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

REPLY BRIEF OF PLAINTIFF-APPELLANT ONEIDA INDIAN NATION

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INTRODUCTION

DOI recognized Oneida Nation as the name of the Oneida Tribe of Indians of Wisconsin without considering the harm that it would cause the Oneida Nation of New York. The available portions of the administrative record show (a) that DOI predicted confusion from changing the name that had been used to distinguish the Wisconsin tribe and (b) that the Wisconsin tribe admitted an intention to change its governmental status vis-à-vis the Nation. DOI left these matters to the judgment of the Wisconsin tribe. DOI did not consider them in making its federal approval and recognition decisions – did not even give the Nation notice and a chance to be heard. On the heels of DOI's decisions, the Wisconsin tribe invoked federal recognition of its new name to demand that the Nation never again call itself the Oneida Nation and to petition the TTAB to cancel the Nation's trademarks, including for Oneida Nation.

The foregoing was detailed in the complaint, but the district court did not rule based on the complaint's allegations, believing it must disregard them. In its brief, DOI simply argues against the allegations. Contrary to what is required by the applicable legal principles, DOI does not accept the allegations as true and acknowledge reasonable inferences from them.

DOI's duty under the APA to consider material impacts of its decisions, heightened by its federal trust responsibility to all tribes, required that DOI

consider the known harm to the Nation of a decision to recognize the Oneida Nation name for the Wisconsin tribe. The harms DOI should have considered, but did not, fully support the Nation's standing to sue to remedy DOI's failure: concrete injury-in-fact traceable to DOI's decisions and thus redressable by a judgment in this case.

If DOI's decisions were to be vacated and remanded after this case is litigated, and then DOI were to consider both tribes' interests and to restore the status quo ante regarding federal name-recognition, that decision plainly would have real world impact. It would deprive the Wisconsin tribe of the ability to continue to use federal recognition of the new Oneida Nation name as a weapon against the Nation and would ameliorate or eliminate the confusion and the harm to the Nation's status that now comes from federal recognition of the Wisconsin tribe as the Oneida Nation. DOI's position that nothing would change even if DOI were to return name-recognition to the status quo ante depends wholly upon unrealistic speculation that the Wisconsin tribe could and would use a self-made name in the same way and to the same effect as a name formally approved and recognized by the federal government. Speculation cannot defeat standing any more than it can support it.

ARGUMENT

I. DOI, LIKE THE DISTRICT COURT, FAILS TO ACCEPT THE COMPLAINT'S ALLEGATIONS AS TRUE AND TO DRAW REASONABLE INFERENCES FROM THEM.

The district court erroneously concluded that all motions to dismiss for lack of standing, because they are Rule 12(b)(1) motions, are taken as challenging the factual allegations of the complaint and thus that the court need not accept the complaint's factual allegations as true and draw all reasonable inferences from them. JA 230-31 (court's statement of legal principles guiding its decision); Nation Br. 26-27 (explanation of court's error). Consequently, the district court disregarded the complaint's allegations and ruled based on documents submitted by the Nation with the complaint or during briefing.

DOI has not attempted to defend the district court's belief that all standing motions contest the complaint's factual allegations and thus justify ignoring them. Nor has DOI disputed the legal principles that the Nation explained are controlling in the absence of an actual factual dispute: courts must accept the complaint's allegations of harm, drawing reasonable inferences and presuming the necessary supporting facts; allegations of harm need not be proved at the pleading stage; and contesting jurisdiction on some basis other than a dispute about the factual allegations in the complaint (such as redressability) does not alter application of the foregoing rules. Nation Br. 24-29; *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871,

889 (1990); *Carter v. HealthPort Techs., LLC*, 822 F.3d 47 (2d Cir. 2016) *WC Capital Management, LLC v. UBS Securities, LLC*, 711 F.3d 322 (2d Cir. 2013).

Without mention of the court's explanation for disregarding the complaint's factual allegations, DOI asserts somewhat inconsistently that its motion "contested the truth of plaintiff's allegations" and that the court "[a]ccepted the complaint's factual allegations as true." DOI Br. 12, 15. DOI, however, does not identify any factual allegation in the complaint that it disputed – or any that the district court or DOI has accepted as true. DOI acknowledges that the few documents it offered below, with its reply memorandum, went to its arguments regarding redressability. DOI Br. 35. They did not challenge factual allegations in the complaint. DOI does not and cannot argue that the district court engaged in fact-finding to resolve disputes about factual allegations in the complaint.

