is a purely federal decision with consequences independent of anything a tribe might attempt unilaterally.

Because the Nation's injuries substantially flow from DOI's decisions, they can be redressed by a judgment vacating them.

ARGUMENT

I. THE DISTRICT COURT ERRONEOUSLY DISREGARDED PLAUSIBLE, CORROBORATED AND UNCONTRADICTED ALLEGATIONS OF INJURY.

On a Rule 12(b)(1) motion to dismiss for lack of standing, in general courts "are constrained not only to accept the truth of the plaintiffs' jurisdictional allegations, but also to construe all reasonable inferences to be drawn from those allegations in plaintiffs' favor." *Brooklyn v. Legal Servs. Corp.*, 462 F.3d 219, 226 (2d Cir. 2006); *accord Selevan v. New York Thruway Auth.*, 584 F.3d 82, 88 (2d Cir. 2009); *W.R. Huff Asset Mgmt. Co. v. Deloitte & Touche LLP*, 549 F.3d 100, 106 (2d Cir. 2008). "[A]t the pleading stage, standing allegations need not be crafted with precise detail, nor must the plaintiff prove his allegations of injury." *Baur v. Veneman*, 352 F.3d 625, 631 (2d Cir. 2003). Courts "presume[] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 889 (1990); *Bennett v. Spear*, 520 U.S. 154, 168 (1997) (same).

The district court should have accepted as true the allegations that the Nation would be harmed by the probable confusion of federal

agencies, the public and others, by the Wisconsin's tribe's actual claim to superior rights to (and the right to forbid the Nation from using) the name Oneida Nation, and the claimed cultural and political diminishment of the Nation in comparison to the Wisconsin tribe. JA 38, ¶65; JA 44, ¶80. The court likewise should have presumed that those allegations embraced any necessary specifics. Thus, the district court should have treated the two specific instances of confusion (one by a federal agency and the other by a private contractor) submitted in a post-argument letter as *examples* of the general injury alleged and corroborative of the allegations in the complaint – not as *limiting* or *narrowing* or *substituting for* the complaint's allegations.

The complaint's allegations regarding injury and confusion were more than plausible: the BIA Midwest Regional Office itself had forecast greater confusion with respect to the Wisconsin tribe's request for approval of a federal election. JA 26, ¶36. Instead of accepting the complaint's allegations as true, the district court disregarded them and treated the two specific examples of confusion offered during briefing as if standing solely depended on them, not on the allegations in the complaint. JA 236-38.

The district court's reasons for disregarding the allegations of injury in the complaint appear to be explained in the "Standard of Review" section at the beginning of its opinion. That section treated the government's motion as if it had launched a factual attack on the allegations. JA 230-31. The court first modified a quotation from a Federal Circuit decision, creating the impression that standing allegations should be disregarded whenever challenged by a Rule 12(b)(1) motion. JA 230 (quoting *Cedars-Sinai Med Ctr. v. Watkins*, 11 F.3d 1573, 1583 (Fed. Cir. 1993)). The Federal Circuit wrote: "*If the Rule 12(b)(1) motion denies or controverts the pleader's allegations of jurisdiction, however,* the movant is deemed to be challenging the factual basis for the court's subject matter jurisdiction." *Cedars-Sinai*, 11 F.3d at 1583 (emphasis added). The district court eliminated the italicized introductory clause, substituted "When a party moves to dismiss a claim pursuant to Rule 12(b)(1)," and then quoted the remainder of the Federal Circuit's sentence. JA 230. The change suggested that *all* Rule 12(b)(1) motions as to standing contest the

factual allegations of the complaint, which is not accurate and conflicts with this Circuit's precedent and *Cedars-Sinai* itself.[7]

This Court has recognized that, even when a party contesting subject matter jurisdiction offers evidence in support of an argument that jurisdiction is lacking but does not controvert material allegations of the complaint, courts accept those uncontroverted allegations as true. *Carter v. HealthPort Techs., LLC*, 822 F.3d 47, 56-57 (2d Cir. 2016); *Aikens v. Portfolio Recovery Associates*, 716 Fed. Appx. 37, 39 & n.2 (2d Cir. 2017) (summary order) (applying de novo review, accepting plaintiff's allegations as true because defendant's evidence "did not contradict any pertinent allegations"). If the parties have submitted conflicting evidence, "the district court will need to make findings of fact in aid of its decision as to standing." *Carter*, 822 F.3d at 57.

[7]The sentence in *Cedars-Sinai* before the one the district court quoted was: "If a Rule 12(b)(1) motion simply challenges the court's subject matter jurisdiction based on the sufficiency of the pleading's allegations – that is, the movant presents a 'facial' attack on the pleading – then those allegations are taken as true and construed in a light most favorable to the complainant." *Cedars-Sinai*, 11 F.3d at 1583.

Carter involved a defendant offering evidence outside the complaint, not to contradict the complaint's allegations, but to contest standing based on a legal theory supported by independent facts. Carter and other plaintiffs, individually and as representatives of a putative class, brought an action alleging that the defendant had overcharged for producing medical records, causing the plaintiffs monetary loss. *Id.* at 51-53. The defendant contested standing, going beyond the complaint, by relying on evidence that the plaintiffs' lawyers had paid the charges, and arguing that the plaintiffs thus had not been injured. *Id.* at 53-54. Based on the allegations in the complaint, this Court reversed the district court's dismissal, applying *de novo* review to the legal question whether plaintiffs sustained Article III injury: "The fact that the payments were to be promptly made by the attorneys does not contradict the allegation that plaintiffs themselves were or would be the ultimate payors." 822 F.3d at 58.

