18-2607

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ONEIDA INDIAN NATION,

Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,

Defendant-Appellee.

Appeal from the United States District Court
for the Northern District of New York
No. 5:17-cv-00913 (Hon. Mae A. D'Agostino)

ANSWERING BRIEF FOR THE FEDERAL APPELLEE

GRANT C. JAQUITH
United States Attorney for the Northern District of New York
KAREN FOLSTER LESPERANCE
Assistant United States Attorney

JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
J. DAVID GUNTER II
REUBEN SCHIFMAN
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice
Post Office Box 7415
Washington, D.C. 20044
(202) 305-4224
Reuben.Schifman@usdoj.gov

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitution, Statutes, and Rules

Regulations

INTRODUCTION

Two federally recognized Indian tribes share a long history and a common word—"Oneida"—in their respective names. In 2015, the Oneida Tribe of Indians of Wisconsin (Wisconsin tribe) changed its name to the "Oneida Nation." In 2016, plaintiff changed its name from the Oneida Indian Nation of New York to the "Oneida Indian Nation." Plaintiff sued the Department of the Interior (Department) for approving a tribal constitution in which the Wisconsin tribe changed its name and for including the new name on a list of federally recognized tribes. Plaintiff contends that the Department's actions are causing confusion and encouraging the Wisconsin tribe to attempt to cancel plaintiff's trademarks.

The district court dismissed plaintiff's complaint for lack of Article III standing, specifically for failure to show a concrete and actual or imminent injury that is traceable to any action by the Department and that is redressable by a setting aside such action. That decision was correct. Plaintiff claims to be injured by "confusion," but this alleged injury is neither concrete nor traceable to action by the Department, flowing instead from the underlying similarities between the respective tribes' histories and chosen names. Moreover, setting aside the Department's actions would not result in any actual reduction in "confusion" or other redress. Indian tribes are sovereign governments that decide for themselves their own names. Regardless of the outcome of this suit, the non-party Wisconsin tribe could continue referring to itself as the Oneida Nation—as it has done for centuries.

At bottom, this is an inter-tribal dispute between two tribes that share a common history and similar names—a dispute that cannot be resolved in this action against the Department. The district court properly dismissed the action.

STATEMENT OF JURISDICTION

Plaintiff invoked the district court's jurisdiction under 28 U.S.C. §§ 1331 and 1362 on the ground that this action arises under 5 U.S.C. §§ 701 et seq. and 25 U.S.C. § 5123(d)(2). JA 17, ¶ 12. As explained in the Argument below, the court correctly dismissed the action for lack of jurisdiction because plaintiff failed to demonstrate Article III standing. *See* JA 225-41. The court entered judgment on August 24, 2018. JA 242. Plaintiff timely filed a notice of appeal on August 30, 2018. JA 244; Fed. R. App. P. 4(a)(1)(B). This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

The overall issue is whether plaintiff lacks Article III standing to maintain this challenge to the Department's approval of the Wisconsin tribe's constitution and its change to the list of federally recognized tribes. That issue contains three sub-issues:

1. Whether plaintiff failed to allege and prove any actual, concrete, or certainly impending injury.

2. Whether plaintiff failed to allege and prove that any injury it might have suffered is fairly traceable to the Department's actions.

3 Whether plaintiff failed to allege and prove that any injury it might have suffered is redressable by an order setting these actions aside.

STATEMENT OF THE CASE

A. Factual Background

1. The Oneida tribes

Plaintiff Oneida Indian Nation is a federally recognized tribe headquartered in Oneida, New York. JA 14. In 2016, the tribe changed its name from the "Oneida Nation of New York" to the "Oneida Indian Nation." Opening Brief 7 n.2. The Oneida Nation ("Wisconsin tribe") is a federally recognized tribe headquartered in Oneida, Wisconsin. In 2015, the Wisconsin tribe changed its name from the "Oneida Tribe of Indians of Wisconsin" to the "Oneida Nation." JA 25, ¶ 33.

Both tribes are "the direct successors in interest" to the historic Oneida Indian Nation, a member of the Six Nations of the Iroquois Confederacy "whose members since time immemorial had prior to the American Revolution occupied land in central New York State." *Oneida Indian Nation of New York v. New York*, 691 F.2d 1070, 1073 (2d Cir. 1982). The historic Oneida Nation's aboriginal homeland comprised approximately six million acres in what is now east-central New York. *See County of Oneida v. Oneida Indian Nation,* 470 U.S. 226, 230-31 (1985) (*Oneida II*). But by treaty and by sale to the State of New York during the late eighteenth and early nineteenth centuries, that territory was drastically diminished, leaving the Oneida Nation with only some 5,000 acres by 1838. *See City of Sherrill v. Oneida Indian Nation of New York*, 544 U.S. 197, 206 (2005).

The State also urged the removal of the Oneida people west, and several hundred Oneidas moved to Wisconsin; others stayed in New York. *New York Indians v. United States,* 170 U.S. 1, 6 n.1 (1898) (*New York Indians II*). Between 1810 and 1816, the Oneidas purchased land in Wisconsin from the Menomonee and Winnebago Tribes. *Id.* at 11-14. By the turn of the twentieth century, fewer than 300 Oneidas remained in New York. *New York Indians v. United States,* 40 Ct. Cl. 448, 470 (1905). Continuing purchases by the State of New York caused the land held by the Oneida in New York to dwindle to only 32 acres in 1920. *City of Sherrill*, 544 U.S. at 207.

After the passage of the Indian Reorganization Act (IRA) in 1934, the Department conducted separate tribal elections for the New York and Wisconsin Oneida to determine whether they wanted to organize under the IRA. JA 20, ¶ 21. Plaintiff elected not to organize under the IRA and not to have a written constitution. *Id.* The Wisconsin tribe voted to establish a written constitution under the IRA, and this was approved by the Department. *Id.* The New York and Wisconsin Oneida tribes have since continued as separate tribes with distinct tribal governments.

2. The Wisconsin tribe's 2015 election

In accordance with its constitution and the IRA, the Wisconsin tribe in 2011 requested authorization from the Department to hold an election on five proposed constitutional amendments. JA 25, ¶ 33. The amendment at issue in this action provides in relevant part: "The Constitution shall be amended to change the name from the 'Oneida Tribe of Indians of Wisconsin' to the 'Oneida Nation' throughout

the Constitution." *Id.* The Department is required by law to call an election for a tribe unless proposed provisions in a tribe's request are "contrary to applicable laws." 25 U.S.C. § 5123(d)(1)(a). After determining that none of the amendments submitted by the Wisconsin tribe was contrary to federal law, the Department called the election, which occurred on May 2, 2015. JA 28, ¶ 40. On June 6, 2015, the Department certified the results of the election and approved the amendments. JA 28, ¶ 41.