II. DOI DOES NOT DISPUTE THAT THE WISCONSIN TRIBE'S CEASE-AND-DESIST DEMAND AND ITS PETITION TO CANCEL TRADEMARKS CONSTITUTE INJURY-IN-FACT, AND IGNORES OR MINIMIZES THE COMPLAINT'S ALLEGATIONS REGARDING INJURY-IN-FACT FROM CONFUSION AND DIMINISHMENT OF THE NATION'S REPUTATION AND DIGNITY.

We address injury-in-fact in this section and then traceability and redressability in the next.

"'Injury in fact is a low threshold. . . .'" *WC Capital Management, LLC v. UBS Securities, LLC*, 711 F.3d 322 (2d Cir. 2013) (citation omitted). "The injury-in-fact necessary for standing 'need not be large, an identifiable trifle will suffice.'" *Lafleur v. Whitman*, 300 F.3d 256 (2d Cir. 2002) (citation omitted).

A. Cease-and-Desist Letter and Trademark Cancellation Proceedings

DOI does not dispute that the Wisconsin tribe's demand that the Nation never refer to itself as the Oneida Nation and the tribe's institution of trademark cancellation proceedings in the TTAB constitute injury-in-fact. DOI Br. 23-27 (limiting argument to traceability); *see* Nation Br. 30-33.

B. Confusion of the Public and Federal Agencies

DOI asserts that the complaint's allegations regarding confusion can be disregarded as "conclusory" and so does not even discuss them, and the district court evaluated confusion as injury-in fact only in terms of the two examples submitted by the Nation during briefing. DOI Br. 13-15; JA 237. In reality, the

complaint's allegations regarding confusion are more than sufficiently detailed and readily permit inferences of actual or likely harm. *See* Nation Br. 24 (legal standards for evaluating complaint).

DOI cannot credibly contest the likelihood of confusion. The complaint (¶36) quotes the admission by DOI staff that the challenged name change "will cause confusion for a number of entities engaged in business with the Oneida Tribe as well as other governments" and that "they will undoubtedly be confused more often than they are now." JA 26. The confusion is so apparent that the district court and DOI have had to avoid it by abandoning use of "Oneida Nation," substituting "the Wisconsin tribe" or some other name. Nation Br. 34. If, instead, DOI had used "Oneida Nation" in its brief, it would be nearly unreadable because of the confusion that would cause.

Other allegations in the complaint also demonstrate confusion or its likelihood. ¶¶1 and 42 allege that the Nation has long been known as "Oneida Nation," the same name that the Wisconsin tribe assumed – alleging further that this Court has referred to the Nation as "Oneida Nation" and that a House Report did the same thing in connection with the legislation requiring DOI to publish a list of recognized tribes. The complaint further alleges a long history of federal recognition of distinct names, Oneida Nation of New York and Oneida Tribe of Indians of Wisconsin, such that a change of the latter that eliminates Tribe and

Wisconsin and uses only Oneida Nation will engender confusion among the public and federal agencies and damage the Nation in its business, reputation, governmental status and otherwise. ¶¶1, 3, 24, 63(d), 65, 79(a), 80. The complaint also alleges that confusion "siphons away the goodwill that the Nation has created in its business and governmental relations" and costs the Nation money needed to pay lawyers and consultants to limit the confusion (a cost reflected in the cease-and-desist demand made by the Wisconsin tribe and in the petition to cancel trademarks that it filed). ¶¶31, 65, 80; JA 58-59, 98-147. DOI understandably never argues that the fair inference from these allegations is that the likelihood and existence of confusion is not real. Common sense dictates otherwise.