Here, DOI disclaimed reliance on evidence outside the record. ECF 23 at 1 n.1. Even if the material DOI mentioned were offered for some point, as in *Carter* it was not to contradict jurisdictional allegations in the complaint. And, as in *Carter*, "the district court did

not rely on [DOI's] evidence and made no findings of fact," 822 F.3d at 57, as it would have been required to do if it had been resolving a factual dispute. The Nation was therefore "entitled to rely on the allegations in the [complaint]." *Id.*

II. THE NATION'S COMPLAINT ESTABLISHED ITS STANDING TO CHALLENGE DOI'S ACTIONS.

The Nation's allegations, taken as true and as embodying any necessary specifics, provided ample basis for Article III standing. "[T]he plaintiff must show an 'injury in fact' that is 'fairly traceable' to the defendant's conduct and 'that is likely to be redressed by a favorable judicial decision.'" *Bank of America v. City of Miami*, 137 S. Ct. 1296, 1302 (2017) (citation omitted).

A. THE NATION'S ALLEGATIONS OF CONCRETE INJURIES CONSITUTE AN INJURY IN FACT.

An injury in fact is "concrete and particularized" and an "actual or imminent, not 'conjectural' or 'hypothetical" injury. *Lujan*, 504 U.S. at 560. The injury need not be grave. "An identifiable trifle is enough for standing." *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973).

The Nation alleged that DOI's approval of the Wisconsin tribe's name-change election and DOI's later Federal Register publication federally recognizing the tribe's new name produced three injuries that easily qualify as injury in fact: (1) the Wisconsin tribe's demands that the Nation stop calling itself the Oneida Nation, together with the threats and litigation enforcing those demands; (2) commercial and governmental confusion, which the BIA predicted; and (3) reputational and dignitary harm arising from the apparent diminishment of the Nation's status as the Oneida Nation, together with the implication that the Wisconsin tribe is the true Oneida Nation.

1. The Wisconsin Tribe's Cease-And-Desist Demands, Threats to Sue, and Petition to Cancel the Nation's Trademarks Constitute Injury.

The complaint alleged that DOI's approval and recognition of the Wisconsin tribe's name change harmed the Nation because it prompted the tribe to demand that the Nation stop using its Oneida Nation name and to challenge the Nation's trademarks, including the mark "Oneida Indian Nation." JA 230-31; ¶¶50-52. The Wisconsin tribe did not seek to prevent the Nation from using its own name during the nearly 80 years before the federal approval of the name change. It acted only

after the federal government approved its new name and appeared to be on its side. *Id.* In a letter from one of its lawyers, the tribe invoked DOI's action as the basis for claiming superior rights to the name Oneida Nation, demanding that the Nation cease using that name (then part of its own federally-recognized name) unless it capitulated to certain commercial demands. JA 31, ¶50.a, b, d. The lawyer further threatened to petition for cancellation of the Nation's registered trademarks – a threat the Wisconsin tribe consummated five months later in a petition in the TTAB invoking the tribe's federal recognition as the Oneida Nation. JA 31-32, ¶¶50.c & 51-52.

These undisputed allegations establish the harm required for standing. The sequence of events as alleged is more than telling – first DOI actions, followed by the Wisconsin tribe's cease-and-desist demands and then litigation against the Nation. And it is not just the sequence of events that show both the harm and causality; the Wisconsin tribe explicitly relied on federal approvals and recognition of its new name when it made demands and when it sued in the TTAB to cancel the Nation's valuable commercial marks. The tribe's demands

and litigation also required the Nation to retain and pay counsel, a concrete and direct monetary injury. JA 38, ¶65.

Whether the Wisconsin tribe's letter is considered a demand letter or a negotiating letter under this Court's "first filed" rule for declaratory judgment actions, it was enough to frame a justiciable "actual controversy" over legal rights in the Oneida Nation name that necessitated retention of counsel and would have justified the Nation in seeking a declaratory judgment. *See Larami Corp. v. Amron*, No. 92-CV-7323, 1994 WL 369251, at *5 (S.D.N.Y. July 13, 1994) ("Any threat, direct or indirect, made by the defendant concerning further litigation for trademark infringement will establish the necessary prerequisite controversy to grant the court jurisdiction in a declaratory judgment matter."). A dispute that is sufficiently concrete and ripe for a declaratory judgment satisfies Article III case or controversy requirements. *Medimmune, Inc. v. Genetech, Inc.*, 549 U.S. 118, 127 (2007). And courts in other contexts have recognized that receipt of a demand letter threatening legal action can constitute Article III injury-in-fact. *See, e.g., Keeler v. Wexler*, 149 F.3d 589, 593-94 (7th Cir. 1998) (creditor demand for $12.50); *Publius v. Boyer-Vine*, 237 F. Supp. 3d

997, 1008-10 (E.D. Ca. 2017) (demand that blogger take down post); *Verdun v. Fidelity Creditor Service*, 2017 WL 1047109, at *3-6 (S.D. Ca. Mar. 20, 2017) (creditor letter demanding payment in violation of Fair Debt Collection Practices Act).