3. Publication of the list of federally recognized tribes

In the 1970s, the Department began to periodically publish a list of federally recognized tribes in the Federal Register. The publication of this list of tribes was codified into law in the Federally Recognized Tribes List Act of 1994 (List Act), 25 U.S.C. §§ 5130-5131. The List Act provides in relevant part:

> The Secretary shall publish in the Federal Register a list of all Indian tribes which the Secretary recognizes to be eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Id. § 5131(a).

The list initially identified the two tribes as the "Oneida Nation of New York" and the "Oneida Tribe of Wisconsin, Oneida Reservation, Wisconsin," respectively. 44 Fed. Reg. 7235, 7236 (Dec. 31, 1979). These identifications continued with minor variations through 2016. JA 21, ¶ 24. After the Wisconsin tribe changed its name, the Department updated the tribe's name on the next list. 82 Fed. Reg. 4915, 4917 (Jan. 17, 2017).

B. Procedural History

1. Plaintiff's complaint and the Department's motion to dismiss

Plaintiff filed suit on August 17, 2017. JA 12. The Complaint asserts two claims under the Administrative Procedure Act (APA). The first claim challenges the Department's publication of the 2016 list of federally recognized tribes as arbitrary and capricious. JA 36-37. The second claim challenges the Department's decision to hold a Secretarial election and to approve the Wisconsin tribe's constitution, likewise as arbitrary and capricious. JA 29-31.

Plaintiff alleges that because of the Department's challenged actions, the tribe was injured by "confusion of federal agencies and the public"; by "the Wisconsin tribe's claims to greater legal rights"; and by "cultural and political diminishment." JA 38, ¶¶ 65, 80. In part, these allegations concerned a separate proceeding, namely, a pending petition before the Trademark Board, in which the Wisconsin tribe is seeking to cancel plaintiff's trademarks over the term "Oneida" on the basis of fraud and abandonment. *See* JA 30-31, 60.

The Department moved to dismiss plaintiff's complaint under Federal Rule of Civil Procedure 12(b)(1) and (6). ECF No. 14. The Department argued that the complaint should be dismissed because plaintiff had not demonstrated standing, for three reasons: (1) plaintiff has alleged no concrete or particularized injury stemming from the Department's approval of a Secretarial election for the Wisconsin tribe or

from the publication of the name change in the Federal Register; (2) if plaintiff had suffered any injury, it was traceable not to the Department's actions but rather to the independent action of the Wisconsin tribe; and (3) no redress was possible from the relief sought by plaintiff, because the Wisconsin tribe would not be bound by the judgment and could continue to refer to itself as the "Oneida Nation" as it had done for years prior to the official constitutional change. The Department presented other arguments in favor of dismissal that were not addressed by the district court due to the dismissal of the complaint on standing grounds.

2. The district court's decision

The district court granted the Department's motion to dismiss under Federal Rule 12(b)(1), concluding plaintiff had not demonstrated standing. JA 224, 242. The court examined both plaintiff's allegations that it was injured by a proceeding initiated by the Wisconsin tribe before the Trademark Board and plaintiffs' allegation that it was injured by "confusion" stemming from the Department's actions. The district court ruled that plaintiff had not alleged a sufficiently actual, concrete, or certainly impending injury that is fairly traceable to the Department's actions or that is redressable by an order setting such actions aside.

First, the district court examined plaintiff's argument that the Wisconsin tribe's petition to cancel plaintiff's trademarks, which is pending before the Trademark Board, constituted an injury in fact traceable to the Department's actions and redressable in the present action. JA 232. Plaintiff argued that the petition "invoked"

the Department's decisions as supporting cancellation, and the Trademark Board litigation itself cost plaintiff time and money. ECF No. 19, at 17. Based on its review of the Wisconsin tribe's petition, the court determined that the Wisconsin tribe's trademark challenge was "based on conduct entirely unrelated" to the tribe's name, and that the Department's actions had no material impact on the Trademark Board proceeding. JA 234-35. The court further determined that even if it were to reverse the Department's decisions, such a reversal "would not alter the outcome of the [Trademark Board] proceeding," and that even if the proceeding constituted an injury traceable to the Department for purposes of standing, it was not redressable and therefore not a basis for standing. JA 235.

Second, the district court examined the allegation that the Department's actions had caused "confusion" that injured plaintiff. JA 235. Plaintiff alleged two instances of confusion, both where correspondence intended for the Wisconsin tribe was sent to plaintiff. In both situations, however, the corresponding party knew with which tribal entity it was supposed to communicate; the party simply used the wrong address. The court reasoned that such "secretarial carelessness" was not the sort of confusion sufficient to demonstrate an injury. JA 237. Moreover, the court found that plaintiff had not shown that the confusion was traceable to the Department's actions, which concerned only internal tribal governance document and a list of federally recognized tribes. JA 236-37. The instances of confusion involved a third party's using wrong contact information for an Indian tribe, but such contact

information is not maintained by the Department or otherwise affected by the Department's actions challenged in this case. JA 238. Therefore, the Court found plaintiff's allegations of confusion insufficient to demonstrate standing.

Third, the Court examined plaintiff's allegation that the Department's actions caused the Wisconsin tribe to engage in misleading or confusing use of the term "Oneida nation." JA 238. The court reasoned that the Department's actions did not supersede trademark law or otherwise give the Wisconsin tribe any rights to the term "Oneida Nation" that it previously lacked. JA 239-40. As any use of the term "Oneida nation" that was lawful before the Department's action continued to be lawful thereafter, the Wisconsin tribe's allegedly confusing and injurious acts could not be traced to the Department's actions. *Id.* Therefore, the court concluded that plaintiff had failed to establish standing to pursue its claims. JA 240.

SUMMARY OF ARGUMENT

Plaintiff has not demonstrated Article III standing.

1. Plaintiff has not identified a sufficiently "concrete" or "actual" injury from the Department's actions. Plaintiff alleges it is injured by "confusion," but the confusion alleged by plaintiff has no tangible consequence or any "concrete" effect. The two items proffered by plaintiff were simply secretarial errors—correspondence sent to the wrong address and easily corrected. Although plaintiff now argues that its reputation has been injured, it made no such allegation in the complaint and even now cites no facts to support this argument. Similarly, plaintiff argues that it has been

subjectively "diminished" by the Wisconsin tribe's name change, but no court has found such an intangible injury to be sufficient for standing purposes.