Characterizing confusion as psychological injury, DOI asserts that real but "[i]ntangible psychological 'injur[y]" is never injury-in-fact, relying on *Valley Forge Christian College v. Americans for Separation of Church & State, Inc.*, 454 U.S. 464, 485-86 (1982). DOI Br. 12. But the Nation does not claim that it is confused, and *Valley Forge* is not about confusion at all. *Valley Forge* involved plaintiffs' claim of harm that would have been true for any member of the American public who believed a federal transfer of land to a religious college to be unconstitutional. In that context, the Court held that "the psychological consequence presumably produced by observation of conduct with which one disagrees" is not injury-in-fact. 454 U.S. at 485-86. "[W]e do not retreat from our

earlier holdings that standing may be predicated on noneconomic injury." *Id*. at 486 (citing decisions); *see Spokeo, Inc*. *v*. *Robins*, 136 S. Ct. 1540, 1549 (2016) ("we have confirmed in many of our previous cases that intangible injuries can nevertheless be concrete"); *Lujan v*. *Defenders of Wildlife*, 504 U.S. 555, 562-63 (1992) ("the desire to use or observe an animal species, even for purely esthetic reasons, is undoubtedly a cognizable interest for purposes of standing").

Faced with the Nation's citation of Lanham Act decisions finding public confusion about a plaintiff's identity to be irreparable injury supporting injunctive relief, Nation Br. 35, DOI argues that confusion must be coupled with proof of economic loss, DOI Br. 12-15. It is true enough that an element of a Lanham Act cause of action (sometimes called statutory standing) is economic loss, but Lanham Act decisions do not require proof of economic loss as a prerequisite for Article III standing or for irreparable injury.[1] The findings of irreparable harm in the cases did not turn on proof of economic loss, which after all generally is not viewed as irreparable harm. DOI does not try to grapple with the obvious difficulty these cases present for it – that public confusion about a plaintiff's identity must be a

[1]Citing *Lexmark Int'l v. Static Control Components, Inc*., 572 U.S. 118, 137 (2014), DOI argues that in Lanham Act cases "standing" requires proof of economic injury, and not just confusion. Lexmark, however, does not concern Article III standing. Lexmark involved "prudential standing," not injury required by Article III.

concrete injury to a plaintiff for Article III standing purposes if it is irreparable harm to a plaintiff for purposes of injunctive relief.

C. Diminishment of the Nation's Reputation and Dignity

DOI argues that diminishment of tribal status and misappropriation of tribal identity are not "sufficiently concrete" to constitute injury-in-fact. DOI Br. 18-22. The district court did not address the question. JA 225-41.

The complaint's allegations sufficiently describe concrete injury-in-fact – that DOI's approval and recognition of the name Oneida Nation for the Wisconsin tribe appears to place the federal government behind the Wisconsin tribe's position that the Oneida Nation left New York and that the Nation, not the Wisconsin tribe, is an offshoot of the founding era tribe.

The Wisconsin tribe told DOI what it was up to with respect "to the Tribe's governmental status," clearly meaning vis-à-vis the Nation. JA 26-27 (¶¶36, 39). Achieving federal recognition as the Oneida Nation was an effort by the Wisconsin tribe to "misappropriate the historic Oneida Nation name and identity" and to "appropriate the historical Oneida Nation name and identity in order to claim the status of the historical tribe itself, shedding the name and identity of the Wisconsin tribe." JA 24, 42-43 (¶¶31, 78). The United States has recognized the Nation as the tribe that signed the founding era treaties between the United States and the Nation and the Wisconsin tribe as an offshoot. JA 18-19 (¶¶15-19). Federal

recognition of the Wisconsin tribe as the Oneida Nation, however, communicated the opposite message – that the Oneida Nation relocated to Wisconsin and that the Oneida Nation of New York is an offshoot. Nation Br. 38-43. It does not matter that DOI did not actually change its position concerning the status of the two tribes. Federal approval and recognition of the name-change communicated to the tribes and the world an apparent change in status.[2]

DOI's argument that it understands the name-change just to mean that the Wisconsin tribe prefers the word Nation to the word Tribe is unconvincing. DOI Br. 20. The tribe did not seek to be named the Oneida Nation of Wisconsin; it asked the federal government to lop off the Wisconsin designation with the obvious intent to have itself recognized by DOI as the Oneida Nation itself, not as the Wisconsin successor always described by DOI. DOI's decisions to approve and recognize that move – handing the Nation's name and status over to the Wisconsin tribe – work a continuing harm to the Nation.