2. Commercial and Governmental Confusion Between the Nation and the Wisconsin Tribe Constitutes Injury.

The likelihood that government officials and the public will be confused by the similarity between the Wisconsin tribe's new name and the Nation's name is obvious – and clearly pleaded in the complaint. JA 36, ¶63.d; JA 38, ¶65; JA 42-43, ¶¶75-78; JA 44, ¶80.

DOI (specifically a Regional Office of the BIA) predicted likely confusion. The BIA noted the Wisconsin tribe's "long history" with the name "Oneida Tribe of Indians of Wisconsin" and asserted that the name change to Oneida Nation "will cause confusion," that the names of the Wisconsin tribe and the Nation "will undoubtedly be confused more often than they are now," and that the name change "will compound the existing confusion." JA 26, ¶36; JA 48. The Wisconsin tribe itself accepted the BIA's predictions, JA 27, ¶39.a; JA 54, and later insisted

that the Nation change its name to avoid confusion with the Wisconsin tribe's new, federally-recognized name, JA 32, ¶52.d.

The likelihood of confusion is evident in the record of this litigation. The district court and DOI's counsel found it hard to escape confusion at argument on DOI's motion to dismiss, and so simply avoided the two tribes' names, Oneida Nation and Oneida Indian Nation. JA 176. DOI's counsel used other names "for ease," and the district court did so for "clarity," together using "the Oneida Nation from the Wisconsin part of the country," "the Oneida in New York," "the Oneida Nation of Wisconsin – formerly known as of Wisconsin," "former Oneida Nation of Wisconsin," and "Oneida Nation in the New York area." JA 178-81. Likewise, in its dismissal decision, the court referred to the Nation as "Plaintiff" – distinguishing the Wisconsin tribe as "OTIW," (an acronym for its former name), so that readers could keep things straight. JA 225. The court's decision never suggests that the Wisconsin tribe's changed name does not cause confusion, or that the allegations in the complaint to that effect are not plausible. JA 36, ¶63.d; JA 38, ¶65; JA 42-43, ¶¶75-78; JA 44, ¶80.

A party has a right to protect its name against confusion from its appropriation by another, even without a registered trademark in the name. *See Sutton Cosmetics (PR), Inc. v. Lander Co.*, 455 F.2d 285 (2d Cir. 1972) (affirming grant of preliminary injunction based on name in abandoned trademark); *Grondin v. Rossington*, 690 F. Supp. 200, 210-11 (S.D.N.Y. 1988) (preliminary injunction requiring labeling of album to clarify that songs were not recorded by the original Lynyrd Skynyrd); *The Kingsmen v. K-Tel, Int'l, Ltd.*, 557 F. Supp. 178, 182 (S.D.N.Y. 1983) (granting a preliminary injunction against selling album including a recording by The Kingsmen, a 1960s band); *National Lampoon, Inc. v. ABC, Inc.*, 376 F. Supp. 733, 747 (S.D.N.Y 1974) (granting permanent injunction against use of Lampoon name based on public confusion even "[a]ssuming plaintiff had no trademark rights, it is 'not a prerequisite that the mark be registered'") (citation omitted).

The fact that the Indian Health Service (a branch of the Department of Health and Human Services) confused the two tribes and mistakenly dunned the Nation for a Corrective Action Plan shows that DOI's prediction was accurate. *See* JA 215-16. Although this was just a post-filing example of the broader harm alleged in the complaint,

by itself it is sufficient injury for Article III purposes. The district court, however, doubted the significance of the errant IHS Request for Corrective Action Plan, finding it "implausible that this mistake could be traced back to [DOI's] actions at issue," which the court described as "a change to an internal governing document." JA 238. But the reference to internal tribal use misunderstands what the complaint alleges. DOI gave federal approval to the name change and federally recognized it in the Federal Register's list of officially recognized tribes – affording the new name a federal imprimatur and nihil obstat. In short, DOI officially changed the tribe's name on the federal government's own books, to which agencies and courts look to know how tribes are recognized. The result, the Nation claimed, was that the IHS confused the Oneida Nation (Wisconsin) and the Oneida Indian Nation (previously listed as the Oneida Nation of New York). There was no contrary evidence to explain the confusion. And one of the purposes of the statute directing DOI to maintain a list of federally-recognized tribes that is published in the Federal Register is to allow federal agencies to accurately identify the tribes eligible for government

services.[8] The Federal Register list is thus the opposite of the internal tribal matter supposed by the district court because it publicly reflects official federal recognition and is published precisely so that federal agencies and others can rely on it.

The other correspondence the Nation submitted during briefing confirms the potential for commercial confusion. A contractor providing services to the Wisconsin tribe in Wisconsin was confused enough by the similar names to mistakenly send the Wisconsin tribe's invoice to the Nation. JA 148-50. A misdirected invoice creates the risk for reputational and financial injury – with respect to the Wisconsin tribe's creditors who mistakenly see the Nation as their debtor, and also with respect to creditor bills that should go to the Nation for payment but are misdirected to Wisconsin. The district court, however, did "not see how this error could be traced back to the matters currently before the Court." JA 238. But the connection was obvious to DOI when it

[8] 25 U.S.C. § 5130 note, Pub. L. 103-454, § 103(7) (1994) ("the list published by the Secretary should be accurate, regularly updated, and regularly published, since it is used by the various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States").

predicted this confusion before allowing the federal election on the name change. JA 26, ¶36; JA 48.