2. Even if the alleged confusion or diminishment were sufficiently concrete to constitute injuries for standing purposes, these injuries not traceable to the Department. Both tribes are sovereign governments, with independent powers to decide their names in government and business relations as well as in their dealings with the public. Both tribes changed their names to remove geographic signifiers. Any confusion resulting from those name changes cannot be traced to the Department's approval of the Wisconsin tribe's constitution or the ministerial action of modifying the tribes' names on an informational list. Nor are any actions that the Wisconsin tribe took to cancel plaintiff's trademarks on the term "Oneida" a result of to the Department's actions. The Wisconsin tribe seeks to cancel those trademarks based on alleged fraud and abandonment that occurred years before those actions. Plaintiff's argument from simple chronology—that the name change *caused* the Wisconsin tribe to attempt to cancel the trademark merely because that attempt occurred *after* the name change—is not correct under applicable case law.

3. Even if plaintiff could demonstrate an injury that is traceable to the Department's actions, it could not show that such injury would be redressed in this action. The tribes have both used "Oneida" in their names for centuries. For at least several decades, the Wisconsin tribe has been referring to itself in its relationships with the public (including in its casino) as the "Oneida Nation," and it has been doing

so on internal government documents as well. The non-party Wisconsin tribe would not be bound by a judgment in this action, and it could continue referring to itself as the "Oneida Nation" regardless of the outcome here. Even if the Department were ordered to change the name on the information list of federally recognized tribes, the Wisconsin tribe could simply amend its constitution again—and the constitution at this time requires no Departmental approval for such a change.

The judgment of dismissal for lack of Article III standing should be affirmed.

STANDARD OF REVIEW

This Court "review[s] *de novo* a district court's dismissal of a complaint for lack of standing" under Rule 12(b)(1). *Selevan v. New York Thruway Authority*, 584 F.3d 82, 88 (2d Cir. 2009).

ARGUMENT

Standing is an "irreducible constitutional minimum" that must be established before a federal court may consider a party's claims. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992); *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009). To establish standing, a plaintiff must show that it has suffered an "injury in fact"—an "invasion of a legally protected interest which is (a) concrete and particularized; and (b) actual or imminent, not conjectural or hypothetical." *Id.* (citations and internal quotation marks omitted). The plaintiff must also show that its injury is the result of the defendant's challenged conduct and that a favorable decision from the court will redress its injury. *Id.*

Plaintiff bears the burden of establishing standing "in the same way as any other matter on which [it] bears the burden of proof, *i.e.,* with the manner and degree of evidence required at the successive stages of the litigation." *Defenders of Wildlife,* 504 U.S. at 561. Consequently, plaintiff was obligated to allege facts that affirmatively and plausibly suggest that it has standing to sue. The stage of the litigation here was the Departments motion under Rule 12(b)(1), which contested the truth of plaintiff's allegations regarding standing. In this context, the district court need not presume the truthfulness of the plaintiff's allegations; instead, the "court may resolve the disputed jurisdictional fact issues by referring to evidence outside of the pleadings." *Fountain v. Karim*, 838 F.3d 129, 134 (2d Cir. 2016) (internal quotation marks omitted).

I. Plaintiff has not demonstrated a concrete injury in fact.

Injury in fact is "the '[f]irst and foremost' of standing's three elements." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 103 (1998). "To establish injury in fact, a plaintiff must show that [it] suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* (quoting *Defenders of Wildlife*, 504 U.S. at 560). "A 'concrete' injury must be 'de *facto*'; that is, it must actually exist." *Id.* Intangible psychological "injuries" such as confusion are not sufficient. *See, e.g.*, *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.,* 454 U.S. 464, 485-86 (1982) ("psychological consequence[s]" cannot confer standing).

A. Unspecified "confusion" is not a sufficiently concrete injury.

Plaintiff alleges that the similarity between the names of the two tribes—"Oneida Nation" and "Oneida Indian Nation"—is causing "confusion." But plaintiff has not demonstrated sufficient facts to show such confusion constitutes a concrete injury for standing purposes. In particular, plaintiff has not alleged sufficient facts to show how the Department's actions have created "confusion" that actually harmed plaintiff's trademark, business relationships, or otherwise led to a concrete injury.

Plaintiff relies heavily on cases addressing requests for preliminary injunctions under the Section 43(a) of the Lanham Act.[1] These cases are inapplicable because Plaintiff has not asserted a Lanham Act claim. And even if it had, standing for such a claim would require plaintiff to plead facts showing, for instance, some economic injury like a competitor's "making false statements about his own goods [or the competitor's goods] and thus inducing customers to switch." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 137 (2014) (internal quotation marks omitted). Plaintiff misplaces reliance on *Sutton Cosmetics (P.R.) Inc. v. Lander Co.*, 455 F.2d 285, 287 (2d Cir. 1972), in which the defendant Lander began marketing Sutton cosmetics and as "a result of Lander's sales efforts, at least two buyers cancelled their

[1] The Lanham Act proscribes "any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which . . . is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her . . . services . . . by another person." 15 U.S.C. § 1125(a)(1)(A).

pending orders with [Sutton] and placed their orders for Sutton products with Lander." *Id.* But plaintiff has pled no such facts here. *See* JA 15, ¶¶ 3, 5. Rather, in its *briefing* on the Department's motion to dismiss, plaintiff relied on two items not mentioned in its complaint for an alleged injury caused by "confusion." The district court correctly rejected these items as evidence of concrete injury.

First, plaintiff pointed to a July 20, 2018 letter from the Indian Health Service that was intended for the Wisconsin tribe but sent to plaintiff in error. JA 215. Two business days later, the Service realized its error and sent a follow-up letter. JA 223. Plaintiff cannot show any concrete harm that resulted from the letter. Moreover, as the district court reasoned, there is no indication that the error was due to the change in the Wisconsin tribe's constitution approved by the Department. JA 238. The Wisconsin tribe has long referred to itself as the "Oneida Nation," and there is no reason to believe the Service's mistaken address was based on the formal change to the constitution or that a successful lawsuit by plaintiff would eliminate such errors.

Second, plaintiff points to a "misdirected invoice." *See* JA 148, Opening Brief 37. The invoice was addressed to the Wisconsin Tribe but emailed to plaintiff by mistake. Plaintiff claims that this mistaken invoice address "creates the risk for reputational and financial injury" if creditors seek money from the wrong tribe. Opening Brief 37. Plaintiff does not allege that such a risk is either "actual" or "imminent"—this alleged harm is, at best, speculative. Moreover, even if a creditor were to seek money from the wrong tribe, there is no indication that it would do so as

a result of the Department's challenged actions, rather than an underlying and preexisting confusion stemming from the similarity in the two tribes' names.