DOI cites *Griffin v. DOL Fed'l Credit Union*, 912 F.3d 649, 654 (4th Cir. 2019). DOI Br. 21. *Griffin* involved only the connection between the plaintiff and the alleged injury, holding that a plaintiff who was legally disqualified from

[2]DOI's discussion of diminished reputation in terms of golf investments, DOI Br. 15-18, misunderstand the Nation's arguments regarding diminishment of the Nation's "status and reputation as the original Oneida Nation," which concern the Nation's identity and history as the Oneida Nation always present on the Oneida reservation in New York, Nation Br. 39.

joining a credit union could not bring an ADA claim for features of its website posing difficulties for blind persons using screen readers to "read" website material aloud. *Griffin* did not question whether the alleged injury would support standing if alleged by someone who was eligible to be a customer of the credit union. Here, DOI does not challenge the connection between the Nation and the claimed dignitary harm.

DOI distinguishes cases recognizing that intangible and dignitary injuries can be injuries-in-fact, noting that no case has held diminishment or misrepresentation of a tribe's status to be a sufficient injury for standing purposes. DOI Br. 16-21; *see Allen v. Wright*, 468 U.S. 737, 754-55 (1984) (dignitary harms, "stigmatic injur[ies]," while not tangible may constitute injuries-in-fact). But no court has examined the injury to a tribe that is alleged here, and thus it means nothing to note that no court has held such an injury to support standing. DOI does not dispute that intangible categories of injury involving reputational and dignitary harm are well-recognized as a basis for a plaintiff's standing. The question is whether the harm alleged here fits those categories. It does.

Federal recognition of tribal names is important enough that Congress requires DOI to publish an accurate list of recognized tribes. 25 U.S.C. § 5131(a). No one would doubt it a real harm if DOI had approved a name change and then formally listed the Wisconsin tribe in the Federal Register as the Oneida Nation of

New York. It was just as harmful for DOI to give the Wisconsin tribe the shortened version, Oneida Nation, a name by which the Nation had been known and referred to by courts, governments and the public.[3]

III. THE ALLEGED INJURIES-IN-FACT ARE TRACEABLE TO DOI'S DECISIONS AND REDRESSABLE BY A JUDGMENT VACATING THEM.

A. Cease and Desist Letter and TTAB Petition to Cancel Trademarks

Like the district court, in evaluating the impact of DOI's approval and recognition of a new name for the Wisconsin tribe and the potential for this APA action to redress those decisions, DOI solely focuses on the substantive reasons for cancellation alleged in the tribe's trademark cancellation claims, things such as error in the contents of the Nation's trademark applications. DOI Br. 26, 33-34. DOI thus fails to respond to the Nation's argument, Nation Br. 57, demonstrating the Wisconsin tribe's reliance on federal name recognition to show that the tribe is or will be damaged by the Nation's Oneida Nation or "similar marks." *See* 15 U.S.C. § 1064 ("is or will be damaged" standard). "Registrant . . . has turned to the Trademark Laws . . ., *limiting Petitioner's own use of its federally recognized*

[3]DOI asserts waiver concerning an injury based on diminishment of tribal status prohibited by 25 U.S.C. § 5123(f). DOI Br. 22 n.2. But the diminishment harm alleged in the complaint exists independently of the statutory duty which the complaint cites in support of APA claims, and would exist if the statute did not exist. This is not a situation in which Congress has, by statute, defined an injury "where none existed before." *Spokeo*, 136 S. Ct. at 1549 (citation omitted).

name – Oneida Nation, thereby harming Petitioner." JA 100 (¶9) (emphasis added); *see* JA 99, 101 (¶¶4, 12) (other instances in petition of tribe's reliance on DOI name recognition). And the petition further alleges that the Wisconsin tribe "has used . . . and has a bona fide intent to use the . . . ONEIDA INDIAN NATION mark[], or similar marks," JA 102 (¶19). The Wisconsin tribe's reliance on DOI's actions for its right to sue is enough to show that reversing those actions would affect the trademark case. *Utah v. Evans*, 536 U.S. 452, 463-64 (2002) (redressability requirement is satisfied if vacating agency action makes an effect on a party's position in another forum "more likely" and not merely "speculative").

The Wisconsin tribe could not credibly have made its allegations of harm from the Nation's "Oneida Indian Nation" mark, or from the tribe's declared intent to use a similar mark, if the tribe had been recognized by DOI, not as Oneida Nation, but as Oneida Tribe of Indians of Wisconsin, as it had been for decades. The "Oneida Indian Nation" mark and the tribe's Oneida Tribe of Indians of Wisconsin name would have remained distinct, and, indeed, the Wisconsin tribe never would have demanded that the Nation cease use of the Oneida Nation name. In these circumstances, and given the tribe's explicit reliance on DOI's recognition of its new name to demonstrate harm to the tribe, the Nation's complaint adequately alleges harm from the TTAB litigation that is traceable to DOI's recognition decisions and is redressable by a judgment vacating them.