Even if the two examples of confusion offered by the Nation were viewed as empty failures, the failure of the examples would not diminish the complaint's well-pleaded allegations of confusion in any way. The fundamental problem here was that the district court evaluated confusion as a basis for standing only in terms of the two examples and disregarded the complaint's allegations – never suggesting that the allegations were deficient to establish standing. Under the black letter principles set out in Part I, *supra*, the complaint's allegations and reasonable inferences therefrom all should have been accepted as true.

3. DOI's Approval and Federal Recognition of the Wisconsin Tribe's New Name Diminishes the Nation's Reputation and Dignity and Constitute Injury.

The Nation also suffered injury because, when DOI changed the Wisconsin tribe's name to the Oneida Nation in the federally recognized list of Indian tribes, it vindicated the Wisconsin tribe's erroneous claim to the Oneida Nation legacy, seeming to take sides in an ancient

controversy. DOI decided to accept and approve the Wisconsin name change without asking about, let alone considering, the substantial historical and political implications to the Nation.

The name change diminished the Nation's status and reputation as the original Oneida Nation, or its direct successor, holding the Founding era treaty rights of the Oneida Nation. JA 38, ¶65; JA 44, ¶80. The Nation clearly alleged that DOI's actions caused it a dignitary and reputational injury by diminishing its cultural and political status. *Id.* The Nation also alleged that the Wisconsin tribe, when confronted with the BIA's concern that the new name would cause confusion, admitted its intention to augment its cultural and political status vis-à-vis the Nation, telling the BIA that the Oneida Nation name would "be[] more responsive to the Tribe's governmental status." JA 27, ¶39.b.

The Nation's status as the Oneida tribe that remained on the reservation in New York through hardships and loss of much of its land base is important to the Nation and its members – especially because the Nation's continuous tribal existence has been challenged repeatedly. In its 2003 decision in *Oneida Indian Nation v. City of Sherrill*, 337 F.3d 139, 165-67 (2d Cir. 2003), this Court rejected the argument that

the Nation had lost its reservation in New York, recognized in Founding era treaties, because the tribe had not existed continually from the Founding era to the present. Although Sherrill renewed that argument before the Supreme Court, the Court left that holding undisturbed. *Sherrill*, 544 U.S. 197. Prior to *Sherrill*, this Court's 1920 decision in *Boylan* likewise affirmed a district court determination that the Nation maintained its foothold on reservation land through decades of state and federal policies designed to push tribes westward. 265 F. at 174. And, as the Nation alleged, DOI recognizes the Nation as the tribe that remained on its ancestral land and federal reservation in New York. JA 19, ¶¶18-19; *see also* Amendment to May 20, 2008 Record of Decision for Oneida Indian Nation of New York Fee-to-Trust Request, *New York v. Jewell*, No. 08-CV-644, ECF 334-1 (N.D.N.Y. filed Feb. 5, 2014) (setting out history of federal jurisdiction over the Nation in New York). By changing the Wisconsin tribe's name to Oneida Nation in the federally-recognized list of Indian tribe names, DOI (likely unintentionally) undermined the Nation's claim to be the Oneida Nation that made the Founding-era treaties – or could be so understood by many.

Courts recognize reputational harm as injury for standing purposes. *See Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 161 (2d Cir. 2003). The Supreme Court has held that when the Attorney General designated charitable organizations as "Communist" they had standing to challenge their designations because of "damage [to] the reputation of th[e] organizations in their respective communities and in the nation." *Joint Anti–Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 139 (1951). The Supreme Court similarly held that a film exhibitor had standing to challenge the Justice Department's characterization of films as "political propaganda" because it would affect "his personal, political, and professional reputation" and, among other things, "adversely affect his reputation in the community." *Meese v. Keene*, 481 U.S. 465, 473-74 (1987); *see also Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 711-12 (6th Cir. 2015) (holding that members of a group labeled a gang in a government report had standing to challenge damage to their reputations); *McBryde v. Comm. to Review Circuit Council Conduct and Disability Orders of the Judicial Conference of the U.S.*, 264 F.3d 52, 57-58 (D.C. Cir. 2001) (finding reprimand created standing because it impacted a judge's

reputation); *Doe v. Nat'l Bd. of Med. Exam'rs*, 199 F.3d 146, 153 (3d Cir. 1999) (holding a student had standing to challenge rule requiring that he be identified as disabled because the label could sour the perception of him by "people who can affect his future and his livelihood").

Dignitary harms to a tribal government are injuries that establish standing. In *Aroostook Band of Micmacs v. Ryan*, the court concluded that an Indian tribe suffered dignitary injury when the Maine Human Rights Commission attempted to make the tribe defend a Title VII administrative proceeding. 404 F.3d 48, 70-71 (1st Cir. 2005), *overruled on other grounds by Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 24-25 (1st Cir. 2006). When the tribe sought a declaration that it was not subject to Title VII because Indian tribes are not "employers," the court identified cognizable injury in the form of dignitary harm when the tribe is "forced to defend itself to the EEOC when, it claims, Congress has shielded the [tribe] from such investigations entirely." *Aroostook*, 404 F.3d at 70. That conclusion rested on the principle that, if "the desire to use or observe an animal species, even for purely esthetic purposes, is undeniably a cognizable interest[,]" *id.* at 70-71

(quoting *Lujan*, 504 U.S. at 562-63), then so is diminishing the sovereign stature of an Indian tribe.