Plaintiff criticizes the district court for having allegedly "disregarded" the complaint's allegations. *Id.* at 38. But the court did no such thing. Accepting the complaint's factual allegations as true, the court could identify no facts alleged in the complaint supporting "concrete" or "actual" harm. This is because there was no such harm alleged. Paragraph 31 of the complaint alleges "confus[ion]" and loss of "goodwill" but only in the abstract; Paragraph 55 uses the phase "business harm" but provides no elaboration; and Paragraph 65(d) asserts "confusion" with no elaboration. JA 24, 33, 38. Like this Court, the district court was not "required to accept as true allegations that are wholly conclusory." *Krys v. Pigott*, 749 F.3d 117, 128 (2d Cir. 2014) (citing *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79, 681, 686 (2009)). The only concrete examples of confusion were fully addressed by the district court, and correctly found wanting.

B. Plaintiff has not pled a concrete injury to its reputation.

Plaintiff asserts that it has suffered injury because the Department's actions have "diminished the Nation's status and reputation." Opening Brief 39. But that assertion is inadequate to demonstrate standing because plaintiff has not identified sufficiently "actual" or concrete injury to its reputation.

The complaint contains a single reference to the word "reputation." JA 30, ¶ 49. This reference, in the background section of the complaint, concerns a golf

tournament and observes in passing that plaintiff "has invested tens of millions of dollars in building the reputation of its golf course and golf business." *Id.* But plaintiff has pled no facts showing that the reputation of its golf course or its golf business has been injured by the Department's actions. Indeed, the district court noted the only example of a potential conflict between the separate golf businesses of the two tribes was a tournament originally proposed to be called the "Oneida LPGA classic." JA 240 n.1. But that tournament was renamed "Thornbury Creek LPGA classic." *Id.* Plaintiff has alleged no other facts relevant to any injury to its reputation in its golf or other businesses.

The authorities cited by plaintiff regarding reputational injury are readily distinguishable, primarily on the ground that plaintiff here was not the object of the action that purportedly affected its business or professional reputation; rather, the Department merely approved an amendment of a *separate tribe's* constitution. When a plaintiff "is not himself the object of the government action" that he challenges, standing "is ordinarily 'substantially more difficult' to establish." *Defenders of Wildlife*, 504 U.S. at 562 (quoting *Allen v. Wright*, 468 U.S. 737, 758 (1984)). For instance, in *Meese v. Keene*, 481 U.S. 465 (1987), the government designated a film exhibitor's film "political propaganda." The plaintiff had standing because he showed that as a result of this designation by the government his reputation was harmed as was his ability "to practice his profession." *Id.* at 473; *see also Block v. Meese,* 793 F.2d 1303, 1308 (D.C. Cir. 1986). Similarly, in *Parsons v. U.S. Dep't of Justice*, 801 F.3d 701, 712 (6th Cir.

2015), the plaintiff was listed as a member of a criminal gang, which listing allegedly caused "concrete reputational injuries resulting in allegedly improper stops, detentions, interrogations, searches, denial of employment, and interference with contractual relations." *See also Paul v. Davis,* 424 U.S. 693, 710 (1976) (holding that where reputational injury is accompanied by concrete harm, such as termination of employment, the plaintiff has a cognizable claim under Due Process Clause). In *Gully v. NCUA Board*, 341 F.3d 155, 162 (2d Cir. 2003), the court found injury because it was "self-evident that [the plaintiff's] reputation will be blackened by the [defendant's] finding of misconduct and unfitness."

Here by contrast, the Department took no action directly against plaintiff and has neither directly nor indirectly commented on the reputation of plaintiff. Rather, plaintiff claims that its reputation is harmed as a collateral consequence of the Department's changing how another tribe's name appears on a list. In general, standing based on alleged reputational harms or related harms is found only where "the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that [the plaintiff] was challenging." *Laird v. Tatum,* 408 U.S. 1, 11 (1972); *see also Keene*, 481 U.S. at 476 (noting that "the alleged injury stem[med] from the Department of Justice's *enforcement of a statute* that employs the term 'political propaganda'" (emphasis added)).

Ultimately, like any other injury, a reputational injury must be "concrete" and actual. While the government's proscriptive action resulting in a reputational injury that impairs an individual's ability to practice his profession (*Meese*) or results in loss of employment (*Parsons*) is sufficient for standing purposes, plaintiff has alleged nothing so concrete. As the D.C. Circuit recognized, at some point, "claims of reputational injury can be too vague and unsubstantiated" to support subject matter jurisdiction. *McBryde v. Committee to Review Circuit Council Conduct & Disability Orders*, 264 F.3d 52, 57–58 (D.C. Cir. 2001). Such is the case here: plaintiff has not alleged a sufficiently "actual" or concrete injury to its reputation.

C. The alleged political diminishment or other a dignitary injuries are not sufficiently concrete.

Plaintiff also alleges that "the Nation has suffered and will suffer injury . . . by reason of the cultural and political diminishment of the Nation." JA 38, ¶ 65; JA 44, ¶ 80. But this alleged injury is far too abstract to constitute a concrete injury in fact for standing purposes. In determining whether a plaintiff's alleged injury is concrete, the Court "need not credit a complaint's conclusory statements without reference to its factual context." *Amidax Trading Group v. SWIFT SCRL*, 671 F.3d 140, 146 (2d Cir. 2011) (internal quotation marks omitted).

Plaintiff argues that when the Department updated the name of the Wisconsin tribe to the "Oneida Nation" on the published list of tribes, it "vindicated the Wisconsin tribe's erroneous claim to the Oneida Nation legacy." Opening Brief 38.

Plaintiff further argues that this "name change diminished [plaintiff's] status and reputation as the original Oneida Nation, or its direct successor." *Id.* at 39; *see also id.* at 40 (arguing that the change "undermined [plaintiff's] claim to be the Oneida Nation that made the Founding-era treaties").

But whether a tribe is the same entity as, or the successor to, an earlier tribe as a legal or historical matter is not determined by how a tribe is denominated in its own constitution. As plaintiff's own complaint acknowledges, the Department recognizes plaintiff—and not the Wisconsin tribe—as "the Indian tribe which remained on the New York Oneida Indian reservation." JA 19, ¶ 18 (quoting affidavit of Department officer). As noted above, moreover, this Court has recognized that *both* tribes are "the direct successors in interest to the Oneida Indian Nation." *Oneida Indian Nation*, 691 F.2d at 1073; *accord, e.g., Oneida II*, 470 U.S. at 230 (recognizing that both tribes are "direct descendants of members of the Oneida Indian Nation"). Nothing in the Department's challenged actions—or in any Department statement cited by plaintiff—is inconsistent with such recognition.