DOI unpersuasively attempts to minimize the TTAB's own assessment that its proceedings might be affected by this case. DOI Br. 34. The TTAB ruled: "Upon *review of the pleadings* from the civil action, the *Board determines* that the outcome of the *civil action may have a bearing on this cancellation proceeding*." JA 173 (Feb. 22, 2018 order) (emphasis added). The TTAB explained that this case "may have [a] bearing on this proceeding" because this case and the TTAB litigation "involve similar issues, namely, Petitioner's name." JA 174.

When it later denied the Wisconsin tribe's motion for reconsideration of the suspension, JA 218-21, the TTAB focused again on the Wisconsin tribe's allegation of harm from the Nation's trademarks – an allegation of damage that is required to sue under 15 U.S.C. § 1064. The TTAB cited to footnote 2 in its earlier decision and the associated text, which recognized that the Wisconsin tribe had alleged that the Nation's use of its trademarks, including for Oneida Indian Nation, will harm the tribe's use of its federally-recognized name and concluded that this meant this case may have a bearing on the TTAB proceeding. JA 220 (denial of reconsideration); JA 174 (prior suspension order). "The Prior Order also explains that Petitioner specifically pleads rights in the name ONEIDA NATION, the name at issue in the Court Action, with Petitioner arguing that Respondent's use of ONEIDA and ONEIDA INDIAN NATION will harm Petitioner's use of ONEIDA NATION." JA 220. The importance of the Wisconsin tribe's use of federal name-

recognition to establish damage was clear to the TTAB, which understands what must be alleged in order to petition to cancel trademarks.

The TTAB denied reconsideration notwithstanding that the Wisconsin tribe made the *same* arguments made by DOI below and in this appeal.[4] *See* March 22, 2018 Motion for Reconsideration, 3 (APA issue "does not relate in any manner to the issues to be decided by the Board"), 5 ("background allegations" referenced federal name recognition, but "none of the grounds for cancellation rely" on it because they "relate to Registrant's own conduct"), 9 ("claims in this cancellation proceeding do not rely or depend on the agency actions challenged under the [APA] in the DOI Action"); *see* 6 (appearing to concede that cancellation petition predicated part of the harm needed for standing/right-to-sue on effect of Oneida Nation trademark on right to use "'federally recognized' name"). Moreover, the Wisconsin tribe submitted DOI's district court briefing as an exhibit to the motion for reconsideration, urging "that the Board may consider a filing by the DOI (represented by the U.S. Department of Justice) in the DOI Action." *Id*. at 2, *see* 4

[4]The Wisconsin tribe filed two reconsideration motions in the TTAB. The first, JA 164, filed on February 1, 2018, was not ruled on. DOI cites that motion. DOI Br. 33. The second motion, filed March 22, 2018, is the one on which the TTAB ruled on July 28, 2018. JA 218-21. That motion is not in the record but is substantially similar to the first, is available on the TTAB website, and is judicially noticeable. The second reconsideration motion is Doc. 18 on the TTAB docket. The filings in the TTAB cancellation proceeding are available online at ttabvue.uspto.gov/ttabvue/v?qt=adv&procstatus=Pending&pno=92066411&propno=&qs=&propnameop=&propname=&pop=&pn=&pop2=&pn2=&cop=&cn=.

(describing DOI position that district court litigation is irrelevant in TTAB, that independent third party (not DOI) responsible for name change, and that Wisconsin tribe used Oneida Nation name before name change occurred).

DOI implies that it is possible to affirm the district court's ruling that the outcome of this case cannot affect the TTAB proceedings without second-guessing the TTAB's conclusion that the outcome of this case may have a bearing on the TTAB proceeding. DOI Br. 34. DOI explains that the standards are different – the district court asking whether this case "'will' affect," and the TTAB determining that this case "may have a bearing," on the TTAB proceeding. *Id*. But the claimed distinction between "will affect" and "may have a bearing" is not meaningful. The district court's conclusion that there will not be any effect in the TTAB necessarily means that the TTAB was wrong to conclude that there may be an effect.