The Nation suffered reputational and dignitary injury when DOI approved and recognized the Wisconsin tribe's use of the Oneida Nation name because the approval and recognition harmed the Nation's interests in its governmental identity as the tribe always occupying the Oneida reservation in New York.[9] The name change also supports the Wisconsin tribe's claim to Oneida tribal supremacy reflected in its past efforts to interfere in New York tribal governance and even to claim land rights in New York, far from its Wisconsin reservation.[10]

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[9]Names matter to governments, especially names relating to a government's origins and status, as shown by the controversy about the name of the former Yugoslavian republic that recently agreed to accept the name Republic of North Macedonia to avoid confusion with the Greek region. *Macedonia and Greece: Deal after 27-year row over a name*, BBC News (June 12, 2018), https://www.bbc.com/news/world-europe-44401643.

[10]JA 23, ¶¶26-32; *see Oneida Tribe of Indians of Wisconsin v. AGB Properties, Inc.*, 2002 WL 31005165 (N.D.N.Y. Sept. 5, 2002) (dismissing suit by Wisconsin tribe against private landowners seeking ownership of their land in New York); Kirk Semple, *2 More Tribes Drop Claims in Exchange for Casinos*, New York Times (Dec. 8, 2004), https://www.nytimes.com/2004/12/08/nyregion/2-more-tribes-drop-claims-in-exchange-for-casinos.html (describing purported settlement of Wisconsin tribe's claims for right to develop casino in New York).

B. THE NATION'S INJURIES ARE FAIRLY TRACEABLE TO DOI'S ACTIONS AND REDRESSABLE BY A FAVORABLE JUDGMENT ON THE NATION'S CLAIMS.

The Nation's injuries are fairly traceable to DOI's approval of the secretarial name-change election (a federal election) and DOI's formal recognition of the resulting new name on behalf of the United States by publishing it in the Federal Register. Those injuries are, therefore, redressable by a favorable judgment vacating DOI's decisions and removing the new name's status as federally sanctioned and required for use by the United States and those dealing with the United States.

The district court nevertheless concluded that the Nation's injuries arose "from independent actions of" the Wisconsin tribe and that reversing DOI's decisions would not redress those injuries. JA 230-40. The court did not hold a hearing or otherwise resolve any factual dispute. Its ruling is thus a determination, as a matter of law reviewed *de novo*, that the connection between DOI's actions and the Nation's injuries was insufficient.

1. The Confusion of the Two Tribes and the Wisconsin Tribe's Threats and Litigation Is Fairly Traceable to DOI's Decisions.

The Wisconsin tribe launched its campaign to claim the Oneida Nation name and sought to prevent the Nation from using the name through legal demands and the TTAB petition, only *after* DOI approved its use of the Oneida Nation name. JA 30-32, ¶¶ 49-52. Sequence can be probative of causation, and it is here. The Wisconsin tribe asked for legally needed and very much wanted federal approval of a new name and federal recognition of the tribe as the Oneida Nation – federal actions of independent significance from any merely tribal decision. The Nation's injuries are therefore traceable to DOI's actions, which the Nation alleged in its complaint:

> To be clear, the Nation's claims here are not about what an Indian tribe chooses to call itself. The Nation's claims concern official agency action taken by the Department under a federal statute, 25 U.S.C. § 5123, first to give federal approval to the Wisconsin tribe's name change, and then under another statute, 25 U.S.C. § 5131, to federally recognize the changed name and to publish the federally recognized name in the Federal Register.

JA 15, ¶4; *see also* JA 31-32, ¶¶50-52; JA 38, ¶65; JA 44, ¶80.

In *Rothstein v. UBS, AG*, 708 F.3d 82, 91-92 (2d Cir. 2013), this Court explained the requirement that injury be fairly traceable to a

defendant's conduct. "The traceability requirement for Article III standing means that the plaintiff must 'demonstrate a causal nexus between the defendant's conduct and the injury.'" *Id.* at 91 (citations omitted). The connection between the defendant's conduct and the plaintiff's injury need not be direct. "[I]ndirectness is 'not necessarily fatal to standing.'" *Id.* (citations omitted). "The requirement that a complaint 'allege[] an injury' that is 'fairly traceable to defendant's conduct . . . for [purposes of] constitutional standing' is a 'lesser burden' than the requirement that it show proximate cause" for tort liability. *Id.* at 92 (alterations in original). Although the Court ultimately held that the plaintiffs' allegations failed to establish (for purposes of Antiterrorism Act liability) that a bank's currency transfers to Iran caused injuries in attacks by Iranian-funded terrorists, the allegations were sufficient to make those injuries fairly traceable to the bank's conduct for purposes of Article III standing. *Id.* at 93-94.

This Court explained that it was enough for Article III standing to infer that the bank had increased Iran's ability to amass U.S. currency, even though plaintiffs did not allege that the bank was a primary or significant source or that Iran could not amass currency without the

bank. *Id.* at 93. And the connection between the defendant's conduct and the plaintiff's injury was much more attenuated in *Rothstein* than it is here. *See id.* at 97 (noting that the complaint did not allege that the bank participated in the attacks, funded the terrorist groups, or even that any of the currency the bank provided was funneled to the terrorist groups). It was enough for Article III purposes, although not for tort causation, that the bank's conduct "increased Iran's ability – and perhaps its readiness" to provide funding to the terrorist groups. *Id.* at 97.