Nor does the name of the Wisconsin tribe actually "diminish" or otherwise have any legal effect on plaintiff's "status as the Oneida tribe that remained on the reservation in New York." Opening Brief 39. That status is based on historical facts and on the treaties signed by each tribe—not by what either tribe calls itself. In any event, as quoted in the previous paragraph, the Department recognizes that plaintiff is "the Indian tribe which remained on the New York Oneida Indian reservation."

The Wisconsin tribe's correspondence with the Department referenced in the complaint similarly provides no support for the argument that the Wisconsin tribe's constitutional amendment attempted—let alone succeeded in an attempt—to "claim the Oneida Nation legacy" in a way that injures plaintiff. That correspondence only notes that the new name is "more responsive to the Tribe's governmental status." JA 54. That the Wisconsin tribe views its governmental status more akin to a "Nation" than a "Tribe" does not diminish plaintiff's governmental status or history. The historical facts regarding the two tribes' shared history are not changed by what each chooses to be called.

In short, plaintiff has demonstrated no practical, legal or other "tangible" effect of the Wisconsin tribe's being called "Oneida Nation." The root of plaintiff's claim appears to be a subjective change in its self-assessed "status" relative to its "rival," the Wisconsin tribe; i.e., plaintiff sees itself as "politically diminished" by the Wisconsin tribe's choice of name. This intangible subjective injury is not sufficiently concrete to demonstrate standing. *See, e.g.*, *City of Los Angeles v. Lyons,* 461 U.S. 95, 107 n.8 (1983) ("It is the *reality* of the threat of repeated injury that is relevant to the standing inquiry, not the plaintiff's subjective apprehensions."); *Laird v. Tatum,* 408 U.S. at 13-14 (holding that a "subjective" effect on a plaintiff's rights is insufficient to create standing).

Plaintiff has cited no authority holding that unidentified and subjective "cultural and political diminishment" of the kind plaintiff alleges here is a sufficiently

"concrete" injury for standing purposes. Rather, plaintiff cites a single, later overruled decision of the First Circuit for the proposition that "[d]ignitary harms to a tribal government are injuries that establish standing." Opening Brief 42 (citing *Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 70-71 (1st Cir. 2005), *overruled by Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16 (1st Cir. 2006)). *Aroostook Band* concerned a tribe's challenge to a state's authority to enforce state employment discrimination laws against it. In that context, the First Circuit opined that an "Indian tribe that is unlawfully called to answer before a state agency may suffer both practical harms and intrusions upon its sovereignty." 404 F.3d at 67. In so holding, the court described the dignitary harm at issue as the tribe's being "forced to defend itself to the EEOC," including a financial obligation to its attorneys, when "Congress has shielded the Band from such investigations entirely." *Id.* at 70.

Plaintiff does not allege anything like the "practical harms and intrusions upon its sovereignty" as a result of having to defend itself from a state agency—or anything else comparable to what was alleged in *Aroostook Band*. *Id.* More generally, plaintiff cites no other decision that even found a comparable "dignitary harm" as alleged here sufficiently concrete to confer standing. And even if plaintiff has alleged a political or dignitary harm, "not all dignitary harms are sufficiently concrete to serve as injuries in fact." *Griffin v. Dep't of Labor Federal Credit Union*, 912 F.3d 649, 654 (4th Cir. 2019). This alleged dignitary harm is not concrete, and thus cannot be a basis for standing.

In sum, Plaintiff has not demonstrated a concrete injury in fact.[2]

II. Even if plaintiff had demonstrated an injury, it failed to show such injury is traceable to the Department's actions.

Plaintiff independently lacks Article III standing because it has not proffered evidence that its purported injuries are caused by or traceable to the Department's approval of the Wisconsin tribe's constitution or to the Department's publication of the list of federally recognized tribes. As stated above, when a plaintiff "is not himself the object of the government action" that he challenges, standing "is ordinarily 'substantially more difficult' to establish" because the plaintiff must "adduce facts showing that" the "unfettered choices made by independent actors not before the courts" will be made "in such manner as to produce causation." *Defenders of Wildlife*, 504 U.S. at 562 (quoting *Allen*, 468 U.S. at 758). Plaintiff has adduced no such facts here. To the contrary, the record demonstrates that plaintiff's asserted injuries stem not from the Department's actions but rather from the independent actions of the non-party Wisconsin tribe.

---

[2] Conceivably, plaintiff might have attempted to plead an injury arising from the statutory provisions foreclosing agency action that "diminishes the privileges and immunities available to [an] Indian tribe relative to other federally recognized tribes." 25 U.S.C. § 5123(f), (g). But plaintiff forfeited any such effort by not raising it in the district court, and forfeited it again by not raising it in its opening brief. *In re Grand Jury Subpoenas Returnable Dec. 16, 2015*, 871 F.3d 141, 147 (2d Cir. 2017) ("A party may waive a challenge . . . if the argument is not properly raised before the district court or in its opening brief on appeal."), *cert. denied*, 138 S. Ct. 1710 (2018).

A. Neither the Wisconsin tribe's demand letter nor trademark suit are traceable to the Department's actions.

Plaintiff argues that a letter from the Wisconsin tribe threatening legal action constitutes an injury in fact. Opening Brief 32. Elsewhere, plaintiff suggests that the trademark suit filed by the Wisconsin tribe is such an injury. *Id.* at 55. But even if these actions by the Wisconsin tribe could otherwise constitute injuries for standing purposes, they are not fairly traceable to the Department's actions.

Plaintiff alleges it has been injured by the Department because the Department "*prompted* the [Wisconsin] tribe to demand that the Nation stop using its Oneida Nation name and to challenge the Nation's trademarks." *Id.* at 30 (emphasis added). But the complaint does not show that the Department in any manner prompted (or otherwise caused) the Wisconsin tribe's actions. Indeed, plaintiff provides no specific allegations to support what is essentially a legal conclusion; instead it offers merely "[t]hreadbare recitals . . . supported by mere conclusory statements," which do not suffice as a matter of pleading. *Iqbal*, 556 U.S. at 678. This Court is "not bound to accept as true a legal conclusion couched as a factual allegation." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal quotation marks omitted).