As if it were addressing fact-finding on the merits, DOI also argues that the temporal relation between its decisions and the subsequent cease-and-desist demand and TTAB litigation is "simple chronology" marred by the *post hoc* fallacy. DOI Br. 27. That argument is a textbook example of DOI's consistent failure to accept the complaint's allegations and related inferences – impermissibly offering an opposing argument instead.

Even in a fact-finding context, the allegations in the complaint regarding the sequence and substance of events would permit a finding that DOI's decisions

were at least a factor contributing to the Wisconsin tribe's cease-and-desist demand and later TTAB petition. The demand threatened TTAB trademark cancellation litigation against the Nation's trademarks unless the Nation entered "a coexistence agreement" permitting the tribe to commercially use its federally-recognized Oneida Nation name, JA 58-59, a threat the tribe followed through on in its TTAB petition, which alleged as harm that the Nation's Oneida Nation trademark restricted the tribe's use of its federally-recognized name. The demand letter rejected the Nation's assertion that consumers would be confused by the Wisconsin tribe's use of the Oneida Nation name, again relying on federal recognition. JA 58. The letter further asserted that "[y]our client, unlike ours has never been federally recognized as Oneida Nation." JA 58. The letter concluded by again asserting that the federal name-recognition defined the parties' rights: Absent "a coexistence agreement, 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 59.

DOI's decisions plainly were a "substantial factor" in and had a "causal nexus" to the tribe's decision to send the cease-and-desist demand and to file a TTAB cancellation petition, and that is all that is required. *Tozzi v. HHS*, 271 F.3d 301, 308 (D.C. Cir. 2001) ("substantial factor" standard). *Rothstein v. UBS AG*,

DOI Br. 25, actually recognizes that it is enough if the defendant's action has a causal nexus to the plaintiff's claimed harm because it simply increases the ability and readiness of another party to cause harm, a causal connection that may be indirect and weaker than required for proximate cause. 708 F.3d 82, 91-92 (2d Cir. 2013) (in terrorism suit against bank, it was enough for traceability that the bank's funds generally strengthened Iran's hand even though Iran had other sources of funds and there was no direct tie between terror attacks and the bank's funds); *see* Opening Br. 45-47. DOI's actions, at a minimum, increased the Wisconsin tribe's ability and readiness to demand that it be permitted to market the name Oneida Nation, that the Nation cease calling itself the Oneida Nation, and that the TTAB cancel Nation trademarks for similar names. Those injuries are traceable to DOI's actions and subject to redress in this case.

B. Confusion of the Public and Government Agencies

The district court concluded that confusion from the Wisconsin tribe's use of the name Oneida, standing alone, is not traceable to the challenged federal decisions. JA 240. That was beside the point. The court did not examine whether DOI's recognition of the Oneida Nation name for the Wisconsin tribe is a "substantial factor" in the tribe's use of the name and thus traceable to it.

For its part, DOI argues against traceability and redressability chiefly on the ground that the Wisconsin tribe has used the Oneida Nation name "for centuries"

and can continue to do so even if DOI's decisions are set aside. DOI Br. 27-33. But the documents DOI cites do not show that, and the district court found no such fact.

- DOI points to a "document attached to the complaint" that asserts the Wisconsin tribe's use of the name for "hundreds of years," DOI Br. 30, without explaining that the cited assertion was made by retained counsel for the Wisconsin tribe in the cease-and-desist demand that the Nation stop using the Oneida Nation name, JA 58. That is the same letter that asserts DOI's recognition of the tribe's new Oneida Nation name in support of its demands concerning the legal rights and disabilities of the two tribes. JA 58.
- DOI next points to two "[o]fficial government documents" (meaning documents created by the Wisconsin tribe but not explaining that) to show the Wisconsin tribe's use of the Oneida Nation name twice in the 1990s. DOI Br. 30. One, JA 9-10, is a press release in which the Oneida Nation reference is set between two government seals stating "Oneida Nation of Wisconsin." The other, JA 11, is an agenda for a gaming compact signing ceremony with the Governor of Wisconsin. Like the press release, the agenda places the Oneida Nation name between two seals stating "Oneida Nation of Wisconsin."

DOI points to nothing else to show "centuries" of use of the Oneida Nation name by the Wisconsin tribe.