DOI's actions increased the Wisconsin tribe's ability and readiness to injure the Nation by claiming superior and exclusive rights to tribal identity as the Oneida Nation. Unlike the bank in *Rothstein*, which was separated from plaintiffs' injuries by both Iran and the terrorist groups, DOI is only one step removed from the Wisconsin tribe's injurious actions. The actual sequence of events, moreover, shows that DOI's actions did more than increase readiness. The Wisconsin tribe demanded that the Nation stop calling itself the Oneida Nation soon after DOI published the Federal Register list of recognized tribes containing the Wisconsin tribe's new name. JA 31, ¶50; JA 58. And

five months later the Wisconsin tribe petitioned the TTAB to cancel the Nation's trademarks. JA 31, ¶51. Moreover, beyond the causality revealed in that sequence, the federal imprimatur matters in its own right, which is why the Wisconsin tribe sought it. The tribe's petition to cancel, like the earlier demand, explicitly drew on federal approval of the Wisconsin tribe as the Oneida Nation to support its claim that the Nation lacked legal right to that name, by which it long had been known. JA 31, ¶¶50-51. The history alleged in the complaint showed that the Wisconsin tribe saw the independent importance of federal approval that the Nation urges; that is why the Wisconsin tribe pushed for federal approvals even in the face of BIA concerns about the name change, JA 25, ¶32; JA 27, ¶39, and why they touted it when challenging the Nation's rights in its own name, JA 31, ¶¶50-51.

Putting the independent impact of federal approval to one side, the fact is that federal approval was legally required. Without it, the Wisconsin tribe could not have changed its official constitutional name. In the 1930s, the tribe asked for a federal election regarding a constitution that included the Oneida Tribe of Indians of Wisconsin name, the vote was successful, and DOI approved the constitution. JA

20, ¶21. DOI approval was given pursuant to federal statute, now codified as 25 U.S.C. § 5123. *See id.* The statute expressly states that tribes may adopt constitutions without federal involvement, but a tribe may claim federal approval, an important seal or imprimatur, only if the constitution is adopted pursuant to a federal election and a resulting constitution approved by DOI.

Because the Wisconsin tribe chose to get that approval in the 1930s and because the approved constitution contained a provision permitting amendment only pursuant to another federal election and federal approval, the tribe both wanted *and required* the federal approval it sought for its name-change amendment in 2010. Absent a federal election and federal approval of the name change pursuant to 25 U.S.C. § 5123, DOI would not have adopted and federally recognized the new name by publishing it in the Federal Register list required by 25 U.S.C. § 5131. As the Seventh Circuit has explained:

> [T]he decision of Congress to privilege federal control over tribal interests in tribal constitutional elections is unmistakable. The language and structure of the statute leave no doubt where authority lies, and debates within Congress are entirely consistent with our conclusion.

Thomas v. United States, 189 F.3d 662, 664 & 668 (7th Cir. 1999).

DOI's approval of the Wisconsin tribe's new name and its publication of the updated Indian tribe names list also directly caused confusion. In fact, after DOI published the list, the Indian Health Service, which would look to DOI's published list of recognized tribes, erroneously demanded that the Nation submit a corrective action plan to remedy a violation by the Wisconsin tribe. JA 215-16. And DOI is directly responsible not only for permitting the Wisconsin tribe to change its name though a federal election, but also for adopting that name as the Wisconsin tribe's federally-recognized identity.

The district court ruled that "[w]here an 'alleged injury flows not directly from the challenged agency action, but rather from independent actions of third parties,' the plaintiff must show 'that the agency action is at least a substantial factor motivating the third parties' actions.'" JA 236 (quoting *Tozzi v. HHS*, 271 F.3d 301, 308 (D.C. Cir. 2001)). Under this standard, the court failed to properly examine whether, on the facts alleged, DOI's official actions substantially motivated the Wisconsin tribe's assertion of rights in the Oneida Nation name against the Nation.

In *Tozzi*, cited by the district court, the D.C. Circuit concluded that injuries flowing from the actions of third parties and not directly from the government were enough to create standing to challenge federal action. 271 F.3d at 308-10. A plastic medical device manufacturer challenged the inclusion of the chemical dioxin in a government list of known carcinogens. *Id.* at 303-07. The government argued that, even if the manufacturer's profits declined, this injury would not be fairly traceable to the publication of the list because the anti-dioxin movement predated the list. *Id.* at 308.

The court disagreed, holding that the manufacturer's injuries were fairly traceable to the publication of the list because it "represent[s] a 'substantial factor' in the decisions of state and local agencies to regulate products containing dioxin or of healthcare companies to reduce or end purchases of PVC plastics." *Id.* at 309. The court based this conclusion on the fact that three cities cited the inclusion of dioxin on the carcinogen list when they passed resolutions demanding healthcare institutions eliminate the use of PVC plastic. *Id.* at 308-09. The court also emphasized that, even though other factors might contribute to the manufacturer's reduced profits, its injuries were

fairly traceable to the publication of the carcinogen list. *Id.* at 309; *see also Bennett,* 520 U.S. at 168-69 (injury is fairly traceable to defendant's conduct even if its actions are not last step in causal chain); *Mendia v. Garcia*, 768 F.3d 1009, 1013 (9th Cir. 2014).