Plaintiff's complaint references a letter from the Wisconsin tribe's trademark counsel titled "Use of Oneida and Oneida trademark registrations." JA 58-59. The letter does not state it was sent at the behest of the Department. Rather, the letter states that it is a response to an earlier letter from plaintiff to the Ladies Professional

Golf Association (LPGA), which was planning a golf tournament in conjunction with the Wisconsin tribe. In this earlier letter, plaintiff stated it holds the trademark to the terms "Oneida Nation" and "Oneida." JA 58. In response to plaintiff's letter, the Wisconsin tribe's trademark counsel proposed that "in light of the longstanding use of the terms Oneida, Oneida Tribe, Oneida Indian Tribe, Oneida Nation, and Oneida Indian Nation by *both* entities, *both* should be able to use and continue to use these terms to identify themselves." JA 59.

The letter then suggested the tribes reach an agreement to that effect and that, if such an agreement were not reached, the Wisconsin tribe would seek to cancel plaintiff's "Oneida" trademarks on the basis of defects and false statements in the registration of the marks. *Id.* The letter contains a single reference to the Wisconsin tribe's recent constitutional change and to the Department's approval of this change: "Your client [plaintiff], unlike ours [Wisconsin tribe], has never been federally recognized as Oneida Nation." JA 58. But nowhere in the letter does the Wisconsin tribe rely on the recent constitutional change as a legal reason to seek to challenge plaintiff's trademark. Indeed, the letter on its own terms states it was sent in response to an earlier letter from plaintiff —not as a consequence of anything the Department did. *Id.*

Accordingly, the allegations in the complaint that the Department injured plaintiff by "prompting" or otherwise causing the Wisconsin tribe to send a reply to plaintiff's letter is contradicted by the letter itself. The Court need not ignore that

plaintiff is overstating the effect of the documents upon which it relies: "where a conclusory allegation in the complaint is contradicted by a document attached to the complaint, the document controls and the allegation is not accepted as true." *Amidax Trading*, 671 F.3d at 146-47 (quoting *L-7 Designs, Inc. v. Old Navy, LLC,* 647 F.3d 419, 422 (2d Cir. 2011)).

But even if it were correct that that the Department's action had inadvertently "prompted" the Wisconsin tribe's letter and lawsuit, that would still not be sufficient to show the letter is "traceable" to the Department's actions, for the letter and lawsuit would still be the independent actions of the Wisconsin tribe. The traceability requirement focuses on whether the asserted injury could have been a consequence of the actions of the defendant rather than being attributable to the "independent action of some third party not before the court." *Defenders of Wildlife*, 504 U.S. at 560 (internal quotation marks omitted). Here, the actions of the Wisconsin tribe—namely, sending a letter and filing a trademark infringement action—were done without the Department's participation, support, or consultation.

Plaintiff cites authority that a demand letter can be a sufficient injury for standing purposes. Opening Brief 30. But crucially, in each of the cited cases, the party sending the demand letter was the defendant. Plaintiff cites no authority holding that one party's sending a demand letter is sufficient to create standing for the recipient to sue a third party that allegedly "prompted" the sender to act. *Id.* In *Rothstein v. UBS AG*, 708 F.3d 82, 87 (2d Cir. 2013), the complaint alleged that the

plaintiffs had been injured in terrorist bombings funded by Iran and carried out by its proxies Hizbollah and Hamas. The complaint further alleged that the defendant illegally provided Iran with "hundreds of millions of dollars in cash" without which the bombings would not have been possible, or at least as likely. *Id.* The Court ruled that the bombings were fairly traceable to the defendant because "the more U.S. currency Iran possessed, the greater its ability to fund Hizbollah and Hamas for the conduct of terrorism; and the greater the financial support Hizbollah and Hamas received, the more frequent and more violent the terrorist attacks they could conduct." *Id.* at 93.

Here, by contrast, the Wisconsin tribe's resources, arguments, and ability to write a letter and commence a trademark suit are independent of the Department's actions. The Department did not provide the Wisconsin tribe with additional money or other resources to commence the suit. Nor did the Department provide any relevant legal theory or argument needed to succeed in the suit. Indeed, as the district court recognized, the Department's actions have no material effect on the Wisconsin tribe's trademark suit, which concerns actions that occurred decades before that tribe's constitutional amendment. *See* JA 167-69.

But even *had* the Department granted a legal right to the Wisconsin tribe, that is not sufficient to make every action taken in reliance on that right traceable to the Department. It would explode the concept of traceability to hold that everything that the Wisconsin tribe did after the Department approved its constitution—including

independently suing plaintiff—is traceable to the Department. Plaintiff's theory is that simple chronology—first the Department acted and then the Wisconsin tribe acted—is enough to show the Department's action is traceable to the harm. Opening Brief 30-31. This argument is logically fallacious (*post hoc ergo propter hoc*) and has no basis in the case law on traceability. Moreover, the chronology is not even correct. The Department's approval of the constitution came years after the Wisconsin tribe first considered the amendments, and there is no evidence that the Department had any involvement with this initial proposal to change the constitution.

The Wisconsin tribe's decision to send a letter and pursue a trademark suit are not "fairly traceable" to the Department's actions.

B. Any reputational injury or confusion is not traceable to the Department's actions.

Any confusion about which tribe is which is likewise not fairly traceable to the Department; it is instead traceable to the tribes themselves.

There have been two federally recognized tribes who share a history and have had the word "Oneida" as part of their name for centuries. *See supra* pp. 3-4. In 2015, the Oneida Tribe of Indians of Wisconsin changed its name to the "Oneida Nation." In 2016, plaintiff changed its name from the Oneida Indian Nation of New York to the "Oneida Indian Nation." Thus, the fundamental source of any confusion is not the Department's actions, but rather the underlying similarity between the two tribes' chosen names and their longstanding practice of using "Oneida Nation" instead of

their official names. Indeed, at least some of the confusion is due to *plaintiff's* own decision to remove "New York" from its name. *See Pennsylvania v. New Jersey,* 426 U.S. 660, 664 (1976) (holding that "self-inflicted" injury cannot support standing and that a plaintiff should not "complain about damage inflicted by its own hand").