The district court and DOI's portrayal of the Wisconsin tribe's name change as a third-party act in which DOI's approval and recognition were not substantial factors is counterfactual. It is undisputed that the Wisconsin tribe *could not* have amended its constitution to change its name without a federal election and federal approval. JA 25 (complaint ¶33); Nation Br. 49; *see Thomas v. United States*, 189 F.3d 662, 664 & 668 (7th Cir. 1999).[5] It is also undisputed that the Wisconsin tribe *did not* change its name absent federal approval and recognition. JA 25-28 (complaint ¶¶33-39 describing tribe's interaction with DOI regarding name change). The complaint alleges that the tribe acted as it did because it wanted the imprimatur of federal approval, which also is undisputed, and understandable in order to legitimate the change to the outside world and to assure publication by DOI in the Federal Register list of recognized tribes. JA 25 (¶32).

Courts refuse to find standing based on speculation, and that reasoning applies equally to DOI's speculation that the Wisconsin tribe will continue to use

[5]DOI observes that the Wisconsin tribe can now act without federal approval to amend its constitution, including the name provision, as the Nation previously pointed out. DOI Br. 30-31; Nation Br. 8 n.5. Even speculating that the tribe would so act without federal approval and recognition of a new name, the tribe would be unable to exploit the imprimatur of federal recognition, which gives legitimacy, and would be exposed to correction by the Nation and others who counter that the name is not federally-recognized.

the Oneida Nation even if DOI's approval and recognition of the name is vacated by a judgment in this action, making any such judgment ineffective to redress the Nation's injuries. The tribe's previous conduct shows the tribe's perception of a need for federal approval and recognition. A tribe has a strong disincentive to adopt a name that DOI does not federally recognize and thus will not be used by federal agencies, states and others. In addition, the agenda for a gaming compact signing ceremony on which DOI relies to show the Wisconsin tribe's use of the Oneida Nation name illustrates the point. The State of Wisconsin compacted with the Oneida Tribe of Indians of Wisconsin, using the tribe's official, federally-recognized name. https://doa.wi.gov/Pages/AboutDOA/Oneida-Tribe-of-Indians-of-Wisconsin.aspx. Similarly, the Wisconsin tribe emphasized federal name-recognition in its cease-and-desist demand to the Nation. JA 58-59. It is unrealistic to suppose that the tribe's use of the Oneida Nation name is not affected by the imprimatur of federal recognition. Nor is it realistic to suppose that a judgment in this case vacating federal recognition of the Oneida Nation name would not affect the willingness of the Wisconsin tribe to use that name and the extent of any such usage.[6]

[6]DOI notes that the complaint states that the Nation is not challenging the right of a tribe to call itself what it wants. DOI Br. 30; JA 15 (complaint ¶4). The next sentence of that paragraph of the complaint, however, emphasizes that the

C. Diminishment of the Nation's Reputation and Dignity

DOI's traceability and redressability arguments, DOI Br. 22-34, do not address harm to the Nation's reputation and dignity. Presumably that is because the essence and the total extent of the harm claimed derive from federal recognition of the Wisconsin tribe as the Oneida Nation, not independent actions of the Wisconsin tribe. If the harm is sufficient to constitute injury-in-fact, as explained above at pages 9-12, there is no question about traceability of harm to that federal recognition or the ability of a judgment vacating the recognition to redress the harm.

CONCLUSION

The judgment should be reversed.

Nation is challenging federal decisions to approve and recognize the name, highlighting that this case is about federal action. JA 15 (complaint ¶4).

DOI also notes that DOI suggests that confusion is a self-inflicted harm because the Nation changed its name from Oneida Nation of New York to Oneida Indian Nation after DOI declined to reconsider its recognition of the Oneida Nation name for the Wisconsin tribe. DOI Br. 28. The complaint is clear that the change was an effort to ameliorate the implication of federal recognition of the Wisconsin tribe's new name that the tribe is true or historic Oneida Nation, with the Nation constituting some offshoot. The complaint was equally clear that the Nation's goal is for the federal government to return to recognition of the Oneida Tribe of Indians of Wisconsin and the Oneida Nation of New York.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because it contains 5,336 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 type face 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.

/s/ *Michael R. Smith*
Michael R. Smith

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2019, an electronic copy of the foregoing Reply 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.

/s/ Michael R. Smith
Michael R. Smith