Like the carcinogen list in *Tozzi*, DOI's decision to approve and federally recognize the Wisconsin tribe's name as Oneida Nation by listing it in the Federal Register substantially motivated the Wisconsin tribe's decision to demand that the Nation stop calling itself the Oneida Nation and to challenge the Nation's trademarks. The Wisconsin tribe did not demand that the Nation stop calling itself the Oneida Nation until it had DOI's approval and recognition. It also cited DOI's approval in its letter demanding that the Nation stop using the Oneida Nation name and threatening to cancel the Nation's trademarks, much like the cities in *Tozzi* cited the carcinogen list in their actions. *See* JA 31, ¶50; JA 58. Those facts more than justify the inference that DOI's actions were a "substantial motivating factor" in the injurious conduct.[11]

[11]During argument, the district court asked, "did the name change embolden or precipitate . . . the trademark litigation . . . ?" JA 180. The court noted that the Wisconsin tribe "does seem to lend credibility to

2. The Confusion Regarding the Two Tribes and the Wisconsin Tribe's Threats and Litigation Are Redressable by a Judgment Vacating DOI's Challenged Decisions.

The Nation's injuries are redressable because vacating DOI's decisions will stop the confusion between the two tribes and will prevent the Wisconsin tribe from relying on DOI's actions in its demands that the Nation stop calling itself the Oneida Nation and in legal attacks on the Nation. A judgment could vacate the decisions on the ground that DOI cannot approve and recognize the Oneida Nation name for the Wisconsin tribe in any circumstances. Or the district court could defer that question and vacate on the ground that a member of the Wisconsin tribe made the Department's decision to list the tribe's new name in the Federal Register or that DOI's decision was arbitrary and capricious because DOI failed to consider at all the impact on the Nation and others of approval and recognition of that name, and remand for a fuller and fairer consideration of the Wisconsin tribe's request for federal approval and recognition as to the new name.

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what they're trying to argue in a trademark action by saying, oh, we've been recognized by the United States Government, so too bad for you, Oneida Nation in the New York area." *Id.* DOI's counsel agreed that the Wisconsin tribe was using DOI's decisions "to lend credibility to themselves," but argued that was irrelevant. JA 181.

It is sufficient for Article III standing that an injury is "likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016). "A plaintiff need not demonstrate with certainty that her injury will be cured by a favorable decision." *E.M. v. New York City Dep't of Educ.*, 758 F.3d 442, 450 (2d Cir. 2014). Indeed, "[a]ll that is required is a showing that such relief be reasonably designed to improve the opportunities of a plaintiff not otherwise disabled to avoid the specific injury alleged." *Huntington Branch, N.A.A.C.P. v. Town of Huntington, N.Y.*, 689 F.2d 391, 394 (2d Cir. 1982).

Reversing DOI's approval of the secretarial election and DOI's decision to recognize the new name in the Federal Register publication of the Indian tribes name list will likely redress the confusion DOI caused between the two tribes. The purpose of the list is to allow "various departments and agencies of the United States to determine the eligibility of certain groups to receive services from the United States." 25 U.S.C. § 5130 note, Pub. L. 103-454, § 103(7). Once the list no longer refers to the Wisconsin tribe as the Oneida Nation, the likelihood of government departments and agencies confusing the two

tribes will decrease. The Wisconsin tribe is likely to use its recognized name in its dealings with federal agencies like IHS. The BIA recognized the connection between confusion and the Wisconsin tribe's name change (which required a federal election and federal approval) by telling the Wisconsin tribe that the two tribes "will undoubtedly be confused more often than they are now" if the Wisconsin tribe changed its name. JA 26, ¶36; JA 48.

Even if the Wisconsin tribe were to continue to call itself the Oneida Nation for some purposes without DOI approval, the federal approval and recognition are the problem here, and a judgment clearly can redress that problem. *See Meese*, 481 U.S. at 476 ("enjoining the application of the words 'political propaganda' to the films would at least partially redress the reputational injury of which appellee complains"); *Parsons*, 801 F.3d at 716-17; *WildEarth Guardians v. U.S. Dep't of Agric.*, 795 F.3d 1148, 1156 n.5 (9th Cir. 2015).

Setting aside DOI's actions would eliminate the Wisconsin tribe's ability to demand that that the Nation stop using its own name, and also its ability to leverage DOI's actions in the TTAB proceeding. Standing's redressability element is satisfied if vacating agency action

could affect a plaintiff's position in another forum. *Utah v. Evans*, 536 U.S. 452, 463-64 (2002) (collecting cases); *Lichoulas v. FERC*, 606 F.3d 769, 775 (D.C. Cir. 2010) (reversing agency action would "significantly increase the likelihood" that plaintiff would prevail in separate court action against different defendant); *Nat'l Parks Conservation Ass'n v. Manson*, 414 F.3d 1, 7 (D.C. Cir. 2005). The TTAB's view, as the forum that will adjudicate the trademark cancellation proceeding, was that "the court decision may have a bearing on [the TTAB] proceeding." JA 174. That is enough to satisfy the standard.

Disagreeing with the TTAB, which suspended the trademark proceedings and denied the Wisconsin tribe's motion to reconsider, the district court conducted an independent analysis of the trademark action and concluded "that the outcome of this case will not materially [a]ffect [the arguments for cancellation's] resolution in the TTAB proceeding." JA 234. The TTAB, though, stayed its proceedings precisely because "[i]t is the policy of the [TTAB] to suspend proceedings when the parties are involved in a civil action, which may be dispositive of or have a bearing on the [TTAB] case." JA 162. Deference is due to the TTAB as the judge of the trademark issues before it.