Plaintiff has identified no concrete confusion that it can show stemmed from the Department's publication of the list—as opposed to the basic similarity in the tribes' names, which was present long before the Department took the challenged actions here. Consequently, this case is thus unlike *Tozzi v. U.S. Department of Health & Human Services*, 271 F.3d 301, 308 (D.C. Cir. 2001). In *Tozzi*, the Department of Health and Human Services (HHS) listed a product as a "known carcinogen" in the HHS Report on Carcinogens. Citing this report, municipalities adopted resolutions calling for the product not to be used in municipal healthcare institutions. *Id.* at 307. The court ruled that sellers of the product had properly alleged that a "substantial factor" in causing the plaintiffs economic injury was HHS's identification of the product as a carcinogen. *Id.* at 308. There is no such discrete traceability here. To the extent plaintiff has even alleged concrete harm due to confusion, it has not alleged that this confusion stemmed originally from the Department's actions of approving and listing the Wisconsin tribe's name. Indeed, plaintiff's complaint is replete with allegations that the Wisconsin tribe has created confusion "beginning in the 1990s." JA 23, ¶¶ 26-30. The Wisconsin tribe, like plaintiff, has used the "Oneida" and "Oneida Nation" names for "hundreds of years." JA 58.

Therefore plaintiff has failed to show that any injury in fact is fairly traceable to the Department's challenged actions.

III. Even if plaintiff had demonstrated an injury traceable to the Department's actions, such injury is not redressable.

The redressability inquiry examines whether "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000). "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement." *Steel Co.*, 523 U.S. at 107. Because the necessary elements of causation and redressability in this case hinge on the independent choices of a third party, "it becomes the burden of the plaintiff to adduce facts showing that those choices have been or will be made in such manner as to produce causation and permit redressability of injury." *Defenders of Wildlife*, 504 U.S. at 562. That is, plaintiff must show that if the Department's actions here are set aside, the Wisconsin tribe will change the behavior that allegedly causes plaintiff's injury.

But plaintiff has adduced no facts that would show that a favorable decision in this case would or could redress any purported injuries, i.e., confusion, harm to its reputation, or being sued in a trademark infringement action. Even if the district court were to set aside the Department's approval of the Wisconsin tribe's official name change, the Wisconsin tribe would retain the independent authority to continue

to refer to itself as the "Oneida Nation," as it has done for centuries. Plaintiff has adduced no facts showing that it is "likely" that if plaintiff prevailed in this suit, the Wisconsin tribe would not simply continue referring to itself as it has, with no consequent reduction in the claimed confusion. Indeed, the Wisconsin tribe could simply amend its constitution to change its name yet again; notably, the constitution now allows such changes without Department approval. Opening Brief 8 n.5; JA 47. Lack of redressability therefore provides an independent reason that plaintiff lacks Article III standing.

A. The Wisconsin tribe has authority to independently name itself, and the complaint does not allege that it would cease calling itself "Oneida Nation."

The complaint confirms that plaintiff is not challenging the Wisconsin tribe's right to call itself whatever it wishes. JA 15, ¶ 5. A document attached to the complaint confirms the historical reality that for "hundreds of years" both tribes have referred to themselves as the "Oneida Nation." JA 58. Official government documents in the record, JA 9-11, show that the Wisconsin tribe referred to itself as the "Oneida Nation" in the 1990s. Accordingly, there is no reason to believe that if plaintiff succeeds in this action, the non-party Wisconsin tribe will reverse hundreds of years of practice and decide to refer to itself differently in its business, government documents, and other interactions.

Moreover, as plaintiff acknowledges, the currently operative constitution of the Wisconsin tribe does not require Secretarial approval of future changes. *See* Opening

Brief 8 n.5; JA 47. Thus, even if the Department were to reconsider whether to approve the name change in the constitution, the Wisconsin tribe could simply again change its name, this time without Secretarial approval. The Supreme Court has made clear that a plaintiff lacks standing where it is purely speculative that a requested change in government action will alter the behavior of third parties who are the direct cause of the plaintiff's injuries.

In *Simon v. Eastern Kentucky Welfare Rights Organization,* 426 U.S. 26, 28 (1976), organizations representing the interests of low-income persons challenged an IRS ruling that allowed favorable tax treatment to nonprofit hospitals that offered only emergency-room services to indigents. The Court held that the plaintiffs lacked standing because their alleged injury—denial of access to certain hospital services—was caused by the regulated hospitals. *See id.* at 40-46. Even accepting the plaintiffs' argument that the IRS's policy *encouraged* hospitals to provide fewer services to indigents, *id.* at 42 n.23, the Court found it "speculative whether the desired exercise of the court's remedial powers . . . would result in the availability to [the plaintiffs] of such services," *id.* at 43. Rather, "[s]o far as the complaint sheds light, it [was] just as plausible that the hospitals to which [the plaintiffs] may apply for service would elect to forego favorable tax treatment to avoid the undetermined financial drain of an increase in the level of uncompensated services." *Id.* Accordingly, the Court ruled that the plaintiffs' complaint was "insufficient even to survive a motion to dismiss." *Id.* at 45 n.25.

Similarly, in *Allen,* 468 U.S. at 739-40, the Court held that parents of African-American public school children lacked standing to challenge IRS tax policies toward racially discriminatory private schools. The Court found it "entirely speculative . . . whether withdrawal of a tax exemption from any particular school would lead the school to change its policies." *Id.* at 758.

In *Warth v. Seldin,* 422 U.S. 490 (1975), the Court affirmed the dismissal of plaintiffs' complaint that the defendant town's zoning ordinance effectively excluded persons of low and moderate income from living there. Assuming that the ordinance contributed, "perhaps substantially," to the cost of housing in the town, the Court nevertheless held that the plaintiffs failed to allege the requisite facts showing that they would have been able to buy or rent homes in the town if the Court granted their requested remedy. *Id.* at 504. The "remote possibility, unsubstantiated by allegations of fact, that their situation . . . might improve were the court to afford relief," did not suffice to establish the redressability of the plaintiffs' injuries. *Id.* at 507.

The same is true here. Plaintiff has adduced no facts that would show it is "likely" that in the event the district court or the Department set aside the approval of the Wisconsin tribe's constitution, that tribe would change its behavior, including how it refers to itself in its business and government relations. The complaint and its attachments recognize that both Oneida tribes have been referring to themselves as "Oneida Nation" for centuries. The Department also introduced evidence outside the pleadings to provide examples and to confirm that the Wisconsin Tribe had referred

to itself as the "Oneida Nation" on official government documents, business interactions, and public interactions years before the Department approved the change in its constitution or updated the list. JA 9-11; ECF No. 14-2, at 10 n.6; ECF No. 23, at 5; *cf. Fountain*, 838 F.3d at 134 ("[T]he court may resolve the disputed jurisdictional fact issues by referring to evidence outside of the pleadings"). Plaintiff did not challenge this information or allege any facts that would otherwise suggest the Wisconsin tribe would change its practice.

B. The district court correctly determined the Department's action had no impact on the trademark action.

Plaintiff argues that "setting aside [the Department's] actions would eliminate the Wisconsin tribe's . . . ability to leverage [the Department's] actions in the TTAB [Trademark Trial and Appeal Board] proceeding." Opening Brief 55. As the district court found, JA 232-34, that is incorrect.

Most fundamentally, plaintiff has conceded that the Department's actions here are "irrelevant to the TTAB proceedings." ECF No. 19, at 13. The Wisconsin tribe agrees and so stated to the Board:

> [The Department's actions] are not referenced within any of the enumerated grounds of the Amended Petition (¶¶ 131-216) beyond a general reference to the background section. Nor did the Board rely on them when it denied Registrant's motion to dismiss. . . . Petitioner's own "rights" are based on Petitioner's historical use. The [Department] did not "give" Petitioner any rights to a name, and Petitioner never alleged that.

JA 167-68.

The district court correctly found that the Wisconsin tribe's challenges to plaintiff's trademark "are based on conduct entirely unrelated" to the Department's listing of tribes or its approval of the Wisconsin tribe's constitutional amendment. JA 234. The allegations in the trademark action are that plaintiff failed to use the trademark, that the Wisconsin tribe had preexisting trademarks in 2006, and that plaintiff knowingly filed fraudulent statements in its trademark application. JA 234-35; ECF No. 23-2, at 191-93, 207-208. The court was correct to conclude that "even if the ongoing trademark action is an injury in fact, it is not redressable by this action and cannot be used to establish standing." JA 235.

Plaintiff has implied that the staying of the trademark action is evidence that the Trademark Board believes that the present case is relevant to the trademark proceeding. Opening Brief 56-57. Not so. The Board's stay of administrative procedures, as the district court recognized, is not evidence that this case "will" affect the proceeding. JA 233. Rather, it is "standard procedure" for the Board to stay its proceedings whenever there is simply litigation "involving related issues." *Id.* (quoting *New Orleans Louisiana Saints LLC v. Who Dat?, Inc.*, 99 U.S.P.Q.2d 1550 (TTAB July 22, 2011), and the Board made an independent determination to stay its proceedings in this instance. That stay is of no moment here, and this case has no relevance to the pending trademark dispute, for standing or other purposes.

C. Consideration of documents outside the complaint is appropriate.

In making its redressability argument, the Department referred to documents from outside the complaint, including the Wisconsin tribe's website, which identifies it as the "Oneida Nation"; the website of its Wisconsin casino called "Oneida Casino"; and an article that discussed the Wisconsin tribe's sponsorship of "Oneida Nation gate" at Lambeau field in Wisconsin. ECF No. 14, at 10. The Department also attached as exhibits official documents from the Wisconsin tribe from the 1990s, which identified the tribe as the "Oneida Nation." JA 9-11. These documents challenged the jurisdictional facts underlying Plaintiffs' alleged standing and are appropriate to consider here. *See Fountain*, 838 F.3d at 134; *supra* pp. 6-7, 12. The Department clearly relied on these documents in making its argument and never waived any right to rely on them. Plaintiff's attempt to recast a single footnote as a broad waiver of reliance on these documents is mistaken.

Waiver is "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Peterson v. Islamic Republic of Iran,* 876 F.3d 63, 78 (2d Cir. 2017). The Department's actions here clearly show it did not relinquish or abandon reliance on documents outside of the complaint. Plaintiff takes out of context a footnote to assert that the Department "disclaimed reliance on facts outside the complaint." Opening Brief 14. As elaborated below, that assertion is incorrect.

The Department's briefs clearly cited, and based its redress argument in part on, facts and documents outside the complaint. In context, it is clear that the footnote cited by plaintiff, *see id.* at 28 (citing ECF No. 23, at 1 n.1), referred only to the "Factual Background" section's discussion of facts outside the complaint. In particular, the Department's motion to dismiss contained a section titled "Factual Background" that discussed the history of the tribes, the Department's actions related to the Wisconsin tribe's 2015 election, and the publication of the list of federally recognized tribes. ECF No. 14, at 2-4. As its name indicated, this section provided background information drawn (in part) from outside the complaint in order to provide context for the district court. *See, e.g.*, *Mangiafico v. Blumenthal,* 471 F.3d 391, 398 (2d Cir. 2006) (holding that it is not erroneous for a district court to consider information outside the complaint for "background" where the court does not rely on such information for its holding).

Plaintiff's opposition cited six discrete facts drawn only from the "Factual Background" section of the Department's brief and argued "none of the assertions is relevant to any argument the Department makes regarding jurisdiction," such that the "Department's unsupported factual assertions should, therefore, be disregarded." ECF No. 19, at 10. Plaintiff cited no facts from the Argument section of the motion to dismiss in making this argument. In response, the Department clarified in a footnote that "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 No. 23, at 1 n.1. It is clear in context that this footnote referred to the specific background facts with which plaintiff had taken issue with in its opposition; the footnote was not a disclaimer of all reliance on any information from outside of the complaint.

* * * * *

Plaintiff lacks Article III standing because it has not suffered an injury in fact, because any injury that plaintiff has suffered is not fairly traceable to the Department's actions, and because a favorable decision will not redress any alleged injury.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

/s/ Reuben S. Schifman
JEFFREY BOSSERT CLARK
Assistant Attorney General
ERIC GRANT
Deputy Assistant Attorney General
J. DAVID GUNTER II
REUBEN S. SCHIFMAN
Attorneys
Environment and Natural Resources Division
U.S. Department of Justice

April 22, 2019
90-2-4-15052

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7) of the Federal Rules of Appellate Procedure, the undersigned counsel for the United States hereby certifies that this brief complies with the type volume limitation of Rule 32(a)(7)(B). As measured by the word-processing system used to prepare this brief, there are approximately 10, 596 words in the brief.

/s/ Reuben S. Schifman
REUBEN S. SCHIFMAN
Environment and Natural Resources Division
U.S. Department of Justice

CERTIFICATE OF SERVICE
BY NEXTGEN CM/ECF

Oneida Indian Nation
v.
United States Department of Interior

Docket No. 18-2607

The undersigned hereby certifies that he is an employee of the United States Department of Justice, Environment and Natural Resources Division, and is a person of such age and discretion as to be competent to serve papers.

He further certifies that on April 22, 2019, he served a copy of the Answering Brief for the Federal Appellee on the United States Court of Appeals for the Second Circuit and counsel for appellant, Michael R. Smith, by uploading to the Second Circuit's ECF system a Portable Document Format (PDF) version of the Brief.

/s/ Reuben S. Schifman
REUBEN S. SCHIFMAN
Environment and Natural Resources Division
U.S. Department of Justice