The TTAB had good reason to conclude that reversing DOI's actions would affect the trademark cancellation action. If it were stripped of DOI approval for the name Oneida Nation, the Wisconsin tribe would have an uphill battle trying to establish the right to challenge the Nation's Oneida Indian Nation trademark. To show that it is entitled to file a cancellation petition, the Wisconsin tribe needed to establish that it will be damaged by the trademark. 15 U.S.C. § 1064. The TTAB might conclude, whether it should or not, that DOI's approval of the name change to Oneida Nation satisfies that requirement for a challenge to the Nation's Oneida Indian Nation trademark because the approval might be understood to give the Wisconsin tribe at least an equal right to use a similar name. *See Int'l Order of Job's Daughters v. Lindeburg & Co.,* 727 F.2d 1087, 1092 (Fed. Cir. 1984) ("by virtue of that Court of Appeals' decision in its favor, Lindeburg has an equal right with that of Job's Daughters-approved-jewelers to use the Job's Daughters emblem on its jewelry. Continued federal registration of the mark is inconsistent with that right.").

3. The Nation's Dignitary and Reputational Injuries Result Directly From DOI's Decisions and Are Redressable by a Judgment Vacating Them.

When DOI approved the Wisconsin tribe's name change, it appeared to vindicate the Wisconsin tribe's claim to the Oneida Nation legacy and diminished the Nation's dignity and reputation. These reputational and dignitary injuries are fairly traceable to DOI's approval of the secretarial election and its publication of the recognized Indian tribes name list and are redressable by a favorable judgment. Reputational or dignitary harms are traceable to a government action and redressable by a favorable decision if the government's action directly and negatively impacts a plaintiff's reputation or dignity. *See Meese*, 481 U.S. at 474-77; *Gully*, 341 F.3d at 158.

In *Meese*, the Supreme Court held that a film exhibitor's reputational injury was fairly traceable to the Justice Department's decision to designate films he wished to exhibit as "political propaganda" because his damaged reputation stemmed from the Justice Department's enforcement of a statute. *Meese*, 481 U.S. at 474-76. The Court also concluded that barring the Justice Department from calling his films "political propaganda" would redress his reputational injury

even though some people "may continue to react negatively to his exhibition of films[.]" *Id.* at 476-77.

Similarly, in *Gully v. National Credit Union Administration Board*, this Court held that damage to a bank manager's reputation was redressable if the administrative board's misconduct finding were set aside. 341 F.3d at 162-63. This Court held that the manager's damaged reputation was fairly traceable to the Board's decision because without it, there would be no public finding that she engaged in misconduct. *Id.* at 162. The Court found that the bank manager's reputational injury was redressable because reversing the Board's decision "would remove the stain on [her] professional record." *Id.* at 162; *see also Shukh v. Seagate Tech., LLC*, 803 F.3d 659, 666 (Fed. Cir. 2015) (finding genuine dispute of fact about whether inventor's reputational injury from being omitted from patent was fairly traceable and redressable with a favorable decision); *Foretich v. United States*, 351 F.3d 1198, 1214 (D.C. Cir. 2003) ("reputational injury that derives directly from government action will support Article III standing to challenge that action.").

The Nation's damaged reputation and dignity are traceable to DOI's actions because, like *Meese* and *Gully*, where the plaintiffs damaged reputations stemmed from government action, without DOI's approval and recognition of Oneida Nation as the name of the Wisconsin tribe, the Nation's claim to Oneida legacy would not have been diminished. Its cultural and political status as the Oneida Nation forever present on the Oneida reservation in New York would not have been damaged. Even though the Wisconsin tribe could have called itself the Oneida Nation without DOI approval, the Nation's reputational and dignitary damages flow directly from the federal government's action to seemingly recognize the Wisconsin tribe's status as "the Oneida Nation." It is the government's imprimatur that harms the Nation. The Wisconsin tribe can say what it wants; it matters what the United States government says.

The damage DOI caused to the Nation's reputation is also redressable. Like *Gully* and *Meese*, the damage to the Nation's reputation and dignity is redressable because vacating DOI's decisions would eliminate federal recognition of the Wisconsin tribe's new Oneida Nation name and the concomitant implication that the tribe is the true

Oneida Nation. A plaintiff "need not show that a favorable decision will relieve his every injury," but that "a favorable decision will relieve a discrete injury." *Larson v. Valente*, 456 U.S. 228, 243 n.15 (1982); *Chevron Corp. v. Donziger*, 833 F.3d 74, 121 (2d Cir. 2016). Here, if a judgment set aside DOI's approval of the Wisconsin tribe's secretarial election and the resulting recognition by Federal Register publication, that would redress the cultural and political damage to the Nation's claim to its Oneida Nation legacy.

CONCLUSION

The order and judgment of dismissal for lack of subject matter jurisdiction should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE AND WORD-COUNT LIMITATIONS

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. 32(a)(7) because it contains 12,150 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word counting feature of Microsoft Word 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the typestyle requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point font.

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CERTIFICATE OF SERVICE

I hereby certify that, on December 13, 2018, an electronic copy of the foregoing Brief for Plaintiff-Appellant Oneida Indian Nation was filed with the Clerk of Court using the ECF system and thereby served upon all counsel appearing in this case.

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